City of San Juan Bautista

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AGENDA - AMENDED

PLANNING COMMISSION

TUESDAY ~ MARCH 7, 2023 ~ 6:00 P.M.

CITY HALL COUNCIL CHAMBERS
311 Second Street, San Juan Bautista, California

– HYBRID MEETING –
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PUBLIC COMMENT TIME RESTRICTION
Public comments generally are limited to three minutes per speaker; the Chair may further limit the time for public comments depending on the agenda schedule.

SUBMISSION OF PUBLIC COMMENT PROCEDURES
If you wish to make a comment, please consider submitting a speaker card if participating in person in the Council Chambers or if joining the Zoom Webinar please use the "Raise Hand" feature or if joining by telephone, press *9 on your telephone keypad.

If you are unable to join the meeting, written comments may be mailed to the Deputy City Clerk at City Hall (P.O. Box 1420, San Juan Bautista, CA 95045), or emailed to deputycityclerk@san-juan-bautista.ca.us not later than 3:00 p.m. on the day of the meeting, and will be read into the record during public comment on the item.

1. **CALL TO ORDER**
   A. Pledge of Allegiance
   B. Roll Call

2. **PUBLIC COMMENT**

Receive public communications on items that are not on the agenda and that are in the City of San Juan Bautista's subject matter jurisdiction. Comments on Consent, Informal Project Review, and Action items should be held until the items are reached.

3. INFORMAL PROJECT REVIEW

Any potential and/or future project applicant may present their project to the Commission during Informal Project Review for the purpose of gaining information as preliminary feedback only. No formal application is required and no action will be taken by the Commission on any item at this time.

4. CONSENT

All matters listed under the Consent Agenda may be enacted by one motion; unless an item is pulled for a separate vote/discussion by a member of the Planning Commission, staff member, or a resident.

A. Affidavit of Posting Agenda.
B. Approve the Minutes of November 1, 2022.
C. Approve the Minutes of December 6 2022.
D. Approve the Minutes of February 7, 2023.

5. ACTION ITEMS

A. Major Site and Design Review Permit:
Recommendation: Approve the Historic Resources Board recommendation regarding Addition; Repair and Rehabilitation of Second Floor Windows; 302 Third Street; APN 002-290-041 (Dante Bains) CEQA Status: Exempt per CEQA Guideline Section 15331; Section SJB MC Section 11-06-120(5) (c)

6. COMMENTS

A. Planning Commissioners
B. Community Development Director

7. ADJOURNMENT

AGENDA MATERIAL / ADDENDUM

The agenda and any addendums will be posted within 72 hours of regular meetings or 24 hours of special meetings, unless otherwise allowed under the Brown Act. City Council reports may be viewed at the Cit of San Juan Bautista City Hall at 311 Second Street San Juan Bautista, and are posted on the City website www.san-juan-bautista.ca.us subject to Staff's ability to post the documents before the meeting, or by emailing deputycityclerk@san-juan-bautista.ca.us or calling the Deputy Clerk (831) 623-4661 during normal business hours.

Any writings or documents provided to a majority of the City Council regarding any item on this agenda will be made available for public inspection at the meeting and in the City Clerk's office located at City Hall, 311 Second Street, San Juan Bautista, California during regular business hours.

In compliance with the American with Disabilities Act, if you need special assistance to attend or participate in the meeting, please call the City Clerk's Office at (831) 623-4661, extension 13 at least 48 hours prior to the meeting at (831) 623-4661.

PUBLIC NOTIFICATION

This agenda was posted on Friday, March 3, 2023 on the bulletin board at City Hall, 311 second street, the bulletin board at the City Library, 801 second street, the bulletin board at the entrance to the United States Post Office, 301 the Alameda, and the City's website.

Meetings are streamed live at https://www.facebook.com/cityofsanjuanbautista/ and televised live on local Channel 17 on the date of the regularly scheduled meeting.

DISCLOSURE

If you challenge any planning or land use decision made at this meeting in court, you may be limited to raising only those issues you or someone else raised at the public hearing held at this meeting, or in written correspondence delivered to the City Council at, or prior to, the public hearing. Please take notice that the time within which to seek judicial review of any final administrative determination reached at this meeting is governed by Section 1094.6 of the California Code of Civil Procedure.

The law does not permit action or extended discussion of any item not on the agenda except under special circumstances. If Board action is requested, the Board may place the matter on a future agenda.

AFFIDAVIT OF POSTING

I, Elizabeth Soto, Do Now Declare, Under the Penalties of Perjury That I Am the Deputy City Clerk / Administrative Services Manager in The City of San Juan Bautista and That I Posted Three (3) True Copies of the attached Planning Commission Agenda. I Further Declare That I Posted Said Agenda on the 2nd day of March 2023, and in the Following Locations in Said City of San Juan Bautista, County of San Benito, California.

1. On The Bulletin Board at City Hall, 311 Second Street.
2. On The Bulletin Board at The City Library, 801 Second Street.
3. On The Bulletin Board at The Entrance to The United States Post Office, 301 The Alameda

Signed At San Juan Bautista, County of San Benito, California, On The 2nd day of March 2023.

Elizabeth Soto
Deputy City Clerk / Administrative Services Manager

CITY OF SAN JUAN BAUTISTA
PLANNING COMMISSION
UNOFFICIAL MEETING MINUTES
NOVEMBER 1, 2022

1. **CALL TO ORDER** – Chair Delgado called the meeting to order at 6:03 p.m. and announced the Historical Resources Board Meeting had been cancelled.

PLEDGE OF ALLEGIANCE – Vice Chair Morris-Lopez led the Pledge of Allegiance.

ROLL CALL

Present:
Commissioner Correia
Commissioner Medeiros *(joined at 6:43 p.m.)*
Vice Chair Morris-Lopez
Chair Delgado

Vacant:
One position was vacant

Staff Present:
Community Development Director Brian Foucht
RGS Clerk Advisor Norma I. Alley, MMC

2. PUBLIC COMMENT ON ITEMS NOT ON THE AGENDA BUT WITHIN THE SUBJECT MATTER JURISDICTION OF THE PLANNING COMMISSION

Chair Delgado called for public comments. Seeing no one come forward, she closed public comments.

3. INFORMAL PROJECT REVIEW
A. No projects to present.

There were no projects to present.

4. CONSENT AGENDA
A. Approve Affidavit of Posting Agenda
B. Approve Affidavit of Posting and Mailing Public Hearing Notice
C. Approve Minutes of the August 2, 2022 Meeting
D. Approve Minutes of the October 4, 2022 Meeting

Chair Delgado called for public requests to pull items. Seeing no one come forward, she closed public comment.

MOTION:
A motion was made by Vice Chair Morris-Lopez to approve the Consent Agenda in its entirety. The motion was seconded by Commissioner Correia. The motion passed on a roll call vote of 3 Yes/0 No/1 Absent (Medeiros)/1 Vacant.

5. PUBLIC HEARING ITEMS

A. Consider a Use Permit to allow expansion of a Non-Conforming Single-Family Residence in the "I" Industrial Zoning District via a Use Accessory Dwelling Unit (ADU) on property located at 830 Mission Vineyard Rd (APN 002-550-019). The Applicant is Olivier Griss.

CEQA: The project is exempt from CEQA per CEQA Guideline Sections 15303 (New construction or conversion of small structures)

Vice Chair Jackie Morris-Lopez declared a conflict of interest due to the applicant is a family member and recused herself from the meeting.

Community Development Director Brian Foucht introduced the item with a brief summary of the staff report and noted the item was to be continued to November 10, 2022, at 6:00 p.m.

Chair Delgado opened the Public Hearing and called for public testimony.

Cara Vonk requested clarification on the square footage of the Accessory Dwelling Unit, square footage of the existing main dwelling unit/house, and difference between the state statute and code height requirements stating 16 feet and the staff report stating 18 feet.

Irvin was unable to unmute himself and did lower his hand; therefore, did not provide any public testimony.

Seeing no further comment, Chair Delgado closed the public testimony and left the Public Hearing open.

MOTION:
A motion was made by Chair Delgado to continue the Public Hearing to November 10, 2022, at 6:00 p.m. The motion was seconded by Commissioner Correia. The motion passed on a roll call vote of 2 Yes/0 No/1 Absent (Medeiros)/1 Vacant.

6. INFORMATION ITEM:

A. Annexation Application – Christopher Ranch

Robert Fulton, applicant, provided a brief summary of the application and annexation request and fielded questions from the Planning Commission.

Community Development Director Brian Foucht stated the application was received and was on hold until the Community Plan was done.

B. Historic Preservation Consultant PSA
Community Development Director Brian Foucht provided a brief update and stated an agreement was to be executed with Margaret Clovis. He fielded questions from the Planning Community Director.

C. Permanent Local Housing Grant – ADU Rehabilitation; and Homeless Services
Planning Commissioner Medeiros joined the meeting at 6:43 p.m.

Community Development Director Brian Foucht presented a staff report accompanied by a PowerPoint.

Discussion ensued amongst the Planning Commissioners.

7. COMMENTS

A. Planning Commissioners
Commissioner Morris-Lopez reported on training she attended from CalCities.

Chair Delgado, Commissioner Correia, and Commissioner Medeiros had no comments.

B. Community Development Director Report
Community Development Director stated the next meeting was the continued public Hearing on November 10, 2022, at 6:00 p.m.

8. ADJOURNMENT

Motion to adjourn the meeting was made by Vice Chair Morris-Lopez. The motion was seconded by Commissioner Correia. There being no further business, the meeting adjourned at 7:08 p.m.

ATTEST:

_____
Trish Paetz, Deputy City Clerk

CITY OF SAN JUAN BAUTISTA
PLANNING COMMISSION
UNOFFICIAL MEETING MINUTES
DECEMBER 6, 2022

1. **CALL TO ORDER** – Chair Delgado called the meeting to order at 6:00 p.m.

   PLEDGE OF ALLEGIANCE – Chair Delgado led the Pledge of Allegiance.

   ROLL CALL

   Present:
   Commissioner Correia
   Commissioner Medeiros *(joined at 6:43 p.m.)*
   Vice Chair Morris-Lopez
   Chair Delgado

   Vacant:
   One position was vacant

   Staff Present:
   Community Development Director Brian Foucht
   City Manager Don Reynolds
   Acting Administrative Services Manager Trish Paetz, CMC

2. Public Comment on Items Not on the Agenda but Within the Subject Matter Jurisdiction of the Planning Commission

Chair Delgado called for public comments, seeing none, she closed public comments.

3. Informal Project Review

A. No projects to present.

There were not projects to present.

4. Action Items

A. Approve Affidavit of Posting the Agenda

Chair Delgado called for public comments. Seeing no one come forward, she closed public comment.

MOTION:

A motion was made by Commissioner Correia to approve the Affidavit of Posting the Agenda. The motion was seconded by Commissioner Medeiros. The motion passed on a roll call vote of 4 Yes/0 No/0 Absent/0 and 1 Vacant.

5. Informational Items

A. Update: Community Plan, Sphere of Influence and Urban Growth Boundary Committee Recommendation

City Manager Don Reynolds presented an update on the Sphere of Influence and Urban Growth Boundary Committee recommendation to the City Council in September. Chair Delgado called for public comments. Dan DeVries provided public comment. Chair Delgado closed the public comment period. City Manager Reynolds fielded questions from the Commission.

Community Development Director Brian Foucht provided an update on the Community Plan and fielded questions from the Commission. Chair Delgado opened for public comment. Seeing no one come forward, she closed public comment.

6. Comments

A. Planning Commissioners

Commissioner Correia had no comments at this time.

Commissioner Medeiros congratulated Commissioner Morris-Lopez on being elected to the City Council.

Vice Chair Morris-Lopez stated this would be her last meeting, and suggested the time to submit an application to serve on the Planning Commission be extend past December 31, 2022.

Chair Delgado asked that the packet be delivered to her.

B. Community Development Director Report

Community Development Director Brian Foucht had no comments at this time.

7. Adjournment

Motion to adjourn the meeting was made by Commissioner Medeiros. The motion was seconded by Vice Chair Morris-Lopez. There being no further business, the meeting adjourned at 7:03 p.m.

ATTEST:

_____

Trish Paetz, CMC
Acting Administrative Services Manager,

CITY OF SAN JUAN BAUTISTA
PLANNING COMMISSION
UNOFFICIAL MEETING MINUTES
FEBRUARY 7, 2023

1. **CALL TO ORDER** – In the absence of the Chair and Vice Chair, Deputy City Clerk Elizabeth Soto, called the meeting to order at 6:01 p.m., in the Council Chambers. The meeting was a hybrid meeting, as such, some members were in the attendance at a zoom location.

PLEDGE OF ALLEGIANCE

ROLL CALL

Present:
Commissioner Jose Aranda
Commissioner Tony Correia
Commissioner Dan DeVries
Commissioner David Medeiros
Commissioner Mishele Newkirk-Smith

Absent:

Staff Present:
Brian Foucht, Assistant CM/Community Development Director
Robert Rathie, City Attorney
Norma I. Alley, MMC, RGS Clerk Advisor
Elizabeth Soto, CMC, Deputy City Clerk

2. INTRODUCTIONS

Community Development Director, Brian Foucht, welcomed the new Planning Commissioners.

3. ELECTION OF CHAIR AND VICE CHAIR

No public comment received.

MOTION:
Upon motion by Commissioner Medeiros, and second by Commissioner Newkirk-Smith, Commissioner Jose Aranda was appointed as Chair to serve a one-year term. AYES: Commissioners: Aranda, Correia, Medeiros, and Newkirk-Smith. NOES: Commissioner DeVries; ABSTAIN: None; ABSENT: None. Motion Carried.

No public comment received.

MOTION:
Upon motion by Commissioner Aranda, second by Commissioner Correia, Mishele Newkirk-Smith was appointed as Vice Chair to serve a one-year term. AYES: Commissioners: Aranda, Correia, DeVries, Medeiros, and Newkirk-Smith. NOES: None; ABSTAIN: None; ABSENT: None. Motion Carried.

4. PRESENTATION

A. City Attorney to provide a presentation on Brown Act/Open Meeting Law.

City Attorney Robert Rathie provided a presentation on California Open Meeting Law: The Ralph M. Brown Act and highlighted new Brown Act Provisions effective January 1, 2024.

No public comment received.

B. Robert Fulton to Introduce Christopher Ranch Annexation Application

Robert Fulton, applicant, provided a brief summary of the application and annexation request and fielded questions.

Received comments from the following members of the public:
Sonny Flores, Community Services Development Corporation
Cara Denny
Chris Martorana
Angela Firpo

5. PUBLIC COMMENT

No public comment received.

6. INFORMAL PROJECT REVIEW

No items to report.

7. ACTION ITEMS

A. Affidavit of Posting Agenda

No public comment received.

MOTION:
Upon motion by Commissioner Aranda, second by Commissioner Medeiros, the Affidavit of posting was approved. AYES: Commissioners: Correia, DeVries, Medeiros, Newkirk-Smith, and Chair Aranda. NOES: None; ABSTAIN: None; ABSENT: None. Motion Carried.

B. Appointment to the San Juan Bautista City Council Safety Sub-Committee
Commissioner Newkirk-Smith and Chair Aranda were appointed as Planning Commission Representatives to serve on the City Council's Public Safety Committee.

No public comment received.

AYES: Commissioners: Correia, DeVries, Medeiros, Newkirk-Smith, and Chair Aranda. NOES: None; ABSTAIN: None; ABSENT: None. Motion Carried.

C. Appointment to the Urban Growth Boundary Ad Hoc Committee
Commissioners Medeiros and DeVries were appointed as Planning Commission Representatives to the Urban Growth Boundary Ad Hoc Committee.

No public comment received.

AYES: Commissioners: Correia, DeVries, Medeiros, Newkirk-Smith, and Chair Aranda. NOES: None; ABSTAIN: None; ABSENT: None. Motion Carried.

8. INFORMATION ITEMS

A. Update: Community Plan, Sphere of Influence (SIB), Urban Growth Boundary (UGB) Committee Recommendation.

Community Development Director Brian Foucht announced that the Active Transportation Plan presented during the Joint City Council/Planning Commission Workshop will be brought forward for approval at the February 21, 2023 City Council meeting. The Community Plan will begin to move forward under the Urban Growth Ad hoc Committee. Staff will review the Historic Preservation Programs the city has and will begin to look at grants to support rehabilitation of historic structures. Architectural Historian Meg Clovis will prepare an overview of historic preservation program and will make a presentation to the Historic Resources Board on March 7th.

Received public comment from the following member of the public:
Chris Martorana

B. COMMENTS

A. Planning Commissioners
Commissioner Medeiros congratulated the newly appointed Commissioners and thanked the public for attending.

C. Community Development Director
Community Development Director Brian Foucht stated that there are two upcoming training opportunities for Planning Commissioners/Historic Resources Board members to attend. Planning Commission Academy in March and California Preservation Conference in April.

D. ADJOURNMENT

Motion to adjourned the meeting by Commissioner Medeiros, second by Chair Aranda. All in favor. There being no further business, Chair Aranda adjourned the meeting at 8:16 p.m.

APPROVED:

_____
Jose Aranda, Chair

ATTEST:

_____
Elizabeth Soto, Deputy City Clerk

CITY OF SAN JUAN BAUTISTA
PLANNING COMMISSION STAFF REPORT

AGENDA TITLE: Major Site and Design Review Permit: Addition; Repair and Rehabilitation of Second Floor Windows; 302 Third Street; APN 002-290-041 (Dante Bains)

CEQA DETERMINATION: Exempt per CEQA Guideline Section 15331; Section SJB MC Section 11-06-120(5) (c)

Iworq Permit No. 213

MEETING DATE: March 7, 2023

SUBMITTED BY: Brian Foucht, Community Development Director

RECOMMENDED ACTION(S): Staff recommends the following:

Staff recommends that the Planning Commission Accept the recommendation of the HRB and Approve a Site Plan and Design Review Permit for Historic Resources subject to conditions and based on findings contained in the Staff Report dated March 7, 2023.

BACKGROUND INFORMATION:

The subject building was constructed in 1906 in the Western False Front vernacular style (1850-1920) and is typical of a variety of such structures along Third Street in San Juan Bautista. The building is retail on the first floor and two apartments on the second floor (DPR sheet attached). The building is located within the Third Street National Register Historic District and the larger San Juan Bautista and Historic District as follows:

11-06-060 City of San Juan Bautista designated historic districts.
(A) Third Street NR Historic District. The City has identified a historic district that meets the criteria for inclusion in the National Register. This historic district shall be known as the "Third Street Historic District" and shall include those properties located within the district boundaries.

(B) City of San Juan Bautista Historic District. The City has identified a historic district that has local significance. This historic district shall be known as the "City of San Juan Bautista Historic District" and shall include those properties located within the district boundaries.

Whenever changes to structures and properties are proposed within these areas, an evaluation is required, as follows:

11-06-120 Site plan and design review permit procedure for historic resources.

(A) Submit Application to City. When a property owner wishes to make an alteration to a property that is more than forty-five (45) years old, the owner shall submit an application to the City Planning Department for a site plan and design review permit.

(B) Review Application. The City Planner shall review the permit application and determine the following:

(1) If the structure is more than forty-five (45) years old;
(2) If the property has been previously inventoried as part of a Citywide comprehensive survey and what the current status code for the property is (see SJBMC 11-06-090 for the various possible status codes);
(3) If the property is listed on the City Register of Historic Resources;
(4) If the property is located within the boundaries of a designated historic district regardless of individual significance;
(5) If the property will require additional evaluation as part of the application process; and
(6) If the proposed alteration is a minor or major alteration.

The subject project is an addition of windows and repair of inoperable windows located on the second floor of the subject building, designated. New windows were added in 2022 without Site and Design Review For Historic Resources or Building Permit, resulting in a Stop Work Order and a Compliance Order issued by the City pending an evaluation of the California Environmental Quality Act (CEQA) status of these alterations.

Accordingly, the Planning Director conducted an evaluation and determined the that the subject building:

- Was constructed in 1906 and is listed on the City's Inventory of Historic Resources;
- Has a status code of 5D1 (contributor to a District that is listed or designated locally);
- Is contained within both the Third Street National Register District and is therefore on the City Register of Historic Resources; and
- Major alterations were determined by the Planning Director to have occurred as follows:

  "Major alteration" refers to any maintenance, rehabilitation, or repair work that alters the exterior appearance of an existing building or structure, including… construct new, reconstruct, remodel, … the resource, … including but not limited to … distinguishing aspects … doors, windows, paint or other coating, siding … walls…"

Accordingly, the following procedures and standards apply to this project:

11-06-120 Site plan and design review permit procedure for historic resources.
(A) Submit Application to City. When a property owner wishes to make an alteration to a property that is more than forty-five (45) years old, the owner shall submit an application to the City Planning Department for a site plan and design review permit….

…(5) Applications for major alterations or demolition to properties that are included in the City of San Juan Bautista Register of Historic Resources, including those properties that contribute to a designated

historic district with status codes of 1 through 5 or to noncontributing buildings within designated historic districts, shall require the following:

(a) A historic resource evaluation and impact report shall be prepared by a qualified architectural historian… that includes a discussion of the property's historic significance, the determination of project impacts and the application of how the project does or does not meet the Secretary of the Interior's Standards for the Treatment of Historic Properties and the City of San Juan Bautista Design Guidelines….

(b) … The HRB will review the recommended impacts and treatments and make recommendations to the Planning Commission and applicant on ways to conform to the Secretary of the Interior's Standards for the Treatment of Historic Properties and the City of San Juan Bautista's Design Guidelines.

The Planning Commission will have discretionary authority over the approval of the application….

(c) Proposed major alterations that comply with the Secretary of the Interior's Standards for the Treatment of Historic Properties shall be considered a Class 31 categorical exemption under CEQA and no further review is required….

The Planning Commission is required to consider the recommendation of the HRB regarding the following findings prior to approving an application for Site and Design Review for Historic Resources:

11-06-120 (C) (7) (a)
(i) The project has been reviewed in compliance with the California Environmental Quality Act (CEQA);
(ii) The project is consistent with the Secretary of the Interior's Standards for Treatment of Historic Properties;
(iii) The project is consistent with the goals and policies of the San Juan Bautista Design Guidelines;
(iv) That the proposal will not adversely affect the character of the historic resource or designated historic district; and
(v) That the proposal will be compatible with the appearance of existing improvements on the site and that the new work will be compatible with massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

The City's Historic Resources Consultant has completed an evaluation, which concludes that the alterations to windows (two new windows and plans submitted for construction (Garavaglia, January 11, and February 23, 2023) and concluded *" The project plans submitted by Garavaglia Architecture for the window replacement and unpermitted project are consistent with the Secretary of the Interior's Standards for Rehabilitation and can be considered as having less than a significant level of impact on the historic resource."*

This information enables the Planning Commission ot Historic Resources Board to affirmatively make the above referenced findings.

RECOMMENDATION

Staff recommends that the Planning Commission that the Planning Commission accept the recommendation of the HRB and adopt the resolution approving the Site and Design Review Permit For Historic Resources to allow new and replacement second floor windows as depicted in plans and attached to the staff report dated March 7, 2023, subject to conditions contained therein and based on the following findings and evidence:

FINDINGS:

1. The proposed project is Exempt from CEQA: Guideline Section 15331 (Historic Resource Restoration/Rehabilitation.).

2. The project will rehabilitate and reconstruct a designated historical resource in a manner consistent with the Secretary of the Interior Standards for the Treatment of Historic Properties with Guidelines (Weeks and Grimmer, 1995).

3. The project is consistent with the City of San Juan Bautista Design Guidelines; (see finding 2. above) in particular, the project will incorporate double-hung windows at the front of the building within the original size and shape of the opening. New windows are compatible with the building and do not duplicate any historic fenestration that remains in the building.

4. The proposal will protect character defining features of the building. In particular, adding a window on both the north and south elevations and restoring operable double hung windows at the Third Street facing second floor will enable continued use of the second floor as a residence.

5. The proposal will be compatible with the appearance of existing improvements on the site and that the new work will be compatible with massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

EVIDENCE (applicable to all of the above findings):

Plans attached to the staff report dated March 7, 2023 (Garavaglia, January 11 and February 23, 2023); "Historical Review of Window Projects at 302 Third Street" (Meg Clovis, February 26, 2023)

ATTACHMENTS:

1) 302 Third Street: floor, window framing interior and exterior details, and detail and elevations
2) Historic Resource Inventory DPR Form: 302 Third Street
3) Historical Review of Window Projects at 302 Third Street (APN 002-160-011); Meg Clovis, February 26, 2023

RESOLUTION 2023-XX

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF SAN JUAN BAUTISTA APPROVING A SITE PLAN AND DESIGN PERMIT FOR HISTORIC RESOURCES TO ALLOW A MAJOR ALTERATION OF A MIXED-USE BUILDING LOCATED IN THE THIRD STREET (NR) HISTORIC DISTRICT, CONSISTING OF THE ADDITION OF TWO NEW SECOND FLOOR WINDOWS AND REPAIR OF TWO SECOND FLOOR WINDOWS LOCATED AT 302 THIRD STREET; APN 002-160-011 (DANTE BAINS)

WHEREAS, on October 26, 2022 Dante Bains (Applicant) applied for Site Plan and Design Permit for Historic Resources to allow the installation of two new second floor windows and rehabilitation of two existing second floor windows as follows:

North Elevation = 2'4" W x 4'H
South Elevation = 3 W x 1'11" H
West Elevation (Third Street Frontage) = 3'10" W x 5'7" H

WHEREAS, the structure is referenced in the City's Historical Resource Inventory with a Status Code of 5D1; requiring an evaluation of the historical significance of the structure prior to any alteration for which a major or minor Site Plan and Design Permit is required; and

WHEREAS, an evaluation was completed by the City's Architectural Historian, Meg Clovis (February 26, 2023) and concluded that alterations are consistent with the City's Design Guidelines and the Secretary of the Interior Standards for the Treatment of Historic Properties with Guidelines; and

WHEREAS, on March 7, 2023 the Historic Review Board considered the applicant's proposal and the referenced evaluation and recommended that the Planning Commission find that the referenced evaluation has been conducted in accordance with SJB MC section 11-06-120 (C) (5) regarding consistency with Secretary of the Interior Standards for the Treatment of Historic Properties and further recommended that the Planning Commission approve the Site Plan and Design Permit based on findings and subject to conditions as follows:

FINDINGS:

1. The proposed project is Exempt from CEQA: Guideline Section 15331 (Historic Resource Restoration/Rehabilitation.).

2. The project will rehabilitate and reconstruct a designated historical resource in a manner consistent with the Secretary of the Interior Standards for the Treatment of Historic Properties with Guidelines (Weeks and Grimmer, 1995).

3. The project is consistent with the City of San Juan Bautista Design Guidelines; (see finding 2. above) in particular, the project will incorporate double-hung windows at the front of the

building within the original size and shape of the opening. New windows are compatible with the building and do not duplicate any historic fenestration that remains in the building.

4. The proposal will protect character defining features of the building. In particular, adding a window on both the north and south elevations and restoring operable double hung windows at the Third Street facing second floor will enable continued use of the second floor as a residence.

5. The proposal will be compatible with the appearance of existing improvements on the site and that the new work will be compatible with massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

EVIDENCE (applicable to all of the above findings): Plans attached to the staff report dated March 7, 2023 (Garavaglia, January 11 and February 23, 2023); ": Historical Review of Window Projects at 302 Third Street" (Meg Clovis, February 26, 2023)

1. The project meets applicable standards set forth in SJBMC Section 11-18-040 is required to make for all proposed Site Plan and Design Review Permit applications, as follows:
   (A) The project is consistent with the standards and requirements of the San Juan Bautista Municipal Code. In particular, the project is consistent with relevant provisions of SJB MC Section 11-06 regarding the evaluation of projects by a qualified Architectural Historian as referenced in the staff report dated March 7, 2022.

   Evidence: the staff report dated March 7, 2023; Plans Dated January 11 and 23, 2023 Historic Resource Evaluation, (Meg Clovis February 26, 2023)

   (B) The project is consistent with the goals and policies of the General Plan and any applicable specific or community plans. In particular the project is consistent with Goals, Policies and Objectives that require review of project plans and development to ensure retention of the historic character of San Juan Bautista.

   Evidence: the staff report dated March 7, 2023; Plans Dated January 11 and 23, 2023 Historic Resource Evaluation, (Meg Clovis February 26, 2023)

   (C) The project contributes to safeguarding the City's heritage and cultural and historic resources.

   Evidence: the staff report dated March 7, 2023; Plans Dated January 11 and 23, 2023 Historic Resource Evaluation, (Meg Clovis February 26, 2023)

   (D) The project is compatible with the surrounding character of the environment because the architectural design, materials and colors are required to harmonize with the character defining features of the building.

   Evidence: the staff report dated March 7, 2023; Plans Dated January 11 and 23, 2023 Historic Resource Evaluation, (Meg Clovis February 26, 2023)

WHEREAS, the Historic Resources Board recommends that the Planning Commission approve the Site Plan and Design Permit for Historic Resources subject to the following Conditions of Approval:

1. Prior to issuance of a Building Permit, applicant shall submit details for colors and materials of window trim for written approval by the City's Architectural Historian. Colors and materials shall be compatible with the historical character of the building. All window installations shall be reviewed and approved by the City's Architectural Historian prior to final inspection by the Building Official. Applicant shall diligently pursue issuance of a Building Permit for the improvements shown in the approved plans.

2. Prior to issuance of a certificate of occupancy, applicant shall provide an updated Historical Inventory DPR form to incorporate updated photographs and a record of the approved window rehabilitation.

3. Prior to issuance of a Building Permit, applicant shall pay all related fees and charges for Historical Resource Evaluation as determined by the Community Development Director.

NOW THEREFORE, BE IT RESOLVED that the Planning Commission of the City of San Bautista APPROVES a Site Plan and Design Permit for Historic Resources for 302 Third Street based on findings and subject to conditions recommended by the Historic Resources Board as referenced herein.

PASSED AND APPROVED by the Planning Commission of the City of San Juan Bautista on this 7th day of March 2023, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

APPROVED:

_____
Jose Aranda, Chairperson

ATTEST:

_____
Elizabeth Soto, Deputy City Clerk

Margaret E. Clovis, M.A.
14024 Reservation Rd.
Salinas, CA. 93908
831-210-9574

February 26, 2023

Mr. Brian Foucht
Assistant City Manager/CD Director
POB 1420
San Juan Bautista, CA. 95045

RE: Historical Review of Window Projects at 302 Third Street (APN 002-160-011) including:
a) Window Replacement on the Front Elevation, and
b) Unpermitted Window Additions

Dear Mr. Foucht:

In response to your recent request, I have reviewed plans prepared by Garavaglia Architecture (dated January 6, 2023, revision submitted on February 23, 2023) for two window projects for the Cravea Building based on the *Secretary of the Interior's Standards for the Treatment of Historic Properties*. The subject property is located at 302 Third Street and is a contributing building within San Juan Bautista's Third Street National Register Historic District. I have included a summary of the building's historical status, a property description and list of the building's character-defining features, and a discussion regarding the project's consistency with the Standards.

HISTORICAL BACKGROUND

The two-story commercial building at 302 Third Street, known as the Cravea Building, was included in the "Updated Historic Context and Citywide Inventory of Architectural Resources within the City of San Juan Bautista" prepared by Galvan Preservation Associates in 2006. The property was recorded on DPR523 A and B forms. Per the survey the Cravea Building was constructed in 1906. In 2009 it was included as a contributing building in the National Register nomination for the Third Street Historic District.

An early photo of the building (see Figure 1) indicates that a saloon was located downstairs. The building was later purchased by Joseph Cravea, an Italian immigrant, who owned the shoe store next door at 304 Third Street. Mr. Cravea moved his family upstairs and opened a clothing store on the ground floor. Per the San Juan Bautista Historic Walking Trail guide, he ran a secondary bootlegging business from the basement. The building is also fondly remembered for the Liar's Bench located out front and frequented by the town's locals. The Cravea Building remained in the family until 2002.

Figure 1: Early photo of 302 Third St. Courtesy of the San Juan Bautista Historical Society

PROPERTY DESCRIPTION

The National Register nomination form describes the Cravea Building as follows:

"This commercial building located at 302 Third Street is in the Western False Front style. It is two-stories in height and faces southwest. It was constructed as an addition to 304 Third Street located directly to the northwest. It is likely that the second-floor level is residential. The building has a wood framed structural system with a concrete foundation. The exterior is clad with a concrete veneer on the first story and smooth stucco on the upper story. There is a classical band between the first and second floor level that includes dentils. A moderately pitched, front-gabled roof clad with corrugated metal sheets shelters the building. The roof is obscured by a wood rectangular false front. A large molded coping caps the false front.

A full width dropped secondary shed roof clad with composition material is located over the primary façade entrance. The roof, shared with 304 Third Street, is supported by rectangular wood posts with wood bracing, and held up by metal rods that connect from the second story to the shed roof. The main entry is recessed and consists of a single wood and glass door with a transom window above. There are fixed wood sash display windows at the first floor. At the second story are two wood and fixed windows with four horizontal panes per sash. The building is built up to the property line with the side elevations abutting the adjacent buildings. Alterations include circa 1940s replacement windows at the second-floor level and the re-cladding of the shed roof from metal to composition shingle."

The front elevation of the building, with its scored concrete to mimic masonry and denticular belt course, belies its humble construction. The side and rear elevation walls are sheathed with

corrugated sheet metal siding, attesting to the builder's visons of grandeur without a budget to match.

CHARACTER DEFINING FEATURES

The character defining features of 302 Third Street are listed in the 2006 inventory form. These include:

- Property built up to the property line with the side elevations abutting adjacent buildings
- Located within downtown San Juan Bautista
- Rectangular plan
- Symmetrical façade
- Front gabled roof with a rectangular parapet and coping
- Recessed entry at the façade with display windows
- Storefront at the first-floor level and residential at the second

Additional character defining features include:

- Denticular belt course
- Corrugated sheet metal siding
- Scored concrete wall (first floor, front elevation)

Figure 2: View of corrugated metal siding and roofing. Courtesy of the San Juan Bautista Historical Society

PROPOSED PROJECT

A two bedroom apartment is located on the second floor of 302 Third Street. The building's corrugated sheet metal siding retains heat, making the apartment very uncomfortable during the summer months. Two windows were added to side elevations to increase air flow; however, this work was not permitted. The proposed project will install operable double hung windows in the window openings on the front elevation, replacing the non-historic windows.

The proposed project includes the following:

1) Replace the two c. 1940 windows on the front elevation's second floor with double hung sash, using the same window openings.

THE SECRETARY OF THE INTERIOR'S STANDARDS FOR REHABILITATION

As an historical resource, the Cravea Building is subject to review under the California Environmental Quality Act (CEQA). Generally, under CEQA, a project that follows the Standards and Guidelines for Rehabilitation contained in *The Secretary of the Interior's Standards for the Treatment of Historic Properties* is considered to have mitigated impacts to a historical resource to a less-than-significant level (CEQA Guidelines 15064.5).

The compliance of the proposed work on the Cravea Building is reviewed below with respect to the applicable Rehabilitation Standards which are Standards Six and Nine. The Standards are indicated in italics, followed by a discussion regarding the project's consistency or inconsistency with each Standard.

Rehabilitation is defined as "the act or process of making possible a compatible use for a property through repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values." (36 CFR 68).

Standard Six

Deteriorated historic features will be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture, and where possible, materials. Replacement of missing historic features will be substantiated by documentary and physical evidence.

The front elevation's two second floor windows were changed to their current non-historic configuration in the 1940s. There is documentary evidence (see Figures 1, 2 and 3) that these windows were originally double hung. Plans indicate (see Sheet A-2.11) that the non-historic windows will be replaced with double hung windows within the same window openings. The proposed work is consistent with Standard Six.

Standard Nine

New additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work will be differentiated from the old and will be compatible with historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and environment.

Two windows were installed on the second floor's north and south elevations, both secondary elevations, without the benefit of a building permit. These windows are now being reviewed for their consistency with Standard Nine. The Secretary of the Interior's Rehabilitation Guidelines recommends that new window openings should be added to secondary elevations and that the new windows should be compatible with the building but not duplicate the historic fenestration. Both windows are located on secondary elevations. They do not duplicate any historic fenestration that remains in the building. The work is consistent with Standard Nine.

Figure 3: Double hung windows in Cravea Building. Photo Courtesy of The San Juan Bautista Historical Society

CONCLUSION

The project plans submitted by Garavaglia Architecture for the window replacement and unpermitted project are consistent with the Secretary of the Interior's Standards for Rehabilitation and can be considered as having less than a significant level of impact on the historic resource.

Respectfully submitted,

Margaret E. Clovis

Margaret (Meg) Clovis

302 A THIRD STREET REHABILITATION

LOCATION MAP

PROJECT LOCATION

N

PROJECT INFORMATION

ADDRESS: 302 THIRD STREET
SAN JUAN BAUTISTA, CA 95045

APN: 0021600110

BUILDING STATUS CODE: 7R

PROJECT DESCRIPTION: RESPONSE TO "STOP WORK ORDER" ISSUED IN ACCORDANCE WITH SECTION 10-1-100 OF THE SAN JUAN BAUTISTA MUNICIPAL CODE FOR INSTALLING WINDOWS WITHOUT A PERMIT. PER REQUIREMENTS OF SECTION 11-06-010 OF THE SAN JUAN BAUTISTA MUNICIPAL CODE, ALL WORK WILL FOLLOW THE SECRETARY OF THE INTERIOR'S STANDARDS FOR REHABILITATION

ZONING: MC

CODE INFORMATION

BUILDING CODE: 2022 CALIFORNIA HISTORICAL BUILDING CODE
2022 CALIFORNIA BUILDING CODE

OCCUPANCY: EXISTING: R-3
PROPOSED: NO CHANGE

CONSTRUCTION TYPE: V-B

PROJECT DIRECTORY

OWNER: BAINS FAMILY LIVING TRUST
PO BOX 192
SAN JUAN BAUTISTA, CA 95045
CONTACT: DANTE BAINS
TEL: 831.801.8880
EML: w.dantebains@gmail.com

ARCHITECT: MICHAEL GARAVAGLIA, AIA
GARAVAGLIA ARCHITECTURE, INC.
582 MARKET STREET SUITE 1800
SAN FRANCISCO, CA 94104
CONTACT: AMBROSE WONG
TEL: 415-391-9633
FAX: 415-391-9647
EML: ambrose@garavaglia.com

DRAWING INDEX

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www.garavaglia.com

302 THIRD STREET
SAN JUAN BAUTISTA, CA 95045

LICENSED ARCHITECT
MICHAEL ALAN GARAVAGLIA
No. C-14833
REN. 7/31/23
STATE OF CALIFORNIA

COVER SHEET

PROJ. NO. 2021-006
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DATE 06 JAN 2023
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	11 JAN 2023	PERMIT SUBMISSION

SHEET NO.
A-0.00

ARCHITECTURAL GENERAL NOTES

1. THE CONTRACT FOR CONSTRUCTION SHALL BE THE A.I.A. DOCUMENT A107 - STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR FOR A PROJECT OF LIMITED SCOPE, 2007 ed. AND A.I.A. DOCUMENT A201 - GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, 2007 ed.

2. THE ARCHITECT/OWNER SHALL SUBMIT DRAWINGS FOR PLAN CHECK. THE OWNER SHALL PAY FOR ALL PLAN CHECK FEES. THE CONTRACTOR SHALL PICK UP PERMITS.

3. ALL WORK SHALL CONFORM TO THE 2019 CALIFORNIA HISTORICAL BUILDING CODE, THE 2019 CALIFORNIA BUILDING CODE AS WELL AS TO THE LATEST EDITIONS OF THE ELECTRICAL, PLUMBING, MECHANICAL, AND ANY OTHER APPLICABLE CODES. ALL WORK SHALL CONFORM TO THE SECRETARY OF THE INTERIOR STANDARDS FOR REHABILITATION AS OUTLINED ON THIS SHEET.

4. ALL WORK SHALL CONFORM TO ALL LOCAL CODES AND/OR ORDINANCES.

5. ALL WORK SHALL BE COMPLETED SKILLFULLY AND IN ACCORDANCE WITH ACCEPTED TRADE STANDARDS.

6. EXCEPT WHERE CONTRACT DOCUMENTS INCLUDE MORE STRINGENT REQUIREMENTS, APPLICABLE INDUSTRY STANDARDS INCLUDING MANUFACTURER STANDARDS AND INSTALLATION INSTRUCTIONS HAVE THE SAME FORCE AND EFFECT AS IF BOUND OR COPIED INTO THE CONTRACT DOCUMENTS. SUCH STANDARDS ARE PART OF THE CONTRACT DOCUMENTS BY REFERENCE. WHERE COMPLIANCE WITH A STANDARD IS REQUIRED, COMPLY WITH THE STANDARD IN EFFECT AS OF THE DATE OF THE CONTRACT DOCUMENTS.

7. THE CONTRACTOR SHALL COORDINATE THE VARIOUS CONSTRUCTION ACTIVITIES TO ENSURE EFFICIENT AND ORDERLY INSTALLATION OF EACH PART OF THE WORK. COORDINATE CONSTRUCTION OPERATIONS THAT ARE DEPENDENT UPON EACH OTHER FOR PROPER INSTALLATION, CONNECTION, AND OPERATION.

8. CONTRACTOR SHALL COORDINATE WITH OWNER FOR OWNER PROVIDED MATERIALS.

9. CONTRACTOR SHALL COORDINATE WITH OWNER FOR REQUIRED SCHEDULING & ORDERING INFORMATION. CONTRACTOR SHALL ASSIST IN DETERMINING QUANTITIES WHEN REQUIRED.

10. CONTRACTOR SHALL PROVIDE OWNER W/ REQUESTED DELIVERY DATES FOR ALL P.B.O. PRODUCTS & KEEP OWNER ABREAST OF SCHEDULE REVISIONS. OWNER SHALL DETERMINE LEAD TIME FOR ALL PRODUCTS & HAVE PRODUCTS DELIVERED WHEN NEEDED BY CONTRACTOR.

11. CONTRACTOR SHALL INFORM THE ARCHITECT OF SCHEDULE REVISIONS.

12. CONTRACTOR SHALL INFORM THE ARCHITECT ON THE PROGRESS OF THE WORK ON A WEEKLY BASIS OR MORE FREQUENTLY AS CONDITIONS WARRANT.

13. CONTRACTOR SHALL SCHEDULE MEETINGS WITH THE ARCHITECT ON A TIMELY BASIS AND TO ALLOW FOR TIME REQUIRED TO PROVIDE APPROPRIATE RESPONSE TO ANY QUESTIONS OR SITE CONDITIONS.

14. CONTRACTOR SHALL ARRANGE FOR A PRECONSTRUCTION MEETING AND FOR ANOTHER MEETING AFTER DETERMINING THE PROJECT DIMENSIONAL LAYOUT FOR THE REVIEW BY THE ARCHITECT AND OWNER.

15. CONTRACTOR SHALL ALLOW TWO WEEKS FOR REVIEW BY THE ARCHITECT OF SUBMITTALS, SHOP DRAWINGS, SUBSTITUTIONS, AND RFI'S BY THE ARCHITECT. CONTRACTOR SHALL REVIEW ALL SUBMITTALS BEFORE ISSUING THEM TO THE ARCHITECT FOR REVIEW.

16. THE CONTRACTOR SHALL SUBMIT SHOP DRAWINGS TO THE ARCHITECT FOR REVIEW OF CONFORMANCE WITH DESIGN INTENT.

17. ALL CHANGE ORDERS SHALL BE IN WRITING AND SHALL BE SIGNED BY THE OWNER, ARCHITECT, AND CONTRACTOR. CHANGE ORDERS SHALL BE SIGNED PRIOR TO BEGINNING THE WORK OR ORDERING THE MATERIALS ADDRESSED IN THE CHANGE ORDER.

18. CONTRACTOR SHALL SUBMIT ALL DESIGN CHANGES OR SUBSTITUTIONS TO THE ARCHITECT FOR APPROVAL. THE ARCHITECT SHALL NOT BE RESPONSIBLE FOR ANY CHANGES IN PLANS, DETAILS, OR SPECIFICATIONS UNLESS APPROVED IN WRITING AND IN ADVANCE BY THE ARCHITECT.

19. THE CONTRACTOR SHALL NOTIFY THE ARCHITECT OF ALL MODIFICATIONS REQUESTED BY THE BUILDING DEPARTMENT, OR OFFICIAL HAVING JURISDICTION, AND OF ALL CHANGES REQUESTED BY THE INSPECTOR, OWNER, OR OTHERS. SUBSTITUTIONS WILL BE CONSIDERED, BUT DO NOT SUBSTITUTE DETAILS, EQUIPMENT, OR METHODS WITHOUT SPECIFIC WRITTEN APPROVAL BY THE ARCHITECT.

20. CONTRACTOR SHALL VERIFY WITH THE ARCHITECT CODE UPGRADE WORK NOT REQUIRED BY BUILDING INSPECTORS. IF THE CONTRACTOR BELIEVES CODE WORK IS NECESSARY, AND IT HAS NOT BEEN REQUIRED BY BUILDING INSPECTOR, THE ARCHITECT SHALL DETERMINE, WITH OWNER'S CONSENT, WHETHER WORK SHALL BE UNDERTAKEN.

21. REMODELING OR REHABILITATION OF AN EXISTING BUILDING REQUIRES THAT CERTAIN ASSUMPTIONS BE MADE REGARDING EXISTING CONDITIONS. BECAUSE SOME OF THE ASSUMPTIONS MAY NOT BE VERIFIABLE WITHOUT DESTROYING ADEQUATE OR SERVICEABLE PORTIONS OF THE BUILDING, THE CONTRACTOR SHALL VERIFY ALL QUESTIONS, CONDITIONS AND PROCEDURES WITH THE ARCHITECT PRIOR TO COMMENCING EACH PORTION OF THE WORK.

22. THE CONTRACTOR SHALL CONFIRM ALL EXISTING DIMENSIONS AND CONDITIONS IN THE FIELD PRIOR TO BEGINNING WORK. ANY DISCREPANCIES BETWEEN THE DRAWINGS AND FIELD CONDITIONS MUST BE BROUGHT TO THE IMMEDIATE ATTENTION OF THE ARCHITECT FOR CLARIFICATION PRIOR TO PROCEEDING WITH WORK. THE CONTRACTOR SHALL RESOLVE ANY DISCREPANCY PRIOR TO PROCEEDING WITH WORK.

23. WRITTEN DIMENSIONS SHALL TAKE PRECEDENCE OVER SCALED DIMENSIONS. DO NOT SCALE DRAWINGS. DIMENSIONS ARE TO THE FACE OF FINISH, UNLESS OTHERWISE NOTED.

24. WHERE CONSTRUCTION ABUTS ADJACENT PROPERTY OR AN EXISTING STRUCTURE, THE CONTRACTOR SHALL VERIFY, PRIOR TO THE START OF WORK, IF ANY CONDITIONS WILL AFFECT WORK PROGRESS OR CONFORMANCE TO THESE DOCUMENTS.

25. THE REMOVAL OR ALTERING IN ANY WAY OF EXISTING WORK SHALL BE CARRIED ON IN SUCH A MANNER AS TO PREVENT INJURY OR DAMAGE TO ANY PORTION(S) OF THE EXISTING WORK, WHICH REMAIN(S).

26. CONTRACTOR SHALL BE RESPONSIBLE FOR ANY DAMAGE INCURRED AS A RESULT OF THE WORK. ANY DAMAGE SHALL BE REPAIRED AT NO ADDITIONAL COST TO OWNER.

27. EXECUTE WORK TO ENSURE THE SAFETY OF PERSONS AND ADJACENT PROPERTY FROM DAMAGE CAUSED BY CONSTRUCTION OPERATIONS IN CONNECTION WITH THIS WORK. WHERE EXISTING CONSTRUCTION IS CUT, DAMAGED, OR REMODELED, PATCH OR REPLACE WITH MATERIALS TO MATCH IN KIND, QUALITY, AND PERFORMANCE WITH ADJACENT MATERIALS.

28. DO NOT NOTCH, BORE, OR CUT MEMBERS FOR PIPES, DUCTS, OR OTHER REASONS WITHOUT THE SPECIFIC, ADVANCE WRITTEN APPROVAL OF THE STRUCTURAL ENGINEER.

29. THE CONTRACTOR IS RESPONSIBLE FOR CAPPING OFF ANY UTILITY LINES DISTURBED DURING THE DEMOLITION AND CONSTRUCTION PROCESS THAT COULD BE A SAFETY HAZARD OR CAUSE DAMAGE TO THE BUILDING.

30. THE CONTRACTOR IS RESPONSIBLE FOR PROVIDING ALL TEMPORARY SUPPORTS, BARRICADES, AND SHORING AS REQUIRED DURING THE CONSTRUCTION PROCESS.

31. UNLESS OTHERWISE INDICATED, ALL NEW WORK SHALL MATCH EXISTING MATERIALS, DETAILS, TRIM, ETC. TO THE FULLEST EXTENT POSSIBLE. PROVIDE PRODUCTS OF THE SAME KIND AND FROM A SINGLE SOURCE.

32. PRIOR TO ORDERING OR FABRICATING MATERIAL, EQUIPMENT, OR PRODUCTS, THE CONTRACTOR SHALL DETERMINE THAT THE SIZE AND PRODUCTS INDICATED MEET THE INTENT OF THE CONTRACT DOCUMENTS.

33. THE CONTRACTOR SHALL INSPECT MATERIALS AND EQUIPMENT IMMEDIATELY UPON DELIVERY AND AGAIN PRIOR TO INSTALLATION. CONTRACTOR SHALL REJECT DAMAGED AND DEFECTIVE ITEMS.

34. CONTRACTOR SHALL INSTALL ALL EQUIPMENT, FIXTURES AND MATERIALS PER MANUFACTURER'S RECOMMENDATIONS. FOLLOW MANUFACTURER'S INSTRUCTIONS CAREFULLY. MANUFACTURER'S INSTRUCTIONS AND GUARANTEES SHALL BE GIVEN TO THE OWNER AT THE END OF THE JOB.

35. THE CONTRACTOR SHALL FLASH AND COUNTERFLASH TO S.M.A.C.N.A. STANDARDS, INDUSTRY STANDARDS, AND MANUFACTURER'S SPECIFICATIONS WHEREVER NECESSARY TO PROVIDE A WATERPROOF AND WEATHERPROOF CONSTRUCTION PROJECT.

36. IF OPENED IN COURSE OF WORK PROVIDE AND INSTALL NEW
FIBERGLASS BATT INSULATION AS FOLLOWS, U.O.N.:
R-13 AT (N) EXTERIOR WALLS OR WALLS ADJACENT TO UNCONDITIONED SPACES
R-19 AT (E) AND (N) FLOORS,
R-19 AT (E) AND (N) ATTICS
R-19 AT (N) CEILINGS/FLOORS

37. WHERE GLASS IS BEING REPLACED IN (E) HISTORIC WINDOWS OR DOORS, PROVIDE AND INSTALL REPLACEMENT GLASS IN KIND. PROVIDE AND INSTALL TEMPERED GLAZING IN (N) NON-HISTORIC OPENINGS WHERE REQUIRED BY CODE.

38. CONTRACTOR SHALL INSPECT AND APPROVE STUCCO PLYWOOD SUBSTRATE AND BUILDING PAPER FOR PROPER INSTALLATION. ADEQUATE PREPARATION OF THE SUBSTRATE IS IMPERATIVE FOR PROPER BONDING OF THE PAINT. PREPARE EACH SUBSTRATE AS RECOMMENDED BY THE MANUFACTURER. CLEAN ALL SURFACES THROUGHOUT, REMOVE ANY PAINT WHERE BONDING FAILURE IS EVIDENT & ROUGHEN ANY SURFACES AS REQUIRED FOR ADHESION OF (N) PAINT.

39. CONTRACTOR SHALL PROVIDE AND INSTALL 5/8" WATER RESISTANT GYP. BD. AT ALL BATH, TOILET, AND LAUNDRY ROOM WALLS TO BE PAINTED. CONTRACTOR SHALL PROVIDE AND INSTALL CEMENTITIOUS BACKER BOARD, WONDER BOARD OR EQUAL AT ALL WALL AND CEILING SURFACES TO BE FINISHED WITH TILE.

40. ALL EXTERIOR EXPOSED WOOD TO BE APPROVED, NATURALLY WEATHER AND PEST RESISTANT, OR PRESSURE TREATED. ALL CUTS SHALL BE TREATED W/ PRESERVATIVE COATING BEFORE INSTALLATION. ALL METAL CONNECTORS AND FASTENERS IN CONTACT WITH TREATED WOOD SHALL BE HOT DIPPED GALVANIZED OR STAINLESS STEEL.

41. ALL FINISHES SHALL BE PAINTED AS FOLLOWS:
EXTERIOR: THREE COAT
STAIN & SEAL WHERE INDICATED
INTERIOR: TWO COAT FOR LIGHT INTERIOR, THREE COAT FOR DARK INTERIOR
STAIN & SEAL WHERE INDICATED
COLORS TO BE SELECTED BY THE ARCHITECT & OWNER. FINAL ACCEPTANCE OF COLORS WILL BE FROM JOB-APPLIED SAMPLES. PROVIDE FULL COAT FINISH SAMPLES ON SURFACES WITH A MINIMUM SIZE OF 4 SF FOR APPROVAL BY THE ARCHITECT & OWNER.

42. AS A MINIMUM, ALL INTERIOR WOOD TRIM SHALL BE PAINT GRADE, SOLID WOOD, (SPECIES TO BE DETERMINED) AND ALL EXTERIOR WOOD TRIM SHALL BE PAINT GRADE, WEATHER-RESISTANT WOOD.

43. CONTRACTOR SHALL CONTACT ARCHITECT FOR DECISIONS REGARDING ALL MATERIALS PROVIDED BY CONTRACTOR WHICH REQUIRE COLOR OR FINISH SELECTIONS.

44. PROVIDE COMPLETE FURRING AND SOFFITS TO INSTALL ALL HORIZONTAL AND VERTICAL HVAC DUCTS, VENTING AND PLUMBING. LOCATIONS AND CONFIGURATIONS TO BE REVIEWED BY ARCHITECT.

45. PLUMBING AND EQUIPMENT VENTING: WHERE FEASIBLE VENT ALL PLUMBING FIXTURES, EXHAUST VENTS, FURNACE, WATER HEATER, EXHAUST VENTS AND PLUMBING FIXTURES TO ROOF - COMBINE WHEN ALLOWED BY CODE. VERIFY ALL LOCATIONS OF VENTS WITH ARCHITECT PRIOR TO INSTALLATION.

46. THE CONTRACTOR SHALL KEEP THE JOB SITE CLEAN AND SAFE AT ALL TIMES, INCLUDING CLEANING MATERIALS, PROTECTING CONSTRUCTION IN PROGRESS AND ADJOINING MATERIALS IN PLACE. PROVIDE TEMPORARY, PROTECTIVE COVERINGS WHERE NECESSARY TO ENSURE PROTECTION FROM DAMAGE OR DETERIORATION.

47. CONTRACTOR SHALL PERIODICALLY CLEAN AND MAINTAIN COMPLETED CONSTRUCTION ON A REGULAR BASIS. AT THE COMPLETION OF THE PROJECT, PROVIDE A FINAL CLEANING OF ALL SURFACES. POLISH ALL GLASS, BROOM SWEEP EXTERIOR SURFACES, AND VACUUM ALL INTERIOR FLOORS. CONTRACTOR SHALL LEAVE THE PREMISES CLEAN AND ORDERLY AND READY FOR OCCUPANCY.

48. CONTRACTOR SHALL DISPOSE OF ALL DEBRIS AND WASTE OFF SITE IN A LEGAL MANNER ON A REGULAR BASIS TO PREVENT EXCESS ACCUMULATION ON SITE.

49. CONTRACTOR IS TO INSPECT THE (E) BLDG FOR ANY ADDITIONAL PROBLEMS OR CONCERNS (STRUCTURAL, FINISH, MECHANICAL, ETC.) WHICH ARE NOT REFLECTED IN THE DRAWINGS & NOTATIONS. REPORT ANY FINDINGS TO THE ARCHITECT DURING BID PHASE AND BEFORE PROCEEDING WITH WORK.

50. ELECTRICAL, MECHANICAL (HVAC), AND PLUMBING SYSTEMS SHALL BE "DESIGN/BUILD." PERFORMANCE SPECIFICATIONS SHALL BE REVIEWED BY THE ARCHITECT BEFORE COMMENCEMENT OF THE WORK (I.E. FURNACE SIZE AND TYPE, ELECTRICAL PANEL SIZES.)

SECRETARY OF THE INTERIOR STANDARDS FOR REHABILITATION

1. A PROPERTY WILL BE USED AS IT WAS HISTORICALLY OR BE GIVEN A NEW USE THAT REQUIRES MINIMAL CHANGE TO ITS DISTINCTIVE MATERIALS, FEATURES, SPACES AND SPATIAL RELATIONSHIPS.

2. THE HISTORIC CHARACTER OF A PROPERTY WILL BE RETAINED AND PRESERVED. THE REMOVAL OF DISTINCTIVE MATERIALS OR ALTERATION OF FEATURES, SPACES, AND SPATIAL RELATIONSHIPS THAT CHARACTERIZE A PROPERTY WILL BE AVOIDED.

3. EACH PROPERTY WILL BE RECOGNIZED AS A PHYSICAL RECORD OF ITS TIME, PLACE, AND USE. CHANGES THAT CREATE A FALSE SENSE OF HISTORICAL DEVELOPMENT, SUCH AS ADDING CONJECTURAL FEATURES OR ELEMENTS FROM OTHER HISTORIC PROPERTIES, WILL NOT BE UNDERTAKEN.

4. CHANGES TO A PROPERTY THAT HAVE ACQUIRED HISTORIC SIGNIFICANCE IN THEIR OWN RIGHT WILL BE RETAINED AND PRESERVED.

5. DISTINCTIVE MATERIALS, FEATURES, FINISHES AND CONSTRUCTION TECHNIQUES OR EXAMPLES OF CRAFTSMANSHIP THAT CHARACTERIZE A PROPERTY WILL BE PRESERVED.

6. DETERIORATED HISTORIC FEATURES WILL RE REPAIRED RATHER THAN REPLACED. WHERE THE SEVERITY OF DETERIORATION REQUIRES REPLACEMENT OF A DISTINCTIVE FEATURE, THE NEW FEATURE WILL MATCH THE OLD IN DESIGN, COLOR, TEXTURE, AND, WHERE POSSIBLE, MATERIALS. REPLACEMENT OF MISSING FEATURES WILL BE SUBSTANTIATED BY DOCUMENTARY AND PHYSICAL EVIDENCE.

7. CHEMICAL OR PHYSICAL TREATMENTS, IF APPROPRIATE, WILL BE UNDERTAKEN USING THE GENTLEST MEANS POSSIBLE. TREATMENTS THAT CAUSE DAMAGE TO HISTORIC MATERIALS WILL NOT BE USED.

8. ARCHEOLOGICAL RESOURCES WILL BE PROTECTED AND PRESERVED IN PLACE. IF SUCH RESOURCES MUST BE DISTURBED, MITIGATION MEASURES WILL BE UNDERTAKEN.

9. NEW ADDITIONS, EXTERIOR ALTERATIONS, OR RELATED NEW CONSTRUCTION WILL NOT DESTROY HISTORIC MATERIALS, FEATURES, AND SPATIAL RELATIONSHIPS THAT CHARACTERIZE THE PROPERTY. THE NEW WORK WILL BE DIFFERENTIATED FROM THE OLD AND WILL BE COMPATIBLE WITH THE HISTORIC MATERIALS, FEATURES, SIZE, SCALE AND PROPORTION, AND MASSING TO PROTECT THE INTEGRITY OF THE PROPERTY AND ITS ENVIRONMENT.

10. NEW ADDITIONS AND ADJACENT OR RELATED NEW CONSTRUCTION WILL BE UNDERTAKEN IN SUCH A MANNER THAT, IF REMOVED IN THE FUTURE, THE ESSENTIAL FORM AND INTEGRITY OF THE HISTORIC PROPERTY AND ITS ENVIRONMENT WOULD BE UNIMPAIRED.

FOR COMPLETE TEXT AND GUIDELINES, GO TO:
https://www.nps.gov/tps/standards/rehabilitation.htm

ARCHITECTURAL REPLACEMENT OF MISSING HISTORICAL ELEMENTS

1. ALL WORK FOR THIS PROJECT SHALL CONFORM TO THE SECRETARY OF THE INTERIOR STANDARDS FOR REHABILITATION. THESE STANDARDS ARE LISTED ON THIS SHEET.

2. THE REPLACEMENT OF MISSING HISTORICAL CONSTRUCTION ELEMENTS REQUIRES THE FULL ATTENTION AND COOPERATION OF THE CONTRACTOR. THE CONTRACTOR SHOULD DEVELOP A SYSTEM OR PROCESS OF RECORDATION PRIOR TO THE START OF ANY WORK.

3. EVERY EFFORT SHALL BE MADE TO REPAIR, RATHER THAN REPLACE, EXISTING ELEMENTS. SUCH REPAIR MAY INCLUDE REPLACEMENT OF EXTENSIVELY DETERIORATED OR MISSING ELEMENTS.

4. HISTORICAL PHYSICAL AND PICTORIAL DOCUMENTATION, IN ADDITION TO SURVIVING PROTOTYPES, WILL BE THE BASIS FOR ANY HISTORIC RESTORATION. MEASURE AND DOCUMENT ALL EXISTING DETAILS PRIOR TO START OF ANY REPAIR OR REPLACEMENT WORK,

5. THE USE OF SALVAGED MATERIALS IS STRONGLY ENCOURAGED AS A MEANS OF REPLACING FEATURES NO LONGER COMMONLY AVAILABLE. THIS OPTION SHALL BE GIVEN THE HIGHEST PRIORITY WHEN IT IS NOT FEASIBLE TO REPAIR A DETERIORATED ELEMENT.

6. CONTRACTOR SHALL DOCUMENT THE LOCATION, ORIENTATION AND ANY OTHER INFORMATION THAT WILL AID IN THE CORRECT REINSTALLATION OF AN ELEMENT PRIOR TO REMOVAL AND STORAGE OF THAT ELEMENT AS REQUIRED BY THE CONTRACT DOCUMENTS OR AS MIGHT BE REQUIRED TO ALLOW OTHER WORK TO PROCEED.

7. PROTECT ALL EXISTING ELEMENTS DURING ALL PHASES OF CONSTRUCTION WORK.

8. CONTRACTOR SHALL PROVIDE HISTORICAL ELEMENT SHOP DRAWINGS AS OUTLINED BELOW.

9. CONTRACTOR SHALL MEASURE AND DOCUMENT ON HISTORICAL ELEMENT SHOP DRAWINGS THE "GHOSTING" OF MISSING ELEMENTS REQUIRING REPLACEMENT AND THEIR LOCATIONS. THE CONTRACTOR SHALL ALSO RECORD ON THESE SHOP DRAWINGS ANY OTHER RELEVANT INFORMATION REGARDING THESE MISSING ELEMENTS THAT CAN BE GLEANED FROM THE FIELD. THESE MEASUREMENTS SHALL BE RECORDED ONTO THESE SHOP DRAWINGS AT AN APPROPRIATE SCALE AND SUBMITTED TO THE ARCHITECT FOR REVIEW.

10. THE CONTRACTOR SHALL NOTE ON THE HISTORICAL ELEMENT SHOP DRAWINGS THE MATERIALS OF IN SITU ELEMENTS AND PROPOSE ALTERNATIVE MATERIALS, SHOULD THE IN SITU MATERIALS NO LONGER BE AVAILABLE.

11. THE HISTORICAL ELEMENT SHOP DRAWINGS SHALL SHOW HOW THE CONTRACTOR INTENDS TO FABRICATE AND INSTALL THESE ELEMENTS. THE ARCHITECT WILL REVIEW THESE SHOP DRAWINGS FOR DESIGN INTENT.

12. ONCE THE ARCHITECT HAS HAD AN OPPORTUNITY TO REVIEW THESE SHOP DRAWINGS, THE ARCHITECT AND CONTRACTOR SHALL ARRANGE A SPECIAL COORDINATION MEETING TO REVIEW THE INTERPRETATION PROPOSED BY THE ARCHITECT AND THE RECONSTRUCTION METHOD PROPOSED BY THE CONTRACTOR.

13. THE ARCHITECT WILL THEN ISSUE THE REVIEWED HISTORICAL ELEMENT SHOP DRAWINGS TO THE CONTRACTOR WITH APPROPRIATE COMMENTS.

ARCHITECTURAL SYMBOLS

(E) CONSTRUCTION TO REMAIN
(E) CONSTRUCTION TO BE REMOVED
(N) 2x WOOD FRAME CONSTRUCTION
1-HR RATED WALL
2-HR RATED WALL
MASONRY WALL
CONCRETE WALL
CMU WALL
LINE ABOVE
LINE BELOW
CENTER LINE

1 / A1.01 — DETAIL
1 / A1.01 — SECTION
1 / A1.01 — ELEVATION
A / D / 1 / A1.01 / B / C — INTERIOR ELEVATION

A — DOOR TYPE
XXX — WINDOW TYPE
X — WALL TYPE
0'-0" — ELEVATION POINT
DATUM LAYOUT POINT
1ST FLR. 0'-0" — ELEVATION LAYOUT POINT
PROPERTY LINE

1 — REVISION
X — COLUMN GRID
1 — KEYNOTE
0'-0" — CEILING HEIGHT

ARCHITECTURAL ABBREVIATIONS

∠	ANGLE
@	AT
℄	CENTERLINE
#	POUND OR NUMBER
(E)	EXISTING
(N)	NEW
A.F.F.	ABOVE FINISH FLOOR
ACOUS.	ACOUSTICAL
ADJ.	ADJUSTABLE
AGGR.	AGGREGATE
ALUM.	ALUMINUM
APPROX.	APPROXIMATE
ARCH.	ARCHITECTURAL
ASPH.	ASPHALT
BM.	BEAM
BTWN.	BETWEEN
BITUM.	BITUMINOUS
BLKG.	BLOCKING
BD.	BOARD
BOT.	BOTTOM
BLDG.	BUILDING
CLG.	CEILING
CEM.	CEMENT
CER.	CERAMIC
CLR.	CLEAR
CLO.	CLOSET
COL.	COLUMN
CONC.	CONCRETE
CONT.	CONTINUOUS
CORR.	CORRIDOR
DTL.	DETAIL
DIA.	DIAMETER
DIM.	DIMENSION
DR.	DOOR
D.H.	DOUBLE HUNG
DN	DOWN
DWG.	DRAWING
EA.	EACH
ELEC.	ELECTRICAL
ELEV.	ELEVATION / ELEVATOR
EQ.	EQUAL
E.J.	EXPANSION JOINT
EXT.	EXTERIOR
F.O.C.	FACE OF CONCRETE
FOF	FACE OF FINISH
FOS	FACE OF STUD
FIN.	FINISH
F.E.	FIRE EXTINGUISHER
FLR.	FLOOR
FD	FLOOR DRAIN
FLUOR.	FLUORESCENT
FT.	FOOT OR FEET
FTG.	FOOTING
F.A.U.	FORCED AIR UNIT
FDN.	FOUNDATION
FURR.	FURRING
GALV.	GALVANIZED
GA.	GAUGE
GL.	GLASS
GYP.	GYPSUM
HT.	HEIGHT
H.P.	HIGH POINT
H.C.	HOLLOW CORE
H.B.	HOSE BIBB
HR.	HOUR
INSUL.	INSULATION
INT.	INTERIOR
ID	INSIDE DIAMETER
KIT.	KITCHEN
LAM.	LAMINATE
LAV.	LAVATORY
L.P.	LOW POINT
M.O.	MASONRY OPENING
MAX.	MAXIMUM
MECH.	MECHANICAL
MTL.	METAL
MIN.	MINIMUM
N.A.	NOT APPLICABLE
N.I.C.	NOT IN CONTRACT
N.T.S.	NOT TO SCALE
NO.	NUMBER
O.C.	ON CENTER
OPNG.	OPENING
OPP.	OPPOSITE
OFOS	OUTSIDE FACE OF STUD
o/	OVER
OD	OUTSIDE DIAMETER
OFD	OVERFLOW DRAIN
PTD	PAINTED
PR	PAIR
PART.	PARTITION
PERM.	PERMANENT
PLAS.	PLASTER
PL.	PLATE
PLUMB.	PLUMBING
PLYWD.	PLYWOOD
PT.	POINT
PREFIN.	PREFINISHED
PTDF	PRESSURE TREATED DOUGLAS FIR
P.B.O.	PROVIDED BY OWNER
R.	RADIUS
RWL	RAIN WATER LEADER
REF.	REFRIGERATOR
REINF.	REINFORCED
REQ.	REQUIRED
R.D.	ROOF DRAIN
RM.	ROOM
R.O.	ROUGH OPENING
S.S.D.	SEE STRUCTURAL DRAWINGS
SHT.	SHEET
SMACNA	SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION
SIM.	SIMILAR
S.H.	SINGLE HUNG
S.C.	SOLID CORE
SPEC.	SPECIFICATION
SQ.	SQUARE
S.S.	STAINLESS STEEL
STOR.	STORAGE
STRUCT.	STRUCTURAL
SUSP.	SUSPENDED
SYM.	SYMBOL
TEL.	TELEPHONE
TOI.	TOILET
T&G	TONGUE AND GROOVE
T.O.	TOP OF
T.O.C.	TOP OF CURB
T.O.W.	TOP OF WALL
TYP.	TYPICAL
U.O.N.	UNLESS OTHERWISE NOTED
VERT.	VERTICAL
VEST.	VESTIBULE
W.C.	WATER CLOSET
W/	WITH
W/O	WITHOUT
WD.	WOOD

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95045

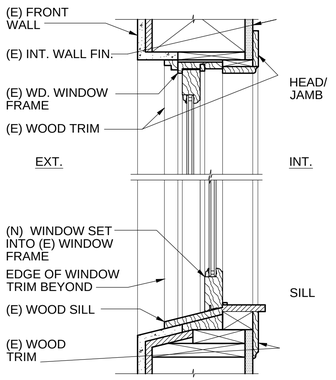
LICENSED ARCHITECT — MICHAEL ALAN GARAVAGLIA — No. C-14933 — REN. 1/31/23 — STATE OF CALIFORNIA

GENERAL NOTES

PROJ. NO. 2021-006
SCALE AS NOTED
DATE 06 JAN 2023
PHASE SD
DRAWN
CHECKED AW

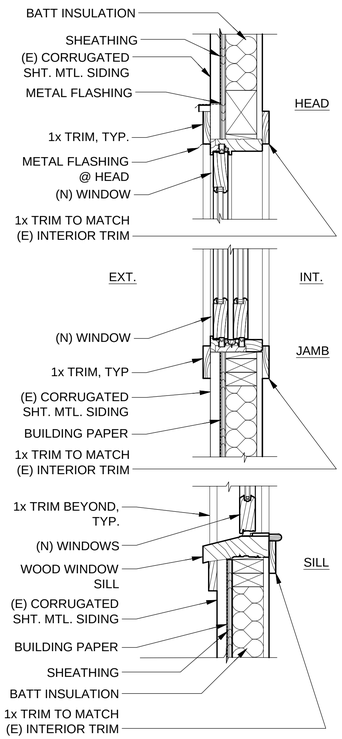
NO.	DATE	REVISION
1	11 JAN 2023	PERMIT SUBMISSION

SHEET NO.
A-0.01



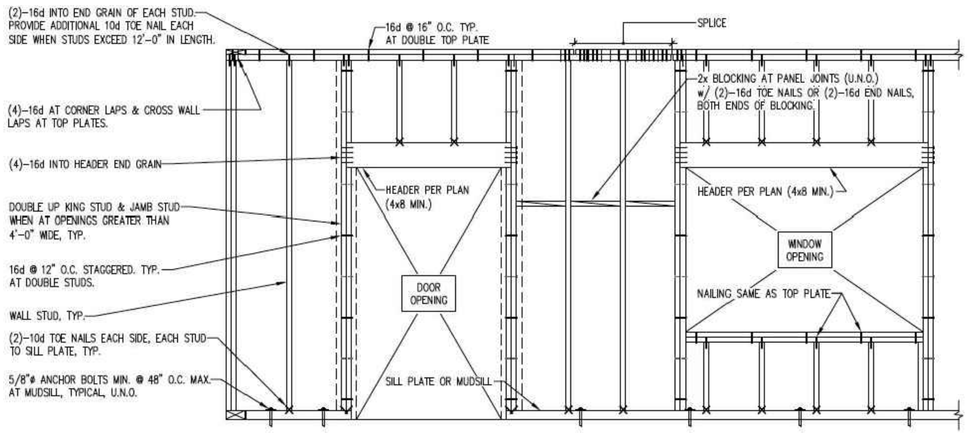
(N) WINDOW SASH IN (E) WINDOW FRAME

18 SCALE: 1-1/2" = 1'-0"



SIDE WINDOW

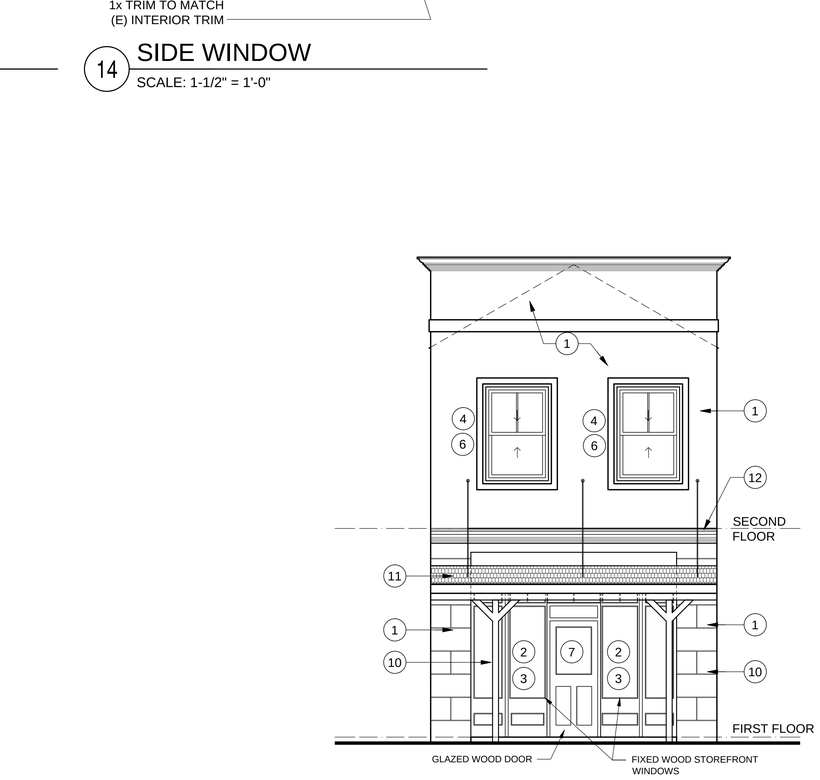
14 SCALE: 1-1/2" = 1'-0"



NOTES:
1. SHEATHING NOT SHOWN FOR CLARITY

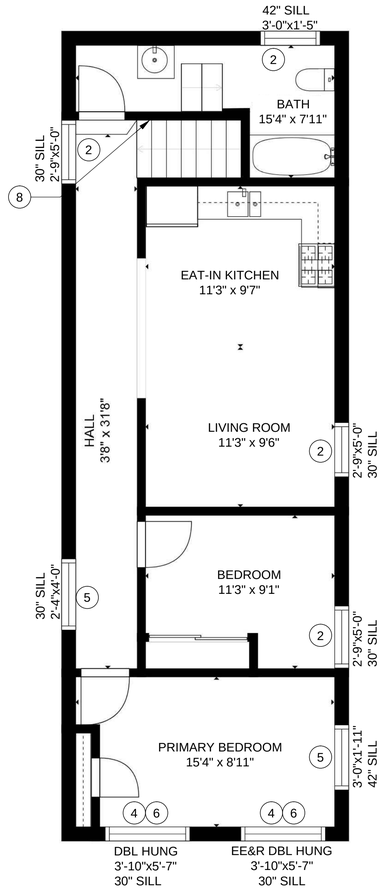
TYPICAL BEARING/STUD WALL FRAMING

10 SCALE: N.T.S.



FRONT ELEVATION

16 SCALE: 1/4" = 1'-0"



FRONT ELEVATION

8 SCALE: 1/4" = 1'-0"

REF. N

0' 1' 2' 4' 8'

SHEET NOTES

1. PROTECT IN PLACE ALL EXISTING (E) ELEMENTS TO REMAIN, TO PREVENT DAMAGE OF ADJACENT AREAS DURING DEMOLITION
2. DEMOLISH AND REMOVE COMPLETE, ITEMS SHOWN DASHED OR NOTED FOR DEMOLITION
3. WALL FINISH NOTED FOR DEMOLITION TO BE REMOVED BACK TO FACE OF STUD, UON
4. ALL (E) HISTORIC WINDOWS & DOORS, TRIM & OTHER SIMILAR ELEMENTS THAT ARE TO REMAIN IN PLACE MUST BE PROTECTED FROM DAMAGE FOR THE DURATION OF CONSTRUCTION
5. REFER TO ARCHITECTURAL GENERAL NOTES FOR ADDITIONAL DEMOLITION-SPECIFIC REQUIREMENTS
6. PROVIDE PERMANENT HEAT SOURCE FOR DWELLING UNIT AS REQUIRED BY CODE
7. PROVIDE SMOKE & CO DETECTORS FOR DWELLING UNIT AS REQUIRED BY CODE
8. PROVIDE GFCI & AFCI PROTECTED OUTLETS FOR DWELLING UNIT AS REQUIRED BY CODE
9. PATCH AND PREP FRONT FAÇADE FOR REPAINTING w/ HISTORICALLY APPROPRIATE COLOR

KEY NOTES

1. (E) SMOOTH FINISH CEMENT PLASTER TO REMAIN, PATCHED AS NEEDED AND REPAINTED
2. (E) WINDOWS TO REMAIN; REPAINT FRAME & TRIM w/ HISTORICALLY APPROPRIATE COLORS
3. PROTECT (E) WINDOW;
4. REMOVE (E) WINDOW SASH ONLY
5. (N) OPENING w/ (N) WINDOW
6. INSTALLATION OF (N) WINDOW; WINDOWS ON FRONT FACADE WILL BE MARVIN WINDOWS OR APPROVED EQUAL TO MATCH THE HISTORIC MUNTIN PATTERN AND SASH PROFILE
7. (E) DOOR TO REMAIN
8. PROVIDE STAIR HANDRAIL AS REQUIRED BY CODE
9. NOT USED
10. (E) WOOD COLUMNS AND BRACES TO REMAIN
11. (E) COMP SHINGLE ROOFING AND ASSEMBLY TO REMAIN
12. (E) WOOD CORNICE TO REMAIN

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LICENSED ARCHITECT
MICHAEL ALAN GARAVAGLIA
No. C-14833
REN. 1/31/23
STATE OF CALIFORNIA

FLOOR PLAN, EXT. ELEVATION & DETAILS

PROJ. NO.	2021-006
SCALE	AS NOTED
DATE	06 JAN 2023
PHASE	SD
DRAWN	HA
CHECKED	AW

NO.	DATE	REVISION
	11 JAN 2023	PERMIT SUBMISSION
	23 FEB 2023	WINDOWS CLARIFICATION

SHEET NO.
A-2.11

State of California - The Resource Agency
DEPARTMENT OF PARKS AND RECREATION
PRIMARY RECORD

Primary #:
HRI #:
Trinomial:
NRHP Status Code: 5D1
Other Listings:
Review Code: Reviewer:
Date: -/-/-

Survey #:
DOE #:

*Resource Name or #: 302 Third Street; San Juan Bautista, CA 95045

P1. Other Identifier: Mission Shoe Renewal

*P2. **Location:** ☒ not for publication ☐ unrestricted

a. **County:** San Benito **and**

b. USGS 7.5' Quad: _____ YEAR: _____ T ___ ; R ___ ; ___ of ___ of Sec ___ ; ___ B.M.

c. Address: 302 Third Street City: San Juan Bautista State: CA Zip Code: 95045

d. UTM: Zone: _____ ; _____ mE/ _____ mN

e. Other Locational Data: APN: 21600110

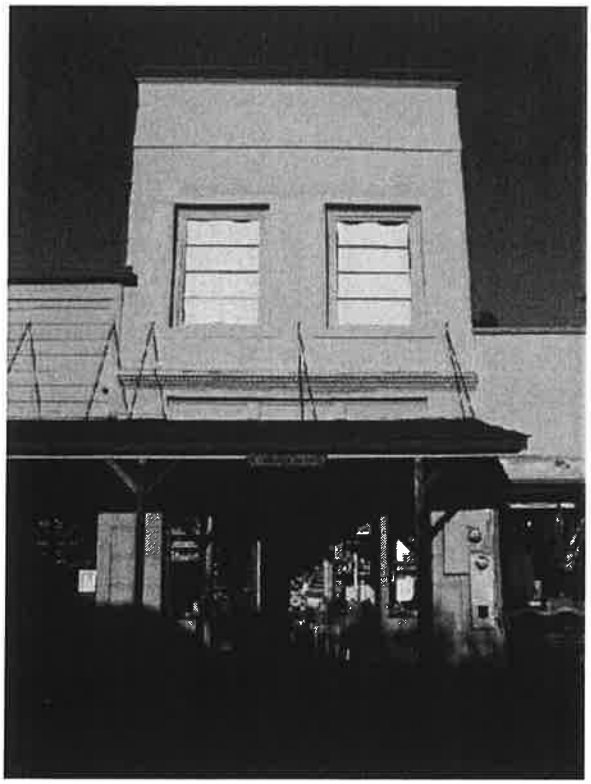
*P3a. **Description:**

This building is a two-story, commercial building constructed in the Western False Front style. It is likely that the second floor level is residential. The building has a wood framed structural...*Continued below*...

*P3b. **Resource Attributes:** HP06

*P4. **Resources Present:** ☒ Building ☐ Structure ☐ Object ☐ Site ☐ District ☒ Element of a District ☐ Other

P5a. **Photograph or Drawing**



P5b. **Description of Photo:** south facing facade

*P6. **Date Constructed/Age and Source:** ☒ Historic ☐ PreHistoric ☐ Both ☐ Neither

Year Built: 1906 - Documented

*P7. **Owner and Address:**

Name: Unknown

Address:

*P8. **Recorded By:**

Wanda Guibert
Volunteer
Galvin Preservation Associates Inc.

*P9. **Date Recorded:** 08/15/2006

*P10. **Survey Type:** Survey - Reconnaissance

Survey Title: 2005 San Juan Bautista Survey

*P11. **Report Citation:**

"Updated Historic Context and Citywide Inventory of Architectural Resources Within the City of San Juan Bautista," Galvin Preservation Associates Inc., September, 2006.

***Attachments:**

☐ NONE ☐ Location Map ☐ Sketch Map ☒ Continuation Sheet ☐ Building, Structure, and Object Record

*Resource Name or #: 302 Third Street; San Juan Bautista, CA 95045

*Recorded by: Wanda Guibert *Date: 08/15/2006

☒ Continuation ☐ Update

P3a.Description (continued):

system with a concrete foundation. The south facing façade is symmetrical. The exterior is clad with a concrete veneer on the first story and smooth stucco on the upper story. There is a classical band between the first and second floor level that includes dentils. The building is covered by a moderately pitched, front-gabled roof clad with corrugated metal sheets (mostly hidden by the rectangular false front façade). A large molded cornice defines the upper false front. A suspended wood shed roof forms an awning over the lower areas.

There is a full width porch on the façade, which is sheltered by a dropped secondary shed roof clad with composition material. The porch is supported by rectangular wood posts with wood brackets, and held by metal rods that connect from the second story to the porch. The main entry is recessed and consists of a single wood and glass door with a transom window above. There are no other entries. There are wood sash, fixed display windows at the first floor. At the second story are two large symmetrically spaced, wood and fixed windows with four horizontal panes per sash.

The building does not have a driveway, garage, or landscaping. The building is built up to the property line with the side elevations abutting adjacent buildings, with which it originally shared a shoe store. There is a concrete sidewalk facing the façade.

Alterations include circa 1940s replacement windows at the second floor level and the re-cladding of the shed roof from metal to composition shingle. The first floor porch is also not original. It is likely that the exterior was reclad with stucco during the early twentieth century. The condition of the building is good.

The character defining features of this Western False Front style building include:

- Property built up to the property line with the side elevations abutting adjacent buildings
- Located within downtown San Juan Bautista
- Rectangular plan
- Symmetrical façade
- Front gabled roof with a rectangular parapet and coping
- Recessed entry at the façade with display windows
- Storefront at the first floor level and residential at the second

☐ Archaeological Record ☒ District Record ☐ Linear Feature Record ☐ Milling Station Record ☐ Rock Art Record
☐ Artifact Record ☐ Photograph Record Other: _____

ABBOTT & KINDERMANN, INC.
ATTORNEYS AT LAW

2023 22ND ANNUAL LAND USE, ENVIRONMENTAL & REAL ESTATE LAW UPDATE

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TABLE OF CONTENTS

The information presented in this update should not be construed to be formal legal advice by Abbott & Kindermann, Inc., or the formation of a lawyer/client relationship. Because of the changing nature of this area of the law and the importance of individual facts, readers are encouraged to seek independent counsel for advice regarding their individual legal issues.

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

ACC	American Chemistry Council
ADUs	Accessory Dwelling Units
AP	Adopted Plan
BLA	Boundary Line Adjustment
BOS or County	Board of Supervisors
CAA	Clean Air Act
CAISO	California Independent System Operator
CARB	California Air Resources Board
CCA	Community Choice Aggregator
CCCR	Citizen's Committee to Complete the Refuse
CDA	Community Development Agency
CEC	California Energy Commission
CPUC	California Public Utility Commission
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CESA	California Endangered Species Act
CEQA	California Environmental Quality Act
CIP	Capital Improvement Program
CSD	Community Services District
CTCAC	California Tax Credit Allocation Committee
CUP	Conditional Use Permit
CWA	Clean Water Act
CWOTS	California Waters of the State
DA	Development Agreement
DEIR	Draft Environmental Impact Report
DFW	California Department of Fish and Wildlife
DOE	Department of Energy
DOT	Department of Transportation
DR	Design Review
DWR	California Department of Water Resources
EA	Environmental Assessment
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FEIR	Final Environmental Impact Report
FERC	Federal Energy Regulatory Commission
FM	Final Subdivision Map
FPPC	Fair Political Practices Committee
FWS	Fish and Wildlife Service
GHGs	Greenhouse Gases
GP	General Plan
GPA	General Plan Amendment
HAA	Housing Accountability Act
HDR	High-Density Residential

HOA	Homeowners Association
ICCTA	Interstate Commerce Commission Termination Act
IHMP	Important Habitat Mitigation Plan
JADUs	Junior Accessory Dwelling Units
LAFCO	Local Agency Formation Commission
LLA	Lot Line Adjustment
MFR	Multifamily Residential
MMRP	Mitigation, Monitoring, and Reporting Program
MND	Mitigated Negative Declaration
NCRWQCB	North Coast Regional Water Quality Control Board
ND	Negative Declaration
NELs	Numeric Effluent Limitations
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NMFS	National Marine Fisheries Service
NOAA	National Ocean and Atmospheric Administration
NOAA Fisheries	National Ocean and Atmospheric Administration Fisheries
NOD	Notice of Determination
NOE	Notice of Exemption
NOI	Notice of Intent
NOP	Notice of Preparation
NPDES	National Pollutant Discharge Elimination System
OAL	Office of Administrative Law
OPR	Office of Planning and Research
ORMP	Oak Resources Management Plan
OS	Open Space
OWMP	Oak Woodlands Management Plan
PD	Planned Development
PDP	Planned Development Permit
PM	Parcel Map
PRA	Political Reform Act
PURPA	Public Utility Regulatory Policies Act
RCRA	Resource Conservation and Recovery Act
RPS	Renewable Portfolio Standard
RWQCB	Regional Water Quality Control Board
RZ	Rezone
SDRWQC	San Diego Regional Water Quality Control Board
SFBRWB	San Francisco Bay Regional Water Board
SEIR	Subsequent Environmental Impact Report
SGMA	Sustainable Groundwater Management Act
SMARA	Surface Mining and Reclamation Act
SP	Specific Plan
SuppEIR	Supplemental Environmental Impact Report
SWRCB	State Water Resources Control Board
TIM	Traffic Impact Mitigation
TMP	Transportation Management Plan

TPM	Tentative Parcel Map
TSM	Tentative Subdivision Map
USACE	U.S. Army Corps of Engineers
USBR	U.S. Bureau of Reclamation
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
VMT	Vehicle Miles Traveled
WSA	Water Supply Assessment
WDR	Waste Discharge Report
WOTUS	Waters of the United States
WSP	Wildlife Safety Plan

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

A. ENVIRONMENTAL LAW UPDATE

Diane G. Kindermann
Glen C. Hansen

1. CALIFORNIA WATER RIGHTS AND SUPPLY

A. Regulatory Framework

- The California Water Code regulates water rights addressing appropriative, riparian, and prescriptive rights associated with surface water within the state, while jurisdiction over groundwater is limited to "subterranean streams flowing through known and definite channels." (Wat. Code, § 1200.)
- The process for acquiring water rights may include the State Water Resources Control Board's ("**SWRCB**") determination of all rights for adjudicated surface waters. (Wat. Code, § 2501.)
- Groundwater is also regulated under the Sustainable Groundwater Management Act ("**SGMA**"), which requires local agencies to draft plans to bring groundwater aquifers into balanced levels of pumping and recharging. (Wat. Code, §§ 10720 *et seq*.)
- The water rights program is administered by SWRCB.

B. Suggested Water Due Diligence Approach

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

Water Requirements

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

What Is the Status of Your Water Right?

- At SWRCB
  - Search for the names of seller and predecessors-in-interest in the database of holders of appropriative rights and riparian owners who have filed riparian diversion statements (not all riparian holders file the statements).
  - Review maps to determine if there is a record of diversion that could lead to finding a water right.
- Other
  - Review contract documents for direct evidence of water rights and water rights descriptions.
  - Examine the property for actual river diversion or pipelines leading from river diversion and check for current or abandoned groundwater wells.
  - Review seller's documents for assessments and taxes paid to water districts.
  - Visit the county courthouse for possible pre-1914 appropriative rights or post-1914 licensed rights.
  - Work with an experienced title company to create a water chain of title.

Determine the Validity and Type of the Water Right

- Appropriative Rights
  - If water for the project involves pre-1914 rights, check for historical diversions to support the full amount claimed and determine if the right has been abandoned or forfeited.
  - If water for the project involves post-1914 rights, determine whether the place of diversion, purpose, use, season, and quantity allowed under the permit and license is sufficient for the project's needs.
- Riparian Rights
  - Has the stream system been adjudicated?
  - Is the water used within the stream's watershed?
  - Is storage required?
  - If used outside the watershed or if storage required, then an appropriative right must be obtained from SWRCB.
    - Water retrieved pursuant to a riparian right must be used on riparian land.
  - Is there sufficient water in the stream, or are correlative cutbacks likely, and what about Endangered Species Act's ("**ESA**") impact on the ability to take water?
  - Determine if there are other water uses on the stream, both appropriative and riparian that may have priority of use.
- Percolating Groundwater Rights
- Overlying Rights
  - Groundwater
    - Is there sufficient groundwater?
    - Has the basin been adjudicated or is there any other limitation on quantity that can be used (including groundwater management plans)?
  - Appropriative Rights
    - Has the basin been adjudicated, and are there any prescriptive rights?
    - Is the water appropriate for the intended use?
    - Determine water suitability for use in the proposed area.
    - Determine if water can be transferred from one location of the project to another.
  - Water Quality Issues
    - Is the chemical makeup appropriate for the intended use?
  - Other Types of Water
    - Reclaimed Water
      - Consider whether secondary-treated or tertiary-treated wastewater is appropriate for the intended use.
    - Desalinated Water

C. 2023 Update

1. *Pacific Coast Federation of Fishermen's Associations v. Raimondo* (E.D. Cal. 2022, March 11, 2022, case no. 1:20-cv-00431-DAD-EPG) 2022 U.S. Dist. LEXIS 44155, 2022 WL 789122 – Federal Judge Allows Government Plan For CVP, SWP Water Flows to Proceed While Biden Administration Reconsiders Trump-Era Biological Opinions

A U.S. District Judge in Fresno issued an opinion not published in the Federal Supplement allowing for a government-endorsed plan to keep two controversial Trump-era biological opinions in place while the Biden administration reconsiders them. The two opinions, issued by the National Marine Fisheries Service ("**NMFS**") and U.S. Fish and Wildlife Service ("**FWS**") in 2019, enable more water to be sent to 20 million farms, businesses, and homes in Southern and Central California through the Central Valley Project ("**CVP**") and the State Water Project ("**SWP**"), the primary federal and state water diversion projects in California. The opinions include an elimination of previous instream flow requirements aimed at preventing water temperatures from rising high enough to damage salmon eggs. A coalition of environmental groups and fishing organizations ("**Plaintiffs**") filed suit in 2021 seeking to block the agencies from relying on the two opinions, which they called "scientifically unsound and fatally flawed."

The challenged opinions affected the Delta Smelt, longfin smelt, winter-run and spring-run Chinook Salmon, and other aquatic species. The court ordered that these opinions remain in effect for three years with added safeguards to ensure the survival of endangered fish. While the Biden administration continues to review the controversial biologic opinions, a process that is not expected to wrap up until 2024, an interim operations plan has been implemented with provisions designed to provide extra protections for the endangered fish. The plan attempts to address such issues as water temperature-related threats to winter-run salmon eggs and sets reasonable carryover storage goals for Shasta Dam water.

The Plaintiffs' coalition argued the opinions were designed to maximize water deliveries to water contractors, even during drought, at the expense of protecting endangered fish. U.S. District Judge Dale Drozd endorsed the government's plan, calling it balanced and reasonable. The judge concluded the interim plan's "middle-of-the road approach" on setting targets for water storage and temperatures was "more likely to be achievable" than what the coalition had proposed. The coalition sought a ban on water deliveries in order to retain more cold water behind the Shasta Dam to prevent salmon die-offs. State and federal agencies were pleased that a federal court had approved an interim operations plan for the CVP and the SWP through September 2022 to address severe drought while protecting species and ensuring water for human health and safety. The judge also granted a request to pause litigation through the end of September, finding the results of the agencies' reviews of biological opinions will "likely change the administrative landscape of the case." Many believe that the court's order was a balanced approach toward resolving differences, bolstering protections for species, and managing the challenges of a third year of drought.

2. *California Water Curtailment Cases* (2022) Cal.App.5th 164 – Sixth District Limits State Water Board's Authority Over Pre-1914 Appropriative Rights

The Sixth District Court of Appeal held the California State Water Resources Control Board ("**SWRCB**") lacked authority under Water Code section 1052(a) to curtail the diversion or use of water by holders of valid pre-1914 appropriative water rights. In June 2015, SWRCB sent notices to holders of water rights who had "a priority date of 1903 and later for the Sacramento-San Joaquin watersheds and Delta," informing them that, due to drought, there would be "insufficient water in the system to service their claims of right." The notices included threats of monetary fines for users who continued diverting water. Nine water districts and agencies ("**Plaintiffs**") filed mandate actions challenging, among other things, SWRCB's curtailment notices on jurisdictional grounds. The notices were eventually rescinded. However, before the recission, SWRCB brought enforcement proceedings against the Byron-Bethany Irrigation District and West Irrigation District. SWRCB subsequently dismissed those actions after the prosecution failed to satisfy its burden of proof following an administrative hearing. Plaintiffs, however, maintained their mandate actions. The trial court ruled in favor of the Plaintiffs. SWRCB appealed.

Water Code section 1052(a) states that "[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass." According to SWRCB, section 1052(a) empowers it to enforce priorities among pre-1914 appropriative rights holders due to the lack of sufficient water to serve all pre-1914 appropriative rights holders. The trial court, however, concluded that Section 1052(a) limits SWRCB's authority to "the diversion of water subject to [d]ivision 2," which excludes water diverted within the valid scope of pre-1914 appropriative water rights.

In affirming the trial court's ruling, the Court of Appeal distinguished two seminal water law cases – *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879 and *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397. While *Millview* and *Young* did determine that SWRCB possessed the ability to assess the scope or validity of an appropriative right, the cases did not consider whether SWRCB possessed authority under Section 1052(a) to curtail a diversion under a pre-1914 water appropriate right without investigating the claim's scope or validity. The Court of Appeal concluded that because pre-1914 appropriative water rights were not created in the Water Commission Act of 1913 — they in fact preceded the act — those acts were not "authorized in" division 2 of the Water Code, and thus, not subject to enforcement action pursuant to section 1052(a).

The Court of Appeal concluded by limiting its holding to section 1052(a), conceding that SWRCB's actions may have been justified if it had utilized emergency regulations instead of Section 1052(a). The court said that its opinion does not preclude SWRCB from exercising its authority over pre-1914 appropriative water rights holders under "the public trust doctrine, applicable emergency regulations, or appropriate authority." The decision is sure to spark conservations regarding legislative clarification pertaining to SWRCB's power of pre-1914 appropriative rights holders, especially as drought conditions appear to be becoming more common.

3. *Buena Vista Water Storage District v. Kern Water Bank Authority* (2022) 76 Cal.App.5th 576 – Second District Holds Full Quantification of Water Rights Not Required For CEQA Review

The Court of Appeal held an Environmental Impact Report ("**EIR**") prepared by the Kern Water Bank Authority ("**KWBA**") adequately addressed the environmental ramifications of its water storage project aimed at diverting unappropriated Kern River water during certain wet years, reversing a trial court's determination to the contrary. KWBA — a joint powers authority comprising five water districts and one-privately owned mutual water company — operates the Kern Water Bank ("**KWB**"). KWBA proposed the Kern Water Bank Authority Conservation and Storage Project ("**Project**"), which sought to divert up to 500,000 acre-feet-per-year from the Kern River to recharge KWB.

KWBA prepared an EIR for the Project, which evaluated various environmental impacts including those regarding existing hydrological and groundwater resources. The EIR's baseline conditions comprised environmental settings from 1995, when KWB began operating, to 2012 when KWBA issued its Notice of Preparation for the Project. The EIR's analysis centered on the proposed water diversions being limited to high flow wet years when all senior rights holder's rights have been satisfied and when the water would have otherwise flooded farmlands; left Kern County; or flowed to the Kern-River California Aqueduct Intertie, a physical structure through which flood waters are diverted to the California Aqueduct. The EIR stated that a hydrological analysis showed flood flows would only be available for diversion in 18% of all years. Regarding hydrological resources, the EIR concluded that the Project was not expected to result in a significant impact on available water supply, and thus, no mitigation measures were required.

The conclusion was based on the fact that diverted water would comprise surplus Kern River water which would not "otherwise be stored or used by existing Kern River water right holders and would not divert surplus flows in normal or dry years." As for groundwater resources, the EIR determined that the Project was not expected to result in a significant impact on ground water recharge or groundwater elevations, and thus, no mitigation measures were needed. The EIR reasoned that the Project only intended to "increase water available for recharge and storage" and "not to change recovery operations in multiple dry years." Thus, recovery operations would not reduce groundwater levels.

Following KWBA's certification of the final EIR, Buena Vista Water Storage District ("**Plaintiffs**"), a water storage district located in Kern County, filed a petition for writ of mandate seeking to set aside the EIR and KWBA's approval of the Project. The trial court granted the writ, contending the EIR was "inadequate" for three reasons: (1) the definitions of Project water and existing water rights were "inaccurate, unstable, and indefinite"; (2) the baseline analysis failed to analyze and quantify competing existing Kern River water rights; and (3) the impact analysis failed to analyze significant environmental impacts on senior rights holders, and on groundwater from long-term KWB recovery operations. The Second District Court of Appeals reversed, disagreeing with all three contentions.

Project Description – Project water and existing water rights

The court held that the description of Project water in the EIR's Project Description was adequate and satisfied the California Environmental Quality Act ("**CEQA**"). Plaintiffs raised multiple issues regarding how the EIR referred to Project water. First, Plaintiffs contended the description was inconsistently phrased, pointing to four other descriptions, including "water historically diverted by KWBA" and "unappropriated" or "surplus" water. The court held, however, that phrasing of Project water was adequate despite different words being used to refer to the same conditions at times in different parts of the document. Second, Plaintiffs argued that the description of Project water was indefinite because it relied on the open-ended limit of 500,000 acre-feet per year. The court rejected this argument, concluding that a Project Description is permitted to use a flexible parameter when the project is subject to future changing conditions. Here, the precise amount of Project water cannot be determined with certainty because changing conditions year-to-year impact water availability.

Regarding the Project Description in relation to existing water rights, the trial court initially concluded that the EIR was inadequate because it failed to include a complete quantification of existing Kern River water rights. The Court of Appeal disagreed, holding that California Code of Regulations Title 14 Section 15124 only requires a general description of the Project's environmental characteristics, and that the EIR satisfied the standard. The court reasoned that the EIR disclosed all it reasonably could, in keeping with the requirement that EIRs reflect a good faith attempt at full disclosure, not perfection. *(Citizens for a Sustainable Treasure Island v. City & County of San Francisco* (2014) 227 Cal.App.4th 1036, 1046.)

Project Baseline

California Code of Regulations Title 14 Section 15125 requires an EIR to include a description of the physical environmental conditions near a proposed project. The baseline setting must be based on actual, existing physical conditions. The trial court in this case originally concluded the baseline description in the Project's EIR was inadequate because it failed to include quantified measurements of both the water used by existing water rights holders and of the water those water rights holders have the right to divert from the Kern River. The Court of Appeal disagreed, contending KWBA, as the lead agency, had the discretion to rely on historical measurements of water to determine how the existing physical conditions without the project can most realistically be measured.

Environmental Impact Analysis

The Court of Appeal held that the trial court erred in finding the EIR failed to adequately analyze the environmental impacts on existing water rights and groundwater from long-term recovery operations. The court held existing water rights were rightfully held to not be significantly impacted due to the project because the Project water comprised only unappropriated water, which, by definition, excludes water being used pursuant to an existing right. Additionally, the court held that substantial evidence supported the EIR's conclusion that there would be no significant impact on groundwater levels because the project would not increase long-term recovery beyond historical baseline operations.

4. Federal Government Threatens Seven Colorado Compact States to Either Negotiate Colorado River Cuts or Risk Federally Mandated Reductions

On June 14, 2022, Camille Touton, commissioner of the U.S. Bureau of Reclamation ("**USBR**"). testified in front of the Senate Committee on Energy and Natural Resources concerning the dire state of the overallocated Colorado River. There, she gave the seven Colorado River Compact states — Colorado, New Mexico, Utah, Wyoming, Arizona, Nevada, and California — sixty days to voluntarily negotiate usage cuts concerning Colorado River allotments by two to four million acre-feet — about 20 to 40 percent of the river's entire flow. California possesses rights to 4.4 million acre-feet of annual Colorado River flow, nearly one-third of the river's natural flow and the largest of all seven states.

Following an initial round of negotiations over the summer, the states failed to produce a plan by the USBR-imposed deadline. USBR, however, did not immediately follow through on its threat. USBR did however launch a conservation program through which it will pay farmers to use less water, using Inflation Reduction Act funds. Additionally, USBR began studying the environmental effects of water cuts, representing an initial step to a future action that could impact flows to Lower Basin states, including California. USBR is analyzing possible revisions to how it operates the Glen Canyon and Hoover Dam, given Lake Powell and Lake Mead have reached historically low levels. Lake Powell and Lake Mead are the nation's two largest reservoirs. Last summer, the water level in Lake Mead sank to 1,040 feet above sea level, its lowest ever. If its water level falls below 950 feet, the Hoover Dam will no longer be able to generate hydroelectric power, and at 895 feet, water would be unable to pass through the dam — a situation referred to as "deadpool."

While USBR has not publicized its end goal, it did recently impose a second deadline for voluntary negotiations among the states. On January 31, 2023, six of the seven Colorado River Compact states announced they reached a tentative proposal concerning Colorado River usage reductions. California was the lone state holdout, announcing it intended to release its own plan separately. The proposal would result in about two million acre-feet of cuts in the Lower Basin, with smaller reductions in the Upper Basin. Negotiators factored Mexico and California into the equations, but Mexico, like California, did not sign on to the proposal. California released a proposal in October 2022 to cut 400,000 acre-feet. Absent a voluntary deal, USBR is likely to eventually follow through on its threat to impose federally mandated reductions, an action that will almost certainly result in litigation.

For more information see:
https://www.nytimes.com/2023/01/27/climate/colorado-river-biden-cuts.html
https://www.theguardian.com/us-news/2023/jan/31/california-colorado-river-water-use-proposal
https://www.cnn.com/2023/01/30/us/colorado-river-water-california-arizona-climate/index.html
https://www.usbr.gov/main/docs/22-10-28_NOI_BOR_CO_River_SEIS_OES%20Final_508.pdf
https://www.energy.senate.gov/hearings/2022/6/full-committee-hearing-to-examine-short-and-long-term-solutions-to-extreme-drought-in-the-western-u-s

5. Construction Begins Modernization Project for B.F. Sisk Dam in Merced County

Construction began in June 2022 on a dam safety project at the B.F. Sisk Dam in Merced County aimed at modernizing the dam to reduce risks to water supply and to quell safety concerns for downstream communities in the event of an earthquake. In March, the U.S. Department of the Interior ("**Interior Department**") announced $100 million in federal funding had been set aside for the project from the $550 billion Infrastructure Investment and Jobs Act, signed by President Biden in 2021 and aimed at subsidizing federal investments in America infrastructure over five years. The law authorized $500 million for dam safety project in total.

Completed in 1967, B.F. Sisk Dam, also known as San Luis Dam, sits on the eastern end of the San Luis Reservoir, which is the fifth largest reservoir in the state and the nation's largest off-stream reservoir. The reservoir provides supplemental irrigational water storage for the federal government's Central Valley Project and municipal and industrial water for the California's State Water Project. The U.S. Bureau of Reclamation ("**USBR**"), an agency under the Interior Department, owns the dam. The California Department of Water Resources ("**DWR**") operates the dam. Reservoir storage space is allotted at 55% state and 45% federal. In 2019, USBR and DWR announced a $1.1 billion seismic upgrade slated for the B.F. Sisk Dam. Contractors are set to install stability berms and other safety features to the existing 3.5-mile-long dam, including an increase in dam height. An increase in dam height will make it safer for downstream residents by reducing the likelihood of overtopping if an earthquake were to occur, according to the Interior Department. Construction was slated to begin in the summer of 2022. The project will be paid for using both Infrastructure Investment and Jobs Act funding and annual appropriations to USBR through Congress. Construction is slated to span several years.

For more information see:
https://www.doi.gov/pressreleases/interior-department-invests-100-million-first-dam-safety-project-through-president
https://www.usbr.gov/newsroom/newsroomold/newsrelease/detail.cfm?RecordID=72003
https://goldrushcam.com/sierrasuntimes/index.php/news/local-news/39087-reclamation-kicks-off-120th-anniversary-with-groundbreaking-for-the-san-luis-reservoir-b-f-sisk-dam-safety-modification-project-in-merced-county

6. Draft Environmental Impact Report Released For Delta Tunnel Project

On July 27, 2022, the California Department of Water Resources ("**DWR**") released a draft Environmental Impact Report ("**DEIR**") for its Delta Conveyance Project, the state's latest plan to reroute how water moves from Northern to Southern California. DWR's preferred plan comprises a single 45-foot underground tunnel that would ferry water from the Sacramento-San Joaquin to State Water Project pumps near Tracy. The agency says the project is needed to reduce risks on state water supplies associated with earthquakes and climate change. According to DWR, the agency's preferred option would minimize various negative consequences. However, the plan still includes the removal of 71 buildings, including 15 homes, and an overtaking of 2,350 acres of farmland. The effort would weave through cultural resources and sites significant to local Native American tribes. The project would also have a negative impact

on threatened and endangered fish species. The DEIR proposed habitat restoration efforts to mitigate the effects on local fish populations, but environmental groups contend the measures failed to go far enough. The DEIR also lists reductions in water quality. DWR did not release price estimates, but it could cost some $16 billion. The price will be paid by State Water Project users. The Delta Conveyance Project is the latest name for a project that has spanned several names over several decades. In 2019, Governor Newsom, upon taking office, scrapped his predecessor's dual-tunnel California Water Fix proposal due to environmental concerns. The public review and comment period spans until December 16, 2022. The project will likely face CEQA challenges and possible delays, although the project could theoretically break ground as soon as 2028.

For more information see:
https://water.ca.gov/News/News-Releases/2022/July-22/DWR-Releases-Draft-Environmental-Impact-Report-for-Delta-Conveyance-Project
https://www.deltaconveyanceproject.com/

7. Governor Issues Executive Orders, SWRCB Issues Curtailment Orders Amid Third Year of Drought

California remained drought-stricken in February 2023, despite recent storms and additional water collected in state reservoirs. On October 19, 2021, Governor Newsom declared a statewide drought emergency. The governor issued an executive order on March 28, 2022, ordering SWRCB to craft water conservation measures due to the state entering a third year of drought. Pursuant to that authority, SWRCB on May 24, 2022, adopted a regulation banning the use of potable water for irrigating decorative or non-functional grass in commercial, industrial, or institutional properties. The emergency regulation applied to grasses at businesses and common areas managed by homeowners' associations. The action, however, did not target residential properties or recreational facilities including parks and schools. Urban water suppliers were also ordered to implement their drought plans to prepare for a water shortage of up to 20%. The executive order also included new impediments to well drilling. In a bid to preserve groundwater supplies, the order required those seeking to drill new wells to first seek approval from local Groundwater Sustainability Agencies ("**GSAs**"). The Sustainable Groundwater Management Act ("**SGMA**"), passed in 2014, requires local agencies located in high and medium priority basins to form GSAs tasked with managing groundwater basins. To receive approval, new wells must not compromise existing wells, or harm infrastructure or groundwater sustainability goals.

For more information see:
https://www.waterboards.ca.gov/press_room/press_releases/2022/pr06142022-new-statewide-emergency-conservation-regulation-in-effect.pdf
https://www.gov.ca.gov/2022/03/28/as-western-drought-worsens-governor-newsom-moves-to-bolster-regional-conservation-efforts/

The state's statewide emergency also directed SWRCB to consider modifying requirements for reservoir releases and diversion limitations to conserve water upstream later in the year to maintain water supply, improve water quality and protect cold water pools for salmon and

steelhead. The state of emergency also enables flexibilities in regulatory requirements and procurement processes to mitigate drought impacts and directs state water officials to expedite the review and processing of voluntary transfers of water from one water right holder to another. SWRCB has now issued multiple emergency curtailment orders pursuant to the Governor's emergency proclamation. On March 21, 2022, SWRCB sent letters to approximately 20,000 water rights holders in Central and Northern California warning of possible curtailments due to insufficient surface water supplies. Curtailments targeting a half-dozen watersheds followed. However, the recent ruling from the Sixth District Court of Appeal in *California Water Curtailment Cases*, *supra*, Cal.App.5th 164 cast doubts on SWRCB's capacity to police pre-1914 Appropriative water right holders in situations beyond questions beyond scope and validity.

State Water and Central Valley Projects

- In April 2022, the first curtailment orders of the year in California targeted water rights for the Central Valley and State Water Projects. The curtailments followed announcements by the California Department of Water Resources ("**DWR**") on March 18, 2022, and U.S. Bureau of Reclamation ("**USBR**") on April 1, 2022, warning of diminished deliveries due to drought.
- In December 2022, SWRCB announced its preliminary State Water Project allocations would constitute five percent of requested supplies, citing the inevitability for a fourth year of drought.
- On January 26, 2023, following several atmospheric rivers, SWRCB revised its initial projections expected to deliver 30% of requested water supplies — 1.27 million acre-feet — in 2023.
- In making its recent announcement, SWRCB cited an above-average snowpack in the Sierra Mountains and a combined collection of 1.62 million acre-feet of water in the Oroville and San Luis Reservoirs, which are among the largest reservoirs in the State Water Project.
- According to USBR, it issued a "zero percent allocation to federal Central Valley Project irrigation water service contractors, reduced allocations to the senior Sacramento River Settlement and San Joaquin River Exchange contractors, and set allocations for municipal and industrial contractors to minimum health and safety levels."
- As of early February 2023, USBR has not yet announced its preliminary allocations for the Central Valley Project.
- https://water.ca.gov/news/news-releases/2022/march-22/swp-allocation-march
- https://www.usbr.gov/newsroom/#/news-release/4157
- https://www.jdsupra.com/legalnews/state-water-board-issues-sweeping-water-5741507/
- https://water.ca.gov/News/News-Releases/2022/Dec-22/DWR-Announces-Initial-State-Water-Project-Allocation-of-5-percent
- https://www.gov.ca.gov/2023/01/26/state-water-project-to-increase-expected-2023-deliveries/
- https://www.kvpr.org/local-news/2023-01-25/farmers-keep-eye-on-water-allocations-after-wet-january

- https://www.energy.senate.gov/services/files/6CB52BDD-57B8-4358-BF6B-72E40F86F510

Sacramento-San Joaquin Delta Watershed

- In June 2022, curtailment orders affecting water rights holders in the Sacramento-San Joaquin Delta Watershed went into effect. The order mirrors one issued for the Delta in August 2021, except this one arrived nearly two months earlier.
- In all, approximately 4,300 rights holders holding 10,000 of the 16,700 total water rights in the Delta were curtailed.
- In response to the curtailments, in July 2022 SWRCB issued a new regulation affecting Delta rights holders and contractors that includes "minor changes to clarify requirements, streamline administration and provide flexibility in the method used to determine water unavailability. The revisions also address the reduced allocation to Sacramento River Settlement and Feather River Contractors."
- As of January 4, 2023, all curtailments affecting the Sacramento-San Joaquin Delta Watershed were suspended due to recent precipitation.
- https://www.waterboards.ca.gov/drought/delta/
- https://www.waterboards.ca.gov/press_room/press_releases/2022/pr07212022-delta-emergency-regs-readoption.pdf
- https://www.waterboards.ca.gov/drought/delta/docs/2023/010423-update.pdf

Scott and Shasta Rivers Watersheds

- Curtailments affecting the Scott and Shasta River Watersheds were readopted by SWRCB on July 29, 2022. Both watersheds were the target of curtailments last year.
- As of December 27, 2022, curtailment orders affecting Shasta River Watershed's water rights holders senior to April 1, 1912, were suspended, while all other rights remained curtailed.
- As of January 26, 2023, all Scott River Watershed curtailments were suspended through February 2, 2023.
- "Inefficient Livestock Prohibitions" targeting both watersheds remained in effect during high flow events, defining as flows greater than 500 cfs in the Scott River Watershed and greater than 220 cfs in the Shasta River Watershed. The Scott and Shasta Rivers are important tributaries for the Klamath River and are important for the threatened Coho, Chinook salmon, and Steelhead trout.
- https://www.waterboards.ca.gov/drought/scott_shasta_rivers/

Mill and Deer Creeks

- SWRCB on August 17, 2022, readopted curtailment orders targeting Mill and Deer Creeks in Tehama County to preserve minimum flows to protect drinking water supplies and fish species. The previous order had been lifted in July; however, the National Oceanic and Atmospheric Administration formally

requested that SWRCB reinstate curtailment orders targeting Mill and Deer Creeks due to ongoing drought conditions that pose a risk to endangered fish.
- Curtailment orders remained in effect as of early February.
- https://www.waterboards.ca.gov/drought/mill_deer_creeks/
- https://www.waterboards.ca.gov/drought/mill_deer_creeks/docs/20220628_nmfs_memo_re-adoption.pdf

Russian River

- Curtailment orders affected water rights holders in the Russian River Watershed in 2022. The first round of curtailment orders went into effect May 31, 2022, with additional users added in July. No curtailments remained in effect as of January 14, 2023, according to SWRCB.
- Data show that water supply levels in Lake Sonoma stood at 80.2% of its storage supply as of January 12, 2023, up from 59.1% in July 2022 and 35.6% in July 2021.
- Meanwhile, the current supply of water at Lake Mendocino was at 131.9% of its storage capacity as of January 12, 2023.
- The Sonoma County Water Agency reported its service area received 28.21 inches of rain so far in the current water year — between October 1, 2022, to January 11, 2023 — representing 139% of the average rainfall totals for the region between 1981 and 2023.
- https://www.waterboards.ca.gov/drought/russian_river/
- https://www.sonomawater.org/current-water-supply-levels

8. SWRCB Renews Ban on Wasteful Water Practices

Due to drought, in December 2022, SWRCB readopted an emergency regulation that barred wasteful water practices, including watering lawns during the rain. Other practices prohibited under the regulation include using decorative fountains without water recirculating pumps and washing vehicles without an automatic shutoff nozzle. The regulation was initially adopted in January 2022 and is now extended to December 21, 2023. It applies to all water users, including individuals, businesses, and public agencies. Enforcement mechanisms include warning letters, water audits or fines.

For more information see:
https://www.waterboards.ca.gov/press_room/press_releases/2022/pr-water-waste-prohibitions-readoption.pdf

9. Shasta River Water Association Defies SWRCB's Curtailment Order, Illustrating the Board's Limited Enforcement Power Amid Droughts

On August 17, 2022, the Shasta River Water Association ("**Association**") began diverting water from the Shasta River in defiance of a curtailment order affecting the watercourse. Before turning on its pumps, the Association sent a letter to SWRCB informing it of the Association's decision. The Association delivers water to ranchers and farmers in rural Siskiyou County. In a

single day, according to SWRCB, the flow of Shasta River dropped by more than half, threatening threatened salmon and other fish. SWRCB immediately issued a Notice of Violation and a draft Cease and Desist Order. Curtailments affecting the Shasta River Watershed were readopted by SWRCB on July 29, 2022. The Shasta River is an important tributary for the Klamath River. It's also home to threatened Coho, Chinook salmon, and Steelhead trout. The violation carries the threat of $500 a day, which generally goes up to $10,000 a day if SWRCB approves a draft Cease and Desist Order. The Association told local media that it stopped diverting about a week after beginning, having delivered relief to the cattle they set out to save. Given the Association stopped diverting on its own accord, it is unclear what penalty the Association may face, if any. The Association's decision to pump water during a curtailment order unimpeded highlights of SWRCB's drawn-out process for enforcing illegal water diversions during a drought. It also illustrates the sometimes-insurmountable incentives water users possess to defy curtailment orders, even with the threat of fines. The case also presents an opportunity for SWRCB and the state Legislature to consider new pathways for enforcing curtailment orders in the future.

For more information see:
https://www.waterboards.ca.gov/docs/srwa-enforcement-action-statement.pdf
https://www.theguardian.com/us-news/2022/sep/22/california-ranchers-water-rights-diversions-fish

2. WATER QUALITY

A. Regulatory Framework

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

- The purpose of CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (33 U.S.C. § 1251(a).)
- Section 301(a) of CWA generally prohibits the discharge of pollutants into waters of the United States except in accordance with the requirements of one of the two permitting programs established under CWA: Section 404, which regulates the discharge of dredged and fill material; or Section 402, which regulates all other pollutants under the NPDES permit program. (Section 404 is discussed in the Wetlands section of these materials.)
- The pre-2015 interpretation of the term "Waters of the United States" was reinstated by court order in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency* (2021) 557 F.Supp.3d 949. This definition includes:
  - All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - All interstate waters including interstate wetlands;
  - All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:
    - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
    - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    - Which are used or could be used for industrial purposes by industries in interstate commerce;
  - All impoundments of waters otherwise defined as waters of the United States under this definition;
  - Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
  - The territorial sea;
  - Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. (40 CFR 230.3(s).)

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

- Section 402 of CWA authorizes states to develop a NPDES program to permit "point source" discharges of pollutants into surface waters of the United States, including:
  - Industrial facilities discharges;
  - Municipal stormwater discharges; and
  - Stormwater discharges associated with construction projects over certain acreage. (33 U.S.C. § 1342(p).)
- According to Section 402, discharge from any point source is unlawful unless the discharge is in compliance with an NPDES permit.
- NPDES permits can be individual (project or activity specific) or general (e.g., California's construction stormwater NPDES permit).
- In California, SWRCB and its RWQCBs are responsible for administering the NPDES permit process. Permits are typically issued for a five-year term.
- Operators disturbing one or more acres during construction must obtain NPDES coverage by filing for a construction general permit. (40 C.F.R. Parts 9, 122-124.) (See Construction General Permit Order 2009-0009-DWQ.)

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

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

Relevance

- Section 401 is triggered by any activity that requires a permit from a federal agency for a project that could affect state water quality, including Section 404/Section 10 permits from USACE. (33 U.S.C. § 1341(a).) For example:
  - Initial site development (including, e.g., vineyards, processing facilities and support buildings that are located in waters of the United States).
  - Facility expansion in waters of the United States.
  - Improvements to drainage, reservoir or other water facilities that are in waters of the United States.

- WDRs are triggered by land discharges from initial site development, facility expansion, and improvements that could affect water quality of waters of the state (not necessarily waters of the United States under USACE jurisdiction) (e.g., certain isolated wetlands).

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

- CWA section 303(d) requires states to identify waters that do not meet or are not expected to meet by the next listing cycle, applicable water quality standards after the application of certain technology-based controls and schedule such waters for development of TMDLs. (40 C.F.R § 130.7(c) and (d).)
- The states are required to assemble and evaluate all existing and readily available water quality-related data and information to develop the list (40 C.F.R § 130.7(b)(5)), and to provide documentation for listing or not listing a state's waters (40 C.F.R § 130.7(b)(6).)
- Waters shall be placed in this category of the section 303(d) list if it is determined, in accordance with the California Listing Factors that the water quality standard is not attained; the standard's nonattainment is due to toxicity, a pollutant, or pollutants; and remediation of the standard's attainment problem requires one or more TMDLs.
- At a minimum, California's section 303(d) list shall identify waters where standards are not met, pollutants or toxicity are contributing to standards exceedance, and the TMDLs completion schedule.
- The water segment listed shall remain in this category of the section 303(d) list until TMDLs for all pollutants have been completed, EPA has approved the TMDLs, and implementation plans have been adopted.
- RWQCBs and SWRCB use several factors to develop the California section 303(d) list. Among the factors is toxicity.
- Under section 303(c)(2)(B) of CWA, California must adopt numeric criteria for the priority toxic pollutants listed under section 307(a) if those pollutants could be reasonably expected to interfere with the designated uses of the state's waters. Priority toxic pollutants are identified in 40 Code of Federal Regulations section 131.36.
- In 1994, a California state court found that the numeric criteria adopted by SWRCB were invalid. As a result, no numeric criteria for priority toxic pollutants existed for California.
- To fill the gap, the EPA promulgated the California Toxics Rule ("**CTR**") on May 18, 2000. The CTR regulations, codified in 40 Code of Federal Regulations section 131.38, establish numeric criteria for water quality standards for priority toxic pollutants for the State of California. To be able to implement the CTR, SWRCB adopted the State Implementation Plan in 2000.
- The CTR sets the following regulations in California:
    - Ambient aquatic life criteria for 23 priority toxics;
    - Ambient human health criteria for 57 priority toxics; and

    - A compliance schedule provision which authorizes the state to issue schedules of compliance for new or revised NPDES permit limits based on the federal criteria when certain conditions are met.
- Numeric water quality objectives for toxic pollutants, including CTR/National Toxics Rule ("**NTR**") water quality criteria, are exceeded when the thresholds for toxicity of a pollutant or pollutants is not met. When this happens waters shall be placed on the section 303(d) list. Remediation of the standards requires one or more TMDLs.
- The State must use the criteria together with the state's existing water quality standards when controlling pollution in inland waters and enclosed bays and estuaries. The numeric water quality criteria contained in CTR are identical to EPA's recommended CWA section 304(a) criteria for these pollutants published in December 1998. (See 63 C.F.R § 68353.)
  For more information, see https://www.epa.gov/tmdl/statute-and-regulations-addressing-impaired-waters-and-tmdls
- In March 2000, SWRCB adopted the state implementation plans ("**SIP**") for priority toxic pollutant water quality criteria contained in the CTR. The SIP also implements NTR criteria and applicable priority pollutant objectives in RWQCB's Basin Plans. Together, the CTR and NTR and applicable Basin Plan objectives, existing RWQCB beneficial use designations, and the SIP comprise water quality standards and implementation procedures for priority toxic pollutants in non-ocean surface waters in California.

California Porter-Cologne Act (Wat. Code, § 13000 *et seq*.)

- The Porter-Cologne Act was used as the basis of CWA. The Porter-Cologne Act entrusts SWRCB and the nine RWQCBs with protecting California's waters. (Wat. Code, § 13001.)
- RWQCBs are responsible for developing Basin Plans and regulating all pollutant or nuisance discharges that may affect either surface water or groundwater in the region's jurisdiction. (Wat. Code, § 13240.) Any person proposing to discharge waste within any region must file a report of waste discharge with the appropriate regional board. (Wat. Code, § 13260.)
- No discharge may take place until a RWQCB issues WDRs or a waiver of the WDRs. (Wat. Code, § 13264.)

WDRs

- Comprehensive programs under the Porter-Cologne Water Quality Act (Wat. Code, § 13264 *et seq*.) regulates point and non-point source discharges of waste to state surface and groundwaters.
- "Waste" is broadly defined, and RWQCB's assertion of regulatory authority to require WDRs is becoming more expansive (e.g., industrial wastewater fully contained in concrete-lined holding tanks in the ground is deemed a point source discharge to land, swimming pools are considered a discharge to land).
- Some general waivers from WDRs exist (e.g., agricultural waiver).

- WDRs require reporting and monitoring according to RWQCB and statutory criteria for constituent limits. (Wat. Code, § 13260 *et seq*.) WDRs can be refused, thus prohibiting the applicant's necessary discharge.
- Examples triggering the need for WDRs include erosion from soil disturbance, and discharge of process wastewater not discharging to a sewer (factories, cooling water, etc.).

B. 2023 Update

1. *S.F. Baykeeper v. City of Sunnyvale* (C.D. Cal. 2022) ___ F.Supp.3d ___ [2022 U.S. Dist. LEXIS 164053]

San Francisco Baykeeper ("**S.F. Baykeeper**") filed lawsuits against the cities of Sunnyvale and Mountain View under the citizen suit enforcement provisions of the Federal Clean Water Act ("**CWA**") to address the allegedly unlawful discharge of bacterial pollution by the two cities. The cities, pursuant to their Municipal Separate Storm Sewer System ("**MS4**") discharge permits, collect stormwater from the streets and other surfaces in the cities and discharge it directly to local creeks. Sunnyvale primarily discharges into Stevens Creek, Calabazas Creek and the Sunnyvale East Channel. Mountain View discharges into Stevens Creek. Flows from both cities subsequently drain into the San Francisco Bay. The cities do not treat stormwater prior to discharge. S.F. Baykeeper took three samples of the stormwater in January and February of 2019, which collectively showed that the stormwater discharges were contributing to exceedances of bacterial state water quality standards ("**WQS**"), in violation of the MS4.

The District Court in a case addressed two primary issues: whether plaintiff S.F. Baykeeper had standing, and what the standard was for determining whether Stevens Creek and Calabazas Creeks were waters of the United States ("**WOTUS**") for purposes of the CWA. The Court determined that S.F. Baykeeper had organization standing, which permits it to sue on its members' behalf, without showing an injury to the organization itself. The test for organization standings is that: (1) at least one of its members would have standing to sue independently; (2) the interests pursued in the case are germane to the organization's purpose; and (3) neither the claims raised, nor the relief sought require individual members to participate. The court determined that S.F. Baykeepers met the test as its members use the affected area and are people for whom the aesthetic and recreational values will be lessened by the challenged activity. Furthermore, the interests pursued were consistent with the organization's purpose and the remedies sought did not require individual members to participate.

Furthermore, the Court determined that Stevens Creek and Calabazas Creek constituted WOTUS for the purposes of the CWA. While the water in the creeks often goes into the subsurface and the creeks dry up in the summer, the court determined they are tributaries of a WOTUS, and therefore, a WOTUS. The Court used the pre-2015 WOTUS guidelines in reaching its decision. Since the CWA does not define WOTUS, the definition has changed over the years and presents a continuously murky issue for the courts, property owners, and, as this case shows, municipalities. In December of 2022, the Environmental Protection Agency ("**EPA**") and the U.S. Army Corps of Engineers ("**Corps**") released a final pre-publication version of their revised definition of WOTUS. The final rule is generally consistent with the pre-2015 definition of

WOTUS but expands the definition to include "relatively permanent" waters and those that have a "significant nexus" to WOTUS.

2. *Central Sierra Environmental Resource Center v. Stanislaus National Forest* (9th Cir. 2022) 30 F.4th 929

Two environmental groups ("**Plaintiffs**") sued the Federal Government alleging the U.S. Forest Service ("**USFS**") violated federal law by allowing livestock grazing in the Stanislaus National Forest that caused fecal matter runoff to pollute area streams. Plaintiffs contended this interfered with their recreational opportunities. The Ninth Circuit Court of Appeals affirmed the district court's order in favor of the Government. The groups sued in March 2017 alleging violations of the Federal Clean Water Act ("**CWA**"), the National Environmental Policy Act, and the National Forest Management Act related to three cattle-grazing allotments. Plaintiffs' appeal centered only on the CWA allegations.

Section 313 of the CWA requires federal agencies with jurisdiction over property where discharge of runoff or pollutants occurs to comply with state laws pertaining to water discharge. In California, the USFS must abide by the Porter-Cologne Water Act. Plaintiffs alleged USFS violated the Porter-Cologne Act in two instances. First, the groups contended USFS improperly modified discharges of waste without filing a discharge report and obtaining Water Discharge Requirements ("**WDRs**") or a waiver. USFS has implemented water management plans on USFS lands in California since signing a Management Agency Agreement ("**MAA**") in 1981 with SWRCB. Under the MAA, the USFS is not required to file reports or obtain WDRs for certain USFS non-point discharges. The court thus held that the Government did not violate the Porter-Cologne Act by failing to file a discharge report or obtain WDRs related to the cattle-grazing allotments because it was not required to do so.

Second, Plaintiffs alleged the Government improperly authorized livestock grazing that caused runoff, which led to fecal coliform levels more than the relevant water quality objectives as found in the Central Valley Regional Water Quality Control Board's Basin Plan. The court concluded Plaintiffs' argument was erroneous, reasoning that the Basin Plan objectives reflect standards that regulators must consider when fashioning requirements that apply to individual dischargers, but that the objectives themselves do not apply to individual dischargers. The court explained that that the Porter-Cologne Act assigns the task of developing water quality objectives to the regional water board, not to the federal courts.

3. EPA Proposes CWA Section 401 Water Quality Certification Rule

In June 2022, the Environmental Protection Agency ("**EPA**") published a proposed rule aimed at giving states and Indian tribes a more expansive scope of review in considering permits under Section 401 of the Federal Clean Water Act ("**CWA**"). (87 Fed.Reg. 35318–35381.) The proposed rule reverses much of the 2020 CWA Section 401 Certification Rule promulgated under the Trump administration, returning to elements of cooperative federalism that existed in the pre-2020 regulatory regime. The 2020 rule narrowed the authority of states and tribes to deny Section 401 certification, which it did by limiting the review timeline and scope of requirements that certifying authorities could require. Under the 2020 regulation, projects such

as pipelines and coal facilities could only be denied for purposes related to water pollution. Prior to the 2020 rule, states and authorized tribes exercised wider latitude in approving or denying projects based on more general goals, including climate change. Trump has said the prior regulatory regime caused "confusion and uncertainty" that hindered development of energy infrastructure.

The 2020 rule remains in effect until the EPA promulgates its replacement. In April 2022, the U.S. Supreme Court temporarily revived the 2020 rule following an application made pursuant to the court's emergency — or "shadow" — docket. The court stayed an October 2021 U.S. District Court decision that vacated the rule. In a brief order that did not include any reasoning, the Supreme Court put the District Court ruling on hold, effectively restoring the Trump policy. The parties who requested the emergency ruling — fossil fuel companies and fossil fuel-reliant states — contended the stay was needed to avoid "irreputable harm." Writing in dissent, Justice Kagan said the parties failed to substantiate their assertions and that the majority signaled "its view of the merits."

Timeline for Review

- The CWA mandates that requests for certification be acted on within a "reasonable period of time (which shall not exceed one year)."
- The 2020 rule vested federal authorities with wide latitude to establish their own timelines for projects within the one-year maximum codified in the CWA.
- The proposed rule requires that state and federal agencies work together to jointly set review timelines within the statutory one-year maximum.
- If the certifying authority and federal agency do not reach an agreement within 30 days on the length of time for review, it will default to 60 days from receipt of the request for certification.

Scope of Review

- The 2020 rule mandated that certifying agencies only consider potential water quality impacts that were directly connected to a proposed project's point source discharges.
- The proposed rule expands both the scope of review and the variety of conditions that can be applied to a certification.
- The proposed rule authorizes states and tribes to look at potential environmental effects from the perspective of the "activity as a whole."
- According to the EPA, the new approach will allow certifying authorities to "holistically evaluate the water quality impacts of a federally licensed or permitted project."

For more information see:
https://www.epa.gov/cwa-401/proposed-clean-water-act-section-401-water-quality-certification-improvement-rule
https://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0002
https://www.scotusblog.com/2022/04/five-justice-majority-restores-trump-era-policy-on-water-pollution-provoking-more-criticism-of-emergency-docket/

4. *County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612

The California Supreme Court held that the California Environmental Quality Act ("**CEQA**") is partially preempted by the Federal Power Act ("**FPA**"), reversing in part a Court of Appeal ruling that CEQA is fully preempted. The court held the FPA preempts CEQA only when CEQA interferes with the FPA's exclusive licensing process. The FPA, meanwhile, does not preempt CEQA when it is used to make decisions concerning issues outside federal jurisdiction or those that are compatible with the federal government's exclusive licensing authority.

The California Department of Water Resources ("**DWR**") sought to renew its license to operate the Oroville Dam and related facilities ("**Oroville Facilities**") in Butte County. The FPA requires entities seeking to operate a dam, reservoir, or hydroelectric power plant in the United States to secure licensure from the Federal Energy Regulatory Commission ("**FERC**"). As part of the renewal process, DWR engaged in FERC-regulated negotiations with stakeholders, culminating in a settlement agreement signed by more than 50 parties. Butte and Plumas counties participated in the negotiations but did not sign the settlement agreement. DWR subsequently submitted the settlement agreement and licensing application to FERC. To satisfy the National Environmental Policy Act ("**NEPA**"), FERC prepared an Environmental Impact Statement ("**EIS**"). The EIS analyzed three alternatives, including a staff alternative, which assumed the Oroville Facilities would operate under the terms of the settlement agreement plus additional modifications proposed by staff. The DEIS declared the staff alternative was the preferred alternative. DWR, meanwhile, prepared an Environmental Impact Report ("**EIR**") pursuant to CEQA that analyzed the same three alternatives analyzed by FERC in its EIS. DWR prepared the EIS as part of the process of satisfying the Federal Clean Water Act ("**CWA**"), which requires applicants for federal licenses involving activities that may result in discharges into navigable waters to obtain certification from state agencies that the discharge will comply with both state and federal water quality laws. The EIR included mitigation measures that addressed the project's impact on wildlife, air quality, and other environmental impacts.

Butte and Plumas counties ("**Plaintiffs**") filed separate writ petitions challenging the sufficiency of the EIR. The cases were later consolidated. The trial court held the EIR was sufficient. The Court of Appeal held the counties' challenges were preempted by the FPA and declined to reach the merits of the case. On appeal before the California Supreme Court the first time, the court remanded the case back to the Court of Appeal for the court to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, which held that the federal Interstate Commerce Commission Termination Act ("**ICCTA**") does not preempt CEQA for a new railroad project, and that the State of California, as the railroad operator, could opt to subject itself to CEQA review without conflicting with the ICCTA. The Third District came to the same conclusion on review. On review for the second time, the primary issue before

the Supreme Court was whether the FPA preempts the application of CEQA when the state acts on its own behalf in exercising its discretion in pursing relicensing of a hydroelectric dam.

In analyzing the issue of full preemption, a divided Supreme Court grappled with federal case law that interpreted the FPA to preempt state regulations governing private entities engaging in activities related to hydroelectric facilities. The majority distinguished that case law, holding it did not consider whether Congress intended to occupy the field to the extent of precluding a state from exercising authority over its own subdivision's license application. The court concluded that the FPA preempted the counties' ability to challenge the sufficiency of the settlement agreement, reasoning that to hold otherwise would pose an obstacle to FERC's congressionally granted exclusive authority on those matters. The court, meanwhile, held CEQA is not preempted by the FPA when parties challenge the sufficiency of an EIR, reasoning that DWR could use the environmental conclusions reached through the CEQA process to aid in its decision whether to accept FERC's staff alternative or request modification to the terms of the license issued by FERC, which FPA allows. The court noted that CEQA, in the context of a state entity applying for a federal license, constitutes "self-governance" rather than traditional state regulation of private actors that has been held preempted in previous cases.

5. *Monterey Coastkeeper v. California Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1

The Third District Court of Appeal held that Monterey Coastkeeper and others ("**Plaintiffs**") failed to state claims for which declaratory and mandamus relief was available in alleging SWRCB and multiple regional water quality control boards violated both the SWRCB Nonpoint Source Pollution Control Policy ("**NPS Policy**") and the public trust doctrine.

Plaintiffs sued the State Board and regional boards (collectively "**Boards**") regarding water permits issued by the regional boards under the Porter-Cologne Water Quality Control Act. SWRCB adopted its NPS Policy pursuant to the Legislature's decree that it implement a nonpoint source management plan. Plaintiffs sought traditional mandamus and declaratory relief regarding allegations the Boards violated the NPS Policy by failing to take adequate measures to address water pollution due to agricultural runoff. In particular, Plaintiffs claimed the regional boards failed to issue specific orders and WDRs for agricultural discharge, and that SWRCB failed to take appropriate action in overseeing the regional boards' actions. Additionally, Plaintiffs sought mandamus relief regarding allegations that SWRCB violated the public trust doctrine by failing to avoid harm associated with agricultural runoff. The trial court sustained a demurrer without leave to amend. Plaintiffs appealed.

In affirming the trial court's ruling, the Court of Appeal concluded that declaratory relief was unavailable because the Plaintiffs, in their allegation describing a pattern of ignoring NPS policy, failed to identify a clear rule that the Boards ignored or improperly applied. Justice Cole Blease wrote that, at its core, Plaintiffs' complaint "contests the effectiveness of SWRCB and the regional water board's efforts to implement" the NPS Policy. He concluded that "[d]eclaratory relief is not available to use the courts to tell an administrative agency how to do its job." The court likewise refused to grant mandamus relief because application of the NPS Policy involved discretionary acts by the Boards rather than a ministerial duty or a quasi-legislative action.

Discretionary tasks are not subject to traditional mandamus. Regarding the public trust doctrine, the court declined to order SWRCB to protect public trust resources statewide through traditional mandamus relief. The public trust doctrine is an "inherently discretionary doctrine," Justice Blease reasoned, and granting traditional mandamus in favor of the Plaintiffs would make the court "the effective overseer of the [Boards]" and "one of the most, if not the most, powerful entities in setting water policy."

3. WETLANDS

A. Regulatory Framework

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

- Section 404 of CWA restricts the "discharge of dredged or fill material into navigable waters at specified disposal sites" without a permit from USACE. (33 U.S.C. § 1344(a); 33 C.F.R. § 323.2(d)(1).)
- Section 404 authorizes USACE to issue permits for the discharge of dredged or fill material into navigable waters as either standard (individual) or general (nationwide) permits. (33 U.S.C. §§ 1344(c)(1), (c)(2).)
- Section 10 of the Rivers and Harbors Act restricts activities that could affect the course, location, condition, or capacity of navigable waters, including the construction of structures in, under, or over navigable waters, without a permit from USACE. (33 U.S.C. § 403.)
- Standard (Individual) permits are issued on a project-specific basis, with public notice requirements. Such permits require compliance with the EPA's Section 404(b)(1); Guidelines (33 C.F.R. § 320.4(a)(1)) and, if involving federal actions, NEPA (42 U.S.C. § 4321 *et seq*.). *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970). For specific EPA guidelines, see 40 C.F.R. § 230.10.
- NEPA process may generate consideration of other federal laws including ESA (16 U.S.C. §§ 1531-1534), the Fish and Wildlife Coordination Act (16 U.S.C. § 662), the Wild and Scenic Rivers Act (16 U.S.C. §§ 1271-1276), the Antiquities Act (16 U.S.C. § 433), and the Coastal Zone Management Act (16 U.S.C. §§ 1451-1464).

The California Coastal Commission treatment of wetlands sometimes catches applicants by surprise. Local Coastal Programs might have slightly different treatment, so that is a consideration as well, but here are some basics:

- Public Resources Code definition
  Section 30121 Wetland [no "s"]
  "Wetland" means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.
- Section 30231 – general protection of water quality.
- Section 30233, standards, including limited purposes of development within wetlands.
- *Bolsa Chica Land Trust v. Superior Court*, 71 Cal.App.4th 493 (1999), clarifies that within wetlands, section 30233 overrides the very strict "ESHA" policies of section 30240 (*Id*. at 515).
- Delineation – Cal. Code of Regs., tit. 14, § 13577(b).

(b) Wetlands.

(1) Measure 100 feet landward from the upland limit of the wetland. Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats. For purposes of this section, the upland limit of a wetland shall be defined as:

(a) the boundary between land with predominantly hydrophytic cover and land with predominantly mesophotic or xerophytic cover;
(b) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or
(c) in the case of wetlands without vegetation or soils, the boundary between land that is flooded or saturated at some time during years of normal precipitation, and land that is not.

(2) For the purposes of this section, the term "wetland" shall not include wetland habitat created by the presence of and associated with agricultural ponds and reservoirs where:

(a) the pond or reservoir was in fact constructed by a farmer or rancher for agricultural purposes; and
(b) there is no evidence (e.g., aerial photographs, historical survey, etc.) showing that wetland habitat pre-dated the existence of the pond or reservoir. Areas with drained hydric soils that are no longer capable of supporting hydrophytes shall not be considered wetlands.

California Wetlands Definition (Resolution No. 2008-0026):

Summary of Procedures – New Rule

On April 2, 2019, SWRCB adopted a State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State ("**Procedures**") formerly known as the "Wetland Riparian Area Protection Policy." Those Procedures will be included in the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California. The Procedures consist of four major elements: (1) a wetland definition; (2) a framework for determining if a feature that meets the wetland delineation is a water of the state;

(3) wetland delineation procedures; and (4) procedures for application submittal, and the review and approval of Water Quality Certifications and Waste Discharge Requirements for dredged or fill activities. SWRCB states that it has developed the Procedures because "[t]here is a need to strengthen protection of waters of the state that are no longer protected under the Clean Water Act ("**CWA**") due to U.S. Supreme Court decisions since the Water Boards have historically relied on CWA protections in dredged or fill discharge permitting practices." SWRCB also points out that there are inconsistencies across the Water Boards in California in the requirements for discharges of dredged or fill material into waters of the state, including wetlands, because there is no single accepted definition of wetlands at the state level. Furthermore, SWRCB believes that "current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California, where there have been especially profound historical losses of wetlands."

The impact may be particularly substantial for the agricultural industry and large-scale infrastructure projects in California that will almost certainly be subjected to additional permitting obligations and exposed to additional third-party litigation. The OAL finalized and approved the rule in September 2019. The rule became operative May 28, 2020. The final rule was codified in the California Code of Regulations Title 23, section 3831(w) in April of 2020.

(1) State Approach to State Jurisdiction

In 2012, SWRCB issued a Preliminary Draft Wetland and Riparian Area Protection Policy as Phase 1 of that policy. The Preliminary Draft was issued for "informational purposes only and does not constitute the initiation of a formal notice and comment period on a draft policy for water quality control." The stated purposes of the Preliminary Draft are to (1) "[b]ring a uniform regulatory approach between the California Water Boards, other agencies involved in aquatic resource protection and the federal [Clean Water Act] section 404 program . . .," (2) "[a]chieve no overall net loss and a long-term net gain in the quantity, quality and diversity of waters of the state including wetlands," and (3) "[p]rovide a common framework for wetland and riparian area monitoring and assessment to inform regulatory decisions, and ensure consistency with statewide environmental reporting programs."

The Preliminary Draft included: 1) a new wetland definition; 2) a new framework for assessing and monitoring wetlands; and 3) adjustments to the rules for permitting activities in wetlands.

(2) A New Wetland Definition

Under the federal CWA, wetlands must meet the three parameters (hydric soils, hydrophytic vegetation and wetland hydrology) but under the state definition, even if the soils and vegetation criteria are not met, it could still be a wetland requiring state regulation. SWRCB suggests defining "wetland" as any area "if, under normal circumstances, it (1) is

continuously or recurrently inundated with shallow water or saturated within the upper substrate; (2) has anaerobic conditions within the upper substrate caused by such hydrology; and (3) either lacks vegetation or the vegetation is dominated by hydrophytes." SWRCB regards "normal circumstances" as the conditions present in the absence of "altered circumstances," which means whenever the hydrology, substrate, or vegetation has been "sufficiently altered by recent human activities or natural processes to preclude wetland conditions."

(3) A New Wetland Delineation Method

SWRCB's policy states that wetlands will be delineated on the ground using the USACE's methods with "adjustments" corresponding to the differences introduced by the new state definition. These differences, of course, may require those undertaking to identify and map wetlands to do so twice, once using the USACE's definition and once using SWRCB's definition. The draft policy also anticipates development of a new three-level method of monitoring and assessing wetlands entailing use of map-based inventories, rapid assessment of a site's general conditions, and intensive assessment of a site's specific conditions.

(4) A New Method of Monitoring and Assessing Wetlands, and New Rules Governing Permits to Fill Waters and Wetlands

SWRCB presented a new set of detailed rules establishing standards and procedures for regulating activities in wetlands. Among the standards is a restriction against permitting any project "unless it is the least-environmentally damaging practicable alternative (LEDPA)." While that terminology has long been used in the USACE's regulatory program, SWRCB gives it a new and different meaning. Under Guidelines issued by the EPA, the USACE generally is prohibited from issuing a permit to fill wetlands if there were a practicable alternative to a proposed project that would have less adverse impact on the aquatic ecosystem, as long as the alternative does not have other significant adverse environmental consequences. As implemented by USACE, the practicable-alternatives test is a tough nut to crack. An applicant must show why the "overall project purpose," (e.g., build a viable upscale residential community with an associated regulation golf course in the northern Sacramento County area) cannot be accomplished by moving the project to an entirely different site, whether owned by the applicant or not, or by reconfiguring the project on site to avoid wetlands.

USACE and EPA also exclude "prior converted croplands" (i.e., former wetlands that were drained or otherwise dried and cropped before 1985 so they no longer exhibit wetland values) from their definition of "wetlands." SWRCB's draft policy says that wetlands will be delineated on the ground

using USACE's methods with "adjustments" corresponding to the differences introduced by the new state definition. These differences, of course, may require those undertaking to identify and map wetlands to do so twice, once using USACE's definition and once using SWRCB's definition. The draft policy also anticipates development of a new three-level method of monitoring and assessing wetlands entailing use of map-based inventories, rapid assessment of a site's general conditions, and intensive assessment of a site's specific conditions.

SWRCB lists certain activities (including normal farming activities, maintenance, construction or maintenance of farm ponds and irrigation ditches and maintenance (but not construction) of drainage ditches) akin to those USACE excludes from regulation under its program and says that these activities "are not subject to" its new rules, but nonetheless maintains that this "exclusion . . . does not prohibit the [State or Regional Boards] from issuing or waiving WDRs [i.e., permits] for the activity."

(5) Alternatives

SWRCB's rule analyzes alternatives differently in two fundamental respects. First, SWRCB defines "overall project purpose" quite differently than USACE and EPA do. According to SWRCB, it means "the fundamental, essential, irreducible purpose of the project with consideration to feasible cost, existing technology, and logistics." By so reducing the project purpose to, for instance, housing or commercial buildings or the like, SWRCB naturally expands the universe of possible alternatives — perhaps more than realistically can be analyzed in a permit proceeding — and, in the process, effectively dispenses with much of the general plan and zoning decisions of the pertinent city or county and the land planning decisions of the project proponent. In comparison, the USACE and EPA use much the same definition, which they dub "basic project purpose," which focuses only on whether a project is water dependent and thus, whether certain presumptions set forth in their Guidelines are triggered. (SWRCB's policy includes similar presumptions, but applies them to all projects, regardless of whether they are water dependent, so SWRCB does not speak of a "basic" project purpose.) In the 1980s, the federal agencies considered using the basic project purpose also to analyze alternatives and rejected the idea as unwise and unworkable. Second, while USACE recognizes that the existence of alternatives that would avoid impacts to wetlands, but cause significant impacts to other resources (e.g., oak forests or endangered species) is no reason to disapprove a project, SWRCB says nothing to that effect in its draft policy.

(6) Mitigation

SWRCB sets forth detailed requirements for mitigation of impacts to wetlands, warning that it "may require a greater amount of compensatory mitigation than other public agencies," and states that in determining the "sufficiency" of mitigation, it will consider the "goals" of (1) "[a]chievement of no net loss and a long-term net gain in the quality and quantity of aquatic resources," (2) "[r]estoration and achievement of past, present, and probable future beneficial uses in the project area and/or project watershed area, based on an analysis of current and historic conditions," and (3) "[o]ther requirements and goals established in local watershed plans or planning or Policy instruments adopted by public agencies." Unmentioned by SWRCB is the constitutional standard established by the U.S. Supreme Court in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), that, notwithstanding any goals or policies an agency may wish to further, it can require a project proponent to provide mitigation only in order to mitigate an impact caused by the proposed project and only to an extent "roughly proportional" to that impact.

(7) Impact Threshold

Complicating an assessment of a project's impacts is a provision in the draft policy that "[a]ny impact located within 150 feet of a water of the state is presumed to affect the water" and "[i]mpacts further than 150 feet may also be considered by the permitting authority if there is potential for water quality degradation." The law generally calls on agencies actually to find, on the basis of substantial evidence, that projects cause adverse impacts before they require project proponents to mitigate those impacts.

B. 2023 Update

1. *Sackett v. EPA* (9th Cir. 2021) 8 F.4th 1075, cert. granted Jan. 24, 2022, No. 21-454, __U.S. __ – U.S Supreme Court Mulls Fate of Federal Wetlands Regulation

On October 3, 2022, the U.S. Supreme Court heard oral arguments in a 15-year-old legal battle that could drastically limit what streams and wetlands qualify as federally protected waters of the United States ("**WOTUS**") under the Federal Clean Water Act ("**CWA**"). Mike and Chantell Sackett ("**Plaintiffs**") purchased land in 2004 near Priest Lake, Idaho. After obtaining the necessary permits and commencing construction of a single-family home in 2007, the Environmental Protection Agency ("**EPA**") demanded that construction stop. The EPA determined that the property was part of a wetland and that they were required to obtain a permit under the CWA before beginning construction, which they had failed to do. Plaintiffs sued. The case reached the Supreme Court for the first time in 2012, with the court holding the couple could challenge in court an EPA compliance order imposing financial penalties until they restore

the affected land. Now, the Plaintiffs have returned to the Supreme Court, seeking clarity of the EPA's regulatory powers of wetlands under the CWA.

The primary basis for federal regulation of wetlands derives from Section 404 of the CWA, which requires that private, state, and federal entities obtain a permit from the Army Corps of Engineers ("**Corps**") before depositing dredged or fill materials into WOTUS. WOTUS is not defined in the CWA. Plaintiffs hope the court will revisit its decision in *Rapanos v. United States* (2006) 547 U.S. 715, the most recent SCOTUS case that sought to clarify the bounds of WOTUS. In *Rapanos*, Justice Antonin Scalia writing for a four-Justice plurality first took issue with the breadth of regulatory power employed by federal agencies over local land use decisions under the CWA, concluding land use and water use are traditionally powers of local government. The plurality determined WOTUS should include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams … oceans, rivers, [and] lakes'" and not "occasional, intermittent," or "ephemeral" flows. As for wetlands, the plurality found a mere "hydrologic connection" was insufficient to fall under CWA authority. Wetlands must have a "continuous surface connection" to a WOTUS that makes it "difficult to determine where the 'water' ends, and the 'wetland' begins."

Justice Anthony Kennedy meanwhile wrote a separate concurring option that rejected the plurality's reasoning. Kennedy concluded that wetlands that are not adjacent to traditionally navigable waterways must have a "significant nexus" with one. Wetlands that have a significant effect on the water quality of navigable waters typically satisfy Kennedy's test. Lower courts and agency regulators have uniformly followed Kennedy's significant nexus text, which is much broader than the plurality's definition.

During oral arguments, the justices mainly wrestled with the word "adjacent." The EPA and Corps mainly rely on "adjacency" when determining if a stream or wetland is close enough to a tributary of a larger water body to have a "significant nexus." Pacific Legal Foundation attorney Damien Schiff argued during oral arguments that the Sacketts could not have plausibly been on notice at the time they purchased their property that the land was "adjacent to" Priest Lake. The EPA determined the Sackett's property constituted an adjacent wetland despite its existing 30-feet away from a jurisdictional wetland, which is separated by the Sacketts' property by a road and ditch. Schiff suggested a two-step process for making wetlands determinations. The first step is to consider whether a wetland is "inseparably bound up" with a stream, ocean, river, lake, or "similar hydrogeographic feature," through a continuous surface-water connection. The second step is to determine whether the water connected to the wetland is a water of the United States. A final decision is due by June.

For more information see:
https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html
https://www.scotusblog.com/2022/10/justices-ponder-clean-water-acts-application-to-wetlands-in-jacksons-first-oral-argument/

2. EPA, Department of the Army Publish Final Rule Re-Defining "Waters of the United States"

On January 18, 2023, the Environmental Protection Agency ("**EPA**") and the U.S. Army Corps of Engineers ("**Corps**") published in the Federal Register the final version of their revised definition of "Waters of the United States" ("**WOTUS**"). (88 Fed.Reg. 3004–3144.) Both agencies are tasked with implementing the Federal Clean Water Act ("**CWA**"). The CWA prohibits the non-permitted discharge of certain pollutants into navigable waters, defined as "[WOTUS], including the territorial seas." (33 U.S.C. § 1362.) The CWA does not define WOTUS, meaning regulations defining the term are important in determining the scope of which waters are subject to CWA permitting. The final rule is generally consistent with the pre-2015 definition of WOTUS but expands the definition to include "relatively permanent" waters and those that have a "significant nexus" to WOTUS. The final rule takes effect on March 20, 2023. The new Biden Administration rule has already been challenged in new lawsuits brought by the Attorney General of the State of Texas and numerous industry groups in federal court in Texas. More lawsuits are expected.

The final rule includes:

- Traditional navigable waters, interstate waters and the territorial seas, and their adjacent wetlands;
- Most impoundments of WOTUS;
- Tributaries to traditional navigable waters, interstate waters, the territorial seas and impoundments that meet either the relatively permanent standard or the significant nexus standard;
- Wetlands adjacent to impoundments and tributaries that meet either the relatively permanent standard or the significant nexus standard; and
    - "Adjacent" is defined as "bordering, contiguous, or neighboring."
- Intrastate lakes and ponds, streams, or wetlands not included in the above definitions — "other waters" — that meet either the relatively permanent standard or the significant nexus standard.
    - The "relatively permanent standard" is defined as waters that are "relatively permanent, standing or continuously flowing waters connected to Traditional navigable waters, interstate waters and the territorial seas, [along with] waters [that have] a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters."
    - The "significant nexus standard" is defined as waters that "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

According to the EPA, the new rule incentivizes "practical, on-the-ground implementation" at the agency level. The American Farm Bureau Federation, meanwhile, called the final rule a "giant step in the wrong direction." The group said the new rule reinstates "confusing standards that have already caused decades of uncertainty and litigation." Future litigation is almost

assured, whether it be from environmentalists who see the new rule an unnecessary departure from more aggressive Obama-era regulations, or by members of industry that view the new rule as federal overreach. Additionally, the new rule may conflict with the forthcoming U.S. Supreme Court decision in *EPA v. Sackett*, discussed in these materials *supra*.

For more information see:
https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-united-states
https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf
https://www.epa.gov/wotus/revising-definition-waters-united-states
https://www.fb.org/viewpoints/epa-wrong-about-new-wotus-rule
https://www.texasattorneygeneral.gov/news/releases/paxton-files-lawsuit-strike-down-biden-administrations-unlawful-waters-united-states-rule
https://www.agriculture.com/news/lawsuit-asks-court-to-void-biden-administration-clean-water-rule
https://www.fb.org/files/3-2023-cv-00020_(0001)_COMPLAINT_against_Lieutenant_General_Scott_A._Spellmon_Michael_L._Connor_Michael_S._Regan_U.S._En.pdf

4. AIR QUALITY

A. Regulatory Framework

NEPA

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

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

- CAA, enacted in 1970, regulates air emissions from area, stationary and mobile sources. This law authorizes the EPA to establish National Ambient Air Quality Standards ("**NAAQS**") to protect public health and the environment. (42 U.S.C. § 7401(b).)
- The goal of CAA was set to achieve NAAQS in every state by 1975. The setting of maximum pollutant standards was coupled with directing the states to develop state implementation plans ("**SIP**") applicable to appropriate industrial sources in the state. (42 U.S.C. § 7410.)
    - SIPS must set forth legally enforceable procedures, allow public availability of information, identify responsible agencies for implementation, include administrative procedures – including stack height procedures and permit requirements.
        - See: https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=0f84e0de247038b7002afe9d179782a9&rgn=div6&view=text&node=40:2.0.1.1.2.6&idno=40
- CAA requires states to develop plans and adopt and enforce regulatory programs to attain (by specified deadlines) and to maintain federal ambient air quality standards adopted by the EPA. It was amended in 1977, primarily to set new goals (dates) for achieving attainment of NAAQS since many areas of the country had failed to meet the deadlines. (42 U.S.C. § 7407.)
- The 1990 amendments to CAA in large part were intended to meet unaddressed or insufficiently addressed problems such as acid rain, ground-level ozone, stratospheric ozone depletion, and air toxins.

Stationary Sources

- Under CAA's prevention of serious deterioration ("**PSD**"), new and modified large industrial facilities that emit more than 100 or 250 tons per year of pollutants must obtain PSD permits ("**100/250 Rule**"). These facilities are also required to use the best available control technology ("**BACT**") for each pollutant subject to regulation under CAA.

- Under CAA's Title V, primary industrial facilities and large commercial operations that emit 100 tons or more per year of a regulated air pollutant require an operating permit.
    - Operating permits are legally-enforceable documents designed to improve compliance by clarifying what sources must do to control the air – those issued by state or local agencies under CAA part 70 permits and others are issued by the EPA as part 71 permits.
        - Part 70: state and local permitting authorities review applications and issue permits.
        - Part 71: Similar functions to 70, just federal
- Leaks, flares, and excess emissions from industries which can constitute hazardous air pollutants ("**HAPs**") are regulated under the CAA in two phases. The first phase develops standards for controlling air toxics based on emission levels already being achieved by other sources in the industry. During phase two the EPA reviews standards established in the first phase to determine whether these standards protect human health within a reasonable margin of safety.

Mobile Sources

- Title II of the CAA seeks to force technological changes in motor vehicles and the fuels they use.
    - New vehicles and engines must have EPA issued certification of conformity before entering the U.S., CAA also requires emission labels.

Department of Energy Regulations

- The DOE Headquarters coordinates activities of the DOE working group which is primarily governed to adhere to the CAA. Headquarters also provides technical assistance to departmental programs.

Waiver Process

- Federal CAA allows California to seek a waiver of the federal preemption which prohibits states and local jurisdictions from enacting emission standards. The EPA must grant this waiver unless California does not need such standards to meet compelling circumstances or California's standards do not meet the equivalent of the federal standards. (CAA § 209.)
    - Under CAA section 209, U.S. EPA must grant California a waiver unless the Administrator finds that:
        - California was arbitrary and capricious in its finding that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards;
        - California does not need such standards to meet compelling and extraordinary conditions; or
        - such standards and accompanying enforcement procedures are not consistent with Section 202(a) of the Clean Air Act.

California's Air Resources Law and Clean Air Act (Health & Safety Code §§ 39000-44563)

- California administers the federal program and clarifies California's air quality goals, planning mechanisms, regulatory strategies, and standards of progress. (Health & Saf. Code, §§ 39656-39659.)
- In addition, CAA provides the state with a comprehensive framework for air quality planning regulation and requires attainment of state ambient air quality standards as soon as possible. (Health & Saf. Code, §§ 40919-40930.)
- CARB is responsible for promulgating regulations and is also responsible for monitoring the regulatory activity of California's 35 local air districts. (Health & Saf. Code, § 39602.)
- In a non-attainment area, CARB must adopt and implement regulations to reduce emissions from stationery, mobile, indirect, and area-wide sources. (Health & Saf. Code, § 39614(b).)
- Constraints are placed upon land development by requiring projects to include:
    - Transportation control measures;
    - Commute alternatives; and
    - Transit-oriented development designs.
        - Practical considerations for undeveloped property:
    - Know attainment status for specific criteria pollutants in area proposed for purchase, etc., if development is anticipated.
    - Consider project design that will not result in significant impacts to air quality or ensure adequate mitigation to reduce the impacts to less than significant.
        - Regarding developed property, illegal air quality emissions resulting from existing land use can result in criminal or civil enforcement actions against responsible parties.
    - Investigate emissions from existing use prior to foreclosure, purchase, or any other transactions.

New Source Review/ Permitting

- There are three types of new source review permitting requirements, a source may have to meet one or more of these permitting requirements;
    - Prevention of significant deterioration permits are required for new major sources or sources making a major modification to meet the NAAQS.
        - PSDs require installation of the Best Available Control Technology, an air quality analysis, an additional impacts analysis and public involvement in order to ensure that standards are met.
            - Nonattainment NSR permits are required for new major sources or major modifications in areas not meeting NAAQS
            - Minor source permits

Community Air Protection (AB 617 (Garcia), Chap. 136, Statutes of 2017)

- Enacted in 2017 under Governor Brown and regulated by CARB.
- Focuses on reducing exposure in communities most affected by air pollution.
- Includes carve outs for community air monitoring and emissions reductions plans.
- Includes funding for development of cleaner technologies to counteract air pollution in sensitive areas.
- CARB has already begun identifying key airsheds and working on development of localized air pollution reduction programs.
- Pilot communities and air district programs were chosen in September of 2019, and in October of 2020 these air districts provided annual reports. Moving forward CARB will consider additional communities for air monitoring and community emissions reduction programs.

Indoor Air: California's Air Cleaner Regulation (AB 2276 (Pavley), Chap. 770, Statutes of 2006)

- In accordance with AB 2276, CARB adopted an air cleaner regulation to limit the amount of ozone produced from indoor air cleaning devices. All indoor air cleaners sold in, or shipped to, California must meet certain ozone emission and electrical safety standards. The regulation was amended in October 2020, to include several exemptions.

CEQA

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

B. 2023 Update

1. *West Virginia v. EPA* (2022) ___ U.S. ___, 142 S. Ct. 2587 — Supreme Court Holds EPA Exceeded its Delegated Authority in Promulgating the Clean Power Plan

The U.S. Supreme Court held that the U.S. Environmental Protection Agency ("**EPA**") exceeded its authority under the Clean Air Act ("**CAA**") when it promulgated a regulation under the Obama administration that sought to substantially restructure the American energy market. In its 6–3 ruling, the court embraced the major questions doctrine, a court-created tool of statutory interpretation that requires Congress to explicitly delegate to administrative agencies authority to promulgate regulations of economic or political significance. In writing for the majority, Chief Justice John Roberts reasoned that while the EPA possesses the authority to regulate power plant

emissions, the agency erred in attempting to shift power generation away from fossil fuels to cleaner sources without explicit Congressional authorization. The ruling will likely impact the extent to which executive agencies can regulate greenhouse gas emissions ("**GHGs**") going forward. The EPA will likely be compelled to focus its climate change-fighting efforts on emissions reductions at individual plants rather than targeting entire sectors. Additionally, the court's holding could affect the discretion the administrative state enjoys more broadly, compelling Congress to either delegate more specific authority in certain circumstances or compel individual agencies to be more cautious about how it wields its delegatory discretion.

In 2015, the EPA finalized the Clean Power Plan rule ("**CPP**") to incentivize a shift in electricity generation to renewable sources to combat climate change. The CPP established guidelines for states to follow to limit GHGs from existing fossil-fired power plants. The EPA relied on Section 111(d) of the CAA, which authorizes regulation of certain pollutants from existing sources, but has only been used by the EPA a handful of times since its enactment in 1970. To meet the requirements in the CPP, fossil fuel-powered plant operators would have had to choose to reduce their own production of electricity, invest in renewable sources, or purchase credits through the cap-and-trade system. The EPA contended CPP constituted the "best system of emission reduction" for existing power plants under Section 111(d) of the CAA. The high court stayed the CPP in 2016 prior to its implementation due to legal challenges. In 2019, the rule was appealed under the Trump administration. The EPA subsequently promulgated a policy more lenient to power plant operators known as the Affordable Clean Energy rule ("**ACE**"). ACE vested states with more discretion for limiting GHGs emitted from existing plants, and plant operators with more flexibility in complying with those standards. The Trump administration's interpretation significantly limited the scope of measures executive agencies could take to address GHG emissions. States and environmental groups challenged ACE. The D.C. Circuit concluded that the Trump administration erred in concluding that only certain on-site emission-reduction measures can be the "best system of emission reduction" for existing power plants under Section 111(d) of the CAA.

2. *Concerned Household Electricity Consumer's Council v. EPA* (D.C. Cir. filed June 28, 2022) No. 22-1139 — D.C. Circuit Mulls Request to Vacate EPA Endangerment Finding

On June 28, 2022, the Concerned Household Electricity Consumer's Council ("**CHEEC**"), an organization of five named individuals, petitioned the D.C. Circuit of the U.S. Court of Appeals (case no. 22-1139, consolidated with case no. 22-1140) to review the denial by the Environmental Protection Agency ("**EPA**") to reconsider the agency's 2009 Endangerment Finding. CHEEC and other organizations petitioned the EPA to reconsider the Endangerment Finding four times between 2017 and 2019. The EPA issued its decision in April 2022, denying the petitions and supporting its findings. The EPA's Endangerment Finding states that greenhouse gas emissions ("**GHGs**") emitted by automobiles constitute an endangerment to health and the environment. The EPA published the Endangerment Finding in response to the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA* (2007) 549 U.S. 497, which held that GHGs are air pollutants under the Federal Clean Air Act ("**CAA**"), and thus, the EPA can regulate emissions of carbon dioxide and other greenhouse gasses under the CAA.

CHEEC rejects the overwhelming scientific consensus that anthropogenic GHGs are driving climate change, contending the EPA acted arbitrarily and capriciously in enacting its Endangerment Finding. The suit is one of several cases brought in the wake of the June 30, 2022, ruling in *West Virginia v. EPA* (2022) ___ U.S. ___, 142 S. Ct. 2587, which curtailed the EPA's authority to regulate GHGs emitted from power plants by invoking the major questions doctrine, which requires clear statutory delegation from Congress for administrative rules with significant economic or political effects. CHEEC relies heavily on *West Virginia v. EPA*, stating in its brief: "While the major questions doctrine as enunciated in *West Virginia v. EPA* is not directly applicable to agency scientific determinations, it nevertheless counsels that where an agency claims authority to regulate something as ubiquitous as CO2 emissions, courts should exercise special vigilance to make sure that the agency's action is grounded in a clear statutory statement granting that authority." CHEEC hopes for a stricter level of scrutiny based on the major questions doctrine rather than the deferential arbitrary and capricious standard of review.

CHEEC's petition to the D.C. Circuit presented arguments that *Massachusetts v. EPA* should be revisited in the wake of *West Virginia v. EPA*. CHEEC acknowledged that the D.C. Circuit lacks the authority to revisit the case but included the arguments so that the U.S. Supreme Court could have grounds to review the landmark case if the matter ever reached the high court. CHEEC argues that the "statutory basis of the authority relied upon as the foundation of this attempt to remake human civilization through climate policy is as thin if not thinner than those deemed inadequate in the major question doctrine precedents."

In its brief submitted on December 20, 2022, the U.S. Department of Justice ("**DOJ**") argued that the Endangerment Finding was based on sound science and that the court should employ the deferential arbitrary and capricious standard of review and defer to the EPA's technical and scientific determinations.

For more information see:
http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220628_docket-22-1139_petition-for-review-1.pdf
https://www.law360.com/articles/1540255/groups-ask-dc-circ-to-revive-fight-over-epa-s-air-finding
https://insideepa.com/daily-news/seeking-traditional-deference-doj-urges-dismissal-ghg-risk-suit
https://insideepa.com/daily-news/petitioners-detail-major-questions-claims-epa-ghg-risk-finding-suit

3. *Texas v. EPA* (D.C. Cir. Filed Feb. 28, 2022) No. 22-1031; *Competitive Enterprise Institute v. EPA* (D.C. Cir. Filed Feb. 28, 2022) No. 22-1032 — Republican States, Regulated Entities Challenge Stringent EPA Fuel Standards

More than a dozen states and several industry organizations have asked the D.C. Circuit Court of Appeals in separate actions to strike down an Environmental Protection Agency ("**EPA**") rule that set revised greenhouse gas ("**GHGs**") emissions standards for passenger cars and light-duty trucks with model years ("**MY**") 2023 – 2026. Two legal challenges were filed on February 28, 2022, the day the new rule went into effect. The first was filed by the state of Texas and fourteen

other states — Alabama, Alaska, Arkansas, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and Utah. That same day, the Competitive Enterprise Institute, a Libertarian think tank, and regulated entities filed a similar suit.
In briefs filed in November, the state challengers relied heavily on the U.S. Supreme Court's 2022 decision in *West Virginia v. EPA* (2022) ___ U.S. ___, 142 S. Ct. 2587, which struck down the Obama Administration's Clean Power Plan rule. In invoking the "major questions doctrine," the court in *West Virginia v. EPA* held the EPA exceeded its authority under the Clean Air Act ("**CAA**") when it sought to "substantially restructure the American energy market" without explicit Congressional authorization. Had Congress delegated to the EPA such an important, or major, responsibility, the court reasoned that the EPA would have done so explicitly. Here, akin to the Clean Power Plan in *West Virginia*, the rule affecting MY 2023 – 2026 cars also constitute a "major question," according to the petitioners. The industry organization's brief alleges the EPA rule affecting MY 2023–2026 cars exceeds the EPA's statutory authority under the CAA because whether or not internal-combustion vehicles should be phased out is a policy question that Congress never explicitly delegated to the EPA. The petitioners contended the EPA's new vehicle emission standards are so stringent that they force auto manufacturers to increase deployment of electric cars by measuring whether an entire fleet complies with the emission standards, rather than individual vehicles. In its brief, the state petitioners said the rule amounted a "de facto electric-vehicle mandate." The industry organization's brief also alleges the standards are arbitrary and capricious due to the EPA's reliance on the social cost of carbon framework, which, they allege, improperly considers international concerns associated with climate change.

For more information see:
http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220228_docket-22-1031_petition-for-review-1.pdf
http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220228_docket-22-1032_petition-for-review.pdf

4. *Center For Biological Diversity v. Regan* (N.D. Cal. filed June 7, 2022) No. 4:22-cv-03309 — Environmental Groups Allege EPA Failed to Issue Smog Rules Required Under Clean Air Act

A lawsuit filed by two environmental organizations alleges the EPA failed to issue regulations to reduce air pollution in California and New Hampshire as required under the Federal Clean Air Act ("**CAA**"). The Center for Biological Diversity and the Center for Environmental Health filed their citizen suit under the CAA on June 7, 2022, in the U.S. District Court for the Northern District of California. According to the complaint, the EPA failed to satisfy the statutory deadline to promulgate Federal Implementation Plans ("**FIPs**") aimed at combatting ozone pollution in Los Angeles County, San Bernardino County, the Greater Sacramento area, and the state of New Hampshire. The complaint states that the EPA published findings on March 6, 2017, that fifteen states and the District of Columbia failed to submit their plans to maintain air quality standards. These plans are called State Implementation Plans ("**SIPs**"). Without the required SIPs, the CAA requires that the EPA step in and promulgate federal regulations to satisfy air quality requirements pursuant to the 2008 ozone *National Ambient Air Quality Standards that apply to nonattainment areas.* The Plaintiffs contend that the EPA had until

March 6, 2019, two years after the initial findings became effective, to promulgate the required FIPs, but failed to do, violating the CAA. Human exposure to ground-level ozone, also known as smog, can cause a variety of health impacts. Ozone also damages local ecosystems. Ozone is one of six criteria pollutants designed by the EPA. Criteria pollutants are designed as such because they have adverse effects on public health or welfare and the pollutant's presence in ambient air results from numerous or diverse mobile or stationary sources.

For more information see:
https://biologicaldiversity.org/w/news/press-releases/lawsuit-filed-to-compel-epa-to-enforce-smog-reduction-measures-in-los-angeles-sacramento-new-hampshire-2022-06-07/

5. EPA Restores California's Authority to Enforce Stricter Vehicle Emissions Standards

On March 14, 2022, the Environmental Protection Agency ("**EPA**") published in the Federal Register a notice of decision officially restoring California's authority to set its own greenhouse gas emissions standards and zero-emission vehicle sales mandates. (87 Fed.Reg. 14332–14379.) The move also allowed other states to adopt California's stricter rules in lieu of the less stringent federal standards. The action reversed a prior agency interpretation of the Federal Clean Air Act ("**CAA**") called the Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program Rule ("**SAFE-1**"), which was put in place in 2019 under then-President Donald Trump. SAFE-1 rescinded a waiver granted to California by the federal government in 2013, which allowed California to enforce tougher greenhouse gas and zero emission vehicle standards for light-duty vehicles compared to those of the federal government.

SAFE-1 was jointly issued by the EPA and National Highway Transportation Safety Administration ("**NHSTA**"). The rule interpreted the Energy Policy and Conservation Act to include greenhouse gas and zero emission vehicle standards. Utilizing the new interpretation, the EPA nixed California's 2013 waiver aimed at greenhouse gas and zero emission vehicle standards. The EPA also disallowed other states from adopting California's more stringent greenhouse gas emissions standards, which was allowable under the 2013 waiver.

The Clean Air Act Waiver

The CAA allows California and other states to seek a waiver from the underlying preemption limitations that prohibit states from enacting emission standards that are more stringent than the federal CAA standards. When a state files a waiver request, EPA publishes a notice for a public hearing and written comment in the Federal Register. The written comment period remains open for a period after the public hearing. Once the comment period expires, EPA reviews the comments, and the EPA Administrator determines whether the legal criteria for obtaining a waiver have been met.

Effect of Waiver Restoration

EPA restoration of the California Waiver will support state climate action, improve air quality, and advance our electric vehicle future. Governor Gavin Newsom said the move remedies the

Trump administration's attack on a critical program that is based on California's decades of experience setting emissions standards as authorized by law. CARB said following the announcement that it plans to significantly increase electric vehicle requirements by 2030 as the state moves to phase out the sale of gasoline-powered, light-duty vehicles by 2035. With this authority restored, the EPA will continue partnering with other states to advance the next generation of clean vehicle technologies.

For more information see:
https://www.federalregister.gov/documents/2022/03/14/2022-05227/california-state-motor-vehicle-pollution-control-standards-advanced-clean-car-program
https://www.epa.gov/newsreleases/epa-restores-californias-authority-enforce-greenhouse-gas-emission-standards-cars-and
https://www.epa.gov/newsreleases/what-they-are-saying-epa-restoration-california-waiver-will-support-state-climate

6. EPA's Stringent New Fuel Standards Rule Goes into Effect

On February 28, 2022, an Environmental Protection Agency ("**EPA**") rule setting revised greenhouse gas ("**GHG**") emissions standards for passenger cars and light-duty trucks with model years ("**MY**") 2023 – 2026 went into effect. (86 Fed.Reg. 74434–74526.) The final rule, published on December 30, 2021, in the Federal Register, increases in stringency each year — 10% in MY 2023, 5% in MY 2024, 6.6% in MY 2025, and by more than 10% in MY 2026. The MY 2025 - 2026 standards represent the most stringent fuel efficiency standards finalized by EPA to date. The Final Rule followed President Biden's Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which in part directed the EPA to reconsider standards previously set under the Trump administration's Safer Affordable Fuel-Efficient ("**SAFE**") Vehicles Rule. According to the EPA, the new rule is expected to achieve industrywide average fuel economy of 40 miles per gallon by the end of 2026, compared to 32 miles per gallon under the SAFE framework. The EPA said in a December 2021 regulatory update that the rule will "prompt automakers to use clean technologies that are available today and help stimulate production of more electric vehicles" and that the regulation represented "a critical step to setting the U.S. on a path to a zero-emissions transportation future."

For more information see:
https://www.federalregister.gov/documents/2021/12/30/2021-27854/revised-2023-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-standards
https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-revise-existing-national-ghg-emissions

7. EPA Proposes Strengthening NAAQS Threshold For Particulate Matter

On January 27, 2023, the Environmental Protection Agency ("**EPA**") published in the Federal Register a proposed rule that would revise the National Ambient Air Quality Standards ("**NAAQS**") for particulate matter. (88 Fed.Reg. 5558–5719.) The proposed rule would revise the primary annual particulate matter NAAQS from its current level of 12 micrograms per cubic

meter to within the range of 9 to 10 micrograms per cubic meter. The Federal Clean Air Act ("**CAA**") requires that NAAQS be periodically set to prescribe the maximum concentrations of criteria pollutants that will be permitted in the country's air. Particulate matter is one of six criteria pollutants. Each pollutant is subject to two standards: Primary NAAQS, which designate quantities of a pollutant needed to achieve public health within an "adequate margin of safety" and secondary NAAQS, which designate acceptable quantities of a pollutant needed to protect public welfare. The proposed rule did not include alterations to the existing secondary NAAQS for particulate matter, also known as soot.

The new proposal represents a middle ground between conflicting interests. Environmental and public health advocates have said the EPA's proposal only inches toward a fully protective health standard. Advocates have long argued that scientific evidence supports lowering the primary level beyond 12 micrograms per cubic meter. Meanwhile, the U.S. Chamber of Commerce's Global Energy Institute called for the existing standard to be left alone, mirroring the Trump administration's approach. Whatever standard is adopted is almost certain to be subject to litigation by states and industry groups. The public comment period closes on March 28, 2023.

For more information see:
https://www.federalregister.gov/documents/2023/01/27/2023-00269/reconsideration-of-the-national-ambient-air-quality-standards-for-particulate-matter
https://www.epa.gov/pm-pollution/national-ambient-air-quality-standards-naaqs-pm
https://www.epa.gov/newsreleases/epa-proposes-strengthen-air-quality-standards-protect-public-harmful-effects-soot

8. EPA Solicits Public Comment For Science Assessment Based into Nitrogen Oxide in Preparation of Future Nitrogen Dioxide NAAQS Revision

The Environmental Protection Agency ("**EPA**") published a call for information in the Federal Register on December 19, 2022, soliciting scientific studies to assist the agency in its proposed revision to the primary National Ambient Air Quality Standards ("**NAAQS**") for nitrogen dioxide. (87 Fed.Reg. 75625–75627.) In particular, the EPA seeks information about nitrogen oxide, a key driver of ozone pollution. Nitrogen dioxide is the most common oxide of nitrogen. Nitrogen dioxide is one of six criteria pollutants established the EPA. Any collected studies will be included in a forthcoming integrated science assessment on the harmful effects of exposure to nitrogen oxide, which will be used in a future revision to the nitrogen dioxide NAAQS. While nitrogen oxide emissions from stationary sources have declined in recent years throughout the country, levels remain high in California and other hotspots for ozone. Comments were due by February 7, 2023.

For more information see:
https://www.federalregister.gov/documents/2022/12/09/2022-26786/call-for-information-on-the-integrated-science-assessment-for-oxides-of-nitrogen-health-criteria
https://insideepa.com/daily-news/epa-launches-review-health-based-federal-limits-nitrogen-oxides

9. EPA Publishes Proposed Rule Concerning Methane

On December 16, 2022, the Environmental Protection Agency ("**EPA**") published a proposed rule in the Federal Register aimed at reducing methane and volatile organic compounds ("**VOCs**") from new facilities and methane from existing facilities in the oil and gas sector. (87 Fed.Reg. 74702–74847.) The proposal constitutes one part of the Biden Administration's strategy to reduce greenhouse gas emissions. According to the EPA, the new regulations, if adopted, will reduce methane emissions by 87% relative to 2005 levels by 2030. The supplemental proposal follows EPA's 2021 proposed rule that sought to restore methane rules for oil and natural gas facilities that the Trump administration repealed, strengthen emissions requirements for oil and natural gas production, and extend coverage of these requirements to more kinds of equipment than were originally included in prior rules. Oil and natural gas operations collectively constitute the nation's largest industrial source of methane.

For more information see:
https://www.federalregister.gov/documents/2022/12/06/2022-24675/standards-of-performance-for-new-reconstructed-and-modified-sources-and-emissions-guidelines-for
https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/epa-issues-supplemental-proposal-reduce
https://www.epa.gov/newsreleases/biden-harris-administration-strengthens-proposal-cut-methane-pollution-protect

10. EPA Publishes Proposed Rule to Cut Truck Pollution

On March 28, 2022, the Environmental Protection Agency ("**EPA**") published a proposed rule in the Federal Register constituting new emissions standards targeting tractor-trailers, buses, and other heavy-duty vehicles in a bid to curb air pollution. (87 Fed.Reg. 17414–17888.) The proposed rule would target nitrogen oxides, which can cause asthma and other lung issues. The EPA's proposed rule would take effect in model year 2027. Officials said it would reduce emissions of nitrogen oxides from gasoline and diesel engines by as much as 60% in 2045. It would also update greenhouse gas standards for certain commercial vehicle categories, including school buses, transit buses, commercial delivery trucks, and short-haul tractors. The rule is modeled after a similar regulation in California. The proposal includes two options, one of which would be comparable to California's standards. The proposed rule comprises one part of the administration's "Clean Trucks Plan" – a series of clean air and climate regulations that the EPA will develop over the next three years to reduce pollution from trucks and buses and to advance the transition to a zero-emission freight sector. The transportation sector is the largest contributor to climate change in the U.S. — making up 29% of planet-warming emissions. Public comment wrapped up on May 13, 2022.

For more information see:
https://www.federalregister.gov/documents/2022/03/28/2022-04934/control-of-air-pollution-from-new-motor-vehicles-heavy-duty-engine-and-vehicle-standards
https://www.epa.gov/newsreleases/epa-proposes-stronger-standards-heavy-duty-vehicles-promote-clean-air-protect

11. CARB Promulgates Final Rule Banning New Gas-Fueled Cars by 2035

The California Air Resources Board ("**CARB**") promulgated a final rule banning new gasoline-fueled vehicles by 2035 in an effort to curb climate change. (Cal. Code Regs., tit. 13, § 1961.4.) The California Office of Administrative Law approved the rulemaking and filed with the Secretary of State the final rule on November 30, 2022. The Advanced Clean Cars II program requires that 35% of new cars, SUVs, and small pick-up trucks sold in the state to be powered by batteries or hydrogen by 2026, and 100% of sales to be net-zero emissions by 2035. The rule also calls for zero-emissions sales to account for 68% of total sales by 2030. The rule does not apply to used vehicles or vehicles already on the road. As of 2020, only about two percent of vehicles on California's roads produced no emissions. Auto manufacturers have called the move aggressive, citing high costs, which would assumingly be passed down to consumers.

Manufacturers and interest groups have also cited the dearth of electric vehicle charging stations as another example of the rule's infeasibility. The plan follows Governor Gavin Newsom's executive order in 2020 that called for phasing out new cars with internal combustion engines within 15 years by requiring that all such vehicle sales produce zero emissions by 2035. Nearly 40% of the state's carbon emissions stem from on-road vehicles.

For more information see:
https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-ii
https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/2acciifro1961.4.pdf

5. CLIMATE CHANGE AND RENEWABLE ENERGY

A. Regulatory Framework

International Efforts

Intergovernmental Panel on Climate Change ("**IPCC**")

- In 1988, the United Nations ("**U.N.**") established the IPCC to prepare and publish reports that provide objective and comprehensive scientific information on climate change.

Rio Earth Summit

- In June 1992, the U.N. held a major international conference that resulted in the creation of the United Nations Framework Convention on Climate Change ("**UNFCCC**") agreement, which acknowledged humanity's role in global warming. Following the conference, 166 countries signed the UNFCCC, including the United States.

Conference of the Parties ("**COP**")

- Every year, the parties that ratified the UNFCCC, which totaled 197 as of 2021, convene at the COP. The Parties review national communications and emission inventories and assess the effects and progress of the measures taken by the Parties.

United Nations Climate Change Conference of Youth ("**COY**")

- COY is a youth-led global climate conference organized in collaboration with YOUNGO, the Official Youth Constituency of the UNFCCC. The main objective of COY is to gather local youth statements and empower the youth to vocalize their concerns within the United Nations decision making process.

Kyoto Protocol

- In December 1997, the Kyoto Protocol ("**Protocol**"), an international emissions reduction Agreement, was adopted. The main goal of the Protocol was to control emissions of the six main greenhouse gases ("**GHGs**") in ways that reflected national differences in GHG emissions, wealth, and capacity to make the reductions.
- The U.S signed the Protocol in November 1998, but the Senate never ratified the Protocol due to a 1997 adopted resolution that expressed disapproval of any international agreement that did not require developing countries to make emission reductions.

Copenhagen Climate Change Conference

- In December 2009, the UNFCCC parties defined the maximum acceptable increase in global temperature as 2°C (3.6 °F) above pre-industrial levels.

Cancun Climate Change Conference and Green Climate Fund

- In December 2010, at COP16, the Green Climate Fund was established to help developing countries limit or reduce their GHG emissions and adapt to climate change.

Paris Agreement

- The COP21 summit resulted in the Paris Agreement, which set the goal of limiting the rise in mean global temperature to well below 2 °C (3.6 °F) above pre-industrial levels. Each country must determine, plan, and regularly report on its contributions.
- As of November 2021, 193 members of the UNFCCC are parties to the agreement. The United States withdrew from the Agreement in 2020 but rejoined in 2021.

Glasgow Climate Pact

- In November 2021, COP26 resulted in the Glasgow Climate Pact (the "**Pact**"), which pledged further action to curb emissions, more frequent updates on progress, and additional funding for low- and middle-income countries. The Pact stated that GHG emissions must fall by 45% from 2010 levels by 2030 for global warming to be maintained at 1.5 °C above pre-industrial levels.

Federal Efforts

NEPA

- Must analyze impact of GHG emissions on Climate Change. "Analyzing the impact of GHG emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires before major federal actions significantly affect the human environment." (*Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir. 2007) 508 F.3d 508.)
- Draft guidance from the Council on Environmental Quality states that if a proposed action would reasonably be anticipated to cause direct emissions of 25,000 metric tons or more of CO2 equivalent GHG emissions on an annual basis, agencies should consider whether a quantitative or qualitative analysis would be meaningful to decision makers and the public. Where an action analyzed in an Environmental Assessment or Environmental Impact Statement would be anticipated to emit GHG, the agency should quantify and disclose its estimates of the expected annual direct and indirect GHG emissions, according to the draft guidance. Agencies should also consider the effects of climate change on the proposed actions.

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

- GHGs meet CAA's definition of air pollutants, which the EPA could not avoid regulating, notwithstanding EPA's arguments it would interfere with governmental foreign policy, and the inability of regulations to address a global issue. (*Massachusetts v. Environmental Protection Agency,* 549 U.S. 497 (2007).)
- In December 2009, EPA issued a final action finding that six key well-mixed GHGs constitute a threat to public health and welfare, and that the combined emissions from motor vehicles cause or contribute to climate change. In July 2016, the EPA issued similar findings for GHG emissions from certain classes of engines used in aircrafts.
- Under the CAA, the EPA has taken steps to limit greenhouse gas pollution including:
    - Setting New Source Performance Standards ("**NSPS**") for GHG emissions from new, modified, and reconstructed fossil fuel–fired power plants. (Section 111(b).)
    - Finalizing rules updating both the 1996 NSPS for new and modified landfills and the 1996 guidelines for existing landfills to reduce emissions of methane-rich landfill gas.
    - Collecting GHG data through the Greenhouse Gas Reporting Program.

Stationary Sources

- For GHGs, prevention of serious deterioration ("**PSD**") is required for new construction projects emitting 100,000 tons per year of GHGs and modifications to existing sources that will increase GHG emissions by more than 75,000 tons per year.
- Under CAA's Title V, facilities emitting at least 100,000 tons of GHG per year will be required to obtain an operating permit.
- Many stationary sources, including but not limited to, oil refineries, pulp and paper mills, landfills, producers of cement and fertilizer are required to report their GHG emissions pursuant to 40 C.F.R. Part 98.

Mobile Sources

- The EPA is responsible for implementing the Renewable Fuel Standard ("**RFS**") Program, a national policy that requires a certain volume of renewable fuel to replace petroleum-based transportation fuel. This program was created under the Energy Policy Act of 2005, which amended the CAA.

The American Innovation and Manufacturing (AIM) Act of 2020

- Directs the EPA to address Hydrofluorocarbons ("**HFCs**"), highly potent GHGs, by providing new authorities to phase down the production and consumption of listed HFCs, manage these HFCs and their substitutes, and facilitate the transition to next-generation technologies that do not rely on HFCs.

- On September 23, 2021, the EPA issued a final rule that will phase down the U.S. production and consumption of HFCs by 85% over the next 15 years, as mandated by the AIM Act.

CAISO

- The CAISO is regulated by the Federal Energy Regulatory Commission, an independent federal agency that regulates the interstate transmission of electricity, natural gas, and oil.
- The California Public Utilities Commission regulates investor-owned utilities operating in the CAISO balancing authority area.
- Publicly owned utilities in California are regulated by their respective city councils or other governance bodies.

Standards Compliance

- The CAISO is responsible for compliance with applicable mandatory standards issued by the North American Electric Reliability Corporation and its regional entity for standards oversight, the Western Electricity Coordinating Council. The CAISO also complies with standards issued by North American Energy Standards Board.
- The CAISO provides public notice of certain information as required legally and by CAISO policies including Alternative Dispute Resolution, government information requests, corporate records, and open meetings.

The United States Fish and Wildlife Service ("**USFWS**")

Endangered Species Act

- The ESA does not expressly require the USFWS to consider the effect of climate change in their ESA decisions. However, the ESA and its implementing regulations (1) direct the USFWS to consider "natural or manmade factors affecting a species' continued existence" when determining whether a species should be protected under the ESA; and (2) require the USFWS to analyze cumulative effects on a species' survival when analyzing whether federal actions jeopardize a species protected under the Act.

California Efforts

CEQA

- SB 97 (Chapter 185, Statutes 2007) - CEQA: Greenhouse Gas Emissions
    - SB 97 required that by July 1, 2009, the Governor's Office of Planning and Research ("**OPR**") prepare and transmit to the Resources Agency CEQA guidelines for the mitigation of GHG emissions. The Resources Agency certified and adopted the guidelines, which became effective in March of 2010.

Guidelines

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

    1. Measures in an existing plan or mitigation program;
    2. Reductions in emissions from the project through measures such as those in Appendix F (Energy Conservation);
    3. Off-site measures;
    4. Sequestration;
    5. In the case of the adoption of a plan, mitigation may include identification of specific measures that may be implemented on a project-by-project basis. (Guidelines, § 15126.4(c).)

- Such a plan may include a plan for the reduction of greenhouse gas emissions and may be used in a cumulative impact analysis. (Guidelines, § 15130(b)(1).) Significant effects of GHG may be analyzed at a programmatic level.
- GHG may be analyzed and mitigated in a plan for the reduction of GHG which:

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

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

Thresholds of Significance

- *Ctr. for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204
- The California Supreme Court identified three options for adequately analyzing GHG impacts:
    - Using data from Scoping Plan to establish relationship with specific project;
    - Tiering or streamlining through a Climate Action Plan or SCS; or
    - Using an appropriate numerical threshold.

Air Districts Thresholds

Bay Area Air Quality Management District
(http://www.baaqmd.gov/Divisions/Planning-and-Research/CEQA-GUIDELINES.aspx)

- The adoption of the thresholds was held to be a "project" and set aside for failure to complete CEQA review of the proposed thresholds. The merits of the thresholds were not addressed. *(California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.,* No. RG10-548693 (March 5, 2012).) The Court of Appeal reversed the judgment. The Supreme Court granted review but ruled only on the limited issue that only the impact of the project on the environment must be analyzed under CEQA, not the reverse, unless the project "exacerbates" the effects associated with an existing physical condition. The case was remanded back to the Appellate Court to reconsider the case in light of its ruling. (See *California Building Industry Assn. v. BAAQMD* (2015) 62 Cal.4th 369.) The appellate court, in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt Dist.*, 2 Cal.App.5th 1067 (2016), held that the receptor thresholds used to evaluate air quality impacts could not be used to evaluate effects on future users, because to do so could trigger the need to prepare an EIR solely because the emissions in the existing environment meet the thresholds as to future users. The case was remanded to the trial court for further action consistent with the California Supreme Court and appellate court decisions.

San Joaquin Valley Air Pollution Control District
(http://www.valleyair.org/Programs/CCAP/CCAP_menu.htm)

- Projects complying with an approved GHG emission reduction plan or GHG mitigation program have a less than significant individual and cumulative impact for GHG. CEQA Guidelines apply.
- Projects implementing Best Performance Standards ("**BPS**") do not require quantification of project specific GHG emissions and have a less than significant individual and cumulative impact for GHG emissions.
- Projects not implementing BPS must quantify project specific GHG emissions and demonstrate that project specific GHG emissions will be reduced or mitigated by at least 29%, compared to Business-as-Usual. Projects achieving at least a 29% GHG emission reduction compared to BAU have a less than significant individual and cumulative impact for GHG.
- Other projects requiring preparation of an EIR require quantification of project specific GHG emissions. Projects implementing BPS or achieving at least a 29% GHG emission reduction compared to BAU have a less than significant individual and cumulative impact for GHG.

Sacramento County Air Quality Management District
(http://www.airquality.org/climatechange/CEQAclimatechange.shtml)

- GHG thresholds of significances for projects subject to CEQA:
    - Stationary source projects — 10,000 direct metric tons of CO2e per year.
    - Operational phase of land development projects —1,100 metric tons of CO2e per year.
    - Construction phase of projects — 1,100 metric tons of CO2e per year.

California's Air Resources Law and Clean Air Act (Health & Safety Code §§ 39000-44563)

- California administers the federal program. (Health & Saf. Code, §§ 39656-39659.)
- CARB is responsible for promulgating regulations. (Health & Saf. Code, § 39602.)

California Climate Registry (SB 1771 (Sher), Chap. 1018, Statutes of 2000)

- Established the California Climate Registry, which cataloged early GHG reductions and set reduction goals and standards for measurement and verification, as a precursor to Cap-and-Trade Program (AB 32) as well as other states and international efforts.

Global Warming Solutions Act of 2006 (AB 32 (Nunez), Chap. 488, Statutes of 2006) Health & Saf. Code, § 38500 *et seq.)*

- Codified the state's goal by requiring that the state's global warming emissions be reduced to 1990 levels by 2020. Set deadlines for GHG reporting.

- Key Goals for implementation by 2030:
    - Increased renewable electricity production by 50%;
    - Reduce petroleum use by 50% in vehicles;
    - Double energy efficiency at existing buildings;
    - Reduce GHG emissions from natural and working lands;
    - Reduce short-lived climate pollutants; and
    - Safeguard Californians sensitive to heavy pollutants.
- Pursuant to AB 32, CARB developed a scoping plan that contains strategies to reduce GHGs, including regulations, alternative compliance mechanisms, monetary and non-monetary incentives, and voluntary actions.

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

Cap and Trade Program (AB 32)

- Developed as part of California's Climate Plan under the Global Warming Solutions Act of 2006.
- The Program covers 450 entities and sets an emissions cap on all electrical generators and large industrial facilities as well as distributors of transportation, natural gas, and other fuels.
- Program linked to other states and regions as well as certain provinces in Canada.
- Where entities exceed their emissions allowance each year, they are able to buy emissions credits from other entities producing under the allowable emissions limits. The exceeding entity can also pull from an emissions bank from previous years where the entity did not use up to the cap of allowable emissions.
- CARB monitors and enforces compliance with the Cap-and-Trade Program.
- Requires CA to reduce its GHG emissions to 1990 levels by 2020.
- These levels were met in 2016. In 2016, the Legislature then passed SB 32, which codifies a 2030 GHG emissions reduction target of 40 percent below 1990 levels (and later 80% below 1990 levels by 2050).
    - CARB has developed tools and resources to help local governments, small businesses, and individual households reduce GHG emissions to support California's AB 32 and SB 32 emission targets. (See: https://ww2.arb.ca.gov/our-work/programs/local-actions-climate-change/about).
- AB 398 (Garcia, 2017) extends California's Cap-and-Trade program through 2030.

CARB Oversight and Reporting (AB 197 (Garcia), Chap. 250, Statutes of 2016)

- This is a companion law to SB 32, requiring CARB to report regularly to the state legislature on its progress in implementing the state's climate and air pollution-related policies.

Disadvantaged Community Benefits (SB 535 (De Leon), Chap. 830, Statutes of 2012)

- Legislation requiring the state to direct at least 25% of state Cap-and-Trade revenues to go to projects that benefit disadvantaged communities.
- These funds are aimed at improving public health, quality of life, and economic opportunity in California's most burdened communities while at the same time reducing pollution that causes climate change.

Short-Lived Climate Pollutant Reduction (SB 605 (Lara), Chap. 523, Statutes of 2014)

- Requires reduction of emissions of short-lived pollutant by 40 - 50% below 2013 levels by 2030.
- CARB in coordination with other agencies established an SLCP Reduction Strategy in 2017 to develop options including implementing new regulations, incentives, and other market-supporting activities to reduce pollutants with short atmospheric lifetimes.

- Common pollutants include:
  - Methane
  - Hydrofluorocarbons
  - Anthropogenic black carbon
- Short-Lived Climate Pollutant Reduction (SB 1383): Requires reduction of emissions of short-lived pollutant by 50% below 2013 levels by 2030.

Transportation Infrastructure Funding (SB 1 (Beall, Frazier), Chap. 5, Statutes of 2017)

- SB 1, the Road Repair and Accountability Act of 2017, was signed into law on April 28, 2017. This legislative package will invest $54 billion over the next decade to fix roads, freeways, and bridges in communities across California and puts more dollars toward transit and safety. These funds will be split equally between state and local investments.
- The legislation carves out funding that is distributed to local and regional agencies for climate change adaptation planning.

Transportation Planning: Travel Demand Models: Sustainable Communities Strategy (SB375; Chapter 728, Statutes 2008)

- Regional transportation Plans are expanded to include a sustainable communities' strategy for the purposes of achieving GHG reduction targets by coordinating land use and transportation planning. The Sacramento Area Council of Governments met its target reduction of seven percent in 2020 and increased its reduction target to 19 percent by 2035. San Joaquin County MPO increased their target to 16 percent reduction by 2035. Since 2018, CARB has increased the GHG emission reduction targets for most of the MPOs and has shifted how staff will evaluate each sustainable community strategy to evaluate the benefits of policies and strategies rather than on modeling outputs. CARB made these shifts in response to the challenges communities were experiencing in demonstrating their performance in the first eight years of evaluation.

Clean Cars 4 All Program (AB 630 (Cooper), Chap. 636, Statutes of 2017)

- The Clean Cars 4 All program helps lower-income California residents replace old, polluting cars with cleaner, more fuel-efficient vehicles.
- The program is funded through the California Climate Investments and the Enhanced Fleet Modernization Program fees authorized under AB 8 (2013, Perea). California Climate Investments is a statewide initiative to utilize cap-and-trade dollars to reduce GHG emissions. By 2021, these investments have put more than 400,000 zero-emission cars, trucks, transit buses, school buses, and freight equipment into operation in California.

Enhanced Fleet Modernization Program (AB 118 (Nunez), Chap. 750, Statues of 2007)

- Provides up to $4,500 to lower-income drivers who scrap an old car and purchase a cleaner and more fuel-efficient (35 MPG or better fuel economy rating) vehicle

or $7,500 for mobility options such as transit passes, in lieu of a replacement vehicle.

Advanced Clean Trucks Regulation (Outlined in the State Implementation Plan for State Implementation Plans, Sustainable Freight Action Plan, Senate Bill (SB) 350, and Assembly Bill (AB) 32)

- CARB regulation that became effective in March 2021. The regulation accelerates the market for on-road zero-emission vehicles and reduces emissions NOx, fine particulate matter, other criteria pollutants, toxic air contaminants, and GHGs from medium- and heavy-duty on-road vehicles. Applies to any manufacturer that certifies on-road vehicles over 8,500 lbs.

Land Use Planning

Integrated Climate Adaptation and Resiliency Program (SB 246 (Wieckowski), Chap. 606, Statutes of 2015) (Pub. Res. Code § 71354)

- Created in 2015 to develop cohesive and coordinated responses to the impacts of climate change across the state.
- Created a climate action team with various departments and state agencies working on different interrelated parts of the climate change legislation.
- Created an adaptation database for local agencies and landowners to find resources necessary to combat climate change. (www.resilientca.org).

California Climate Adaptation Strategy (AB 1482 (Gordon), Chap. 603, Statutes of 2015)

- In 2009, in response to Governor Schwarzenegger's Executive Order S-13-08, the Natural Resources Agency ("**NRA**") developed the California Climate Adaption Strategy ("**CCAS**"). The CCAS summarized the best-known science on climate change impacts in the state and outlined solutions to implement across state agencies to promote resiliency. Part of the CCAS addressed land use planning strategies to minimize climate change impacts.

- AB 1482 required that the NRA update the State's climate adaption strategy every three years. The NRA is currently drafting the 2021 CCAS.

General Plan Safety Element (SB 379 (Jackson), Chap. 608, Statutes of 2015)

- Requires the safety element of each County's General Plan to be reviewed and updated as necessary to address climate adaptation and resiliency strategies applicable to that city or county.
- The bill would require the update to include a set of goals, policies, and objectives based on a vulnerability assessment, identifying the risks that climate change poses to the local jurisdiction and the geographic areas at risk from climate change impacts, and specified information from federal, state, regional, and local agencies.

Addition in Public Safety Code Relating to Climate Change (AB 2800 (Quirk), Chap. 580, Statutes of 2016)

- Requires state agencies to consider the current and future impacts of climate change when planning, designing, building, operating, maintaining, and investing in state infrastructure.

California Public Utilities Commission ("**CPUC**")

Renewables Portfolio General

- Established in 2002 under Senate Bill 1078 (Chap. 516, Stats. 2002), California's Renewables Portfolio Standard ("**RPS**") was accelerated in 2006 under Senate Bill 107 (Chap. 464, Stats. 2006) by requiring that 20% of electricity retail sales be served by renewable energy resources by 2010.
- In November 2008, Governor Arnold Schwarzenegger signed Executive Order S 14-08 requiring that "... [a]ll retail sellers of electricity shall serve 33% of their load with renewable energy by 2020."
- The following year, Executive Order S-21-09 directed the California Air Resources Board, under its Assembly Bill 32 authority, to enact regulations to achieve the goal of 33 percent renewables by 2020, which was subsequently codified in Senate Bill X1-2 (Chap. 1, Stats. 2011) and signed by Governor Edmund G. Brown, Jr., in April 2011.
- That new RPS applies to all electricity retailers in the state including publicly owned utilities ("**POUs**"), investor-owned utilities ("**IOUs**"), electricity service providers ("**ESPs**"), and community choice aggregators ("**CCAs**").
- Most recently in 2015, the Legislature passed, and the Governor signed Senate Bill 350 (Chap. 547, stats. 2015).

Clean Energy and Pollution Reduction Act (SB 350 (De Leon); Leno, Chap. 574, Statutes of 2015)

- SB 350 increases California's renewable electricity procurement goal to 50% by 2030. This objective will increase the use of Renewables Portfolio Standard ("**RPS**") eligible resources, including solar, wind, biomass, geothermal and others.
- To meet this goal the California Energy Commission is working with other state agencies such as CARB, CPUC, CAISO, requiring large utilities to submit integrated resource plans to implement the law.
- CPUC implementation framework can be broken down into five major areas: integrated resource planning, renewable energy, energy efficiency transportation electrification, and disadvantaged communities.

Integrated Resource Plan and Long-Term Procurement Plan (IRP-LTPP; Pub. Res. Code § 454.51 & § 454.52)

- The IRP-LTPP considers the Commission's electric procurement policies and programs to maintain California's energy supply.

- The plan implements SB 350 requirements by implementing a process for integrated resource planning ensuring that a load serving entities meet targets to contribute to California's economy wide GHG reduction goals.

Electric Power Procurement and Generation (ABX2 82, Keely (2001))

- The CPUC evaluates the long and short-term need for additional power generation by the regulated utilities in California using public input and data from utilities (CEC, CAISO).
- The Commission monitors the amount of power demanded and determines how to use it as renewable resources increase in California.

Resource Adequacy (Cal. Pub. Utility Code § 380)

- The Resource Adequacy policy framework was adopted to ensure reliability of electric service in California and has dual goals to achieve this.
- First, to provide sufficient resources to the CAISO ensuring the safe and reliable operation of the grid in real time.
- Second, to provide appropriate incentives for the siting and construction of new resources needed for reliability in the future.
- The Commission's RA policy framework guides resource procurement and promotes infrastructure investment by requiring that LSEs procure capacity so that capacity is available to the CAISO when and where needed – meeting a series of procurement requirements set by CPUC.

Distributed Generation and Renewable Energy Credits (RECs) (Cal. Pub. Utility Code § 399)

- A REC confers to its holder a claim on the renewable attributes of one unit of energy generated from a renewable resource and consists of the renewable and environmental attributes associated with the production of electricity from a renewable source.

- Owners of renewable DG facilities own the RECs associated with the generation of electricity from those facilities funded under the California Solar Initiative.

For more information see:
http://www.cpuc.ca.gov/PUC/energy/Renewables/overview.htm

California Energy Commission ("**CEC**")

Green Building Standard (Building Energy Efficiency Standards, Title 24, Parts 6 and 11)

- The program was designed to reduce the energy use of California buildings including funding to bring buildings into compliance with current efficiency standards and construction of new buildings.
- Implemented through joint authority by the CEC and CARB.

- Adopted in 1978 under the Building Energy Efficiency Standards, but later expanded under the 2008 AB 32 Scoping Plan.

Renewable Portfolio Standard – Verification and Compliance

- The California Energy Commission verifies the eligibility of renewable energy procured for Renewables Portfolio Standard ("**RPS**") compliance periods by retail sellers and publicly owned utilities ("**POUs**").
- For POUs, the CEC determines the classification of procurement claims, requirements, and determines compliance.

Renewable Portfolio Standard – Certification

- The RPS sets continuously escalating renewable energy procurement requirements for the state's load-serving entities.
- Generation must be procured from RPS-certified facilities which require all load-serving entities in California to procure a portion of their electricity sales from eligible renewable resources.
- The Energy Commission certifies facilities that generate renewable energy as eligible for the RPS. Energy suppliers are required to report information and data to the California Energy Commission.

For more information see:
http://www.energy.ca.gov/portfolio/index.html

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

- The Act was enacted in 1978, and bars restrictions by homeowners' associations on the installation of solar-energy systems, but originally did not specifically apply to cities, counties, municipalities, or other public entities.
- Amended in September 2003 to prohibit a public entity from receiving state grant funding or loans for solar-energy programs if the entity prohibits or places unreasonable restrictions on the installation of solar-energy systems.
- A public entity is required to certify that it is not placing unreasonable restrictions on the procurement of solar-energy systems when applying for state-sponsored grants and loans.
- The Act was amended again in September 2004 by extending its prohibition on restrictions to all public entities.
- Additional key changes minimize aesthetic solar restrictions to those that cost less than $2,000 and limits building official's review of solar installations only to those items that relate to specific health and safety requirements of local, state, and federal law.
- In 2008, Assembly Bill 1892 (Chap. 40, Stats. 2008) further amended the civil code to nullify any restrictions relating to solar energy systems contained in the governing documents of a common interest development.

PURPA (95 P.L. 617, 92 Stat. 3117, 95 P.L. 617, 92 Stat. 3117) Enacted November 9, 1978

- PURPA provides for Energy Dept. ("**DOE**") and Federal Energy Regulatory Commission regulation of electric and natural gas utilities and crude oil transportation systems in order to promote energy conservation and efficiency, and equitable utility rates for consumers.
- It includes provisions to: amend Federal Power Act to authorize regulation of certain electric utility interconnections, wheeling, pooling, and automatic rate adjustment clauses; encourage cogeneration and small-scale power production; create a DOE aid program for small hydroelectric projects; establish procedures and schedule for Interior Dept. selection of systems to transport Alaskan oil to central States; provide expedited procedures governing preparation of environmental impact statements for pipeline proposals; authorize facilities for seasonal power exchanges with Canada; and establish a Utility Regulatory Institute.

Renewable Energy for Agriculture Program (REAP)

- Funded under Assembly Bill 109 (Chap. 249, Stats. 2017), provides grants for the installation of onsite renewable energy on agricultural operations in California.
- Includes accelerating the adoption of onsite renewable energy technologies on agricultural operations to accomplish a number of benefits including reducing GHG emissions, reducing demand for fossil fuels and grid electricity, and providing additional co-benefits to local communities.
- REAP is a part of California Climate Investments funded by the Greenhouse Gas Reduction Fund ("**GGRF**").
- REAP will fund the installation of onsite renewable energy technologies and related equipment that serve agricultural operations and that support achieving the state's long term GHG emission reduction goals.
- Prioritize investing the funds in projects that achieve the highest GHG reductions, maximize benefits to priority populations, and are necessary to meet the state's climate goals.

California Department of Water Resources

The Water Conservation Act of 2009 (SB X7-7 (Steinberg) Chap. 4, Statutes of 2009):

- This Act mandated that the State achieve a 20 percent reduction in urban per capita water use by 2020. The purpose of the Act was to encourage urban and agricultural water providers to implement conservation strategies, monitor water usage, and report data to DWR.

Water Conservation and Drought Planning (AB 1668 (Friedman, 2018) and SB 606 (Hertzberg, 2018))

- AB 1668 and SB 606 created a foundation for long-term improvements in water conservation and drought planning. The legislation provided guidelines for efficient water use and a framework for the implementation and oversight of the new standards, which must be in place by 2022. The legislation required action by the DWR, SWRCB, and water suppliers.
- The two bills provide the following drought resiliency provisions:
    - Establish water use objectives and long-term standards for efficient water use that apply to urban retail water suppliers; comprised of indoor residential water use, outdoor residential water use, commercial, industrial, and institutional irrigation with dedicated meters, water loss, and other unique local uses.
    - Provide incentives for water suppliers to recycle water.
    - Identify small water suppliers and rural communities that may be at risk of drought and provide recommendations for drought planning.
    - Require both urban and agricultural water suppliers to set annual water budgets and prepare for drought.

California Water Plan (Required by Water Code Section 10005(a))

- The California Water Plan is the State's long-term strategic plan for managing and developing water resources throughout the state. The Plan describes the status of the State's water supply and agricultural, urban, and environmental water demands. The Legislature is required to take steps to authorize the specific actions proposed in the Plan and provide funding for implementation.
- DWR is required to update the Plan every five years. The 2018 update reaffirmed the State's commitment to sustainable, equitable, long-term water resource management and introduced implementation tools to assist decision-making.

The California Comeback Plan: Water and Drought Resilience Package (SB 129 (Skinner), Chap. 69, Statutes of 2021)

- Invests $5.2 billion over three years to support immediate drought response and long-term water resilience.
- Funds will be used for emergency drought relief projects to secure and expand water supplies; support for drinking water and wastewater infrastructure with a focus on small and disadvantaged communities; and SGMA implementation to improve water supply security and quality.

Drought Planning: Small Water Suppliers (SB 552 (Hertzberg) Chap. 245, Statutes of 2021)

- Ensure small and rural water suppliers develop drought and water shortage contingency plans and implement drought resiliency measures.

State Water Resources Control Board and the Regional Water Quality Control Boards ("**Water Boards**")

2020 Water Resilience Portfolio (Governor Gavin Newsom Executive Order N-10-9)

- Multi-agency effort to outline steps for building a climate-resilient, watershed-based future, including providing data, tools, and guidance for adaptation.
- The Portfolio has several goals including: maintaining and diversifying water supplies, protecting and enhancing natural ecosystems, building connections between various agencies, and preparing for the dynamic consequences of climate change.

The SWRCB 2007 Climate Change Resolution No. 2007-0059 (Supports implementation of the California Global Warming Solutions Act of 2006 (AB 32))

- A commitment to embed climate change in all SWRCB actions and programs.

Policy for Recycled Water Resolution No. 2018-0057

- The Recycle Water Policy streamlines permitting for recycled water projects, and identifies, and funds research needs to ensure the state's recycled water goals are achieved. Recycled water helps to improve the State's long term water resilience and can reduce GHG emissions.

Safe and Affordable Funding for Equity and Resilience ("**SAFER**") drinking water program (California Climate Investments, uses Cap-and-Trade (AB 32) dollars)

- Protects Californians who are at risk of water scarcity and ensures that the water systems serving them establish sustainable solutions.

California Department of Fish and Wildlife ("**CDFW**")

State Wildlife Action Plan ("**SWAP**") (Required under the State and Tribal Wildlife Grant Program, 2000):

- The USFWS grants funds to state agencies to develop and implement programs that benefit wildlife, including creating State Wildlife Actions Plans. CDFW is required to update the SWAP every ten years. In 2015, the SWAP update included addressing climate change impacts and adaption strategies.

California Natural Resources Agency ("**CNRA**")

Safeguarding California Plan (AB 1482 (Gordon), Chap. 603, Statutes of 2015)

- Directs the Natural Resources Agency ("**NRA**") to update the Safeguarding California Plan every three years. Designed to encompass all policies and programs that implement the State's overarching strategy for climate change resiliency.
- Safeguarding California: Implementation Action Plans:

- Governor Brown's Executive Order B-30-15 required all state agencies to take current and future climate impacts into account in all planning and investment actions and directed the preparation of implementation plans to ensure progress on the objectives of the Safeguarding California Plan.

Sea Level Rising Planning (AB 2516 (Gordon) Chap. 522, Statues of 2014)

- Required the CNRA and the Ocean Protection Council to conduct biannual surveys of sea-level rise. The information is posted on the State Climate Adaption Clearinghouse.

Climate Change Adaption: Integrated Climate Adaption and Resiliency Program ("**ICARP**") (SB 246 (Wieckowski) Chap. 606, Statutes of 2015)

- Directed the Governor's Office of Planning and Research ("**OPR**") to form ICARP. The Program is designed to develop a coordinated response to the impacts of climate change across State, local, and regional levels. Under the Program, OPR established the State Climate Adaption Clearinghouse, which provides a centralized source of information and resources for planning and implementing climate adaption and resiliency efforts across California.

The California Department of Forestry and Fire Protection ("**CalFire**")

Forest Resources: Carbon Sequestration (AB 1504 (Skinner) Chap. 534, Statutes of 2010)

- Required the Board of Forestry and Fire Protection to ensure that its rules and regulations that govern timber harvesting consider the capacity of forest resources to sequester carbon dioxide emissions sufficient to meet or exceed the AB 32 Climate Change Scoping Plan goal of five million metric tons carbon dioxide sequestered per year.

Resource Conservation: Working and Natural Lands (SB 1386 (Wolk) Chap. 545, Statutes of 2016)

- Declared it to be the policy of the state that the protection and management of natural and working lands, including forests, is an important strategy in meeting the state's greenhouse gas reduction goals, and requires all state agencies to consider this policy when revising, adopting, or establishing policies, regulations, or expenditures relating to the protection and management of natural and working lands.

Strategic Fire Plan 2018 Update (Adopted by the Board of Forestry and Fire Protection under PRC § 4130)

- The 2018 Plan reflects CalFire's focus on natural resource management to maintain the state's forests as a resilient carbon sink to meet California's climate change goals and to serve as important habitat for adaptation and mitigation.

California Forest Carbon Plan 2018 (Implements target dates for California's 2017 Climate Change Scoping Plan and the State Wildlife Action Plan)

- The Plan describes forest conditions across California based on the best available information and provides a projection of future conditions given the ongoing and expected impacts of climate change. It also describes goals to improve overall forest health, enhance carbon storage resilience, increase sequestration, and reduce GHG emissions, and provides principles and policies to guide and support those actions.

California's Wildfire and Forest Resilience Action Plan (Implements the California Forest Carbon Plan of 2018 and Executive Order B-52-18)

- The California Forest Management Task Force developed a framework for establishing resilient forests that can withstand wildfire, drought, and climate change.
- The Plan goals include accelerating restoration across all lands, increase prescribed fire, mobilize Regional Action Plans, conserve working forests, reforest burned areas, and improve regulatory efficiency.

B. 2023 Update

1. President Biden Signs Inflation Reduction Act

On August 16, 2022, President Biden signed the Inflation Reduction Act. (Pub. L. No. 117-169, 16 Stat. 1818 (2022)). The bill includes an estimated $369 billion in climate change-related efforts. While the government touts the package as the largest-ever U.S. investment in climate change reduction efforts, environmentalists were upset at various compromise provisions, including mandates the federal government offer up parts of the Gulf of Mexico and Alaskan Coast for oil and gas development. It also requires additional oil and gas leasing be allowed in order for new wind and solar projects to be approved. Some of the environmental investments include:

Transition to clean energy

- A ten-year extension of consumer tax credits that includes clean energy incentives;
- $30 billion in tax credits to accelerate U.S. manufacturing of solar panels, wind turbines, batteries, and critical minerals processing;
- $10 billion in investment tax credits aimed at building clean technology manufacturing facilities, including facilities that build electric vehicles, wind turbines and solar panels;
- $2 billion in grants to reconfigure existing auto manufacturing facilities to manufacture clean vehicles;
- $2 billion for National Labs to accelerate "breakthrough energy research";
- Unspecified tax credits and grants to support the domestic production of biofuels.

Transition to clean transportation

- $500 million in the Defense Production Act funding that includes funds for critical minerals processing;
- Up to $20 billion in loans to build new clean vehicle manufacturing facilities nationwide;
- $4,000 consumer tax credits for lower/middle income individuals to buy used clean vehicles, and up to $7,500 tax credit to buy new clean vehicles;
- $3 billion for the U.S. Postal Service to purchase zero-emission vehicles;
- $1 billion for clean, heavy-duty vehicles, including school buses, transit buses, and garbage trucks.

Other environmental provisions

- $20 billion to fund "climate-smart agriculture practices";
- $5 billion to support forest conservation and urban tree planting efforts;
- $2.6 billion to conserve and restore coastal habitats;
- $3 billion to fund zero emissions equipment and technology aimed at combatting air pollution at ports, which generally experience high levels of toxic air pollution;
- $315.5 million for air monitoring specifically aimed at communities living near polluting industry sectors.

For more information see:
https://www.congress.gov/bill/117th-congress/house-bill/5376

2. Governor Newsom Signs Renewable Energy Streamlining Bill

On June 30, 2022, Governor Gavin Newsom signed into law Assembly Bill 205 ("**AB 205**"), which created a streamlined permitting process for renewable energy creation and storage projects under exclusive state jurisdiction. (Chapter 61.) The law also provides new funding for qualifying generation and energy storage facilities. Under the new program, project proponents would submit application materials directly to the California Energy Commission ("**CEC**") instead of local jurisdictions. The CEC will act as the California Environmental Quality Act ("**CEQA**") lead agency and must review applications within 30 days of submittal for completeness. The environmental review must then be completed within another 270 days. Eligible projects must demonstrate net economic benefits, labor union agreements, and prevailing wage guarantees, along with community benefits packages, in order to qualify. Examples of economic benefits include employment growth, housing development, infrastructure and environmental improvements, and property taxes and sales and use tax revenues. Prior to AB 205, CEC authority was limited to thermal power plants with capacities of 50 megawatts ("**MW**") or more.

AB 205 expands CEC's authority and establishes a new siting certification pathway for the following eligible facilities:

- Solar photovoltaic ("**PV**") and onshore wind generating facilities with capacities of 50 MW or more;
- Energy storage facilities capable of storing at least 200 MWh of energy;
- Facilities for the manufacture, production, or assembly of energy storage systems, wind systems, solar PV systems, or the components of those systems if the developer certifies the project will require a capital investment of $250 million over a period of five years;
- Transmission lines from the above-mentioned generating or storage facilities to the first point of interconnection; and
- Thermal generation facilities with capacities of 50 MW or more that are not powered by fossil or nuclear fuels.

For more information see:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB205

3. Biden Administration Proposes Requiring All Publicly Traded Companies to Disclose Climate-Related Data

On April 11, 2022, the Securities and Exchange Commission ("**SEC**") published a proposed rule in the Federal Register that aims to require all publicly traded companies to disclose their greenhouse gas emissions and any climate-related risks their businesses face. (87 Fed.Reg. 21334–21473.) The SEC said the proposal aims to help investors make informed decisions about the impact of climate change on current and potential investments. Some companies, such as Coca-Cola and Tesla, already release some climate-related data. The proposal seeks to standardize climate disclosures in a manner that is common in some countries but not in the United States.

The proposal represents one piece of a broader plan by the Biden Administration to impose climate change-related public policies. Under the proposed policy, applicable companies would be required to include climate-related disclosures in their registration statements and periodic reports. The required information would include "information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements," according to an agency statement. The proposed rule would include a "phase-in period" for all registrants. The public comment period ended on May 20, 2022. House Republicans have introduced legislation to block the SEC from promulgating the rule.

For more information see:
https://www.federalregister.gov/documents/2022/04/11/2022-06342/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors
https://www.sec.gov/news/press-release/2022-46

4. California Adopts Ambitious 2022 Climate Change Scoping Plan

On December 15, 2022, the CARB adopted the 2022 Climate Change Scoping Plan, which the state regulator contends will guide California as it transitions to a clean energy economy; reduces the state's reliance on fossil fuels; and improves statewide air quality, particularly in disadvantaged communities. The plan set a goal of reaching carbon neutrality by 2045, in keeping with Assembly Bill 1279 signed by Governor Newsom in September 2022, which set forth a legally binding commitment to achieve carbon neutrality no later than 2045. The plan also set a target of a 48% reduction of greenhouse gas emissions ("**GHGs**") below 1990 levels by 2030, along with a longer-term goal of an 85% reduction in GHGs below 1990 levels by 2045. The plan included increased funding for public transportation and a requirement that no new gas-powered power plants be constructed. According to CARB, the plan will result in four million new jobs.

Meanwhile, the plan also included plans for the capture and storage of carbon dioxide both through natural and artificial means. Environmental groups disapproved of the state's partial reliance of carbon capture and storage, arguing the technology for artificially capturing and storing carbon remained unproven. Carbon is naturally captured by carbon sinks, such as forests, oceans, or soils, which absorb carbon dioxide from the atmosphere. Carbon capture and storage technology, meanwhile, artificially captures carbon at point sources before the carbon enters the atmosphere and transports it off-site for long-term storage.

In 2018, former-Governor Jerry Brown issued an executive order establishing a statewide goal to achieve carbon neutrality no later than 2045. In 2020, Governor Gavin Newsom issued an executive order calling for a transition away from fossil fuels to combat climate change. Assembly Bill 32, or the Global Warming Solutions Act of 2006, requires that CARB update the state's climate strategy twice every decade.

For more information see:
https://ww2.arb.ca.gov/sites/default/files/2022-11/2022-sp.pdf
https://news.bloomberglaw.com/environment-and-energy/california-set-to-advance-accelerated-five-year-climate-strategy

5. CPUC Slashes Rooftop Solar Rates For New Customers

The California Public Utilities Commission ("**CPUC**") voted unanimously on December 15, 2022, to reduce the rates paid to new California households who export their excess power to the grid. For decades, households with rooftop solar panels have received rates at or near the full retail electricity rate. Under the new scheme, ratepayers will receive that vary depending on the utility and time of day. The CPUC said the new regime aims to incentivize households with solar panels to purchase batteries so that more power could be returned to the grid during the nighttime hours. CPUC argues that existing incentives lead to excessive solar power during the day, when demand is diminished, and while leading to less solar power returned to the grid at night, when demand rises. The previous paradigm forced the state to use more natural gas generation to satisfy peak energy needs during the nighttime. The new rules affect only new customers. Existing rooftop solar customers retain their previous rates.

For more information see:
https://www.cpuc.ca.gov/news-and-updates/all-news/cpuc-modernizes-solar-tariff-to-support-reliability-and-decarbonization
https://www.reuters.com/world/us/california-vote-hotly-debated-change-rooftop-solar-policy-2022-12-15/
https://www.eenews.net/articles/calif-rule-overhaul-shakes-up-solar-industry/

6. ENDANGERED SPECIES

A. Regulatory Framework

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

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

Section 7

- Section 7 of ESA requires all federal agencies to ensure, in consultation with USFWS and NMFS, that their actions do not jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat. (16 U.S.C. § 1536(a)(2).)
- Any federal action triggers the Section 7 consultation process. Examples include: the granting of permits, licenses, leases, granting of federal funds, and easements.
- A species list is required to determine if there are listed species in the project area that may be affected by the agency's action. (16 U.S.C. § 1533(a)(2)(A).)
- A Biological Assessment is required where the action may affect a listed species to determine if the action would adversely affect the listed species. (16 U.S.C. § 1536(c).)
- Formal consultation, with a Biological Opinion from USFWS and NMFS, is required if the action would adversely affect the listed species or adversely modify or destroy critical habitat.
- The Biological Opinion must state whether it is a jeopardy or no jeopardy opinion. In most cases, a no jeopardy opinion results, and it will include any conditions governing an incidental take statement granted under Section 7. (16 U.S.C. § 1536(b)(3).)

Section 9

- Section 9 of ESA prohibits the "take" of a species listed as endangered. (16 U.S.C. § 1538.)
- Species listed as threatened receive protections under ESA through special rules called 4(d) rules. (16 U.S.C. § 1533(d).)
- "Take" is defined as the act or attempt to hunt, harm, harass, pursue, wound, capture, kill, trap, or collect. (16 U.S.C. § 1532(19).) "Harm" is defined as any act that kills or injures a species, including significant habitat modification. "Harass" is defined as any act creating the likelihood of injury to a species, including significant disruption of normal behavior patterns. (50 U.S.C. § 17.3.)

Section 10

- Section 10 of ESA authorizes the Secretary of Interior via USFWS and Secretary of Commerce via NMFS to permit the incidental take of listed fish and wildlife species, where no incidental take authorization was issued to a federal agency through the Section 7 process. (16 U.S.C. § 1539(a)(1)(B).)
- A Section 10 incidental take permit is cumbersome and requires preparation of a Habitat Conservation Plan ("**HCP**") specifying the activities to be pursued and the measures to mitigate any take. (16 U.S.C. § 1539(a)(2)(A).)

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

- Section 2080 of CESA prohibits the unauthorized take of state endangered or threatened species. (Fish & G. Code, § 2080.)
- "Take" is defined as the act or attempt to hunt, pursue, catch, capture, or kill a state-listed species. (Fish & G. Code, § 86.)
- Take of state-listed species may be authorized by DFW under section 2080.1 or 2081.
- Section 2080.1 addresses the process for those species listed under both ESA and CESA. Section 2080.1 provides for "consistency determinations." CESA allows an applicant who has obtained a federal incidental take statement under Section 7 or a Section 10 incidental take permit to notify DFW that it has a federal permit and apply for a consistency determination.
- Section 2081 allows an incidental take permit for state listed species only if specific criteria are met. CESA requires DFW to make findings regarding no jeopardy and that impacts of take are minimized and fully mitigated.
- No incidental take permit is available under section 2081 for "fully protected" species and "specified birds." (Fish & G. Code, §§ 3505, 3511, 4700, 5050, 5515 and 5517.) For example, the California condor is a fully protected species and therefore no take permits will be issued for it.
- If a project is planned in an area where a fully protected species or specified bird occurs, an applicant must design the project to avoid all "take"; DFW cannot provide take authorization under CESA.
- Natural Communities Conservation Planning Act ("**NCCP**") process authorizes DFW to enter into agreements to allow for the take of state-listed species in conjunction with a regional multi-species conservation plan. (Fish & G. Code, § 2835.)
    - NCCP identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. It is the California counterpart to the federal HCP program.

B. 2023 Update

1. *Defenders of Wildlife v. U.S. Fish & Wildlife Service* (N.D. Cal. 2022) 584 F.Supp.3d 812 — Judge Strikes Down Trump Administration Removal of Gray Wolf ESA Protections

The U.S. District Court for the Northern District of California vacated a final rule promulgated in 2020 that removed protections for the gray wolf under the Federal Endangered Species Act ("**ESA**"). In March 2019, the U.S. Fish and Wildlife Service ("**FWS**") proposed delisting the two remaining protected populations of gray wolf — the Minnesota gray wolf, listed as threatened, and the gray wolf entity residing in all or portions of 44 lower U.S. states and Mexico, listed as endangered. After 120 days of public comment, the FWS issued its final rule, removing all protections. Environmental groups sued, alleging violations of the ESA and Administrative Procedure Act ("**APA**").

In promulgating its final rule, the agency first contended that neither gray wolf population met the statutory definition of a "species," meaning neither was eligible for protection under the ESA. "Species" is defined as any "subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." (16 U.S.C § 1532(16).) In support of its position, the agency argued gray wolves are widely distributed across the globe, and that the U.S.-based wolves did not constitute an entire taxonomic species or subspecies. The court disagreed, holding the agency improperly relied on the definition of species as an independent basis for delisting gray wolves. Next, the court held the agency improperly analyzed specified populations of gray wolves in the Great Lakes and Northern Rocky Mountains, which the agency said had purportedly recovered, in determining that the entire species should be delisted nationally. The court also found FWS failed to provide a reasonable interpretation of the "significant portion of its range" standard. Meanwhile, the court also determined the agency's decision to lump wolves in Washington, Oregon, and California with the Northern Rocky Mountain Wolves was arbitrary and capricious under the APA because the agency failed to address science indicating that West Coast wolves are of mixed ancestry, possessing distinct traits. The court reasoned that the agency failed to address the best available science, including studies that wolves with coastal ancestry "should be considered a priority for conservation given their unique evolutionary heritage and adaptations."

2. *Center for Biological Diversity v. Haaland* (N.D. Cal., July 5, 2022, case no. 3:19-cv-05206-JST) 2022 U.S. Dist. LEXIS 121104, 2022 WL 2444455 — Controversial Trump ESA Rules Remain in Place During Rulemaking Process

The U.S. District Court for the Northern District of California ordered three controversial Federal Endangered Species Act ("**ESA**") rules promulgated under the Trump administration in 2019 to remain in place while federal agencies conduct rulemaking processes for their replacements. The opinion was not reported in the Federal Supplement. Proposed rules may not be published until early 2023, with final rules not expected until May 2024. In 2019, the U.S. Fish and Wildlife Service ("**FWS**") and National Marine Fisheries Service ("**NOAA Fisheries**") enacted regulations that substantially modified ESA implementation that affected protections for

threatened species under Section 9, the listing and delisting process for species and the designation of critical habitat under Section 4, and the interagency consultation process under Section 7.

The first rule rescinded FWS's long-standing "blanket rule" under Section 4(d) that automatically extended to threatened terrestrial and freshwater species Section 9 "take" protections that the ESA affords to endangered species. (The Blanket Rule Repeal, 84 Fed. Reg. 44,753.) The stated purpose of the rule was to align with NOAA Fisheries' policy, which does not have a similar blanket rule for marine species. The rule did not apply to previously listed species, only those listed after September 26, 2019. The second rule altered how the Services add, remove, and reclassify endangered or threatened species and the criteria for designating listed species' critical habitat under Section 4. (The Listing Rule, 84 Fed. Reg. 45,020.) The new rule removes the prohibition against referencing the economic and other impacts on landowners resulting from a listing decision. The rule does not, however, allow listing decisions to be based on economic or other impacts, which is forbidden by statute; listing decisions must be made "solely on the basis of the best scientific and commercial data available." The third rule changed the process through which both services work with federal agencies to prevent proposed agency actions that could harm listed species or their critical habitat. (Interagency Consultation Rule, 84 Fed. Reg. 44,976.) Environmental groups ("**Plaintiffs**") immediately sued alleging violations of the ESA, APA, and NEPA. In January 2021, President Joseph Biden directed FWS and NOAA Fisheries to review the challenged rules. In June 2021 FWS announced its intent to rescind the Listing Rule designation affecting Section 9 "take" protections for threatened species, and revise Section 4 and Section 7 Rules. The Plaintiffs agreed to several litigation stays totaling 150 days, with the groups finally reinstating litigation. The Defendant agencies filed a motion for remand without vacatur, which U.S. District Judge Jon Tigar granted, holding the court could not vacate the 2019 rules without first adjudicating the merits of the Plaintiffs' claims.

3. *Center for Biological Diversity v. Haaland* (D. Mont., May 26, 2022, Case no. CV 20-181-M-DWM) 2022 U.S. Dist. LEXIS 94822, 2022 WL 1686908 — Judge Blocks Agency's Wolverine ESA Non-Listing Decision

A U.S. District Court judge in Montana vacated a Trump-era decision against listing the wolverine as a threatened species under the Federal Endangered Species Act ("**ESA**"), concluding the 2020 decision included "serious errors." In an opinion not reported in the Federal Supplement, Judge Donald W. Molloy remanded the case back to the U.S. Department of Fish and Wildlife Service ("**FWS**"), which has 18 months to submit a new listing determination. There are about 300 wolverines in the lower 48 states. Conservation groups allege the existence of the snow-dependent wolverine is threatened due to habit losses associated with climate change. The decision centers on a 2020 FWS determination that concluded the wolverine did not qualify for ESA protection. The court labeled the agency's historical approach to wolverine classification as "inconsistent." In 2008, FWS concluded that the lower-48 wolverine population did not qualify as a distinct population segment and did not warrant listing under the ESA. In 2010, FWS officials reversed its prior decision, but halted further progress on the issue, concluding it was "precluded by higher priority listing actions." In 2013, the agency proposed to list the species as threatened, subsequently withdrawing the proposal in 2014. The 2014 reversal

was challenged by conservation organizations. The District Court judge in that case vacated the withdrawal and remanded the decision for further agency consideration. The judge specifically remanded the matter back to FWS to reevaluate its determination that "climate change and small population size and low genetic diversity do not pose a threat to [the] wolverine." In response to the order, the agency issued its 2020 determination, withdrawing the 2013 proposed rule. In justifying its decision, FWS said the current and future threat factors "are not as significant as believed at the time of the proposed rule" and that the lower-48 wolverine population does not qualify as a distinct population segment. Two sets of Plaintiffs challenged the 2020 reversal. During litigation, FWS had requested it be allowed to revisit its decision without its 2020 determination being vacated. Judge Molloy did not oblige, concluding there were "serious errors [that] undermine the [agency's] decision." Vacatur allows the wolverine to enjoy certain ESA protections as a proposed protected species. Agencies must confer with FWS officials regarding any action that could harm the wolverine.

4. *Almond Alliance of California v. Fish and Game Commission* (2022) 79 Cal.App.5th 337 — Third District Holds Bumble Bees Can Be Classified as 'Fish' Under California ESA

The Third Appellate District of the California Court of Appeal held state officials correctly determined four bumble bee species meet the statutory definition of fish under the California Endangered Species Act ("**California ESA**"). The court reasoned that bumble bees, as terrestrial invertebrates, qualify for protection under the California ESA's definition of "fish," which are statutorily defined as constituting either a "wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals") (Section 45). The court said the term fish constituted a "term of art" and that the California ESA allowed listing any invertebrate as an endangered or threatened species, whether aquatic or terrestrial. The dispute at issue originated in October 2018 when public interest groups petitioned the state Fish and Game Commission ("**Commission**") to list four species of bumble bee as endangered under the California ESA — the Crotch, Franklin, Suckley Cuckoo, and Western bumble bees. The Commission subsequently provided notice that the four species were candidate species under Section 2068 of the California ESA.

The Almond Alliance of California and others ("**Plaintiffs**") filed a mandamus action in a state superior court. In ruling in favor of the Plaintiffs, the trial court reasoned that the word "invertebrates" as it appears in Section 45 of the California ESA clearly denotes invertebrates connected to a marine habitat. On appeal, the Third Appellate District focused on the purported ambiguity surrounding whether "the Legislature intended for the definition of fish to apply to purely aquatic species." To answer that question, the court set out to discern the Legislature's purpose at the time of the enactment of the California ESA. The court undertook an expansive search into the law's legislative history, concluding it supported a "liberal interpretation" of the California ESA that allows the Commission to list any invertebrate as an endangered or threatened species. The ruling could negatively affect growers that will have to grapple with potential pesticide restrictions and habitat protections premised upon protecting bumble bee species. The Third District's decision was published on May 31, 2022. The Plaintiffs subsequently petitioned the California Supreme Court to review the lower court's decision, which the high court denied on September 21, 2022. In rejecting the Plaintiffs' petition, the

justices, in an entry on the court's docket, cautioned the public not to read too much into the Third Appellate Court's decision. The justices stated that their decision not to review the lower court's decision does not constitute an endorsement or rejection. "For although it may not be exceptional for a court to determine that a particular word or phrase within a statute carries a meaning that deviates from common parlance or understanding, such decisions also can provide notice to legislators that some clarification may be in order," the justices wrote.

5. FWS Considers Endangered Species Act Protections For Salamander Species Found in Multiple California Counties

On October 18, 2022, the U.S. Fish and Wildlife Service ("**FWS**") published a proposed rule in the Federal Register that aims to afford two species of salamanders found in Kern, Inyo, and Tulare counties protections under the Federal Endangered Species Act ("**ESA**"). (87 Fed.Reg. 63150–63199.) FWS accepted public comment on its proposal to designate the relictual slender salamander as endangered and the Kern Canyon slender salamander as threatened. With the proposed listing of the Kern Canyon slender salamander, the Service is proposing a special 4(d) rule that exempts activities related to fuels management to reduce the risk of wildfire from the ESA's section 9 prohibitions for take of a listed species. FWS is proposing to designate 2,685 acres of critical habitat for the relictual slender salamander and 2,051 acres of critical habitat for the Kern Canyon slender salamander; 92% of the proposed critical habitat falls within Sequoia National Forest and lands managed by the Bureau of Land Management. The remaining 8% falls on private lands. The FWS cited climate change impacts including drought and wildfire as major impacts to the species' habitat. Both salamander species live near creeks and watersheds that flow into the Kern River, though neither species frequents the Kern River itself. The FWS said the designation of critical habitat "is not expected" to impact water releases or flows into the Kern River. Public comment ended on December 19, 2022.

For more information:
https://www.federalregister.gov/documents/2022/10/18/2022-21661/endangered-and-threatened-wildlife-and-plants-12-month-finding-for-the-kern-plateau-salamander
https://www.fws.gov/press-release/2022-10/public-comment-sought-proposal-list-two-salamanders-california

6. Whitebark Pine Listed as Threatened Under Endangered Species Act

On December 15, 2022, a final rule was published in the Federal Register officially listing the Whitebark Pine (*Pinus Albicaulis*) as threatened under the Federal Endangered Species Act ("**ESA**"). (87 Fed.Reg. 76882–76917.) The U.S. Fish and Wildlife Service ("**FWS**") said Whitebark Pine blister rust, a non-native fungal disease, threatens the survival of Whitebark Pine. Additional threats include mountain pine beetles, altered wildfire patterns, and climate change. Scientists estimate that as of 2016, 51% of all standing Whitebark Pine trees are dead. According to the FWS, it did not designate critical habitat for the Whitebark Pine because habitat loss is not a threat to the species' survival, but rather, the Whitebark Pine blister rust is the primary threat. Whitebark Pine trees live in windy, cold, high-elevation or high-latitude environments across the western United States, including California, and southern Canada. The rule took effect on January 17, 2023.

For more information see:
https://www.federalregister.gov/documents/2022/12/15/2022-27087/endangered-and-threatened-wildlife-and-plants-threatened-species-status-with-section-4d-rule-for
https://www.fws.gov/press-release/2022-12/whitebark-pine-receives-esa-protection-threatened-species

7. Northern Long-Eared Bat Reclassified as Endangered Under Endangered Species Act

On November 30, 2022, a final rule was published in the Federal Register officially reclassifying the long-eared bat as endangered under the Federal Endangered Species Act ("**ESA**"). (87 Fed.Reg. 73488–73504.) The U.S. Fish and Wildlife Service ("**FWS**") said the reclassification was necessary because the bat, listed as threatened in 2015, now faces extinction due to the wide range impacts of White-Nose Syndrome, a deadly disease caused by the growth of fungus, affecting hibernating bats across North America. Bats are critical to healthy, functioning natural areas and contribute at least $3 billion annually to the U.S. agriculture economy through pest control and pollination, according to FWS. The Northern Long-Eared Bat is found in 37 states in the eastern and north central United States and the District of Columbia. White-Nose Syndrome has spread across nearly 80% of the species' entire range. The rule took effect on January 30, 2023.

For more information see:
https://www.federalregister.gov/documents/2022/11/30/2022-25998/endangered-and-threatened-wildlife-and-plants-endangered-species-status-for-northern-long-eared-bat
https://www.fws.gov/press-release/2022-11/northern-long-eared-bat-reclassified-endangered-under-endangered-species-act

8. Emperor Penguin Listed as Threatened Under Endangered Species Act

On October 26, 2022, a final rule was published in the Federal Register officially designating the Emperor penguin as threatened under the Federal Endangered Species Act ("**ESA**"). (87 Fed.Reg. 64700–64720.) The U.S. Fish and Wildlife Service ("**FWS**") cited habitat loss in Antarctica due to melting sea ice caused by climate change as the reason for listing. While Emperor penguin populations are still large and "relatively stable," the species' danger of extinction still looms. Emperor penguins need sea ice to form breeding colonies, forage for food, and avoid predation. As carbon dioxide emissions rise, the Earth's temperature will continue to increase, and the related reduction of sea ice could affect a variety of species, including Emperor penguins, who rely on the ice for survival. FWS cited the best available science in concluding the global population size of Emperor penguins will likely decrease between 26% and 47% by 2050 under low and high carbon emissions scenarios, respectively. The rule went into effect on November 25, 2022.

For more information see:
https://www.federalregister.gov/documents/2022/10/26/2022-23164/endangered-and-threatened-wildlife-and-plants-threatened-species-status-for-emperor-penguin-with
https://www.fws.gov/press-release/2022-10/emperor-penguin-gets-endangered-species-act-protections

9. California Considers Endangered Designation for Four Bumble Bee Species

The California Department of Fish and Wildlife ("**CDFW**") is once again considering providing California Endangered Species Act ("**California ESA**") protections to four species of bumble bees — the Crotch, Franklin, Suckley Cuckoo, and Western bumble bees. The bees were previously at the center of litigation, with the Third District Court of Appeal upholding the California Department of Fish and Wildlife ("**CDFW**") determination to consider the bees for protection, paving the way for the resumption of a listing determination that initially began in 2018. (*Almond Alliance of California v. Fish and Game Commission* (2022) 79 Cal.App.5th 337.) The individual species of bees have separate habitats and difficulties. Generally, the four bumble bee species are collectively suffering from habitat loss and exposure to pesticides. The Franklin bumble bee has a particularly small population size, while the Suckley Cuckoo bumble bee — a nest parasite of the Western bumble bee — is threatened by the decline of its host species. CDFW publicized the resumption of its inquiry on December 14, 2022, a process that CDFW can take a year. Comments were accepted until January 15, 2022.

For more information see:
https://wildlife.ca.gov/News/cdfw-seeks-public-comment-related-to-crotchs-bumble-bee-franklins-bumble-bee-suckleys-cuckoo-bumble-bee-and-western-bumble-bee

10. California Eyes Endangered Designation for Mojave Desert Tortoise

Continued threats to the survival of the Mojave Desert Tortoise prompted the California Department of Fish and Wildlife ("**CDFW**") to mull a proposal to uplist the reptile from a threatened species to an endangered species under the California Endangered Species Act ("**California ESA**"). On May 11, 2022, CDFW officials solicited public comment in relation to the agency's uplisting proposal. The agency is continuing to craft its recommendation, which will eventually be submitted to the California Fish and Game Commission ("**Commission**") at an unspecified future point in time. The Desert tortoise (*Gopherus Agassizii*) is found in the Mojave Desert, the western Sonoran Desert and the southern Great Basin Desert. Factors threatening the reptile's survival include human land use patterns and climate change. A 2018 study found that adult tortoise populations had plummeted by 50% in some designated recovery areas since 2004, and by as much as 90% in some critical habitat management units since the 1980s. State officials listed the tortoise as threatened under the California ESA in 1989, with the U.S. Fish and Wildlife Service following suit in 1990 pursuant to the Federal Endangered Species Act. The Commission granted the Mojave Desert Tortoise temporary endangered status in 2020 following a petition submitted by wildlife advocates.

For more information see:
https://wildlife.ca.gov/News/cdfw-seeks-public-comment-related-to-mojave-desert-tortoise

11. California Considers Endangered Listing For Southern California Steelhead

Habitat destruction spurred the California Department of Fish and Wildlife ("**CDFW**") to mull a proposal to list the Southern California Steelhead as an endangered species under the California Endangered Species Act ("**California ESA**"). Earlier this year, the California Fish and Game

Commission ("**Commission**") granted the fish temporary endangered status following a petition submitted by environmentalists. On July 15, 2022, agency officials solicited public comment pertaining to the proposal. Comments were accepted until September 30, 2022. Officials will compile their findings and make a recommendation to the Commission. The U.S. FWS listed the Southern California Steelhead as threatened in 1997 pursuant to the Federal Endangered Species Act; however, no current designation exists for the fish under the California ESA. Southern California Steelhead are found in streams from the Santa Maria River at the southern county line of San Luis Obispo County down to the U.S.-Mexico border. The California ESA petition includes both ocean-going and stream-dwelling forms of the species. Threats to the fish include destruction, modification, and fragmentation of habitat due to anthropogenic water use -- dams or diversions for the purposes of providing water for human use -- and climate change impacts like increased stream temperatures and intensified drought conditions.

For more information see:
https://wildlife.ca.gov/News/public-invited-to-comment-on-petition-to-list-southern-california-steelhead-as-endangered

7. HAZARDOUS MATERIALS & REMEDIATION

A. Regulatory Framework

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

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

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

- Under CERCLA, owners and operators of property may be held liable for the full costs of cleaning up contaminated property, even though they may have not actually caused the contamination;
- CERCLA also creates a Superfund, financed through a combination of appropriations, industry taxes and judgments, to pay for cleanup costs;
- Empowers state and federal governments to clean up hazardous substance releases, recover costs of cleanup from responsible parties (i.e., owners and operators), and order abatement actions if there is imminent and substantial endangerment to the public health, welfare, or the environment;
- Under CERCLA, any other person may clean up the hazardous substance release and recover costs of the cleanup from responsible parties;
- CERCLA provides for strict liability, meaning that a responsible party is liable even if no fault is involved;
- Responsible party or owner and operator are broadly defined. This includes a lender who acquired property from its mortgagee at a foreclosure sale;
- Secured Creditor's Exemption:
  - When a secured creditor holds indicia of ownership primarily to protect security interest in property and does not participate in the management of the property, then it is not liable under the exemption;
  - A secured creditor may be an owner and operator. There is potential for lender liability finding that a secured lender participates in management of

facility when it participates in management to a degree indicating a capacity to influence the corporations' treatment of hazardous waste. *United States v. Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990);
    - To be held liable, a secured creditor must actually manage the facility. *In Re Bergsoe Metal Corporation*, 910 F.2d 668 (9th Cir. 1990);
    - There is a "safe harbor" rule for lenders in flux as well as acts of god, war, and 3rd party exemptions.

The Federal Resource Conservation and Recovery Act (RCRA § 1002(b)(1))

Congress passed RCRA to address the problem of solid and hazardous wastes, "disposal of solid waste and hazardous waste in or on land can present a danger to human health and the environment."

Triggering RCRA: The Definition of Solid Waste (42 U.S.C. § 6903)

- RCRA applies to solid waste which is defined in the statute to include any garbage, refuse, sludge, and other discarded material resulting from industrial, commercial, mining, and agricultural operations;
- Solid waste does not have to be solid – liquids, semisolids, and even some gaseous materials qualify;
- Solid waste does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or industrial sources which are subject to permitting under the Clean Water Act;
- Congress expressly exempted wastes regulated under other statutes (like the Clean Water Act) from also being regulated by RCRA.

Discarded Material (40 C.F.R. §261.2(a))

- Solid waste needs to be waste that is "discarded material" to qualify under RCRA;
- To be discarded, a material is abandoned by being disposed of, burned, or incinerated, accumulated, or stored but not treated, recycled, or considered inherently waste-like (including objects like military munitions).

RCRA's Regulation of Non-Hazardous Solid Wastes: Subtitle D

RCRA divides its regulation of solid waste into two subtitles, subtitle D for non-hazardous solid waste, and subtitle C for hazardous waste.

Basic Requirements and Liabilities

- Non-hazardous waste is mostly composed of municipal solid waste which is collected and disposed of by local governments;
- RCRA § 4003 requires states to enact solid waste management plans which must meet six statutory requirements to receive federal approval, including the implementation of solid waste management facilities.

Constitutional Limitations on State's Handling of Solid Waste

- The Supreme Court has held that waste disposal is a commercial or economic activity and thus, under the dormant Commerce Clause, state and local governments cannot discriminate against out-of-state waste in their waste-disposal-plants;
- Additionally, Congress can preempt state law through federal statutes like RCRA;
    - RCRA is an example of cooperative federalism where Congress encourages states to take over RCRA regulation;
    - Specifically, the state can be the primary enforcer of RCRA if they enact state programs which are at least as stringent as RCRA, and they provide for adequate enforcement.

RCRA's Regulation of Hazardous Solid Wastes: Subtitle C

- Hazardous waste must fit within the definition of solid waste before it can be subsequently classified as a hazardous waste under RCRA.

Hazardous Waste Defined

- Hazardous waste is defined by the statute as a solid waste or a combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious nature may;
    - Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or
    - Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. (RCRA § 1004(5), 42 U.S.C. § 6903(5).)
- There are two basic ways that a solid waste may qualify as a hazardous waste;
    - The first is that the solid waste may exhibit one of the four regulatory characteristics (ignitable, corrosive, reactive or flammable);
    - The second is the solid waste may be a listed hazardous waste because the EPA specifically listed that waste as hazardous by the EPA's regulations.

Cradle-to-Grave Regulation

- Congress aimed to address the country's hazardous waste problem through a cradle-to-grave regulatory and tracking program which allows Subtitle C to regulate hazardous waste generators, transporters and treatment, storage, and disposal ("**TSD**") facilities;
    - Hazardous waste generation is the act or process of producing hazardous waste;
    - Generators are required to keep records, properly label, and use appropriate containers, furnish information, file reports, and begin the tracking system for the waste.

- Hazardous waste transporters also must keep records about the waste they transport, refuse to transport improperly labeled hazardous waste, continue the tracking system, and only transport hazardous waste to a permitted TSD facility;
- Hazardous waste treatment is any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste to render it non-hazardous. Treatment facilities must maintain records of all hazardous wastes they treat, comply with reporting and monitoring, generate contingency plans, and follow other stringent regulations to ensure proper handling.

Avoiding TSD Status

Given the numerous and expensive requirements imposed on TSD facilities, facilities that handle solid waste often aim to avoid TSD status.

- Facilities generally argue that it does not handle solid waste and therefore could not handle hazardous waste, or if they handle solid waste – that it is not hazardous waste under RCRA;
- Additionally, facilities can store hazardous waste for up to 90 days without becoming TSD facilities so long as they follow the EPA's storage and labeling requirements, or they could fall into a household waste exclusion;

Permitting TSD Facilities

In addition to proper permitting, potential TSD facilities must consider disparate effects on low-income communities.

RCRA Hazardous Waste "Land Ban"

Congress enacted the "Land Ban" which imposed severe restrictions on the disposal of hazardous wastes into landfills.

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

- In 2008, the Department of Toxic Substance Control ("**DTSC**") was statutorily authorized to: (1) identify and prioritize chemicals of concern, evaluate alternatives as well as specify regulatory responses; and (2) establish an online Toxics Information Clearinghouse to provide public access to information on the toxicity of chemicals. In September 2010, DTSC issued regulations in response to that legislation, but those were subsequently withdrawn. DTSC issued informal draft regulations in October 2011. The Office of Administrative Law

approved the regulations in August 2013, and they became effective on October 1, 2013.

- On April 16, 2015, the DTSC released its Priority Product Work Plan, which classifies seven product categories and identifies specific example products within each category that will be the focus of the DTSC's research through 2017. The categories include Beauty, Personal Care and Hygiene Products;
- Building Products: Painting Products, Adhesives, Sealants, and Flooring; Household, Office Furniture and Furnishings; Cleaning Products; Clothing; Fishing and Angling Equipment; Office Machinery.

For more information see:
https://www.dtsc.ca.gov/SCP/PriorityProductWorkPlan.cfm

B. 2023 Update

1. *In Re: Gold King Mine Release* (D.N.M, Nov. 21, 2022, case no. 1:18-md-02824-WJ) 2022 U.S. Dist. LEXIS 210316, 2022 WL 17093503 — District Court Finds Contractor Not Liable Under CERCLA For 2015 Gold King Mine Spill

A U.S. District Court held that a contractor tasked with overseeing the treatment of toxic mine water was not liable under Section 107 of Comprehensive Environmental Response, Compensation, and Liability Act ("**CERCLA**") stemming from the discharge of more than three million gallons of wastewater and sediment into Colorado's Animas River watershed in 2015. The Gold King Mine spill made national headlines due to the Animas River temporarily turning orange. Section 107 states that owners or operators of a facility, arrangers of waste disposal or treatment, and persons who accept waste for transport to disposal or treatment facilities are liable for four categories of damages. These include costs of removal or remedial action by the U.S. government, states, or Indian tribes, costs incurred by others, damage to natural resources, and costs of health studies. The State of New Mexico and the Navajo Nation ("**Plaintiffs**") sought recovery costs under CERCLA from Weston Solutions, Inc. ("**Weston**"), a technical assistance contractor hired to treat mine water. Weston previously escaped negligence claims related to the disaster. In a decision not reported in the Federal Supplement, the court granted summary judgment in favor of Weston, holding the Plaintiffs failed to raise a genuine issue of material fact regarding whether Weston was a transporter, operator, or arranger.

Transporter

Plaintiffs first sought transporter liability based on the theory that Weston accepted hazardous waste for transport to disposal. Weston argued that the plain meaning of "accept" means "took" or "held," and that, because construction was ongoing, no mechanism was in place to move water from the mine to the treatment system. The court agreed with Weston. Plaintiffs also alleged Weston was liable as a transporter because it selected the disposal location. Plaintiffs' contended Weston was involved in the water management system construction process by providing both "input" and by making certain calculations associated with the efforts. The court held Weston's input and calculations during the construction process did amount to selecting a disposal location.

Operator

Plaintiffs sought CERCLA liability under an operator theory citing Weston's involvement in the planning operations at the mine and Weston's performance of calculations in relation to the water treatment system during construction. Additionally, Plaintiffs attempted to seize on the fact that Weston was tasked with observing excavation operations in which Weston was expected to report any dangerous conditions it observed. In rejecting the operator theory, the court relied on *United States v. Bestfoods* (1998) 524 U.S. 51 in which the U.S. Supreme Court "sharpen[ed]" the definition of operator to require that a liable party "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, at p. 66–67. Here, the court held the record failed to show Weston "managed, directed, or conducted operations" in keeping with the *Bestfoods* standard which requires the "exercise of discretion over the facility's activities."

Arranger

The U.S. Supreme Court defines an "arranger" as an entity that "take intentional steps to dispose of a hazardous substance." *Burlington Northern v. Santa Fe Rey. Co. v. United States* (2009) 556 U.S. 599, 611. The Tenth Circuit Court of Appeals precedent states that arranger liability exists where an accused party owns or possesses a hazardous substance prior to its disposal. *Chevron Mining Inc. v. United States* (10th Cir. 2017) 863 F.3d 1261, 1279. The court in *Chevron Mining Inc.* acknowledged "control" over hazardous substances could establish constructive ownership or possession sufficient to trigger arranger liability but did not opine on whether "control" constituted Tenth Circuit precedent. *Chevron Mining*, at p. 1283. Here, Weston contended the release occurred before the waste entered into the water management system in which Weston had assisted in designing. The court thus held that while Weston may have had control over the water management system, that was insufficient to prove it had control over the water that was released from the Gold River Mine.

2. EPA Publishes Proposed Rule For CERCLA PFAS Hazardous Substance Designation

On September 6, 2022, the Environmental Protection Agency ("**EPA**") published its proposed rule in the Federal Register that aims to regulate Perfluorooctanoic Acid ("**PFOA**") and Perfluorooctanesulfonic Acid ("**PFOS**"). (87 Fed.Reg. 54415–54442.) The proposed rule aims to designate two per- and polyfluoroalkyl substances ("**PFAS**") as Hazardous Substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("**CERCLA**"). The agency has said a final rule is expected in summer 2023. Once finalized, the rule will require facilities to report on PFOA and PFOS releases and allow for cost recovery or contributions for costs incurred related to cleanup of such releases. Currently, no disclosure is required. PFAS, also known as forever chemicals, can linger for decades in the environment and people's bodies. Scientific studies indicate exposure to PFAS causes cancer, reproductive challenges, cardiovascular effects, among other issues. The pervasiveness of PFAS, coupled with their status as a "forever chemical," has worried farmers and other industry entities who fear liability stemming from non-intentional use. These fears are not unique, however. CERCLA is a

strict liability statute that holds Potentially Responsible Parties ("**PRPs**") liable regardless of the culpability of a party's conduct. Through CERCLA, the EPA enjoys a broad Congressional mandate to clean environmental pollutants and contaminants. The public comment period ended on November 7, 2022.

For more information see:
https://www.federalregister.gov/documents/2022/09/06/2022-18657/designation-of-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos-as-cercla-hazardous
https://www.epa.gov/superfund/proposed-designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos#rule-history
https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/18/fact-sheet-biden-harris-administration-launches-plan-to-combat-pfas-pollution/

8. NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA")

A. Regulatory Framework

- The National Environmental Policy Act of 1970 ("**NEPA**") (42 U.S.C. § 4321 *et seq*.) was the first of the modern federal environmental statutes. NEPA is the nation's basic charter for environmental responsibility. Unlike CWA or CAA, NEPA is often referred to as a "procedural statute," establishing a process by which federal agencies must study the environmental effects of their actions. It requires the federal government to prepare and publish information about the environmental effects of and alternatives to actions that the government may take;
- NEPA process is outlined in NEPA's Section 102(2)(C) (42 U.S.C. § 4332(2)(C)) and is fully described in the White House Council on Environmental Quality ("**CEQ**") NEPA implementing regulations (40 C.F.R. Parts 1500-1508). NEPA process includes efforts to inform and seek comments from the public, state and local agencies, Native American tribes, and other federal agencies;
- There are three potential findings that a federal agency can make under NEPA:

  (1) Categorical Exemption/Exclusion – The project falls under those sets of projects that have been pre-determined to not have a significant impact on the environment, known as categorical exemptions or exclusions. (CEQ NEPA Guidance, § 1508.4.)
  (2) Environmental Assessment ("**EA**") – If it is determined that the project may have a significant impact, an EA is completed. If the EA shows that the project will not have a significant impact on the environment, then the agency may issue a finding of no significant impact ("**FONSI**") based on the EA. (CEQ NEPA Guidance, §§ 1508.9, 1508.13.)
  (3) Environmental Impact Statement ("**EIS**") – If it is determined that a project will have a significant impact on the environment, then an EIS is required. (CEQ NEPA Guidance, § 1508.11.)

B. 2023 Update

1. *Environmental Defense Center v. Bureau of Ocean Energy Management* (9th Cir. 2022) 36 F.4th 850 — Ninth Circuit Holds Feds Violated NEPA in Fast-Tracking Fracking Permits

The Ninth Circuit Court of Appeals invalidated dozens of permits authorizing offshore oil drilling off the California coast issued by federal agencies, holding the agencies conducted insufficient environmental review under the National Environmental Policy Act ("**NEPA**"). Environmental groups learned through Freedom of Information Act ("**FOIA**") requests in 2012 that agencies under the Department of Interior had authorized 51 permits for offshore well stimulation treatments, including hydraulic fracturing – or fracking – without first conducting environmental review. Litigation followed, and the federal government soon agreed to study the environmental effects of the well stimulation treatments, which were slated for the Outer Continental Shelf. The agencies subsequently issued a final programmatic Environmental

Assessment ("**final programmatic EA**") in 2016 that found the treatments would not pose a significant environmental impact and issued a Finding of No Significant Impact. The groups concluded the EA was inadequate and sued again, alleging violations of NEPA and the Federal Endangered Species Act ("**ESA**"); the State of California also sued the agencies, alleging violations of NEPA and the Coastal Zone Management Act ("**CZMA**") (together the "**Plaintiffs**"). A U.S. District Court judge granted summary judgement in favor of the federal government on the NEPA claims, and to the Plaintiffs on the ESA and CZMA claims. All parties appealed.

The court reversed the District Court's NEPA decision. First, the court held the agencies violated NEPA by preparing an inadequate final programmatic EA that failed to take the requisite "hard look" of the environmental impacts of well stimulation treatments by relying on incorrect data assumptions, and for failing to consider a reasonable range of alternatives. The court reasoned that the agencies relied on incomplete data that erroneously suggested that well stimulation treatments would be infrequent. The court also took issue with the agencies' conclusions that Clean Water Act permits issued by the EPA for the well stimulation treatments rendered their environmental impacts insignificant. The court reasoned that the permits were issued by a separate federal agency, and they did not specifically address the impacts of the project. Second, the court held that the agencies violated NEPA by failing to prepare an EIS despite the significant data gaps related to risks posed to the environment by well stimulation. The court reasoned that an agency must prepare an EIS "where uncertainty regarding the environmental effects of a proposed action may be resolved through further data collection." The Court of Appeals remanded the NEPA claims back to the District Court with instructions to prohibit the agencies from approving permits for well stimulation treatments unless agencies prepare an EIS and study reasonable alternatives. The court upheld the District Court's grants of summary judgement in favor of Plaintiffs on the ESA and CZMA claims.

2. *350 Montana v. Haaland* (9th Cir. 2022) 29 F.4th 1158 — Ninth Circuit Holds Trump Interior Violated NEPA in Approving Coal Mine Expansion

The Ninth Circuit Court of Appeals held a federal agency violated the National Environmental Policy Act ("**NEPA**") when it rationalized its preparation of a finding of no significant impact ("**FONSI**") for a Montana coal mine expansion by comparing the project's potential environmental impacts to global greenhouse gas emissions ("**GHGs**"). The court reasoned that comparing the mine expansion's potential environmental effects to global GHGs "predestined that the emissions would appear relatively minor." The 2 – 1 majority, however, was not persuaded that the Department of Interior's Office of Surface Mining Reclamation and Enforcement ("**Agency**") must utilize the Social Cost of Carbon ("**SCC**") metric to quantify the environmental harms stemming from the project.

In 2018, the Agency published an Environmental Assessment ("**EA**") that concluded the expansion would not produce significant impacts on the climate or the environment relative to the cumulative statewide, national, and global GHG emissions. The EA stated that the project would amount to 0.44% of the total GHGs emitted globally each year, a figure that included the extracting and transporting of coal, but not combustion-related emissions. Agencies must generally prepare an Environmental Impact Statement ("**EIS**") if a major federal action might

significantly affect the quality of the human environment. In determining whether an effect is "significant" enough to warrant an EIS, an agency analyzes a project's context and intensity. (40 C.F.R. § 1508.27.) Context requires that the "([t]he significance of an action …be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." (40 C.F.R. § 1508.27(1).) Intensity, meanwhile, requires an agency to analyze the severity of a purported impact. (40 C.F.R. § 1508.27(2).)

The court admonished multiple aspects of the Agency's significance analysis. First, the Agency said the project's environmental effects would be insignificant, even the project would collectively "generate more GHG emissions annually than the largest single point source of GHG emissions in the United States." The court reasoned that "virtually every domestic source of GHGs may be deemed to have no significant impact as long as it is measured against total global emissions." Next, the court took issue with the Agency's failure to analyze combustion-related emissions, which the court said should be analyzed "regardless of where the coal is burned." The court stated the project's emissions jumped from 0.4% of U.S.-based annual GHG emissions to approximately 3.33% if combustion-generated emissions were included.

The Plaintiffs also contended the Agency acted arbitrarily and capriciously for failing to use the SCC metric in preparing the project's initial EA. SCC is a method for quantifying the environmental harms by estimating the harm, in dollars, caused by each ton of carbon dioxide emitted into the atmosphere in a given year. In siding with the Agency, the court reasoned that NEPA does not require that courts "resolve disagreements among various scientists as to methodology" (quoting *Friends of Endangered Species, Inc. v. Jantzen* (9th Cir. 1985) 760 F.2d 976, 986.) The court concluded that prescribing specific metrics, such as SCC, falls outside of the court's authority.

3. *Mountain Communities For Fire Safety v. Elliott* (9th Cir. 2022) 25 F.4th 667 — Ninth Circuit Holds USFS Need Not Prepare EA or EIS for Commercial Thinning Project in National Forest

The Ninth Circuit Court of Appeals pondered the legality of a proposed U.S. Forest Service ("**USFS**") project aimed at thinning a forested area in Cuddy Valley in the Los Padres National Forest. Citing overcrowding-related risks related to insects, disease, and wildfire, USFS proposed to thin and prune smaller trees in the area, while cutting commercially viable trees and mechanically harvesting them for sale. Following public comment, USFS sought to proceed with the project. Conservation and community groups ("**Appellants**") sued, alleging violations of the National Environmental Quality Act ("**NEPA**") and National Forest Management Act ("**NFMA**"). The District Court ruled in favor of the USFS, and the Appellants appealed. The Ninth Circuit affirmed. The primary issue before the Ninth Circuit was whether the CE-6 NEPA exemption which USFS relied upon when it proceeded with the project without preparing an Environmental Assessment ("**EA**") or Environmental Impact Statement ("**EIS**") applies to commercial tree thinning.

The CE-6 exemption applies to "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction," including activities such as "[t]hinning or brush control to improve growth or to

reduce fire hazard." (36 C.F.R. § 220.6(e)(6).) Here, USFS contended the project satisfies the CE-6 exemption because thinning is a timber stand improvement activity, meaning the project could proceed without an EA or EIS. Appellants contended the CE-6 exemption did not apply to commercial thinning but only to pre-commercial saplings only, and that an EA or EIS was required prior to engaging in commercial thinning. The Ninth Circuit first reasoned that the plain language of CE-6 does not place limits on tree age or size, but only on "the use of herbicides or do not require more than 1 mile of low standard road construction." (36 C.F.R. § 220.6(e)(6).) Next, the court turned to whether the phrase "timber stand improvement" limits tree age or size, and reasoned that it does not, and that a timber stand improvement includes commercial thinning. The panel then examined the ordinary meaning of the word "thinning," which it found does not include such qualifiers. The court thus held CE-6 unambiguously allows for commercial thinning. Because the proposed commercial thinning operation did not involve "the use of herbicides or do not require more than one mile of low standard road construction," the CE-6 exemption was properly applied. (36 C.F.R. § 220.6(e)(6).)

The panel then concluded that the USFS' decision to invoke the CE-6 for the project was not arbitrary and capricious under the Administrative Procedure Act ("**APA**"). Appellants contended "USFS should have analyzed the project under NEPA's intensity factors" to provide context as to whether the resulting project's environmental impacts would have been significant. In particular, Appellants argued USFS should have analyzed factors related to effects on "public health or safety" and effects that are "highly controversial." (40 C.F.R. § 1508.27.) The Ninth Circuit held USFS was not required to analyze the intensity factors given USFS had essentially already analyzed those same factors, though with different names. Even if a project fits a categorical exclusion, NEPA requires the preparation of an EA or EIS if "extraordinary circumstance[s]" exist. (36 C.F.R. § 220.6(b). According to the Ninth Circuit, the resource conditions within the "extraordinary circumstance[s]" analysis essentially encapsulate the intensity factors Appellants demanded USFS analyze. The Court reasoned that it would be inconsistent with the purpose of the categorical exclusion process — to achieve efficiencies — to require duplicative analysis. Additionally, the court also grappled with whether USFS violated the NFMA, which sets certain aesthetic management standards. Though Appellants argued USFS did not satisfy the requisite aesthetic management standards, the Ninth Circuit disagreed.

4. New NEPA Rule Reverses Narrow Set of Trump-Era Regulatory Changes

On May 20, 2022, a new Council of Environmental Quality ("**CEQ**") rule went into effect targeting a portion of changes made to National Environmental Policy Act ("**NEPA**") implementation completed under the Trump administration. The changes include:

- (1) The elimination of language added by the 2020 rule requiring agencies to base the "purpose and need" of a proposed action on the goals of the applicant and the agency's authority (40 CFR 1502.13) and make a conforming edit to the definition of "reasonable alternatives" (40 CFR 1508.1(z));
- (2) The removal of limitations on agency NEPA procedures for implementing CEQ's NEPA Regulations (40 CFR 1507.3); and

- (3) A return to the definition of "effects" to include direct, indirect, and cumulative effects, which had existed since the 1978 NEPA Regulations (40 CFR 1508.1(g)).

The rule constitutes "Phase 1" of a two-part strategy aimed at reversing an unspecified quantity of Trump-era changes to longstanding NEPA regulations. CEQ described the latest rule as comprising a "narrow set of changes to the 2020 NEPA regulations" aimed at achieving "environmental, climate change, and environmental justice objectives." A future "Phase 2" rule is slated to include "broader changes" to the 2020 rules, according to the Biden administration. In practice, the effects of the most recent rule will probably be limited due to the short-time period between the 2020 and 2022 rules, meaning few NEPA analyses were realistically conducted during that time. The prior rule, the first major NEPA regulatory overhaul since 1978, went into effect on September 14, 2020. The rule followed Executive Order 13807, issued by then-President Trump, which directed CEQ to use its authority "to interpret NEPA to simplify and accelerate the NEPA review process." Phase 2 will include a more comprehensive look at the 2020 rule and may reverse other changes made by the 2020 rule or propose other revisions to the regulations. It is unclear how far the Biden administration will opt to go in reversing the current NEPA regulations on the books. Biden has publicized his goal of building more renewable energy infrastructure in order to transition the nation away from fossil fuels. That construction effort will certainly be aided by the current NEPA regulations and stifled by reinstating certain pre-2020 regulations.

For more information see:
https://www.whitehouse.gov/ceq/news-updates/2022/04/19/ceq-restores-three-key-community-safeguards-during-federal-environmental-reviews/
https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0331-AA07

5. CEQ Releases Proposed NEPA Climate Change Guidance

On January 9, 2023, the Council of Environmental Quality ("**CEQ**") published new guidance tasking federal agencies with considering the effects of Greenhouse Gas Emissions ("**GHGs**") and climate change when evaluating proposed projects pursuant to the National Environmental Quality Act ("**NEPA**"). The new guidance restores and builds on similar guidance issued under the Obama administration, which was later rescinded under the Trump administration. The latest guidance directs federal agencies in their NEPA reviews to "quantify proposed actions' GHG emissions, place GHG emissions in appropriate context and disclose relevant GHG emissions and relevant climate impacts and identify alternatives and mitigation measures to avoid or reduce GHG emissions."

In sum, the guidance recommends agencies:

- Use projected GHG emissions associated with proposed actions and their reasonable alternatives to help assess potential climate change effects;
- Provide additional context for GHG emissions, including through the use of the best available social cost of GHG ("**SC-GHG**") estimates, to translate climate impacts into the more accessible metric of dollars, allow decision makers and the

public to make comparisons, help evaluate the significance of an action's climate change effects, and better understand the tradeoffs associated with an action and its alternatives;

- Discuss methods to appropriately analyze reasonably foreseeable direct, indirect, and cumulative GHG emissions;
- Consider reasonable alternatives and mitigation measures, as well as addressing short- and long-term climate change effects;
- Use the best available information and science when assessing the potential future state of the affected environment in NEPA analyses and providing up to date examples of existing sources of scientific information;
- Use the information developed during the NEPA review to consider reasonable alternatives that would make the actions and affected communities more resilient to the effects of a changing climate;
- Analyze biogenic carbon dioxide sources and carbon stocks associated with land and resource management actions under NEPA;
- Use a "rule of reason" that the depth of analysis should be proportional to a project's impacts and clarifies that projects that will reduce GHG emissions, such as certain renewable and low GHG projects, can have less detailed GHG emissions analysis;
- Incorporate environmental justice considerations into their analyses of climate-related effects.

For more information see:
https://www.federalregister.gov/public-inspection/2023-00158/guidance-national-environmental-policy-act-guidance-on-consideration-of-greenhouse-gas-emissions-and
https://www.whitehouse.gov/ceq/news-updates/2023/01/06/biden-harris-administration-releases-new-guidance-to-disclose-climate-impacts-in-environmental-reviews/

9. MINING, OIL AND GAS

A. Regulatory Framework

Surface Mining and Reclamation Act ("**SMARA**")

- SMARA (Pub. Res. Code, § 2710 *et seq*.) was enacted by the California Legislature in 1975 to address the need for a continuing supply of mineral resources, and to prevent or minimize the negative impacts of surface mining to public health, property, and the environment;
- The California Department of Conservation oversees SMARA at the state level. Within the California Department of Conservation are three offices, each with a different responsibility. They are the Office of Mine Reclamation, the State Mining and Geology Board ("**SMGB**"), and the Division of Mines and Geology;
- The Office of Mine Reclamation renders technical assistance, maintains a database of all mines in California, and regulates compliance statewide;
- The SMGB promulgates regulations, sets California policy regarding mining issues, and conducts the Appeals Board in disputed issues;
- The Division of Mines and Geology is an information resource. They maintain the Mineral Resource Library, publish the California Geology magazine, and classify all identified mineral resource land in California;
- SMARA applies to anyone, including government agencies, engaged in surface mining operations within the state which disturb more than one acre or remove more than 1,000 cubic yards of material;
- The local city or county's "lead agency" adopts ordinances for land use permitting and reclamation procedures which provide the regulatory framework under which local mining and reclamation activities are conducted;
- The SMGB reviews these lead agency ordinances to determine whether they meet or exceed SMARA requirements. If the SMGB determines that the lead agency is not in compliance with SMARA, the SMGB has the authority to step in and exercise the powers of the lead agency, except for permitting authority.

SB 4 Oil and Gas – Well Stimulation (Pavley, 2014)

- SB 4 was implemented under the Final Permanent Well Stimulation Treatment Regulations, creating a comprehensive regulatory scheme for well stimulation treatments within the state;
- SB 4 requires the Division of Oil, Gas, and Geothermal Resources to ensure that well stimulation is conducted safely through a permitting scheme, and mandates operators to comply with public disclosure requirements and neighbor notification;
- The Division also created a website to facilitate public disclosure of well stimulation information, prepare an Environmental Impact Report ("**EIR**"), and oversee an independent scientific study of the impacts of fracking;
- SWRCB must approve operators' groundwater monitoring plans, develop model groundwater monitoring criteria, and implement a regional groundwater monitoring plan.

B. 2023 Update

1. *Louisiana v. Biden* (W.D. La., Aug. 18, 2022, case no. 2:21-CV-0078) 2022 U.S. Dist. LEXIS 148570, 2022 WL 3570933 — District Court Permanently Blocks Biden Administration Pause on New Oil and Gas Leasing

A federal judge issued a permanent injunction stopping the Biden administration's pause on new oil and gas leasing on federal lands and waters. In *Louisiana v. Biden*, the U.S. District Court in the Western District of Louisiana held various executive branch agencies violated the Administrative Procedure Act ("**APA**") when they stopped new lease sales for oil and gas drilling. President Biden ordered the temporary stoppage shortly after taking office in January 2021 with the signing of Executive Order 14008: Tackling the Climate Crisis at Home and Abroad. The order directed that the Secretary of the Interior "pause new oil and natural gas leases on public lands or in offshore waters," pending the completion of a review of the federal government's oil and gas leasing policies. The State of Louisiana and twelve other states ("**Plaintiffs**") subsequently sued in federal court seeking to enjoin the pause.

Eight of the Plaintiffs' ten causes of action arose under the APA. The Government Defendants argued they had discretion to stop new oil and gas leases under the Mineral Leasing Act ("**MLA**"), which governs onshore oil and gas leasing, and the Outer Continental Shelf Lands Act ("**OCSLA**"), which governs offshore oil and gas leasing. U.S. District Court Judge Terry A. Doughty disagreed, concluding the Government Defendants violated the APA by engaging in actions that were contrary to law, arbitrary and capricious, and by failing to provide notice and comment. Of particular interest, Judge Doughty held the pause was in violation of both the OCSLA and the MLA, which both, per Judge Doughty, require the Government sell oil and gas leases. "By stopping the process, the agencies are in effect amending two Congressional statutes. Neither the OCSLA nor the MLA gives the Government Defendants' agencies the authority" to pause lease sales, Judge Doughty wrote. The Western District's opinion offers lasting implications regarding the extent, if any, the Executive Branch can unilaterally curtail oil and gas drilling on federal lands and waters absent explicit Congressional authorization.

The case includes a notable procedural history. Judge Doughty, in an opinion published in the Federal Supplement, issued a preliminary injunction against the "pause" on June 15, 2021. (*Louisiana v. Biden* (W.D. La 2021) 543 F.Supp.3d 388.) The Fifth Circuit on August 17, 2022, vacated and remanded the decision, contending the word "pause" was ambiguous and that the order needed to be clarified. Judge Doughty On August 18, 2022, subsequently issued essentially the same order as the June 15, 2021, albeit with a clarified discussion related to what "pause" entails and issuing a permanent injunction instead of a preliminary injunction. Judge Doughty's latest decision was not reported in the Federal Supplement.

2. *Oakland v. Chevron* (N.D. Cal., Oct. 24, 2022, case no. No. C 17-06011 WHA) 2022 U.S. Dist. LEXIS 193512, 2022 WL 14151421 — Federal Judge Rules Bay Area Cities Can Sue Oil Companies Over Climate Change in State Court

U.S. District Judge William Alsup held lawsuits filed by San Francisco and Oakland against five oil companies alleging public nuisance due to the companies' marketing and extraction of fossil fuels must be litigated in state court. The cities contend companies including Chevron, ConocoPhillips and Exxon Mobil marketed their products as environmentally safe while concealing the products' contribution to global climate change. The plaintiffs first filed their suits in state court in 2017. The defendants subsequently removed them to federal court, where Alsup dismissed the claim pursuant to a Rule 12(b)(6) motion for failure to state claim on which relief can be granted. The defendants preferred the claims to be litigated in federal court, where judges are generally less receptive to state laws compared to state courts, and thus, more likely to dismiss such lawsuits. The Ninth Circuit Court of Appeals reinstated the lawsuit in 2020, holding the state public nuisance claims do not arise under federal law. (*City of Oakland v. BP PLC et al.* (2020) 969 F.3d 895.) The court remanded the case back to the district court to determine whether an alternative basis for subject-matter jurisdiction exists. On remand, Alsup appeared receptive to multiple theories for removal put forth by defendants, but instead ruled against removal jurisdiction due to recent precedent.

The Ninth Circuit in April held public nuisance claims filed by San Mateo, Marin, and Santa Cruz counties, along with the cities of Richmond, Santa Cruz, and Imperial Beach, against thirty fossil fuel-related companies on theories similar to that put forth by Oakland and San Francisco could proceed in state court. (*Cnty of San Mateo v. Chevron Corp.* (9th Cir. 2022) 32 F.4th 733.)

In the present suit, defendants first sought removal jurisdiction based on the Outer Continental Shelf Lands Act ("**OCSLA**"), which governs the extraction of natural resources from submerged lands in federal waters. OCSLA vests federal courts with jurisdiction over actions "arising out of, or in connection with" operations on the Outer Continental Shelf "involve[ing] exploration, development, or production." The cities' complaints emphasize "production" of fossil fuels as a basis for the theory of liability. Alsup conceded that had he been "writing on a clean slate," the cities' allegations could have justified removal jurisdiction under OCSLA. However, Alsup, citing San Mateo, rejected removal based on OCSLA. The *San Mateo* court, in rejecting the OCSLA theory, held the plaintiffs alleged climate change-related injuries occurring exclusively in their local jurisdictions. Additionally, the court reasoned that the defendants' alleged marketing practices additionally did not occur on the Outer Continental Shelf. Next, the defendants contended that a portion of their production and sale of oil and gas occurred on federal enclaves. Alsup once again cited *San Mateo* in ruling against removal jurisdiction on the federal enclave theory. In *San Mateo*, the court held any connection between the federal enclaves and alleged injuries was too attenuated due to the alleged tortious conduct involving damage to real property and infrastructure in the cities' and counties' local jurisdictions. It is unclear to what extent the plaintiffs' claims will proceed in state court; however, San Mateo and Oakland are sure to pave the way for additional climate change-related litigation by local municipalities. Jurisdictions in California have already approved seawall construction projects in

an effort to combat sea level rise, paving the way for additional litigation to recoup the costs of those projects.

10. STREAMBED ALTERATION AGREEMENTS

A. Regulatory Framework

Streambed Alteration Agreements or Permits

- California Fish and Game Code sections 1600-1616 authorize DFW to enter into agreements for activities that will divert, obstruct, or change the natural flow of, or substantially change or use any material from the bed, channel, or bank of any river, stream, or lake or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any such body of water;
- There is no longer a distinction between agreements with public entities (formerly section 1601) and private entities (formerly section 1603). All agreements are now issued under section 1602;
- Fish and Game Code section 1602 requires any person, state or local governmental agency, or public utility to notify DFW before beginning any activity that will substantially modify the bed, bank or channel of a river, stream, or lake.

B. 2023 Update

NO UPDATES TO DATE.

11. FOREST RESOURCES/ WILDFIRE PROTECTION

A. Regulatory Framework

1. Federal Statutes

National Forest Management Act 76 CIS PL 94588, 94 CIS Legis. Hist. P.L. 588

- NFMA provides policy guidelines and requires development of new procedures for Forest Service multiple-use planning and sustained-yield timber management in national forest system, affecting planning and research, reforestation, timber production and sales, and land acquisition. Authorizes appropriations beginning with FY78 for reforestation.
- It also requires rulemaking proceedings on land management to include public participation; annual reports on wood utilization, wastes, recycling, forest system fiber potential, reforestation needs, and herbicide-pesticide use; and study of Dutch elm disease control. Repeals clearcutting prohibition on national forest lands under National Forest Organic Act of 1897 and terminates National Forest Reservation Commission.

2. State Statutes

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

- Section 21083.4 requires a county to determine if a project will result in a conversion of oak woodlands that will have a significant effect on the environment. (Pub. Res. Code, § 21083.4(b).)
- The statute defines oak as: (1) a native tree species in the genus Quercus; (2) not designated as Group A or Group B commercial species pursuant to the regulations of the State Board of Forestry & Fire Protection section 4526; and (3) five inches or more in diameter at breast height. (Pub. Res. Code, § 21083.4(a).) However, "oak woodlands" is not defined in the statute or in any regulations. The Department of Forestry & Fire Protection appears to use the definition provided in the Oak Woodlands Conservation Act (Fish & G. Code, § 1363(a)), but this is subject to change.
- If the project will have a significant impact on the environment through the conversion of oak woodlands, the impact must be mitigated in one or more of the following ways (Pub. Res. Code, §§ 21083.4(b)(1)-(4)):

  (1) Conserve oak woodlands through conservation easements;
  (2) Plant appropriate number of trees, but this can only account for up to half of the mitigation requirements;
  (3) Contribute funds to the Oak Woodlands Conservation Fund; and
  (4) Other mitigation measures developed by the county.

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

- Developers must also be wary of the Professional Foresters Law requiring that only Registered Professional Foresters engage in the practice of forestry defined as the practice of managing forested landscapes and the treatment of the forest cover in general. Exceptions to this requirement include certain professions that have expertise in the area such as geologists. Although it is not explicitly stated in the Oak Woodlands mitigation statute (Pub. Resources Code, § 21083.4), the Professional Foresters Law might apply to the project, requiring a Registered Professional Forester to be involved in the mitigation process. (Pub. Resources Code, § 750 *et seq*.)

Oak Woodlands Conservation Act (Fish & G. Code, § 1360 *et seq*.)

- The Oak Woodlands Conservation Act established the Oak Woodlands Conservation Fund in order to promote the conservation of oak trees and the habitat they sustain. (Fish & G. Code, § 1363(a).)
- The Oak Woodlands are defined as an oak stand with a greater than ten percent canopy cover or that may have historically supported greater than ten percent canopy cover. (Fish & G. Code, § 1361(h).)
- The funds may be used as grants for the purchase of oak woodlands conservation easements, grants for land improvement, cost-sharing incentive payments to private landowners who enter into long-term conservation agreements, public education, and outreach on the subject of oak woodlands, and technical assistance consistent with the purpose of preserving oak woodlands. (Fish & G. Code, § 1363(d)(1)-(6).)
- The funds may be granted to local government entities, park and open-space districts, resource conservation districts, private landowners, and nonprofit organizations. (Fish & G. Code, § 1364.) In order to qualify and receive the funds, the county or city in which the money would be spent must prepare an oak woodlands management plan that includes a description of all the oak species within the cities' or counties' jurisdiction. (Fish & G. Code, § 1366(a).) The plan must protect and restore oak woodlands above and beyond what the law in the jurisdiction already requires.

Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Res. Code, § 4511 *et seq*.)

- In order to harvest timber, the owner or lessee of the property must submit a timber harvest plan ("**THP**") prepared by a Registered Professional Forester. The THP should include a description of the land and the means by which the timber will be harvested, along with other detailed requirements. (Pub. Res. Code, §§ 4581, 4582.)
- Many subdivision developments are not required to submit a THP, because they are exempt under Public Resources Code section 4628. This section exempts all subdivision projects where the city or county has approved a tentative subdivision

map and granted a subdivision use permit, as long as the site is not within a timberland production zone.

3. Local Ordinances

- Many of the regulations concerning the conservation of oak woodlands will be found at the local level, instead of the state level. Both cities and counties may have more or less stringent requirements than the state. (See https://oaks.cnr.berkeley.edu/description-of-county-oak-conservation-policies/.)

4. State Policy

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

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

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

5. Private Conservation Groups

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

  (1) California Oak Foundation ("**COF**") (www.californiaoaks.org)
  (2) Sierra Club (www.sierraclub.org)
  (3) International Oak Society (www.saintmarys.edu/~rjensen/ios.html)

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

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

  (1) Protecting and extending the diversity of oak woodlands and associate habitats through site design and land use regulations;
  (2) Reducing in scale, redesigning, or modifying any project which cannot sufficiently mitigate significant adverse impacts on oak woodlands;
  (3) Encouraging property owners to establish Open Space Easements or deed restrictions;
  (4) Encouraging concentration of development on minimum number of acres (density exemptions) in exchange for maximizing long term open space; and
  (5) As a mitigation option, allowing restoration of any area of oak woodland which is in a degraded condition.

6. Other Sources

Integrated Hardwood Range Management Program ("**IHRMP**"), UC Division of Agriculture and Natural Resources (2005)

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

  For interactive list of 41 counties' oak mitigation policies, visit https://oaks.cnr.berkeley.edu/description-of-county-oak-conservation-policies/

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

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

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

- The authors of this book intended it to be used as a guide for professional planners, consultants, and landscape artists when confronted with Oak Woodlands during their projects. The book provides a science-based approach to the preservation of oak woodlands and was the first book of its kind back in 1992. IHRMP recommends its use during the planning process.

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

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

For more information see:
https://ucanr.edu/sites/oakplanner/files/71734.pdf

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

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

For more information see:
https://californiaoaks.org/

B. 2023 Update

1. President Biden Signs Legislation to Improve Federal Emergency Response For Wildfires

On December 20, 2022, President Biden signed the Federal Emergency Management Agency ("**FEMA**") Improvement, Reform, and Efficiency Act. (Pub. L. No. 117-251, 136 Stat. 2354 (2022).) The new law (the "**FIRE Act**") updates the Stafford Act governing FEMA, which was written when the agency focused primarily on hurricanes, tornadoes, and floods. The FIRE Act aims to improve FEMA's wildfire response to ensure wildfire-fighting assets are pre-deployed to

wildfire-prone areas at time of highest wildfire risk. The legislation also seeks to reorganize how FEMA does counseling and case management services in wildfire-struck areas, especially in disadvantaged areas, along with shoring up other gaps in FEMA's existing wildfire-related response efforts.

For more information see:
https://www.congress.gov/bill/117th-congress/senate-bill/3092/actions
https://www.padilla.senate.gov/newsroom/press-releases/padilla-wildfire-response-and-preparedness-improvement-bill-heads-to-presidents-desk%EF%BF%BC/

2. Senators Introduce Federal "Community Wildfire Protection Act"

On September 13, 2022, Democratic Sen. Dianne Feinstein and Republican Sen. Steve Daines introduced the Community Wildfire Protection Act in the U.S. Senate. (S. 4826.) The legislation seeks to expand access to federal grants for wildfire risk reduction. Current law limits federal grant eligibility to communities that exist either adjacent to federal lands or are listed in a report issued by the Secretary of Agriculture and Secretary of the Interior in 2001, which the bill authors call "outdated." The bill amends the Healthy Forests Restoration Act [Pub. L. No. 108-148, 117 Stat. 1887 (2003)] to refine what constitutes an "at-risk community," and, in doing so, expands the pool of eligible grant recipients. The new definition would encompass any community at high risk for wildfire that would significantly threaten human life and property. The legislation aims to expand access to federal wildfire mitigation grants, including the development of Community Protection Plans, which involve federal and local stakeholders in a collective effort to reduce hazardous fuels in forests.

For more information see:
https://www.congress.gov/bill/117th-congress/senate-bill/4826?s=1&r=21
https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=D829FE8C-9618-4BF3-82E1-FE4D87CC8B1A

3. 2022–23 California State Budget Includes New Wildfire Funding

Governor Newsom signed the $308 billion 2022–23 California State Budget on June 30, 2022. The budget included $670 million in new wildfire funding. In 2021, the state approved a $1.5 billion investment in what it deemed a comprehensive wildfire and forest resilience strategy, combining for a total of $2.7 billion in recent funding aimed at reducing wildfire risk and bolstering forest health. The new funding includes:

- $400 million to enhance wildfire resilience across California's diverse landscapes by thinning forests, replanting trees, expanding grazing, utilizing prescribed fire, and supporting reforestation, which will also improve biodiversity, watershed health, carbon sequestration, air quality, and recreation.
- $265 million to support strategic fuel breaks projects that will enable local communities to develop their own fire safety projects.
- $5 million to expand defensible space inspections.

- The Budget also sets aside an additional $530 million over two years that will be allocated in the summer pending additional discussions with the Legislature to support additional wildfire and forest resilience actions.

For more information see:
https://www.gov.ca.gov/2022/06/30/governor-newsom-signs-budget-putting-money-back-in-californians-pockets-and-investing-in-states-future/
https://ebudget.ca.gov/2022-23/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf
https://lao.ca.gov/reports/2022/4495/wildfire-forest-resilience-012622.pdf

4. Cal Fire Releases Proposed Update to Fire Hazard Severity Map

For the first time, more than half of California's rural and unincorporated communities could soon be classified as "very high" Fire Hazard Severity Zones. Cal Fire released a proposed map in December 2022 that captures the likelihood that various rural, unincorporated areas included in California's State Responsibility Area ("**SRA**") will experience wildfire. If the proposed map is approved, nearly 55 percent of SRA acreage will be categorized as "very high" fire hazard severity zones, a 14.6 percent increase since the map was last updated in 2007. A Fire Hazard Severity Zone is a designated zone that considers wildfire hazards, such as fire history, topography, vegetation, blowing embers, and weather. Areas labeled among the three types of hazard zones are: moderate, high, or very high. Fire Hazard Severity Zone designations influence future construction zones and construction standards and can impact insurance availability and disclosure requirements. The Office of the State Fire Marshal will be conducting public hearings throughout the state and accepting public comment on the new map through February 2023.

For more information see:
https://www.fire.ca.gov/media/ra5mr04g/fhsz-news-release_2022-121422final3.pdf
https://www.latimes.com/environment/story/2022-12-27/more-than-half-of-rural-california-in-very-high-fire-zone

5. Governor's Task Force Recommends Utilizing More 'Beneficial Fire' to Reduce the Threat of Wildfire

In March 2022, the California Wildfire & Forest Resilience Task Force, a task force of fire experts created by Governor Newsom, released its Strategic Plan For Expanding the Use of Beneficial Fire ("**Plan**"). California experienced five of its six largest wildfires to date in 2020 alone. The 2020 fires charred more than four million acres, doubling the state annual record of burned acreage. Experts blame the increasing intensity of California's wildfire season on a combination of effects from climate change and inadequate forest management practices, including lackluster usage of beneficial fire. In an attempt to reverse the tide, the Plan sets the goal of expanding the use of beneficial fire to 400,000 acres each year by 2025. The plan uses beneficial fire as a collective term to refer to prescribed fire, cultural burning, and fire managed for resource benefit. Cultural burning encapsulates many of the goals of prescribed burning — reducing risk of wildfire, improving the health of forests, and improving wildlife habitat — except cultural burning seeks to achieve other cultural goals, including subsistence and

ceremonial objectives. In sum, the Governor's task force recommended various measures to increase usage of beneficial fire in California. These include:

- launching an online prescribed fire permitting system to streamline the review and approval of prescribed fire projects;
- establishing the state's new Prescribed Fire Claims Fund to reduce liability for private burners;
- beginning a statewide program to enable tribes and cultural fire practitioners to revitalize cultural burning practices;
- a prescribed fire training center to grow, train, and diversify the state's prescribed fire workforce;
- an interagency beneficial fire tracking system;
- pilot projects to undertake larger landscape-scale burns; and
- a comprehensive review of the state's smoke management programs to facilitate prescribed fire while protecting public health.

For more information see:
https://www.fire.ca.gov/media/xcqjpjmc/californias-strategic-plan-for-expanding-the-use-of-beneficial-fire-march-16_2022.pdf

12. CULTURAL RESOURCES PROTECTION

A. Regulatory Framework

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

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

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

- The California Register includes resources listed in, or formally determined eligible for listing on, the National Register of Historic Places, and/or California State Landmarks and Points of Historical Interest;
- Properties of local significance that have been designated under a local preservation ordinance (local landmarks or landmark districts) or that have been identified in a local historical resources inventory may be eligible for listing in the California Register and are presumed to be significant resources for purposes of CEQA unless a preponderance of evidence indicates otherwise (Pub. Res. Code, § 5024.1; 14 C.C.R. § 4850);
- A resource does not need to have been identified previously either through listing or survey to be considered significant under CEQA. Lead agencies have a responsibility to evaluate them against the California Register criteria prior to making a finding as to a proposed project's impacts to historical resources (Pub. Res. Code, § 21084.1; 14 C.C.R. § 15064.5(3));
- An archaeological site may be considered a historical resource if it is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California (Pub. Res. Code, § 5020.1(j)) or if it meets the criteria for listing on the California Register. (14 C.C.R., § 4850.)

Archaeological Sites and CEQA

- CEQA provides conflicting directions regarding the evaluation and treatment of archaeological sites. Amendments to CEQA Guidelines try to resolve this

ambiguity by directing the lead agencies to first evaluate an archaeological site as a historical resource (i.e., listed, or eligible for listing in the California Register); potential adverse impacts to it must be considered, just as for any other historical resource. (Pub. Res. Code, §§ 21084.1, 21083.2(l).)

- If an archaeological site is not a historical resource but meets the definition of a "unique archaeological resource" as defined in Public Resources Code section 21083.2, then it should be treated in accordance with the provisions of that section;
- "Substantial Adverse Change" includes demolition, destruction, relocation, or alteration such that the significance of a historical resource would be impaired. (Pub. Res. Code, § 5020.1(q).)
- CEQA Guidelines provide that a project that demolishes or alters those physical characteristics of a historical resource that convey its historical significance (i.e., its character-defined features) can be considered to materially impair the resource's significance;
- "Substantial Adverse Change" can be avoided or mitigated by mitigation of significant impacts and must lessen or eliminate the physical impact that the project will have on the historical resource;
- Relocation of a historical resource may constitute an adverse impact to the resource;
- In most cases, the use of drawings, photographs, and/or displays does not mitigate the physical impact on the environment caused by demolition or destruction of a historical resource. (14 C.C.R. § 15126.4(b).) However, CEQA requires that all feasible mitigation be undertaken even if it does not mitigate below a level of significance. In this context, recordation serves a legitimate archival purpose;
- Avoidance and preservation in place are the preferable forms of mitigation for archaeological sites;
- When avoidance is infeasible, a data recovery plan should be prepared which adequately provides for recovering scientifically consequential information from the site;
- Merely recovering artifacts and storing them does not mitigate impacts below a level of significance;

<u>AB 52 – Cultural Resources (Gatto, 2014)</u>

- By adding new requirements regarding tribal cultural resources early in the CEQA process, the Legislature intended to ensure that local and tribal governments, and project proponents would have information available to identify and address potential adverse impacts to tribal cultural resources;
- The Public Resources Code now establishes that "a project with an effect which may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment." (Pub. Res. Code, § 21084.2.)
- To help determine whether a project may have such an effect, the Public Resources Code requires a lead agency to consult with any California Native

American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project;

- That consultation must take place prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. (Pub. Res. Code. § 21080.3.l.)
- If a lead agency determines that a project may cause a substantial adverse change to tribal cultural resources, the lead agency must consider measures to mitigate that impact;
- The new provisions in the Public Resources Code proscribe specific steps and timelines governing the notice and consultation process.

B. 2023 Update

1. *Kammeyer v. U.S. Army Corps of Engineers* (C.D. Cal., April 22, 2022, case No. EDCV 15-00869 JGB) 2022 U.S. Dist. LEXIS, 2022 WL 1782558

A federal judge held the U.S. Army Corps of Engineers ("**Corps**") complied with Section 106 of the National Historic Preservation Act ("**NHPA**") in determining a patriotic mural painted on a Southern California dam spillway crest was not a historic property eligible for listing on the National Register of Historic Places. The decision by U.S. District Judge Jesus Bernal of the Central District, which was not reported in the Federal Supplement, paved the way for the removal of the mural, which is painted with lead-based paint. The mural will be replaced with a new display reminiscent of the original. Students at Corona High School in Riverside County painted the mural at the Prado Dam in 1976 to celebrate the bicentennial of the nation's founding. Section 106 of the NHPA requires that federal agencies consider the effects of their projects on historic properties of projects. A "historic property" is defined as any "prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register of Historic Places, including artifacts, records, and material remains relating to the district, site, building, structure, or object." (54 U.S.C. § 300308.) During the Section 106 consultation process, the Corps determined the mural was not eligible for protection under NHPA for several reasons. First, the Corps found the mural lacked exceptional significance under the National Register's fifty-year age guideline. Second, it determined that, beyond its commemoration of an event, the mural lacked significant historical associations. In addition, the Corps concluded that the mural did not qualify on exceptional grounds as an art piece or as the work of a significant artist, and that the property did not have the potential to yield information important to understanding the bicentennial era's history, America's founding, or mural design. The court, in granting a motion for summary judgment filed by the federal government, determined that the Corps made a reasonable and good faith effort in fulfilling its obligations under Section 106 of the NPHA.

2. California Wildfire & Forest Resilience Task Force Adopts "Strategic Plan For Expanding the Use of Beneficial Fire" (March 2022), While Tribes Look to Expand Cultural Burning to Restore Traditional Practices and Address Catastrophic Wildfire Threats

Indigenous Californians have proactively ignited the landscape to manage plants and wildlife, provide community protection, control insects and disease, and engage in cultural and religious practices since time immemorial. Experts estimate that before 1800, between 4.5 million and 12 million acres of the state burned annually, through some combination of lightning and cultural burning. For perspective, the "unprecedented" 2020 wildfire season burned just over 4 million acres.

In March 2022, the California Wildfire & Forest Resilience Task Force, a task force of fire experts created by Governor Newsom, released its Strategic Plan For Expanding the Use of Beneficial Fire ("**Plan**"). California experienced five of its six largest wildfires to date in 2020 alone. The 2020 fires charred more than four million acres, doubling the state annual record of burned acreage. Experts blame the increasing intensity of California's wildfire season on a combination of effects from climate change and inadequate forest management practices, including lackluster usage of beneficial fire. In an attempt to reverse the tide, the Plan sets the goal of expanding the use of beneficial fire to 400,000 acres each year by 2025. The Plan uses beneficial fire as a collective term to refer to prescribed fire, cultural burning, and fire managed for resource benefit. Cultural burning encapsulates many of the goals of prescribed burning — reducing risk of wildfire, improving the health of forests, and improving wildlife habitat — except cultural burning seeks to achieve other cultural goals, including subsistence and ceremonial objectives. In sum, the Governor's task force recommended various measures to increase usage of beneficial fire in California. These include:

- launching an online prescribed fire permitting system to streamline the review and approval of prescribed fire projects;
- establishing the state's new Prescribed Fire Claims Fund to reduce liability for private burners;
- beginning a statewide program to enable tribes and cultural fire practitioners to revitalize cultural burning practices;
- a prescribed fire training center to grow, train, and diversify the state's prescribed fire workforce;
- an interagency beneficial fire tracking system;
- pilot projects to undertake larger landscape-scale burns; and
- a comprehensive review of the state's smoke management programs to facilitate prescribed fire while protecting public health.

For more information see:
https://www.fire.ca.gov/media/xcqjpjmc/californias-strategic-plan-for-expanding-the-use-of-beneficial-fire-march-16_2022.pdf

13. ENVIRONMENTAL ENFORCEMENT

A. Regulatory Framework

- Federal, state, and local environmental laws provide enforcement mechanisms for ensuring compliance with the various statutory schemes that protect the environment. The various agencies work together to ensure compliance and pursue enforcement;
- Violations of state and local laws can also be referred to the Attorney General or local district attorney for civil penalties or criminal charges. (See Wat. Code, § 1052; Fish & G. Code, § 5650.)
- Citizen Enforcement Actions under section 505 of CWA are increasingly popular for discharges to waters of the United States. (33 U.S.C. §1365.) While some claims proceed to trial, many businesses end up settling frivolous suits to avoid the expense of litigation;
- Code of Civil Procedure section 1021.5 codifies the private attorney general fee doctrine. The purpose of the doctrine is to encourage suits effectuating a strong public policy by awarding substantial attorneys' fees to those who successfully bring such suits to benefit a broad class of citizens. To recover such fees, a plaintiff must establish: (1) the action has resulted in the enforcement of an important right affecting the public interest; (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate.

B. 2023 Update

1. Almond Orchard Owner Fined $212,000, Ordered to Restore Wetlands in San Joaquin Valley

Federal officials reached an agreement with the owner of an almond orchard near Merced, California, in the San Joaquin Valley, whose earth-moving activities violated the Federal Clean Water Act ("**CWA**"). The settlement required the man to pay $212,000 in civil penalties and restore and preserve fifteen acres of wetland habitat, according to the Environmental Protection Agency ("**EPA**"). The EPA said the man violated a prior 2014 EPA order when he built a retention basin, new access roads and planted a new almond orchard. He failed to inform the U.S. Army Corps of Engineers prior to beginning the work, as the EPA ordered him to do under the 2014 agreement, which required him to alert federal officials prior to engaging in any work that could impact local water systems. The earth-moving work caused fill materials to discharge into waters that flow into the San Joaquin River. He failed to secure a CWA Section 404 permit. The work caused the degradation of more than two acres of vernal pool wetlands. The EPA ordered the man to remove 1.9 acres of fill material, restore 2.44 acres of wetland habitat, and preserve 12.66 acres of wetland habitat.

For more information see:
https://www.epa.gov/newsreleases/epa-fines-owner-san-joaquin-valley-almond-orchard-clean-water-act-violations-orders

2. Southern California Oil Refinery Operator Fined $112,673 for Clean Water Act Violations

A Southern California oil refinery operator must pay $112,673 in civil penalties for violating the Federal Clean Water Act ("**CWA**") oil spill prevention requirements. Lunday-Thagard Company (dba World Oil Refining) owns a refinery in South Gate, California, near waterways that flow through the Long Beach Harbor and into the Pacific Ocean. U.S. Environmental Protection Agency ("**EPA**") staff conducted two inspections of the refinery in March and April of last year. Staff contend the refinery operator failed to conduct integrity tests, failed to correct visible discharges which result in a loss of oil from containers, failed to develop an adequate response plan to respond to oil spills, and failed to implement tank and faculty inspections, all violations of the CWA and its implementing regulations. As part of the settlement with the EPA, the refiner operator agreed to update its response plan to oil spills, develop and implement a tank and inspection schedule, and implement a revised oil spill prevention training program.

For more information see:
https://www.epa.gov/newsreleases/us-epa-penalizes-southern-california-refinery-violating-oil-spill-prevention-0

3. AT&T Must Pay $5.9 Million For Failing to Report Battery Storage to California Regulators.

On November 8, 2022, a California superior court judge signed off on a settlement that included a stipulated $5.9 million penalty that AT&T must pay for violating California's rules governing the transportation of hazardous materials. The case centered around the telecommunication company's failure to report hazardous materials — batteries — stored at cellphone towers and other facilities to the California Environmental Reporting System ("**CERS**"). California businesses, which handle 55 gallons, 200 cubic feet or 500 pounds of hazardous materials, must submit a Hazardous Materials Business Plan to CERS that includes the type, quantity, location, and health risk of the materials involved. The information is accessible to first responders and others. AT&T used the batteries to operate emergency generators at more than 3,200 sites across California. The stipulated payment stemmed from a civil lawsuit filed by cities and counties statewide following AT&T's self-reported recordkeeping error in May 2019. While the reporting rules are meant to shield against the improper transport of hazardous materials, AT&T told news outlets it had not transported or produced any waste from properly hazardous materials and that the violation was simply tied to reporting. No environmental damage was reported.

For more information see:
https://syvnews.com/news/local/crime-and-courts/legal-action-against-at-t-settled-for-5-9m-santa-barbara-county-to-get-274k/article_c323795a-332b-5a5b-a1ab-ddbd7dc84723.html

4. California, Boeing Reach New Agreement for Cleanup at Toxic Santa Susana Field Laboratory in Ventura County

On May 9, 2022, the California Environmental Protection Agency announced it reached a new remediation agreement with Boeing to clean up a contaminated site in Ventura County. The

agreement creates a framework that sets up protocols and timelines for Boeing to clean up radiologically contaminated soil, groundwater, and storm-water runoff. Boeing must also remediate radionuclides in the soil to the background level, as if industrial activity had never happened. Conversations regarding the standard for which Boeing must remediate chemical contamination on its portion of the site, however, remain ongoing, with the state announcing the standard could be as stringent as a "resident with garden" level where people can live and safely grow homegrown produce from the site. Officials said the chemical contamination standard must finish winding through the CEQA process. The latest agreement follows an earlier one penned in 2007 that was never honored or enforced. Some critics accused the new agreement of being "vastly weaker and less protective" compared to the 2007 agreement; state officials have refuted that contention. The Santa Susana Field Laboratory encompasses 2,850 acres. Boeing and its predecessors, along with NASA and the DOE, developed, researched, assembled, and tested rocket engines, small-scale nuclear reactors, and chemical lasers at the site from 1947 to 2006. It experienced a partial nuclear meltdown in 1959.

For more information see:
https://calepa.ca.gov/2022/05/09/press-release-california-holds-boeing-accountable-for-cleanup-at-toxic-santa-susana-field-laboratory/
https://www.dailynews.com/2022/05/11/states-new-deal-to-clean-up-radioactive-santa-susana-field-lab-is-slammed-by-critics/

5. Orange County Developer Fined $6.6 Million For Illegal Stormwater Discharges

A developer involved in a sprawling 95-acre neighborhood construction project in Lake Forest in Orange County must pay $6.6 million in civil penalties for releasing millions of gallons of untreated stormwater into an area waterway. The San Diego Regional Water Quality Control Board ("**SDRWQC**") voted to approve the fine — the largest it ever ordered — following years of unsuccessful negotiations. According to the SDRWQC, 6.3 million gallons of runoff from the construction site flowed into Aliso Creek during rainstorms over four days in 2015 and 2016. The SDRWQC accused Baldwin & Sons and partners of failing to implement required best management practices and ignoring numerous cease-and-desist orders, violating its Construction Stormwater Permit. The SDRWQC said Baldwin & Sons and partners failed to control erosion and runoff and contain fluids leaking from equipment, despite repeated warnings. SDRWQC inspections began in January 2016, and after years of unsuccessful negotiations, the SDRWQC issued an Administrative Civil Liability complaint in January 2020. Untreated stormwater can harm plants and animals. Erosion control is also important for maintaining infrastructure and avoiding flooding downstream.

For more information see:
https://www.waterboards.ca.gov/press_room/press_releases/2022/pr06082022-baldwin-enforcement.pdf
https://www.ocregister.com/2022/06/17/early-developer-behind-portola-center-in-lake-forest-fined-6-6-million-for-alleged-runoff/

6. Man Sentenced to 24 Years for Setting Big Sur Wildfire that Killed a Dozen Endangered Condors

A Monterey County superior court judge sentenced a man to 24 years in state prison for setting a wildfire in Big Sur that killed a dozen endangered California condors, seriously injured a firefighter, and destroyed multiple homes. The "Dolan Fire" sparked on the evening of August 18, 2020, in the Los Padres National Forest, according to the Monterey County District Attorney's Office. Around that time, a man was reported throwing rocks at vehicles on Highway 1. Peace officers located the man, who prosecutors said told officers he sparked a fire at a nearby illegal marijuana grow. Fire investigators later determined the Dolan Fire did originate there. The man was arrested and later convicted of 16 felony counts, including twelve counts of animal cruelty; stemming from a dozen California condors that died when the blaze tore through an 80-acre sanctuary in Big Sur, operated by the Ventana Wildlife Society of Monterey. The California condor is the largest North American land bird and is listed as critically endangered. The fire scorched more than 124,000 acres before firefighters got the upper hand four months later.

For more information see:
https://www.co.monterey.ca.us/Home/Components/News/News/9050/9444
https://www.latimes.com/california/story/2022-04-08/dolan-fire-arson

7. Battery Recycling Company to Pay $2.3 Million Stemming From Hazardous Materials Releases, Other Environmental Infractions

The California Department of Toxic Substances Control ("**Department**") announced a proposed civil settlement agreement in which Quemetco Inc. of the City of Industry in Southern California will pay $2.3 million and upgrade its facility to resolve years of state environmental law violations. The settlement resolves violations documented during onsite inspections between 2015 and 2018, including a non-functioning leak-detection system; failure to construct an adequate groundwater monitoring system; and failure to minimize possible hazardous waste releases into the environment. The agreement also addresses a field audit of groundwater monitoring as well as a multi-agency inspection led by the U.S. EPA. Quemetco must also upgrade its facility to include Department-approved improvements to the batch house, installing new monitoring wells, and decommissioning old ones.

For more information see:
https://dtsc.ca.gov/2022/12/13/news-release_t-15-22/

8. East Bay Municipal Utility District to Pay $816,000 For Toxic Discharge into San Francisco Bay

On August 22, 2022, the San Francisco Bay Regional Water Board ("**SFBRWB**") announced it approved an $816,000 settlement with the East Bay Municipal Utility District ("**EBMUD**") stemming from the release of 16.5 million gallons of partially treated wastewater into the San Francisco Bay. The discharge contained wastewater featuring chlorine levels that were dangerous for aquatic life. The discharge flowed from EBMUD's Point Isabel Wet Weather Facility to Richmond Inner Harbor in the bay back in October 2021 during a major rainstorm.

EBMUD reported it had run out of the chemical used to remove chlorine prior to the release, although additional details were unclear. EBMUD will pay $379,000 to the State Water Pollution Cleanup and Abatement Account and another $408,000 on a supplemental environmental project.

For more information see:
https://www.waterboards.ca.gov/press_room/press_releases/2022/pr082222-region-2-enforcement-release.pdf

9. Government Entity Agrees to $1.6 Million Fine for Improperly Abandoning Underground Storage Tanks at Moffett Field

SWRCB announced it reached an agreement with Defense Logistics Agency — a governmental entity that manages supply chains for military and other governmental organizations — to pay $1.6 million for improperly abandoning five underground storage tanks at the former Defense Support Point Moffett Field in Santa Clara. The agency emptied the tanks but failed to satisfy protocols demanded by the Santa Clara County Department of Environmental Health. Between 2005 and 2015, the county issued five violation notices to the agency for failing to inspect and monitor the tanks. The county referred the matter to SWRCB, which found "numerous violations" related to operation of the empty fuel tanks. Leaking storage tanks can discharge petroleum into groundwater and contaminate drinking water aquifers and wells.

For more information see:
https://www.waterboards.ca.gov/press_room/press_releases/2022/pr092922-ust-1-6-million-settlement.pdf

10. Modesto Oil Transfer Facility Agrees to a $430,000 Fine for Violating California's Hazardous Waste Laws

The California Department of Toxic Substances Control ("**Department**") announced it has entered into a settlement agreement with a Modesto oil transfer facility. California Oil Transfer LLC agreed to pay $430,000 in fines for unauthorized acceptance, storage, and comingling of hazardous waste; failure to maintain proper records; and exceeding permitted hazardous waste storage volumes. The Modesto Facility, known previously as Riverbank Oil Transfer, is a used oil transfer facility permitted to receive used oil, anti-freeze, and oily wastewater. It previously accepted hazardous waste used oil into railcars for transportation to offsite hazardous waste treatment, storage, recycling, or disposal facilities. Inspections found that between 2014 and 2016 California Oil Transfer LLC moved railcars filled with hazardous waste used oil to unauthorized areas without secondary containment at least 78 times.

For more information see:
https://dtsc.ca.gov/2022/10/10/news-release_t-14-22/

11. North Coast Water Officials Report Increased Cannabis-related Water Quality Enforcement Actions

The North Coast Regional Water Quality Control Board ("**NCRWQCB**") reported a 25% increase in enforcement actions against cannabis-related water quality violators over the past two years, with fines dipping into the six figures. Water officials shared two examples. First, in August 2022, the NCRWQCB ordered cannabis cultivators operating on 100 acres in Humboldt County to pay a $301,950 fine for building a road that threatened to cause erosion runoff into the Mad River. Second, in September 2022, the NCRWQCB proposed a $506,813 fine for Trinity County growers operating on a four-acre parcel. The NCRWQCB accused the growers of repeated violations, leading to numerous water quality issues. The enforcement actions show that, despite the legality of cannabis in California, cultivators run the risk of massive fines on the water quality front.

For more information see:
https://www.waterboards.ca.gov/press_room/press_releases/2022/pr10132022-r1-north-coast-increases-enforcement.pdf

B. 2023 REAL ESTATE AND EASEMENTS UPDATE & TAKINGS

Glen C. Hansen

1. GENERAL REAL ESTATE

A. 2023 Update

1. *Whitlach v. Premier Valley, Inc.* (2022) 86 Cal.App.5th 673

Plaintiff James R. Whitlach pursued a claim under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 *et seq*.) against defendants Premier Valley, Inc. (doing business as Century 21 MM), and Century 21 Real Estate LLC, to enforce civil penalties for violations of the Labor Code. The trial court sustained the defendant brokerage firm's demurrer to the operative complaint without leave to amend. Whitlach appealed. The Court of Appeal addressed the question of: "What is the applicable test or governing standard for determining whether a real estate salesperson is an 'employee' or an 'independent contractor' for purposes of the Labor Code's wage and hour provisions?" The court held that the applicable test under these facts is that set forth in Unemployment Insurance Code sections 650 and 13004.1, as incorporated in Business and Professions Code section 10032, subdivision (b), which is itself incorporated in Labor Code section 2778, subdivision (c)(1). The agent had signed an independent contractor agreement with the firm and was a licensed real estate agent paid by commission. He was therefore an independent contractor under the three-factor test for real estate salespeople (Unemp. Ins. Code, §§ 650, 13004.1; Bus. & Prof. Code, § 10032, subd. (b)), which applied instead of the ABC test (Lab. Code, § 2775, subd. (b)(1)), from which real estate licensees are exempted (Lab. Code, § 2778, subd. (c)(1)).

2. *Miller v. Department of Real Estate* (2022) 84 Cal.App.5th 141

Nijjar Realty, Inc., and its real estate broker of record, Everet Gordon Miller, operated a mobile home park owned by one of Najjar's clients. The Department of Real Estate filed an accusation alleging Nijjar violated various provisions of the Real Estate Law (Bus. & Prof. Code, § 10000 *et seq*.), the Health and Safety Code, and administrative regulations under the Health and Safety Code by: (1) employing an unlicensed individual to solicit and enter into lease-to-own agreements with the tenants/buyers of several mobile homes; and (2) permitting the tenants/buyers to move into mobile homes that were not permitted for human occupancy. Following a hearing, an administrative law judge issued a proposed order revoking Nijjar Realty's and Miller's licenses, which the Department adopted. Business and Professions Code section 10177 authorizes the Commissioner of the Department to revoke a license if the licensee "[w]illfully disregarded or violated" the Real Estate Law, "[d]emonstrated negligence or incompetence in performing an act for which the … person is required to hold a license" or "failed to exercise reasonable supervision over the activities of that licensee's salespersons" or a corporation for which the licensee is the designated broker. The administrative law judge ruled there were grounds to revoke Nijjar's and Miller's licenses under section 10177 because Nijjar violated Business and Professions Code section 10137. Section 10137 provides: "It is unlawful for any licensed real estate broker to retain, compensate, directly or indirectly, any person for performing any of the acts within the scope of [Chapter 3 of the Real Estate Law] who is not a licensed real estate broker, or a real estate salesperson licensed under the responsible broker retaining or compensating him or her … ." One of the acts within the scope of chapter 3 is described in section 10131.6, subdivision (a): "[A] person licensed as a real estate broker may

sell or offer to sell, … solicit prospective purchasers of, … or negotiate the purchase, sale, or exchange of any manufactured home or mobile home," subject to certain limitations.

Nijjar and Miller filed a petition for a writ of administrative mandate, contending they did not receive a fair hearing because the administrative law judge considered improper evidence, including expert testimony from several witnesses the Department did not designate as experts. Nijjar and Miller also contended the administrative law judge erred in ruling they violated statutes in the Business and Professions Code and the Health and Safety Code governing the sale and occupancy of mobile homes. The trial court denied the petition, ruling that the administrative law judge did not consider any improper evidence and, after conducting an independent review of the evidence, that Nijjar and Miller violated the applicable statutes. Nijjar and Miller appealed, making the same arguments they made in the trial court. The Court of Appeal affirmed the judgment, finding that Nijjar and Miller were provided a fair administrative hearing, and substantial evidence supported the trial court's finding that there were grounds to revoke Nijjar and Miller's license.

3. *Munoz v. Patel* (2022) 81 Cal.App.5th 761

Luis Munoz and LR Munoz Real Estate Holdings, LLC ("**LRM Holdings**") (together "**Munoz**"), bought a hotel from a company owned and managed by Rajesh Patel ("**Rajesh**") and his son, Shivam Patel ("**Shivam**"). Before escrow closed, the parties negotiated a leaseback arrangement requiring Munoz to lease the hotel back to the Patels' company after the sale. Escrow closed and the parties thereafter executed the previously negotiated lease — or so Munoz thought. According to Munoz, the Patels secretly swapped out the agreed-upon lease for a different one — a lease substantially more beneficial to the Patels and worse for Munoz — and then tricked him into signing it. Munoz filed an action against the Patels, an alleged alter ego entity of the Patels called Inn Lending, LLC ("**Inn Lending**"), and other defendants involved in the sale, asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing, promissory fraud, and elder financial abuse, among other causes of action. Rajesh and Inn Lending demurred to the operative second amended complaint. The trial court sustained the demurrer without leave to amend, and Munoz appealed the ensuing judgment. In a prior opinion, the Court of Appeal reversed the judgment and determined, among other things, that Munoz alleged a viable fraud cause of action based on a theory of fraud in the execution.

Rajesh and Inn Lending petitioned the Supreme Court for review, arguing that rehearing was required under Government Code section 68081 because this court's decision was based upon an unbriefed issue — fraud in the execution. The Supreme Court granted review and transferred the matter back to the Court of Appeal with directions that it vacates the decision and rehear the case after allowing the parties to file supplemental briefs addressing whether the complaint stated a cause of action for fraud in the execution.

The Court of Appeal followed the Supreme Court's instructions and the parties filed supplemental briefs addressing whether the complaint adequately alleges fraud in the execution. The appellate court then held that the operative complaint alleges facts sufficient to state a viable cause of action for fraud in the execution against Rajesh, but not against Inn Lending. The conclusion was based on secret substitution of leases because failure to read the executed lease did not necessarily negate reasonable reliance when seeking equitable remedies such as

reformation. Moreover, the seller could be liable as a nonparty to the lease. Additionally, the court held that the complaint plead facts sufficient to state an elder financial abuse cause of action against both Rajesh and Inn Lending because the complaint alleged elder status (Munoz is 80-years old and a resident of California) and that the demurring parties received Munoz's property for a wrongful use and/or with fraudulent intent (Welf. & Inst. Code, §§ 15610.27, 15610.30), although it did not allege lack of capacity or unsound mind (Welf. & Inst. Code, § 15657.6). Also, the court held that Munoz failed to establish that the trial court erred in dismissing his breach of contract and bad faith causes of action because a letter of intent executed in anticipation of a loan transaction was not binding as to specific loan terms.

2. COMMON INTEREST DEVELOPMENTS

A. Legal Framework

- Common interest developments are governed by the Davis-Stirling Common Interest Development Act (Civil Code, §§4000 et seq).
- Community associations are usually incorporated and governed under the Nonprofit Mutual Benefit Corporation Act (Corp. Code §§7110-8910).

B. 2023 Update

1. *Loeffler v. Trabuco Highlands Community Assn.* (Cal.App., Dec. 10, 2021, case no. G059087) 2021 Cal.App.Unpub. LEXIS 7718, 2021 WL 5858596; *Loeffler v. Trabuco Highlands Community Assn.* (Cal.App., June 7, 2022, case no. G059753) 2022 Cal.App.Unpub. LEXIS 3511, 2022 WL 2043748

These unreported cases are not precedent. But they present a story with valuable lessons and warnings to homeowners and homeowners' associations that engage in ever-widening litigation arising out of a neighbor-to-neighbor dispute. The final scene in this saga was a fight over nearly $1 Million in attorneys' fees allegedly incurred by the HOA.

A homeowners' association's ("**Association**") CC&Rs were recorded in 1987 by the original developer of 21 lots and provided for annexable territory in the future. Additional annexations took place until 2012. During that time, the Association in 1999 adopted a new formula for the computation of annual assessments reflecting the proportionate share of the common area services that leveled out the variance among the different annexed areas. Members received updates on the varying annual assessments among these different annexed areas. In December 2012, the Association annexed the sixth area consisting of eight lots, and then employed the same methodology used since 1999 to estimate the annual assessments for those new lots.

In January 2013, the plaintiff homeowner purchased one of those eight lots. In May 2014, the homeowner stopped paying her assessments. Her stated reason was her anger over perceived lack of enforcement of the CC&Rs against her neighbors. Even though she had no legal right to withhold payment of assessments because of a dispute with her neighbors, the homeowner filed a preemptive lawsuit in 2016 against the Association on the grounds of: (1) quiet title; (2) declaratory relief seeking determination of her rights to her property; (3) breach of CC&Rs; (4) nuisance; (5) invasion of privacy; (6) slander of title; (7) defamation; and (8) fraud. The homeowner sought to quiet her property title and several liens recorded against her property by the Association for nonpayment of assessments on the purported grounds that her property was not within the legally described "[a]nnexable territory" and that annexation of her tract was not approved according to the provisions in the CC&Rs. The homeowner also asserted that the Association's recordation of the notice of addition and liens slandered her property title; she disputed the validity of the assessment liens recorded by the Association and she alleged it violated the CC&Rs by imposing and attempting to collect regular assessments "substantially greater in amount than the regular assessments imposed and collected from other Lots and/or Owners within the common interest development." The homeowner's Claims 4 and 5 were not alleged against the Association and so they were dismissed before trial. The Association brought an anti-SLAPP motion to strike Claims 7 and 8, which the trial court granted. The trial court

granted summary adjudication against the homeowner as to Claims 1 and 6 because they were time-barred. After a bench trial, the trial court issued a judgment against the homeowner and in favor of the Association as to Claims 2 and 3 because the Association properly followed the CC&Rs provisions requiring assessments at a uniform and equal rate and because the Association utilized the methodology the homeowner acknowledged at the time of her purchase. The Court of Appeal affirmed all of the trial courts' rulings and judgment against the homeowner.

For its part, the Association filed a cross-complaint on an open book account against the homeowner seeking to enforce the CC&Rs provisions requiring payment of the assessments, and seeking recovery of the unpaid assessments, late charges, and interest. The trial court issued a judgment for the Association on the cross-complaint in the amount of $17,000 for past-due assessments. The Court of Appeal affirmed because the evidence showed: (1) the Association and the homeowner had financial transactions with each other in the form of monthly assessment payments; (2) the Association, in the regular course of business, kept an account of the debits and credits involved in the transactions; and (3) those financial documents demonstrated the homeowner owed the Association the delinquent assessments on the account and specified the amount of money owed.

The Association then brought two motions for attorney's fees. One motion for attorney's fees was filed by attorneys with the defense firm, Kulik Gottesman, Siegel & Ware, and sought $397,637.50 for work defending against the homeowner's complaint. The second motion for attorney's fees in the amount of $540,000 was filed by counsel Daniel Nordberg for his services in responding to and participating in pre-judicial statutory internal dispute resolution and alternative dispute resolution procedures initiated by the homeowner as well as for his services on the cross-complaint. The trial court reduced the hourly rate of Nordberg from $400 to $240 to correspond with the hourly rate in Kulik Gottesman Siegel & Ware's declaration. The trial court also substantially reduced the number of Nordberg's hours with this explanation: "[The Association's] success took the form of a directive that [the homeowner] was part of the [Association], and that she owed $17,000 in past assessments; this is hardly the kind of victory normally associated with a seven-figure fee request. According to the [Association], [the homeowner] and her unbridled mischief made this litigation unnecessarily convoluted and hostile, and only possible because her significant other was doing the litigation. [The homeowner] responds that the [Association] attorneys double-billed, doubled-down, and did all they could to 'milk' this. There is also the subtle message sent by the [Association] that it would spare no expense to crush member resistance. There is enough blame to go around." The trial court concluded "that there would have been at least 30% fewer hours logged had the [Association] used the same firm to handle both sides of the litigation. That brings the total fee award down to $456,330," which the trial court split between the two law firms representing the Association. The Court of Appeal found no error and affirmed the award of attorneys' fees. The court held that, "[r]egardless of the title of the various causes of action or allegations, an award of attorney fees to the prevailing party is appropriate under [Civil Code] section 5975, subdivision (c), when the gravamen of the entire complaint is to enforce the governing documents. [Citation.] [The homeowner's] action and the Association's cross-complaint were both based upon enforcing the CC&R's." In response to the homeowner's argument on appeal that attorney's fees should be reduced because the lawsuit involved a challenge to the annexation vote, the court explained: "In this unique case, however, the gist of [the homeowner's] action as a whole was not based upon a righteous election issue regarding annexation. Instead, the gravamen of [the homeowner's] entire

complaint was to avoid the property assessments imposed by the CC&R's. As explained above, this properly fell under the statutory authority provided by section 5975, subdivision (c)."

So, before homeowners and Homeowner Associations commence litigation, take careful heed to the cautionary tale told in this *Loeffler* litigation.

3. REAL ESTATE CONTRACTS AND TRANSACTIONS

A. 2023 Update

1. *Honchariw v. FJM Private Mortgage Fund, LLC* (2022) 83 Cal.App.5th 893

Nicholas and Sharon Honchariw took out a $5.6 million dollar bridge loan, with 8.5% interest assessed per annum, secured by a first lien deed of trust on real property. The Honchariws defaulted on their September 1, 2019, monthly payment. By missing that payment of $39,667, the Honchariws triggered certain late-payment fee provisions set forth in the Loan: (1) a one-time 10% fee assessed against the overdue payment ($3,967); and (2) a default interest charge of 9.99% per annum assessed against the total unpaid principal balance of the Loan (collectively, the "**Late Fee**"). The Honchariws commenced arbitration, in which they contended the Late Fee was unlawful: (1) pursuant to regulations applicable to a mortgage-loan originator with a license regulated by the Department of Real Estate, and (2) because it was a liquidated damage constituting an unlawful penalty in violation of Civil Code section 1671. FJM averred the loan was not subject to the Real Estate Loan Law, and that the late-payment fee did not violate section 1671. The arbitrator agreed with FJM on both points and denied the demand for arbitration ("**Arbitration Award**").

The Honchariws petitioned to vacate the Arbitration Award on the basis that the arbitrator exceeded their authority by denying claims in violation of "nonwaivable statutory rights and/or contravention of explicit legislative expressions of public policy," specifically identifying both the rights protected by the Real Estate Loan Law's prohibition against lenders charging more than 10% of the installment amount due (Bus. & Prof. Code, §§ 10248.1, 10242.5) and section 1671. The trial court denied the petition, holding the Honchariws "'did not meet their burden of proof' to show that the 'default interest provision in the subject loan was invalid as a penalty.' …" "[E]ven when the Court considers the evidence presented in this motion, the Court cannot conclude that the arbitrator exceeded her powers by denying [the Honchariws'] claims."

The Court of Appeal reversed because the Arbitration Award constituted an unlawful penalty in contravention of the public policy set forth in section 1671. The court recognized that an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." However, Code of Civil Procedure section 1286.2 provides an exception to this general rule where "[t]he arbitrators exceeded their powers, and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." Arbitrators may exceed their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy. The public policy so contravened must be a well-defined and dominant public policy as ascertained by reference to the laws and legal precedents, and not from general considerations of supposed public interests. Here, the Court of Appeal found that section 1671 expresses a well-defined and dominant public policy such that a challenge predicated thereon escapes the general prohibition against review of arbitral decisions. Under section 1671, a liquidated damages provision is presumed valid if it is in a nonconsumer contract but presumed invalid if it is in a consumer contract. This case involves a nonconsumer contract as it is neither for the purchase of property for personal use nor does it involve a primary dwelling. However, whether or not an agreement is a nonconsumer contract or consumer

contract, it may not violate public policy. Here, the Late Fee violates the public policy in section 1671 because it provides for a penalty of a one-time 10% fee of the overdue monthly payment and a default interest charge of 9.99% per annum assessed against the total amount of unpaid principal balance of the Loan, even if there is one missed monthly payment at any time during the life of the Loan.

2. *Cam-Carson, LLC v. Carson Reclamation Authority* (2022) 82 Cal.App.5th 535

A commercial real estate developer brought a complaint against a city for breach of contract and breach of the implied covenant of good faith and fair dealing based on a contract between the developer and the city's former redevelopment agency. The developer alleged that the city and its former redevelopment agency engaged in gross mismanagement and malfeasance that created a massive funding deficit which derailed the project, causing damages to the developer of over $80 million. The developer also alleged that the public entities concealed that the project had a shortfall in funding. The developer sought to hold the city liable in equity under alter ego principles for the development agency's breach of the contract between the developer and the agency. The city demurred. The Court of Appeal held that the trial court erred in sustaining the city's demurrer to the developer's breach of contract claim. The appellate court explained that the alter ego doctrine could be applied to a government entity such as a city where the facts justified an equitable finding of liability. Here, the developer alleged that the city and the redevelopment agency pursued a single business purpose with integrated resources, the city totally dominated the redevelopment agency, the development agency was inadequately capitalized, and the funding deficit for the development agency was intentionally concealed. Such alleged facts were sufficient to establish that it would be inequitable to treat the development agency as separate from the city. Also, the Court of Appeal held that the trial court erred in sustaining the city's demurrer to the developer's claim against the city for breach of the implied covenant of good faith and fair dealing. The complaint alleged a breach of a development agreement to which the city was a party.

3. *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC* (2022) 80 Cal.App.5th 409

A retail lease for space in a shopping center included a negotiated co-tenancy provision. Under that provision, the shopping center must either have three anchor tenants or 60% of the space leased, and, if not, the tenant is permitted to pay a "substitute rent." After two anchor tenants closed, the tenant announced that it would pay the "substitute rent." The landlord alleged that the co-tenancy provision was an unenforceable penalty under Civil Code section 1671. On cross-motions for summary judgment, the trial court held that the provision was enforceable. Disagreeing with the holding in *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, the Court of Appeal affirmed the trial court's conclusion. The provision was enforceable because it did not liquidate damages or impose a penalty for breach of contract or failure of a condition. Instead, the provision included a different rent structure as an alternative performance in the event of contingencies, and so section 1671 did not apply. The holding in *Grand Prospect*, which equated an unenforceable penalty with a forfeiture (Civ. Code, § 3275), did not apply here because there was no suggestion that reduced occupancy in the shopping center had caused a breach by the landlord. Also, section 1671 did not apply because the provision was not unreasonable when the contract was made. The court agreed with the tenant that the parties' contractual intent when reduced to writing should be controlling and

enforced, particularly as applied to the commercial leasing market in arms-length negotiations and transactions.

The California Supreme Court granted review, which is still pending. (*JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC* (Cal., Oct. 12, 2022, case no. S275843) 299 Cal.Rptr.3d 342, 517 P.3d 1156, 2022 Cal. LEXIS 6001, 2022 WL 7229291.)

4. EASEMENTS, ADVERSE POSSESSION, DEDICATIONS, AND BOUNDARY DISPUTES

A. Legal Framework

1. Easements

Definitions

- Easements are essentially property rights that do not rise to the level of complete ownership of property. Generally, an easement allows one person to undertake a specified activity on the property of another. The most common type of easement is the right to travel over another person's land. In addition, easements are used for the placement and maintenance of utility poles, utility trenches, and water or sewer lines.
- The owner of property that is subject to an easement is said to be "burdened" with the easement, because he or she is not allowed to interfere with its use. The property on which the easement is located is called the "servient" estate, while adjoining property that has the benefit of the use is considered the "dominant" estate. Easements run with the land, meaning that subsequent property owners receive the burdens and benefits of an existing easement when they are deeded the property.
- Most easements are considered non-possessory, meaning that the easement owner cannot exclude others from the easement unless they are interfering with its use. However, in some cases an exclusive easement can be created, in which the easement owner can exclude everyone to the extent of his allowed use. There are many types of easements recognized in California. (Civ. Code, § 801 *et seq*.)

Types of Easements, Which Have Different Methods of Creation, Rights and Termination

- Express Easements by deed;
- Easements by implication;
- Easements by necessity;
- Easements by prescription;
- Equitable easements;
- Conservation easements.

2. **Adverse Possession**

Differences Between Adverse Possession and Prescriptive Use

The key difference between adverse possession and prescription involves the nature of the right that is obtained. Adverse possession allows a party to acquire fee title to real property. Prescription, such as a prescriptive easement, allows a limited right to use the property in the same way it was continuously used for a five-year period of time or more; prescription does not lead to acquisition of title to the property.

Prerequisites for Adverse Possession

(1) An adverse possessor must be in possession of the property *either* under color of title founded on some written instrument that is not actually effective to transfer title despite holder's good-faith belief that he or she is the lawful owner of the property (Code Civ. Proc. §§322, 323), or under a claim of right based solely on possession and not on any color of title (Code Civ. Proc. §§324, 325);
(2) There must be an actual, open, and notorious occupation of the premises in such a manner as to constitute reasonable notice (either actual or constructive) to the true owner;
(3) Under color of title, there must be exclusive possession, and the document provides the required hostility; under claim of right, the possession of a claimant must be exclusive and hostile;
(4) Possession of the property must be continuous and uninterrupted for the full five-year statutory period; and
(5) The possessor must pay all real property taxes that are validly levied and assessed on the property during the five-year period.

3. Dedications

Statutory Dedications

(1) Offers to dedicate rights-of-way/roads in a parcel map. (Govt. Code §66439, subd. (a).)
(2) Local agency may (a) accept the offer, (b) accept the offer subject to improvement or (c) reject the offer and keep it open for acceptance at a later time.
(3) Offers can be terminated under the statutory procedure for abandonment, or under the conclusive presumption after 25 years in Code of Civil Procedure section 771.010.

Common Law Dedications

(1) An offer of dedication may be "implied by law" if the public has openly and continuously made adverse use of the property for more than the prescriptive period. An owner who seeks to negate a finding of intent to dedicate the lands therefore "must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use."
(2) Implied-in-fact dedications arise when the period of public use is less than the period for prescription and the acts or omissions of the owner afford an implication of actual consent or acquiescence to dedication. The public may accept a dedication through a public entity's formal acceptance, actions of a public entity assuming control over the property, or public use of the property.

4. Boundary Disputes

Agreed Boundary Doctrine

(1) When coterminous landowners are uncertain as to the true location of their common boundary, they may establish that boundary by agreement, pursuant to a legal theory commonly referred to as the "agreed boundary" doctrine. The doctrine is an exception to the general rule, which accords determinative legal effect to a description of land contained in a deed.

(2) The requirements of proof necessary to establish a title by agreed boundary are (1) an uncertainty as to the true boundary line; (2) an agreement between the coterminous owners fixing the line; and (3) acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position.

B. 2023 Update

1. *Tariwala v. Mack* (2022) 84 Cal.App.5th 807

Defendant owned two adjoining properties, but lost title to one of the properties when he defaulted on a secured loan in 2011. Plaintiffs purchased the foreclosed property from the lender in 2017. Defendant sought to prevent plaintiffs from renovating or occupying the house on his former property by blocking access to the house by locking a gate that spanned a recorded driveway easement. Plaintiffs brought an action against the defendant for enforcement of a driveway easement under Civil Code section 809. The trial court granted plaintiffs' motion for a preliminary injunction that prohibited defendant from obstructing the easement; and on two separate occasions the trial court found defendant in contempt for blocking the easement by parking vehicles on the easement, including an immobilized RV. Defendant argued that the easement was extinguished by the merger doctrine in Civil Code section 811. The trial court rejected that argument, declared the easement valid and permanently enjoined defendant from obstructing plaintiffs from accessing their property. The Court of Appeal affirmed. The court held that the trial court properly rejected the merger doctrine defense. Even if the defendant had established a unity of interest, equity supports the trial court's decision. Defendant did not dispute the property was legally and physically landlocked. Documenting the easement in the pledged deed of trust ensured defendant's lender could foreclose on marketable collateral in the event of default. Defendant presented no evidence the lender would have funded his loan in the absence of this crucial provision. The lender would have been severely prejudiced because its successors in interest (plaintiffs) would suffer if the merger doctrine were applied and they were left with no means to lawfully access their house.

2. *Canyon Vineyard Estates I, LLC v. DeJoria* (2022) 78 Cal.App.5th 995

Over 400 acres of undeveloped land along the Santa Monica Mountains and Pacific coastline in Malibu, California, were determined by the trial court on summary judgment to be subject to a conservation easement that prohibits development, consistent with the statutory definition of a conservation easement in Civil Code sections 815.1, *et seq.* The Court of Appeal affirmed the

trial court's summary judgment, as well as the injunction that enjoined violation of the easement. The court explained that a use restriction in a grant deed to a nonprofit land trust required that the property "to be held as [o]pen [s]pace in [p]erpetuity and that no development of any kind shall take place on the [p]roperty," even though it did not label the open space as a conservation easement. Also, extrinsic evidence established an intent to preserve the property as natural open space in perpetuity. Furthermore, the deed had to be liberally construed to effectuate the easement and to avoid forfeiture from a power of termination provision in the grant deed. However, the trial court's injunction was overbroad when it also enjoined future claims involving the conservation easement.

3. *Romero v. Shih* (2022) 78 Cal.App.5th 326; Review Granted and Review Denied, 2022 Cal.LEXIS 4609, 2022 WL 3269736 (Cal. Aug. 10, 2022), Petition For Certiorari Filed Aug. 8, 2022

After a bench trial, the trial court resolved a property line dispute between two neighbors by creating an easement in favor of respondents, the encroaching property owners. It granted respondents an exclusive implied easement and, alternatively, an equitable easement over the entire 1,296-square-foot encroachment where appellants would be entitled to compensation if subject to the equitable easement for the diminution in value to their property in the amount of $69,000. At trial, "a battle of expert witnesses ensued" involving the effect and the cost of the encroachments and on the potential remedies. Appellants appealed the judgment.

The Court of Appeal reversed the judgment on the cause of action for an exclusive implied easement. As a matter of first impression, the court held that an exclusive implied easement which, for all practical purposes, amounts to fee title cannot be justified or granted unless: (1) the encroachment is "de minimis"; or (2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. Here, there was no express grant of an exclusive easement; the encroachment, totaling 1,296 square feet of appellants' 9,815-square-foot property, could not reasonably be qualified as de minimis as it amounts to approximately 13.2% of appellants' property; and nothing in the record suggested that the encroachment is necessary for essential utility purposes or to protect general public health or safety.

However, the Court of Appeal affirmed the judgment on the cause of action for equitable easement. Substantial evidence supported the trial court's finding that the owners of the encroaching property did not have knowledge of their encroachment on the neighboring property at the time of purchase. If those owners of the encroaching property were negligent by failing to investigate in light of the advisories in transactional documents, so too were the owners of the encroached-upon land for the same reason, and so there was corresponding contributory negligence on the part of the latter. Also, substantial evidence supported the inference that the hardship experienced by the appellants is greatly outweighed by the actual harm to respondents if the encroachments were enjoined because the respondents' driveway would be reduced to 7.2 feet at its narrowest point for an approximate 32-foot stretch, thereby reducing the driveway to a width of less than 10 feet, the minimum required by the local municipality. Furthermore, the judicially crafted equitable easement was limited in scope and duration. While the equitable easement should run with the land, it should terminate if the encroaching property were to cease its continued use of that land for a driveway, planter box and wall/fence, which were the encroaching structures on respondents' property.

On August 10, 2022, the Supreme Court denied the petition for review filed by appellants. But the court granted the petition for review filed by respondents in order to consider whether the trial court correctly found the existence of an exclusive implied easement.

C. 2022 FEES, TAKINGS, AND EXACTIONS UPDATE

Glen C. Hansen

1. FEES, TAKINGS, AND EXACTIONS

A. Legal Framework

- The Takings Clause in the Fifth Amendment to the United States Constitution provides "nor shall private property be taken for public use, without just compensation." The Takings Clause is designed to secure compensation in the event of otherwise proper interference amounting to a taking.
- The paradigmatic taking that requires just compensation is a direct government appropriation or physical invasion of private property. When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.
- Government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster, and such "regulatory takings" may be compensable under the Fifth Amendment. The U.S. Supreme Court has recognized four different theories under which a government regulation may be challenged under the Takings Clause.
    - The two categories of regulatory action that are deemed per se takings are where government requires an owner to suffer a permanent physical invasion of her property, and where regulations completely deprive an owner of all economically beneficial use of her property.
    - For regulatory actions that do not involve per se takings, the Court has historically applied either:
        - The factored analysis in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), which examines the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action; or
        - The heightened standard of review in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard* 512 U.S. 374 (1994), under which a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. In *Koontz v. St. Johns River Water Management District,* 570 U.S. 595 (2013), the Court held that this two-part test applies when the government demands a monetary exaction in order to obtain an adjudicative land use permit.

B. 2023 Update

1. *Zolly v. City of Oakland* (2022) 13 Cal.5th 780

In 2012, the City of Oakland approved two contracts granting private waste haulers the right to "transact business, provide services, use the public street and/or other public places, and to

operate a public utility" for waste collection services. As consideration for the special franchise right, the waste haulers agreed to pay certain fees to Oakland. Owners of multifamily properties who paid their tenants' waste collection bills filed an action against a city on the grounds that the city's franchise fees on private waste haulers violated Cal. Const., art. XIII C. The owners argued that the franchise fees did not bear a reasonable relationship to the value received from the government and they were not based on the value of the franchises conveyed. The trial court sustained the city's demurrer. The Court of Appeal affirmed in part and reversed in part and held that plaintiffs adequately stated a cause of action under Art. XIII C by alleging that the challenged fees did not bear a reasonable relationship to the franchises' values.

The Supreme Court granted review to consider how fees that a local government does not formally designate as taxes should be treated under Article XIII C of the California Constitution, which sets forth voter approval requirements that apply to taxes imposed by local government. While the City argued that Article XIII C, as amended in 2010 by Proposition 26, categorically exempts its challenged fees from such voter approval requirements, plaintiffs argued that the fees are exempt only if the amount of the fee bears a reasonable relationship to the value of the franchise. The Court held that the City did not show on demurrer that its challenged fees are exempt from Article XIII C's voter approval requirements. Proposition 26's use of the term "imposed" demonstrates that the voters did not intend to limit the term to situations where a charge is imposed through coercion.

2. *Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394.

Full Disclosure: *Abbott & Kindermann, Inc., is counsel of record for Defendant and Respondent County of El Dorado in this case.*

The County of El Dorado ("**County**") imposed a $23,420 traffic impact mitigation fee ("**TIM fee**" or "**fee**") as a condition of issuing George Sheetz a building permit for the construction of a single-family residence on his property in Placerville, California. Sheetz filed an action challenging the fee on various grounds, *inter alia*, that the TIM fee is invalid under the Mitigation Fee Act ("**MFA**") (Gov. Code, § 66000 *et seq*.) and the takings clause of the United States Constitution, namely the special application of the "unconstitutional conditions doctrine" in the context of land use exactions established in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*). The trial court rejected both of Sheetz' arguments, sustained the County's demurrer without leave to amend, and denied his verified petition for writ of mandate. The Court of Appeal affirmed.

As to the MFA claim, the Court of Appeal held that the County satisfied the requirements for legislative enactment of the TIM fee provided in Government Code section 66001, subdivision (a).

As to the takings claim, the Court of Appeal held that the heightened scrutiny under *Nollan/Dolan* did not apply to the TIM fee. The court explained that under California law, the requirements of the *Nollan/Dolan* test apply to development fees imposed as a condition of permit approval where such fees are imposed neither generally nor ministerially, but on an individual and discretionary basis: "The requirements of *Nollan* and *Dolan*, however, do not extend to development fees that are generally applicable to a broad class of property owners through legislative action." As our Supreme Court has explained, "legislatively prescribed

monetary fees' — as distinguished from a monetary condition imposed on an individual permit application on an ad hoc basis — 'that are imposed as a condition of development are not subject to the *Nollan/Dolan* test'." (Citing *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 459–460, fn. 11.) "[W]hile the *Nollan/Dolan* test applies to monetary land use exactions, which are imposed ad hoc on an individual and discretionary basis, it does not apply to generally applicable development impact fees imposed through legislative action." "[T]he heightened scrutiny of the *Nollan/Dolan* test does not apply to legislatively mandated development impact fees that, as here, generally apply to a broad class of permit applicants." The Court of Appeal concluded that the trial court properly determined that the TIM fee is not subject to the heightened scrutiny of the *Nollan/Dolan* test because the fee was not an "ad hoc exaction" imposed on a property owner on an individual and discretionary basis, but rather was a development impact fee imposed pursuant to a legislatively authorized fee program that generally applies to all new development projects within the County. The fee was calculated using a formula that considers various factors. Therefore, the validity of the fee and the program that authorized it was only subject to the deferential "reasonable relationship" test embodied in the Mitigation Fee Act and the California Constitution.

The Court of Appeal further held that the County satisfied that "reasonable relationship" test. The County met its initial burden of demonstrating that it used a valid method for imposing the TIM fee, one that established a reasonable relationship between the fee charged and the burden posed by Sheetz's development of a single-family residence in a specific geographic zone. The County considered the relevant factors and demonstrated a rational connection between those factors and the fee imposed. Also, the court concluded that Sheetz failed to show that the record before the County clearly did not support the County's determinations regarding the reasonableness of the relationship between the fee and his development project.

Sheetz filed a petition for review with the California Supreme Court as to the *Nollan/Dolan* claim. That petition was denied on February 1, 2023.

3. *City of San Buenaventura v. United Water Conservation District* (2022) 79 Cal.App.5th 110

United Water Conservation District manages the groundwater resources in central Ventura County. The City of San Buenaventura pumps groundwater from the District's territory and sells it to residential and commercial customers. The District collects a fee from the City and other groundwater users based on the volume of water they pump. In imposing its extraction charges, the District divides groundwater pumpers into two classes: Ag and M&I. Ag uses include the production of food and commercial crops, livestock support and aquaculture. M&I uses include drinking water, residential and commercial uses, and landscape irrigation. The District applies a fixed ratio of rates for nonagricultural users, such as the City, who pump groundwater M&I uses. The District charges such users three times more than Ag users in accordance with Water Code section 75594.

Earlier in the litigation, the California Supreme Court held that "article XIII C of the California Constitution, as amended by Proposition 26 … supplies the proper framework for evaluating the constitutionality of the groundwater pumping charges." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1198.) The Supreme Court remanded the

matter "to consider whether the record sufficiently establishes that the District's rates for the 2011–2012 and the 2012–2013 water years bore a reasonable relationship to the burdens on or the benefits of its conservation activities, as article XIII C requires." The Supreme Court invited the parties to address "whether the three-to-one ratio in … section 75594 is facially unconstitutional under article XIII C." On remand, the trial court held: (1) that the groundwater extraction charge adopted by the District for the 2019–2020 water year is invalid as to nonagricultural users and must be set aside; and (2) that section 75594 violates Article XIII C, section 1, subdivision (e) of the California Constitution and is therefore unconstitutional. The trial court did not find persuasive the District's arguments or evidence that the allocation of costs for reliability or regulatory compliance costs are reasonably related to the benefits for which Ag and M&I are charged, but instead found that the City's expert opinions more credible and more persuasive as to the lack of reasonable relationship of costs to benefits. The Court of Appeal agreed with the trial court's analysis and affirmed. Substantial evidence supported the trial court's findings determination, and section 75594 is facially unconstitutional.

4. *640 Tenth LP v. Newsom* (2022) 78 Cal.App.5th 640

In response to the COVID-19 pandemic, Governor Newsom declared a state of emergency in California on March 4, 2020. About two weeks later he issued Executive Order N-33-20, that among other things, prohibited restaurants from providing both indoor and outdoor dining. Restaurants, gyms, and other businesses deemed nonessential remained closed until May 4, when the Governor issued Executive Order N-60-20. It allowed reopening in phases as determined by the Department of Public Health ("**Health Department**"). Restaurants and gyms in San Diego County ("**County**") were allowed to reopen in May and June respectively. After a July surge of infections, the Health Department issued the "Guidance on Closure of Sectors in Response to COVID-19" ("**Guidance**"). It prohibited indoor dining in 29 counties, including San Diego. The Blueprint for a Safer Economy ("**Blueprint**") followed in late August and created a color-coded tiered system, updated weekly, that assigned each county a color (purple, red, orange, or yellow) based on its assessed risk level for COVID-19 transmission and imposed corresponding restrictions for different business sectors. The Blueprint was rescinded by an executive order in June 2021.

In April 2021, owners of affected restaurants and gyms in San Diego County filed a third amended complaint against the Governor and other state and County officials. The owners sued on behalf of themselves and three classes consisting of: all (1) restaurants and (2) gyms in the County; and (3) California businesses "whose operations or activities are misclassified or other improperly [sic] subject to a complete or total shutdown order(s), under the authority of the Blueprint. . . ." The trial court sustained the defendants' demurrers without leave to amend and dismissed the action. The Court of Appeal affirmed.

The owners alleged that the orders in the Guidance and the Blueprint were procedurally invalid because they were adopted without complying with the Administrative Procedure Act ("**APA**") (Gov. Code, § 11340 *et seq.*). The Court of Appeal held that the powers granted to the Governor under the Emergency Act included suspension of the procedural requirements of the APA. Therefore, Executive Order N-60-20 precluded the owners' claims that the Guidance and Blueprint were invalid for lack of APA compliance.

The owners also alleged that the orders constituted an uncompensated taking under the Fifth Amendment to the U.S. Constitution. The Court of Appeal held that the orders did not constitute a regulatory taking, similar to the "virtual torrent of California federal district court decisions rejecting similar challenges to Governor Newsom's emergency COVID-19 orders." The court considering the takings claim under the *Penn Central* factors of (1) the economic impact of the regulation; (2) its interference with reasonable investment-backed expectations; and (3) the character of the government action. While the owners argued that the Governor's executive orders and related Health Department regulations "have significantly reduced plaintiffs' revenues, profits and income, resulting in significant uncompensated harm," the court explained that a "significant" diminution in value is not enough to constitute a regulatory taking. While the owners alleged that, if the emergency orders and restrictions are not enjoined, "plaintiffs are threatened with the imminent total loss of their property interests," the court stated that "[a] regulatory taking requires actual severe economic loss, not merely threatened harm." The court also held that the Governor's emergency orders "are quintessential examples of regulations that 'adjust the benefits and burdens of economic life to promote the common good'." The court concluded that "a mandated-but-temporary business closure to deal with a public health emergency is not sufficiently akin to a governmental appropriation of private property for a public use so as to require compensation."

D. 2023 LAND USE LAW UPDATE

William W. Abbott
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1. CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

A. Regulatory Framework

Summary

- Over 40-years old, CEQA requires lead agencies to prepare environmental documents prior to granting discretionary approvals. CEQA documents are subject to numerous court decisions applying case law and the CEQA Guidelines. (Pub. Res. Code, §§ 21000, *et seq*.; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000, *et seq.*)
- Substantive mandate: Public agencies should not approve projects that will significantly affect the environment if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (Pub. Res. Code, § 21002.)

B. 2023 Update

Exemptions

1. *County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612

The California Supreme Court held that the California Environmental Quality Act ("**CEQA**") is partially preempted by the Federal Power Act ("**FPA**"), reversing in part a Court of Appeal ruling that CEQA is fully preempted. The court held the FPA preempts CEQA only when CEQA interferes with the FPA's exclusive licensing process. The FPA, meanwhile, does not preempt CEQA when it is used to make decisions concerning issues outside federal jurisdiction or those that are compatible with the federal government's exclusive licensing authority.

The California Department of Water Resources ("**DWR**") sought to renew its license to operate the Oroville Dam and related facilities ("**Oroville Facilities**") in Butte County. The FPA requires entities seeking to operate a dam, reservoir, or hydroelectric power plant in the United States to secure licensure from the Federal Energy Regulatory Commission ("**FERC**"). As part of the renewal process, DWR engaged in FERC-regulated negotiations with stakeholders, culminating in a settlement agreement signed by more than 50 parties. Butte and Plumas counties participated in the negotiations but did not sign the settlement agreement. DWR subsequently submitted the settlement agreement and licensing application to FERC. To satisfy the National Environmental Policy Act ("**NEPA**"), FERC was required to prepare an Environmental Impact Statement ("**EIS**"). The EIS analyzed three alternatives, including a staff alternative, which assumed the Oroville Facilities would operate under the terms of the settlement agreement plus additional modifications proposed by staff. The EIS declared the staff alternative was the preferred alternative. DWR, meanwhile, prepared an Environmental Impact Report ("**EIR**") pursuant to CEQA that analyzed the same three alternatives analyzed by FERC in its EIS. DWR prepared the EIS as part of the process of satisfying the Federal Clean Water Act ("**CWA**"), which requires applicants for federal licenses involving activities that may result in discharges into navigable waters to obtain certification from state agencies that the discharge

will comply with both state and federal water quality laws. The EIR included mitigation measures that addressed the project's impact on wildlife, air quality, and other environmental impacts.

Butte and Plumas counties ("**Plaintiffs**") filed separate writ petitions challenging the sufficiency of the EIR. The cases were later consolidated. The trial court held the EIR was sufficient. The Court of Appeal held the counties' challenges were preempted by the FPA and declined to reach the merits of the case. On appeal before the California Supreme Court the first time, the court remanded the case back to the Court of Appeal for the court to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, which held that the federal Interstate Commerce Commission Termination Act ("**ICCTA**") does not preempt CEQA for a new railroad project, and that the State of California, as the railroad operator, could opt to subject itself to CEQA review without conflicting with the ICCTA. The Third District came to the same conclusion on review. On review for the second time, the primary issue before the Supreme Court was whether the FPA preempts the application of CEQA when the state acts on its own behalf in exercising its discretion in pursing relicensing of a hydroelectric dam.

In analyzing the issue of full preemption, a divided Supreme Court grappled with federal case law that interpreted the FPA to preempt state regulations governing private entities engaging in activities related to hydroelectric facilities. The majority distinguished that case law, holding it did not consider whether Congress intended to occupy the field to the extent of precluding a state from exercising authority over its own subdivision's license application. The court concluded that the FPA preempted the counties' ability to challenge the sufficiency of the settlement agreement, reasoning that to hold otherwise would pose an obstacle to FERC's congressionally granted exclusive authority on those matters. The court, meanwhile, held CEQA is not preempted by the FPA when parties challenge the sufficiency of an EIR, reasoning that DWR could use the environmental conclusions reached through the CEQA process to aid in its decision whether to accept FERC's staff alternative or request modification to the terms of the license issued by FERC, which the FPA allows. The court noted that CEQA, in the context of a state entity applying for a federal license, constitutes "self-governance" rather than traditional state regulation of private actors that has been held preempted in previous cases.

2. *Save Downtown Livermore v. City of Livermore* (Cal.App., Dec. 28, 2022, case no. A164987) 2022 Cal.App. LEXIS 1091, 2022 WL 18460890

Both the trial court and the First District Court of Appeal rejected a challenge to an affordable housing project submitted in the City of Livermore. The project was found by the City to be exempt from CEQA based upon on an existing specific plan. The original specific plan EIR was certified in 2004, followed by a Subsequent EIR adopted in 2009 in conjunction with an increase in allowable density within the specific plan. (Govt. Code section 65457; CEQA Guidelines section 15182.)

During the trial court litigation, the developer moved to require the petitioner to post a bond in the amount of $500,000 to cover the potential damages to the developer as a result of delay due to unsuccessful litigation. On the merits, the trial court denied the petition for writ of mandate.

The appellate court first addressed the consistency issue, affirming the deferential standard of review to be applied by a court when considering an inconsistency claim. While an opponent can always find some aspect of inconsistency to argue over, as a general rule, an appellate looks to apply a test of overall consistency. As part of this analysis, the appellate court also noted the limitations on denials under the Housing Accountability Act. (Government Code section 65589.5.) The appellate court acknowledged the staff report which explained the basis for finding consistency (illustrating once again the value of thoughtful staff reports in successful land use litigation.) Having established the deferential review, the court then considered and rejected the arguments concerning siting, orientation, massing, window design, and open space.

Regarding the CEQA exemption pursuant to specific plan, the appellate court addressed the 2020 analysis regarding onsite contamination and remediation requirements. The court found that there as a consideration of contamination issues in the 2009 subsequent EIR sufficiently covered this issue, and the 2020 studies did not constitute new information.

Finally, the appellate court affirmed the trial court's decision to require that a bond be posted pursuant to Code of Civil Procedure section 529.2. This statute can be involved for certain qualifying low and moderate-income projects. Requiring a bond is not automatic. It requires the trial court to make certain determinations including the impact on the petitioners' ability to pay, whether the litigation intended to delay the project, and the impact of the litigation on the developer. An appellate court does not independently review the evidence but is deferential to the trial court. Notably, the appellate court agreed with the trial court that "this is not a close case," supporting the trial court conclusion that the purpose of the litigation was delay. Reviewing all of the evidence, the appellate court concluded that the trial court had not abused its discretion in requiring a bond.

3. *County of Mono v. City of Los Angeles* (2022) 81 Cal.App.5th 657

In 2010, the City of Los Angeles, the Los Angeles Department of Water and Power ("**LADWP**"), and Los Angeles Department of Water and Power Board of Commissioners (collectively, "**Los Angeles**") approved a set of substantively identical leases (2010 Leases) governing about 6,100 acres of land Los Angeles owns in Mono County. Los Angeles deemed the approval of the leases to be categorically exempt from CEQA review because they involved the use of existing structures or facilities with no or negligible expansion of use. (CEQA Guidelines § 15301.)

The 2010 Leases included various provisions concerning water that essentially made it clear that water supply to the farms was given subject to the paramount rights of Los Angeles with respect to all water and water rights and that Los Angeles reserves "all water and water rights … together with the right to develop, take, transport, control, regulate, and use all such water and water rights." The availability of water for use in connection with the premises leased was conditioned upon the quantity in supply at any given time and the amount and availability of water, if any, shall at all times be determined solely by Los Angeles. The 2010 Leases stated that water supplies to all land classified for irrigation (alfalfa and pasture) will be delivered in an amount not to exceed five acre-feet per acre per irrigation season, dependent upon water availability and weather conditions; due to this, delivery of irrigation water may be reduced in dry years. In actuality, the delivery of water varied widely from 2010 to 2018, depending on

water runoff and the needs of Los Angeles. For instance, no water was provided to the landowners in 2016, and only .7-acre feet in 2016. However, in 2012 and 2018, 5.4- and 5.0-acre feet of water were provided for irrigation. Even in the first year of the 2010 Lease, Los Angeles provided only 4.3-acre feet, not the 5.0-acre feet mentioned in the Lease.

In March 2018, Los Angeles sent the lessees copies of a proposed new form of leased for a five-year period running until the end of 2022, renewable up to three additional five-year periods. As to irrigation water for the Lessee or the leased premises, the Lessee shall not use water supplied to the leased premises as irrigation water. The Lease then stated that from time to time, based on Los Angeles's "operational needs," Los Angeles might spread or instead the lessee to spread excess water on the leased property. The lease has similar clauses about the paramount right of Los Angeles to the water rights.

Mono County and Los Angeles disagreed about whether Los Angeles's reduction of water was the implementation of a previously approved project or the approval of a new project under CEQA. CEQA defines a project as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the follow: (a) an activity directly undertaken by any public agency; (b) an activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other form of assistance from one or more public agencies; (c) an activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (Public Resource Code §21065) CEQA Guidelines expand on this definition and provide, "the term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval. (CEQA Guidelines §15378(c).) The focus of the Appellant Court's inquiry was whether the 2018 water allocation is the whole of an action or part of a larger action, either the 2010 Leases or the Proposed Dry Leases. The Court determined the proposed 2018 Leases (the "**Dry Leases**") were part of the 2010 Leases and therefore not a project for purposes of CEQA.

The First Appellant Court reviewed the 2010 Lease carefully, and relied on its language that specifically provided the leases are subject to the paramount rights of Los Angeles with respect to all water and water right and subject to the paramount right of Los Angeles at any time to discontinue the providing water in whole or in part and take or hold or distribute such water for the use of Los Angeles and its inhabitants. The plain language of the Lease accorded Los Angeles the right to do precisely what Mono County contends Los Angeles did: curtail water deliveries for the purpose of increasing water deliveries to Los Angeles's residents.

Since the Appellant Court determined that the 2018 Leases did not constitute a "project" and just a subsequent discretionary decision or approval of an activity under the 2010 Lease, the statute of limitations permit started in 2010. Mono County should have filed a CEQA petition in 2010, or at a minimum in 2014, 2015 or 2016 when Los Angeles exercised its authority to reduce water to zero or close to zero.

4. *St. Ignatius Neighborhood Association, v. City and County of San Francisco (2022) 85 Cal.App.5h 1063*

The St. Ignatius College Preparatory High School ("**School**") requested authorization to install four 90-foot light standards in the school's athletic stadium. In February 2018, the school submitted an application for approval of the addition of four permanent 90-foot-tall outdoor light standards to its athletic field to enable nighttime use of the stadium. The City determined that the project was exempt under CEQA review under the Class 1 and Class 3 categorical exemptions.

Class 1 Exemption

The Class 1 exemption for "existing facilities" applies to "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of the existing or former use" (CEQA Guidelines, § 15301). The City determined that the project qualified for a Class 1 exemption because it involves negligible or no expansion of the existing use of the facility. While the Project will not increase the capacity of the stadium or the overall frequency of use, the installation of the permanent lights will significantly expand the nighttime use of the stadium. With the project, the field will be lit and in use approximately 80% of the fall and winter weeknights. The school suggests that the existing nighttime use of the field is 40% to 50% evenings during the fall and winter, with the use of temporary lights. The Court determined that increasing the use of the field to 150 nights a year is a significant expansion of the facility's existing use, and therefore the City erred in finding the Class 1 Categorical exemption applicable.

Class 3 Exemption

The City also exempted the Project from CEQA review under the Class 3 exemption, which applies to construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. (Guidelines § 15303) City contended installation of the four light standards falls within section 15303, as it applied to "limited numbers of new, small . . . structures." While reference to square footage is meaningful when referring to commercial and residential buildings, as the guidelines do, whether a structure is "small" when referring to detached light-emitting standards cannot be evaluated solely on the basis of the square footage at their base. The light standards, at 90 feet tall, are significantly taller than any other structure in the neighborhood. The Court determined that a 90-foot-tall light standard does not qualify as "small" within the meaning of the exemption.

The Project included installation of telecommunications equipment that was not an issue on the appeal. The City relied on cases finding a Class 3 exemption that installed telecommunications equipment on an existing pole. If the 90-foot-tall light standard was already constructed and the Project was merely to add telecommunication equipment to it, the exemption would be applicable. However, the exemption is not available for the installation of a 90-foot-tall light standard in a residential neighborhood.

Environmental Impact Reports

***We Advocate Thorough Environmental Review v. City of Mount Shasta* (2022) 78 Cal.App.5th 629**

After purchasing a former water bottling facility in 2013, Crystal Geyser Water Company ("**Crystal Geyser**") began the process of seeking the various permits and agency approvals needed to facilitate the renovation ("**Project**"). Siskiyou County ("**County**"), acting as lead agency, prepared and certified an EIR finding that the Project would result in significant unavoidable impacts. The City of Mount Shasta ("**City**"), acting as a responsible agency, relied on the EIR when issuing a wastewater permit for the Project. Although the EIR found the Project had significant and unavoidable impacts, the City in issuing the wastewater permit concluded that there would be no unmitigated adverse impacts of the wastewater discharges in particular, without making further findings. We Advocate for Environmental Review and Winnehem Wintu Tribe (collectively, "**Petitioners**") filed a petition asserting that the City failed to make findings required by CEQA, that the City should have adopted further mitigation to address the Project's environmental impacts before approval, and that the City should have conducted further environmental review of the Project. The trial court rejected all of these arguments.

On appeal, Petitioners argued, and the Court agreed, that the City did not comply with the mandate of Public Resources Code Section 21081 that an approving agency find, for each significant impact, either (1) the impact has been mitigated; (2) mitigation of the impact is the responsibility of another agency; or (3) other considerations make mitigation or alternatives infeasible and there are overriding benefits that outweigh the impact. The simple blanket statement that the City had "considered" the EIR and found no unmitigated environmental effects from wastewater was inadequate. While the trial court ruled that a blanket statement is sufficient when all impacts are mitigated, a position echoed by the City on appeal, the Court held the position to be untenable, as one of the findings under Section 21081 is that the impact has been adequately mitigated. Thus, in this circumstance, Section 21081 required the agency to make that finding for each individual impact and a blanket finding was inadequate.

Petitioners also argued that the City should have themselves adopted the EIR's mitigation measures in a mitigation and monitoring plan because the County, as lead agency, lacked authority to enforce them.

Acknowledging that CEQA requires even responsible agencies to mitigate significant effects whenever feasible, the Court found no evidence that the County lacked such authority. The Court recognized that a responsible agency in the City's position might be required to adopt feasible mitigation itself in some instances, absent a finding that such mitigation is in the exclusive jurisdiction of another agency, but the Court declined to rule on whether the City could make such a finding on remand. Without delving into the merits of the argument, the Court also rejected Petitioners' claims that changes made to the EIR's description of the wastewater permit after the draft required further environmental review, the Court held that the suit against the City was not the proper forum for challenging the adequacy of the County's EIR.

***We Advocate Thorough Environmental Review v. County of Siskiyou* (2022) 78 Cal.App.5th 683**

This case addresses the re-opening of a water bottling plant that sought to extract groundwater to be used to produce bottled water. The issue was the County description of the project objectives for purposes of CEQA, and whether they were overly narrow so as to exclude the consideration of any other feasible alternatives. The County defined the proposed project and related renovations to a former bottling plant for the production of sparkling water, flavored water, juice beverages and teas. The EIR further described the project's objectives as follows:

(1) To "operate a beverage bottling facility and ancillary uses to meet increasing market demand;
(2) To site the proposed facility at the Plant previously operated by Dannon to take advantage of the existing building, production well, and availability and high quality of existing spring water on the property;
(3) To utilize the full production capacity of the existing Plant building based on its current size;
(4) To initiate operation of the Plant as soon as possible to meet increasing market demand;
(5) To minimize environmental impacts by utility existing facilities and infrastructure to the extent possible
(6) To modify the existing facility at the Plant in a manner that incorporated sustainable building and design practices, recycling efforts, and other conservation methods, in order to reduce water use;
(7) To withdraw groundwater in a sustainable manner that does not result in negative effects on nearby springs or wells, the underlying shallow or deep aquifers, or the surrounding environment; and
(8) To create new employment opportunities for the local and nearby communities.

The Third District Court of Appeal found that these objectives were too narrow to preclude any alternative other than the Project. The County largely defined the Project objectives as operating the Project as proposed. One of an EIR's major functions is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official. The County also rejected the no project alternative as infeasible. In the County's view, this alternative would not accomplish any of the basic project objectives.

The Court also determined the EIR needed to be recirculated for public review when significant new information is added to the EIR. In this case, the draft EIR stated the project will result in greenhouse gas emissions of 35,486 metric tons of carbon dioxide equivalent ("**$MTCO_2e$**") per year. Because this amount exceeded the County's established threshold of significant of 10,000 $MTCO_2e$ per year, the County concluded that the Projects' emission would result in a significant impact. In the final EIR, the county estimated a far higher level of emission: 61,281 $MTCO_2e$ per year. The County determined that this was not significant new information that required circulation. The Court disagreed finding that an increase of 25,795 $MTCO_2e$ per year was not an insignificant detail.

This case highlights the importance and inherent difficulty in providing an adequate project description and analysis of feasible alternatives when preparing an Environmental Impact Report ("**EIR**"). The case involved an EIR for demolishing the State Capitol Building Annex attached to the Historic Capitol and replacing it with a larger new annex building. The project also included the construction of an underground visitor center attached to the Historic Capital's west side and an underground parking garage east of the new Annex. The Plaintiffs argued that the EIR lacked a stable project description; failed to adequately analyze and mitigate the Project's impacts on cultural resources, biological resources, aesthetics, traffic, and utilities and service systems; put forth analysis of alternatives to the project that was legally deficient; and violated the California Environmental Quality Act ("**CEQA**") by not recirculating the EIR a second time before certifying it. The Third District Court of Appeal held that the EIR's project description, analysis of historical resources and aesthetics, and analysis of alternatives did not comply with CEQA and the EIR must be recirculated.

Project Description

In the initial draft EIR, the Department of General Services ("**DGS**") stated that without detailed information on the new Annex's exterior appearance and how it would integrate with the Historic Capitol, and the parking garage's specific location and footprint, the project's impact on historical architectural resources, and in particular the Historic Capital, "cannot be fully confirmed."

In the recirculated draft EIR, DGS provided a revised project description that described the visitor center's new design. The revised project description repeated the description of the new Annex and the parking garage, including that the new Annex's aesthetics and materials would be consistent with the Historic Capitol to create a "One Building" feel and its building materials would be consistent with the Historic Capitol. The visitor center and parking garage were shown in the general envelope being considered between the Historic Capitol's south side and N Street.

The Final EIR provided for the first time the new Annex's exterior design and the parking garage's new location. The footprint of the new Annex would be a "Double-T" configuration, appearing from above as if a letter "T" was immediately above another letter T, and the bottom of the lower "T" was attached to the Historic Capitol. The Annex's exterior would be a "pleated glass design." The design maximized the availability of natural light and improved working conditions for building occupants. DGS stated the design will be compatible with, but not identical to, the Historic Capitol. Additionally, the Final EIR stated the underground parking garage would be built east of the new Annex underneath the 12th Street walkway, not south of the Historic Capitol as originally planned. The new design would accommodate 150 vehicles, not the 200 as originally planned.

An EIR must contain an accurate, stable, and finite project description for an intelligent evaluation of a project's potential environmental impacts. The Third Appellant Court determined that the project description changed significantly in the Final EIR, particularly as viewed as a factor for determining the project's impact on a historical resource. The new Annex

will have a glass exterior. A glass exterior is so different from the Historic Capitol that DGS no longer stated the new Annex's material would be consistent with the Historic Capitol. Instead, it would be "compatible." DGS clarified that it sought to create a "One Building" feel within the new Annex's interior spaces for the occupants as they move through the Capitol. Moreover, a primary purpose for the glass exterior design was the building occupants' health and well-being and maximizing natural light in the new building. Although the project's objectives included providing a safe environment for building occupants, neither of the two prior EIRs stated that occupants' health and maximizing natural light would drive the new Annex's exterior design. The Third Appellate Court held that the description of the exterior of the new Annex's exterior was designed to the detriment of public participation and informed decision-making on the project's most controversial aspect – its impact on historical resources. Therefore, the EIR needed to be recirculated.

Analysis of Feasible Alternatives

CEQA requires an EIR to identify feasible alternatives that could avoid or substantially lessen the project's significant environment impacts. (Public Resources Code §§ 21002, 21100, subd. (b)(4).) The Court concluded that the alternatives chosen did not contribute to a reasonable range of alternatives. The Final EIR modified the visitor center's design and moved it to the West Lawn from the south side of the Historic Capital. Furthermore, the underground parking garage would be east of the new Annex underneath the 12th Street walkway, not south of the Historic Capital as originally planned. However, in the Final EIR, DGS rejected considering leaving the Visitor's Center as in the prior draft EIRs because DGS argued there would be no impacts on the Capitol's western façade. The Court concluded that the EIR did not comply with CEQA's requirement that the EIR consider a reasonable range of alternatives.

***Southwest Regional Council of Carpenters v. City of Los Angeles* (2022) 76 Cal.App.5th 1154**

In *Southwest Regional Council of Carpenters v. City of Los Angeles*, the Second District Court of Appeal reversed the trial court decision and held that the environmental impact report ("**EIR**") for a mixed-use commercial and residential project did not violate the California Environmental Quality Act ("**CEQA**"). The project had a somewhat complex history, with a Draft EIR, a Recirculated Draft EIR, and a Final EIR, each which introduced additional alternative iterations of the project, as well as a newly recommended revised project ("**Revised Project**") introduced after the Final EIR was released. But unlike the leading cases that have found an unstable project description, here the appellate court keyed in on one simple, important fact: "The project, from inception through approval, was a mixed-use commercial/residential development project on a defined project site. The only changes involved the composition and ratio of the residential to commercial footprint, but the proposals demonstrate that the overall size of the project remained consistent, and the site remained the same."

Importantly, even the newly recommended Revised Project represented a slightly smaller version of Alternative 5 where the number of residential units was reduced from 675 to 623 and the amount of commercial use remained unchanged at 60,000 square feet. The appellate court also noted that the various project alternatives were the result of the CEQA process "which resulted

in revision to the original Project based on public comments received." As for the Revised Project triggering recirculation claim, the appellate court relied on the limited scope of new information that triggers recirculation identified in CEQA Guidelines section 15088.5 to conclude that no recirculation was required. It reasoned that because the Revised Project was a reduced version of Alternative 5, it "was not 'considerably different from other alternatives previously analyzed' in the [Draft] EIR." It further noted that even if recirculation should have occurred, neither Petitioners nor the public were prejudiced because they "had five months and multiple public comments public hearings to comment on the Revised Project.

Buena Vista Water Storage Dist. v. Kern Water Bank Authority **(2022) 76 Cal.App.5th 576**

A senior water rights holder on the Kern River ("**Petitioner**") challenged the certification of an environmental impact report ("**EIR**") by the Kern Water Bank Authority ("**Authority**") in support of a water supply reliability project using existing infrastructure for its water rights permit application for a new appropriative right to divert and store 500,000 acre-feet per year from the Kern River. Until 2010, the Kern River was considered fully appropriated, but SWRCB removed the designation when it determined that in certain wet years there are excess flood flows that remain in the Kern River. Petitioner argued the Authority had failed to comply with the California environmental Quality Act ("**CEQA**"), because the EIR (i) did not include an accurate, stable, and finite project description, and (ii) the failure to quantify existing water rights rendered the water supply impacts analysis inadequate. The trial court ruled in favor of the Petitioner and the Authority appealed. The Second District Court of Appeal reversed.

As for the project description claims, the Second District held that the project description was adequately finite and stable. It first rejected Petitioner's argument that the EIR was internally inconsistent because it used several different phrases to describe the hydrologic conditions under which diversions would occur. The appellate court reasoned that the phrasing, including the descriptions of "flood flows," water the Authority "has historically received," and "unappropriated water" is consistent, and the use of the proposed 500,000-acre-feet per year "limit" was consistent with CEQA's flexibility to allow for project fluctuations due to changing conditions that are subject to maximum limit. The appellate court also held that the Authority was not required to quantify the amounts, diversion measurements, or water used by existing Kern River water rights holders. It reasoned that because the project proponent sought the use of unappropriated surface waters, CEQA does not require that proponent to inventory existing appropriated water rights in the water source, particularly so here because it noted that there had never been a quantified stream-wide adjudication of the Kern River.

As for the evaluation of impacts on water supply, the appellate court held that the EIR's conclusions were supported by substantial evidence. It reasoned that because the EIR relied on historical measurements of actual diversions as the baseline to conclude that project water would be available about 18% of the time, the impact evaluation and conclusions were supported by substantial evidence. The appellate court also rejected claims that the EIR failed to adequately evaluate impacts associated with groundwater storage and recovery related activities of the project. It reasoned that the EIR's less-than-significant impact conclusion was supported by substantial evidence because the withdrawals in dry years were compared to baseline conditions

and were expressly limited to the amount of water diverted and banked in wet years where the surplus water was available.

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700

The First District Court of Appeal affirmed the trial court's ruling that Marin County ("**County**") did not violate the California Environmental Quality Act ("**CEQA**") when it approved a decades-old mountaintop residential development proposal in accordance with two federal court judgments and after completing environmental review. The First District reasoned that CEQA is flexible and can be adjustable based on any legal limitations placed on an agency's discretionary authority.

The Project and First Lawsuit

The Martha Company ("**Martha**") owns 110 acres overlooking the San Francisco Bay near the town of Tiburon. In 1974, the County adopted a rezoning measure that reduced how many residences Martha could build on its property. The action also precluded Martha from constructing homes on an area known as the "Ridge and Upland Greenbelt." Martha sued the County, alleging the rezoning constituted a regulatory taking.

The litigation resulted in a stipulated judgment in 1976. The judgment allowed Martha to develop no fewer than 43 residences on lots spanning at a minimum of a half-acre. The judgment also allowed for some of the homesites to be located on Ridge and Upland Greenbelt. In return, Martha agreed to dedicate 50% of its land to the County as open space and to allow the County to develop hiking trails there. A 1976 letter from the county counsel commenting on the stipulated judgment said the Project must still meet "procedural and hearing requirements," including the preparation of an environmental impact report ("**EIR**").

Second Lawsuit

For years the County refused to approve the project. The County sued Martha in 2005 in U.S. District Court to declare the 1976 judgment void, alleging the County "illegally contracted away its police powers over its statutory land use authority when it entered into the judgment." The district court dismissed the County's complaint, leading to a second stipulated judgment in 2007. The second judgment required the County to abide by the terms of the 1976 agreement. That judgment explicitly mandated the preparation of an EIR.

Third Lawsuit

Martha filed its most recent development application with the County in 2008. The draft EIR, prepared in 2011, analyzed project impacts, mitigation measures, and four alternatives. The parties debated the scope of the proposal for nearly seven years, resulting in Martha eventually agreeing to reduce the scope of the project area from 64 acres to 32 acres, and to dedicate 71% of the parcel as public open space. The County certified the EIR and conditionally approved a master plan in 2017, concluding Martha sufficiently addressed unavoidable significant impacts via proposed conditions and mitigation measures. The conditional approval included a statement

of overriding considerations addressing significant and unavoidable impacts. Following the approval, the Tiburon Open Space Committee ("**Committee**") filed a petition for a writ of mandate against the County, challenging the EIR on several grounds. The Committee further alleged the environmental review process was flawed in that the County had already predetermined that it would approve the Project, thinking it had to due to the 1976 and 2007 stipulated judgments. The Committee contended the County agreements constituted an illegal contracting of the County's police power. The Town of Tiburon ("**Town**") joined the action after filing a petition in intervention. The trial court ruled in favor of the County. The Committee and Town (collectively, "**Petitioners**") appealed. The First District addressed several issues, including:

The Stipulated Judgments did not Constitute an Abdication of CEQA by County

Petitioners alleged the 1976 and 2007 stipulated judgments constituted illegal agreements by which the County agreed to avoid CEQA in order to approve the project. By this logic, Petitioners accused the County of engaging in a "truncated version of CEQA, one that had a preordained conclusion." Additionally, Petitioners contended the County relied on these illegal agreements in refusing to require Martha to adopt an alternative that included a smaller footprint than was analyzed in the EIR. The First District rejected the claims. It noted that the County certified an 850-page EIR, and that a lengthy, six-year administrative process preceded the EIR's adoption. The appellate court reasoned that CEQA is flexible in that it "recognizes that the scope of environmental review must be commensurate with an agency's retained discretionary authority, including any limitations imposed by legal obligations."

Rejection of Alternatives

Petitioners accused the County of abusing its discretion by rejecting a less-dense, 32-unit alternative analyzed within the EIR and by deciding to limit the alternatives to the four it analyzed. CEQA generally bars lead agencies from approving projects that may cause significant environmental impacts if there exist feasible alternatives that could substantially lessen those impacts. The appellate court reasoned that the term "feasible" is a "flexible concept that can outrank and overpower what might otherwise qualify as alternatives to the proposed project." The court concluded that because the County was legally bound to approve 43 units pursuant to the stipulated judgments, that any alternative comprising fewer units would be "legally infeasible."

Traffic Safety

The Town specifically objected to the EIR's determination that the Project's impacts on traffic safety in neighborhoods in the Town of Tiburon could be mitigated to a less-than-significant level by adopting certain mitigation measures. The EIR suggested the Town prohibit people from parking dumpsters on certain roads in order to mitigate increases in residential traffic and emergency vehicles due to the Project. The appellate court found the County made a good faith attempt to reduce the anticipated impacts with a "reasonable plan for mitigation" (quoting *City of Marina v. the Board of Trustees of California State University* (2006) 39 Cal.4th 341, 365).

Traffic Analysis

The Committee contended that substantial evidence did not support the EIR's traffic study given the failure to study peak hour traffic including the "school rush." The Committee argued a new traffic analysis should be conducted that included broader time periods. The appellate court rejected the argument, reasoning that lead agencies need not conduct every test imaginable to analyze a possible impact. Agencies must only make a good effort at full disclosure. Thus, the appellate court concluded the County did not abuse its discretion by not requiring traffic impacts to be measured during the mid-afternoon school rush.

California Red-Legged Frog

The Town alleged the Project threatened the survival of California Red Legged Frogs; many lived east of the Project site in a freshwater pond. The EIR found the Project would result in significant impacts to the frog – the pond would suffer decreased water quality and water flow patterns. The County's EIR included five mitigation measures to reduce the impacts to the protected frog. However, a portion of the County's mitigation plan involved participation by a neighbor, and that neighbor refused to participate. The Court found the County made a reasonable plan for mitigation, which was comprehensive and should not be faulted due to the neighbor's non-cooperation.

Water Tank and Fire Flow Mitigation

The EIR found that existing water storage facilities could not provide all homes with standard water pressures required for domestic water service, constituting a significant impact. To mitigate the impact, Martha agreed to construct a new 180,000-gallon water supply tank on one of those sites which would satisfy the water needs of the new development. The Committee contended the plan was inadequate. The EIR also concluded that, as designed, the project would not provide for adequate firefighting water flow. The EIR implemented several mitigation measures: (1) Receive approval for reduced fire flow requirements as permitted by the Fire Code; (2) reduce the size of the homes to compensate for the flow requirements; and (3) upgrade existing water lines. The EIR found the mitigation measures would reduce the project's fire flow impacts to a less-than-significant level. The Committee challenged the above collection of mitigation measures. The appellate court concluded the Committee's allegations were without merit because the County instituted a reasonable plan comprised of mitigation measures and a monitoring program.

Temporary Construction of On-Site Road

The Committee challenged Martha's construction and use of a private road to be used for construction purposes. The road was not proposed to be open to the public. The Committee contended the final EIR inadequately analyzed safety risks to construction workers who were slated to use the road. Despite finding that the EIR analyzed such impacts, the appellate court held the County did not have to because CEQA does not "regulate environmental changes that do not affect the public at large" (quoting *Parker Shattuck Neighbors v. Berkeley City*

Council (2013) 222 Cal.App.4th 768, 782). Thus, it concluded that the County should not be penalized for going above and beyond CEQA's requirements.

Save the Hill Group v. City of Livermore (2022) 76 Cal.App.5th 1092

Petitioners challenged the approval by the City of Livermore ("**City**") of an environmental impact report ("**EIR**") for a residential development located in the last remaining undeveloped area of the City known as the Garaventa Hills. The Project was originally submitted in 2011 and subsequently reduced in size through successive iterations to overcome public opposition until it was finally approved in 2019. The Project is located adjacent to a wetland preserve, which provides habitat for special status species. Petitioners argued that the EIR was inadequate, having failed to adequately consider certain significant impacts, investigate, and evaluate the no-project alternative, or fully mitigate those impacts. The trial agreed the no-project analysis was inadequate but held that Petitioners had failed to exhaust administrative remedies and denied the petition. Petitioners appealed. The First District Court of Appeal reversed.

First, the appellate court addressed exhaustion. It held that Petitioners had exhausted its claims as to the no-project alternative. The court reasoned that even though the comments did not specifically refer to the EIR's no-project alternative, the City was "fairly apprised" of Petitioners' claim because they had expressed concerns about the destruction of habitat and supported keeping the project site in its present condition rather than approve the project. The court also noted that though the City Council had an interest in exploring a feasible acquisition/ preservation option, it was advised not to consider the no-project alternative by the City Attorney due to takings liability concerns.

Second, the appellate court considered Petitioners' claims on the merits. As for the no-project alternative, the Court held that the re-issued final EIR lacked critical information to support informed decision-making, because it failed to consider the availability of funding to permanently conserve the project site, instead the EIR improperly dismissed the no-project alternative as "not reasonably foreseeable" because it was already zoned for residential development, which the court noted was always subject to change. Petitioners also argued that the proposed compensatory mitigation site for impacts to wetlands habitat was inadequate because the area was already protected under the City's general plan. The appellate court was unpersuaded. It reasoned that the mitigation requirement would create a permanent easement, something the general plan does not provide, and required a replacement site should the selected location be found inadequate for the identified species.

League to Save Lake Tahoe v. County of Placer (2022) 75 Cal.App.5th 63

Petitioners filed suit to challenge the approval by the County of Placer ("**County**") of a specific plan involving nearly 7,500 acres of undeveloped forest land in the Lake Tahoe Basin. Specifically, the project proposed to effectively transfer developments from most of the property to concentrate development of 760 residential units and 6.6 acres of commercial uses on 775 acres, while permanently preserving the remaining acreage as open space and conservation. The lengthy and complex decision measuring 123 pages in length involves several significant issues, but this writing focuses on its discussion on some of the noteworthy issues the court considered

in its review of the adequacy of the wildfire impact analysis in the project's environmental impact report ("**EIR**") pursuant to the California Environmental Quality Act ("**CEQA**").

Petitioners argued the County failed to: (1) adequately address the Project's impacts on emergency response and evacuation plans; and (2) support its conclusion that the impact would be less than significant. They claimed that the County's reliance on a traffic modeling study to evaluate cumulative impacts on emergency evacuation planning routes was insufficient, because: (i) it should have considered additional foreseeable scenarios that would impact the ability of the public to evacuate, and (ii) the County's evacuation route impact conclusion was inconsistent with its traffic impacts conclusions. Petitioners also argued the County's reliance on only two emergency access roads failed to lessen the project's impact because they both simply funneled the vehicles to route 267.

The appellate court rejected petitioners' claims and held for the County. On the traffic modeling study, it reasoned that the County's choices to model an evacuation during the peak summer season, assume that certain intersection improvements on Route 267 would be implemented, but a planned widening project (from two lanes to four lanes) would not. They were entitled to deference to the County's discretion to determine its methodologies for analyzing the impact and the reasonableness of the methodologies the County used. The appellate court also upheld the County's decision not to consider two specific situations included in a comment on the EIR: (1) a family van towing a boat trailer that tips over and blocks the evacuation route; and (2) someone at the end of a queue responding to embers and smoke drifting across the road. It reasoned that CEQA does not require agencies to evaluate speculative impacts, nor does it require such analyses to be exhaustive. As for the purportedly inconsistent impact conclusions, the appellate court held that the conclusions were not necessarily inconsistent when considered in context. It reasoned that "an agency might find *time* the sole relevant consideration when evaluating impacts to traffic conditions, but then find *public safety* the guiding criterion when evaluating impacts to emergency evacuation plans." The appellate court last rejected Petitioners' claimed deficiencies of the emergency access roads, noting that "without knowing how the authorities will direct the use of Route 267 and the project's roads in an actual evacuation, it would be speculative to conclude that, just because all roads lead to Route 267, the impact is significant as a result."

Air and Water Quality in the Lake Tahoe Basin

On appeal, the League also argued that the EIR did not describe the Basin's existing air quality and the lake's water quality as part of its description of the regional environmental setting. Even though the Project was not within the Basin, the Court found that the EIR was required to discuss the Basin's existing air and water quality so that potential environmental impacts could be determined. Regarding the existing air quality in the Basin, the Court found that the County had not abused its discretion in omitting in-Basin air quality data that was determined to be unreliable. The Court did, however, hold that the EIR failed to discuss the lake's existing water quality, and that the FEIR's discussion of how Vehicle Miles Traveled ("**VMT**") affected water quality did not supplant the need for the FEIR to describe the lake's existing water quality. Nor did the EIR's discussion of the lake's Total Maximum Daily Load ("**TMDL**") – a pollutant abatement program designed to restore Lake Tahoe's deep-water transparency – adequately

describe the existing setting, as it was merely referenced without any summary or analysis of its contents. As such, the Court found that the County abused its discretion because the EIR lacked a description of the lake's existing physical water quality.

The League also argued that the EIR violated CEQA by not discussing the Project's specific impacts on water and air quality in the Basin. Tahoe Regional Planning Agency ("**TRPA**"), the agency charged with protecting the natural resources of the Basin, utilized a VMT significance threshold for projects within its jurisdiction to address air and water quality impacts to the lake resulting from traffic, such as automotive dust and emissions. It required total VMT in the Basin to remain below an established number. Though the Project was outside of the Basin, both the League and TRPA had urged the County to use TRPA's VMT threshold to evaluate its impacts. On appeal, the League argued that the EIR should have used this threshold despite the Project being outside of the Tahoe Basin, and thus outside TRPA's jurisdiction, because the Project would create in-basin traffic. The County instead used a significance threshold developed by the Placer County Air Pollution Control District ("**Air District**") to evaluate the significance of the Project's air quality impacts. Using this threshold, the County determined the Project's emissions would be cumulatively significant, but mitigation measures reduced these impacts to less than significant. Examining other EIRs for recent projects near the Basin, the County determined that the Project would not result in Basin VMT exceeding TRPA's VMT threshold. Without resolving whether the Project's increase in VMT would cause specific significant air or water quality impacts individually or cumulatively within the Basin, the County determined that proposed fees paid to expand transit services would mitigate the Project's impacts on VMT.

The Court acknowledged that CEQA requires a lead agency to consult and obtain comments from trustee agencies, like TRPA here, that have jurisdiction by law over natural resources a project may impact. The Court noted, however, that CEQA grants the lead agency discretion to accept or reject the threshold of significance standard that a trustee agency uses to determine an impact's significance so long as the lead agency identifies the "areas of controversy" between the agencies per CEQA Guidelines section 15123(b)(2), (3). Here, the Court found that the EIR adequately responded to TRPA's comments, explained why it did not employ TRPA's threshold of significance, and disclosed the disagreement. Further, the Court found reliance on the Air District's threshold to be supported by substantial evidence. Though the threshold was different than TRPA's, nothing in the record indicated that it would not protect Basin resources, in part because the Tahoe Air Basin was within the Air District's jurisdiction as well. In contrast to *Sierra Watch v. Placer County* (2021) 69 Cal.App.5th 86 ("**Squaw Valley**"), in which an EIR was inadequate because it failed to provide a threshold of significance and did not determine whether the impact was significant, the Court here found that the EIR evaluated significance with an adequately supported significance threshold. Thus, the County did not abuse its discretion in applying the Air District's threshold instead of TRPA's VMT threshold to address impacts to the Basin's air quality. However, despite adequately evaluating air quality impacts from traffic, the Court found that the EIR did not address the impacts on water quality from traffic particulates. The Court observed that a VMT-based threshold, such as TRPA's, would have addressed this. Though the EIR had referenced TMDL, it did not evaluate consistency with that standard, and as such, the mere reference did not suffice for this purpose. Nor did the County's responses addressing the Project's impacts on the VMT threshold after the FEIR was

circulated cure the issue because this analysis was required to be in the DEIR. Thus, the EIR's analysis of water quality impacts were found to be inadequate.

***Save the El Dorado Canal v. El Dorado Irrigation District* (2022) 75 Cal.App.5th 239**

Petitioner filed a petition for writ of mandate challenging the decision by the El Dorado Irrigation District ("**EID**") to certify an environmental impact report ("**EIR**") pursuant to the California Environmental Quality Act ("**CEQA**") and undertake its Upper Main Ditch piping project. The Project would replace approximately three miles of an unlined ditch system with a buried water pipeline to conserve water and improve water quality. EID had originally considered placing the new pipe system under the existing ditch system, but later selected an alternative alignment, the "Blair Road" alternative which was approximately 3,100 feet shorter than the original alignment. Petitioner alleged that the EIR's project description was inadequate because it failed to identify the to-be-abandoned ditch section also served as the watershed's drainage system. Petitioner also identified infirmities in the EIR as to the project's impacts on hydrology, biological resources, and wildfires. The trial court rejected each of Petitioner's claims and Petitioner appealed. The Third District Court of Appeal affirmed.

The appellate court rejected Petitioner's claims that the project description failed to acknowledge the role of the ditch in the area watershed. It noted that the project description disclosed that: (1) the ditch section passively intercepts and conveys stormwater; (2) the ditch section can accommodate 10-year design stormflows before proceeding to the American River's South Fork; and (3) a remnant channel will remain in place to receive and convey stormwater flows at its current capacity. The appellate court further noted that despite Petitioner's claims to the contrary, CEQA does not require the EIR to specifically state that the ditch is "the watershed's only drainage system," only "adequacy, completeness, and a good faith effort at full disclosure."

Regarding the specific impact analyses, the appellate court also rejected Petitioner's claims, finding the EIR's conclusions were supported by substantial evidence. On hydrology, Petitioner claimed that EID's abandonment of maintenance responsibilities of the abandoned ditch would lead to flooding impacts because it was foreseeable that the ditch would be clogged from vegetation and debris from adjoining landowners. The appellate court sided with EID, agreeing that Petitioner's claims were speculative. On biological resources, the appellate court found substantial evidence supported EID's analysis that the Blair Road alignment would result in fewer impacts than Petitioner's preferred alignment because it removed fewer trees, affected no riparian areas, and similarly avoided or minimized impacts to oak trees. As for wildfire impacts, the appellate court held that EID adequately demonstrated that the ditch was neither identified as in fire protection plans nor even used as a source of water or other fire-fighting resource.

***Ocean Street Extension Neighborhood Assn. v. City of Santa Cruz* (2021) 73 Cal.App.5th 985**

Petitioners challenged the adoption of an Environmental Impact Report ("**EIR**") by the City of Santa Cruz ("**City**") in support of its approval of a general plan amendment, rezone, and Planned Development Permit ("**PDP**") for a 32-unit residential project. The developer initially applied for a 40-unit residential project in 2010. In 2016, an initial study was prepared identifying two

potentially significant biological impacts, which were reduced to a less-than-significant level with mitigation. The City next released a Draft EIR and included the initial study as an appendix, and later issued a partially recirculated Draft EIR in response to public comments on traffic and transportation impacts. The City ultimately approved Alternative 3, which reduced the number of residential units from 40 to 32. The trial court rejected Petitioners' claims under the California Environmental Quality Act ("**CEQA**"), while also finding the City erred as to a separate planning and zoning law claim. Petitioners appealed the CEQA claims and the City cross-appealed on the planning and zoning law claim. The Fourth District Court of Appeal found in favor of the City as to all of Petitioners' claims. Each of the issues are discussed below:

Biological Resources

Petitioners argued the EIR was deficient because the impact analyses and proposed mitigation measures were located in the Initial Study, rather than the body of the EIR. The appellate court reasoned that Petitioners' position would "elevate form over substance" and held that the Initial Study's inclusion as an appendix was sufficient to conclude the EIR was an adequate informational document. The appellate court also rejected Petitioners claim that the discussion on impacts to protected bird species in the Initial Study was inadequate because it failed to analyze potential impacts to specific impacts to individual bird species, finding the discussion sufficient under CEQA. Finally, Petitioners claimed that the City violated CEQA because mitigation measures may only be discussed as part of the Final EIR, pursuant to *Salmon Protection & Watershed Network v. City of Marin* (2004) 125 Cal.App.4th 1098, and in any event as drafted the mitigation's reliance on pre-construction surveys were impermissible deferred mitigation. The appellate court rejected both claims, finding that: (1) *Salmon Protection & Watershed Network* involved the use of mitigation measures to justify the exemption; (2) the mitigation measures were added to the Mitigation Monitoring and Reporting Program adopted by the City; and (3) though the Petitioners had failed to exhaust administrative remedies on this issue, the pre-construction survey mitigation measures included the necessary specificity and are sufficiently detailed and certain as to what must occur as based on the findings of the required surveys.

Project Objectives

Petitioners next argued that the EIR's project objectives, including objectives that "target 40 units" were impermissibly narrow and precluded serious consideration of smaller projects. The appellate court first noted that Petitioners had failed to challenge the range of alternatives proposed in the EIR. It then reasoned that the City's ultimate selection of a reduced-size alternative demonstrated that the City actually did consider smaller projects. The appellate also rejected Petitioners' claim that the project failed to meet the stated objectives furthering affordable housing and housing for people with disabilities, reasoning that the project exceeded the City's affordable housing requirements and included some accessible dwelling units.

Cumulative Impacts

Petitioners challenged the Project's cumulative impacts on water supply and traffic impacts as inadequate. As to the traffic analyses, the appellate court quickly dismissed the issue noting the

regulatory changes to the CEQA Guidelines that no longer require a Level of Service analysis. As to water supply impacts, the appellate court rejected Petitioners' claim that the analysis failed to account for water supply impacts in light of other projects and the Project's additional contribution to the existing shortfall. It noted that the claims lacked merit, because the City's water management plan already included the Project and its contributions which was used to support the EIR's analysis.

Save North Petaluma River and Wetlands v. City of Petaluma **(2022) Cal.App.5th 207**

In another long-term saga to construct housing, the First District Court of Appeal held that the City of Petaluma ("**City**") complied with the California Environmental Quality Act ("**CEQA**") in certifying an Environmental Impact Report ("**EIR**") for an apartment complex because the analysis of special status specifically did not have to be conducted entirely in the same year that the Notice of Preparation was published under Guidelines section 15125(a). The EIR sufficiently presented a comprehensive assessment based on site visits, studies, and habitat evaluation undertaken before and after the Notice of Preparation with no apparent material changes. Additionally, the Court determined that the analysis of public safety impacts relating to emergencies satisfied Guidelines section 15126(a).

Initially, the proposed development was for a 312-unit apartment complex in 2003 along the Petaluma River. In May 2008, the City adopted its General Plan 2025, and to conform to the General Plan, the project was reduced to a 278-unit complex. In May 2018, the City finally published the Draft EIR for public review and comment. After public comment and review, the project was further reduced to 180 units to increase the setback from the Petaluma River and preserve two wetlands near the river and avoid development in the River Plan Corridor. On February 3, 2020, the City Council certified the EIR and approved the necessary zoning changes.

Special Status Species

The Notice of Preparation was issued in July 2007. The EIR contained a 70-page analysis which the Court reviews extensively, addressing potential impacts to biological resources on the Project site, including special species. The analysis included a 2004 WRA Special Status Species Report, site visits, various state and federal plant and wildlife databases, input from regulatory agencies, arborist reports, vegetation mapping, and environmental communities mapping of the site to support the analysis. The issue was if there needed to be a study conducted at the time of the Notice of Preparation in 2007 for setting the appropriate special status species baseline. The Court determined that petitioners failed to show that the EIR was rendered legally inadequate simply because no special status-specific analysis was conducted in 2007. The EIR's special status species analysis was drawn from site visits, studies, and habitat evaluations that were taken both before and after the Notice of Preparation, and there was no indication the analysis was flawed due to material changes in the on-site habitats over the time period at issue. There is no requirement under CEQA that a study be conducted in 2007 to establish the baseline for the special status species.

Public Safety Impacts Relating to Emergencies

Appendix G of the Guidelines requires the city to access the impacts of the Project with an adopted emergency response plan or emergency evacuation plan. The EIR relied on the 2013 California Fire Code and the review and expertise of the Petaluma Fire Department's review of the proposed emergency evacuation access route and found it to provide acceptable emergency access to the site. Petitioners submitted a one-page letter from a Professor who claimed to be a National Evacuation Expert and opined that the Project may have significant public safety impacts in the event residents from the planned development and the adjacent apartments have to evacuate from hazardous events. The Court determined they could not reweigh conflicting evidence and upheld the City's determination with regard to its analysis of public safety impacts relating to emergencies.

Citizens' Committee to Complete the Refuge v. City of Newark (2021) 74 Cal.App.5h 460

Citizens' Committee to Complete the Refuge ("**CCCRB**") and the Center for Biological Diversity argued the City of Newark ("**City**") violated the California Environmental Quality Act ("**CEQA**") when it approved a housing development project by relying on a prior environmental impact report ("**EIR**") from its approval of a specific plan without conducting further environmental review. The First District Court of Appeal determined that the City project was exempt from further CEQA review under Government Code section 65457 because it was consistent with the specific plan.

In 2010, the City certified an EIR on the specific plan to allow for development of up to 1,260 residentials units as well as a golf course and related facilities. CCCR challenged the specific plan under CEQA, contending the EIR was inadequate. The trial court in that case identified several deficiencies in the EIR, including that the EIR failed to make clear in what respects it was intended to be a program-level or project-level document. In response, the City prepared a recirculated EIR ("**REIR**") and remedied the deficiencies the trial court had identified. In 2015, the City certified the final REIR, readopted the 2010 specific plan, and entered into a development agreement with the developer.

In 2016, the City approved a subdivision map for the development comprising 386 housing units. In 2019, the developer submitted a subdivision map for approval of 469 residential units. The subdivision map proposed no development outside subareas B and C and omitted the golf course. Instead, the development agreement proposed to deed much of subarea D to the City. The city concluded the construction of 469 units as proposed in the subdivision map would be consistent with the specific plan, and there was no changed circumstances or new information that might trigger the need for additional environmental review.

Government Code section 65457 provides an exemption from CEQA for housing development proposals that follow a city's specific plan. CCCR argued that there were significant differences from the specific plan because:

- The subdivision map proposes to fill and elevate only the upland portions of subareas B and C and not the wetlands in those areas;
- The subdivision map does not include a golf course; and
- The filled and raised portion of subareas B and C to be developed will be directly next to other wetlands and the western banks of those elevated areas will be armored with riprap.

The Court was not persuaded, pointing out the specific plan included the complete development of subareas B, C, and D. By contrast, the subdivision map did not develop subarea D at all (except for a multi-use trail) and sought to develop only 96.5 acres of the approximately 148.7 upland areas in subareas B and C. The Court reasoned those changes contained in the subdivision map compared to the uses envisioned in the specific plan, thus would result in the development of fewer total acres and fewer upland areas. The subdivision map also provided for fewer residential units than the specific plan allowed.

CEQA Litigation

***American Chemistry Council v. Department of Toxic Substances Control* (2022) 86 Cal.App.5th 146**

The case involves a regulatory decision to list spray foam systems as a priority product by the Department of Toxic Substances Control ("**Department**"). The Court decision addresses the regulatory issues, though the court's analysis of the California Environmental Quality Act ("**CEQA**") is of particular importance. The Department issued an Exemption Notice with respect to the decision to list spray foam as a priority product. The Department concluded the listing was exempt from CEQA because the "project will not result in a change in any of the physical conditions within the area affected by the project." Therefore, the Department found "with certainty that there is not a possibility that the activities in question will result in a significant environmental effect." (CEQA Guidelines §15061(b)(3).)

The Department sent its proposed regulatory package to the Office of Administrative Law ("**AOL**"), which endorsed, approved, and filed the regulatory package on April 26, 2018. On May 1, 2018, the Department issued an alert stating that spray foam systems would be listed as a priority product effective July 1, 2018. On May 30,2018 the American Chemistry Council ("**ACC**") filed an appeal with the AOC, which was finally rejected on February 25, 2019. ACC filed a petition for writ of mandate on August 9, 2019. The Department argued that the CEQA claim was time-barred because it had not been filed within 180 days of the OAL enforcement, approval and filing of the regulatory package.

If an agency determines a project is categorically exempt from the environmental review requirements of CEQA and proceeds to approve the project, any party objecting that such determination was improper must file an action within 35 days after a valid notice of exemption has been filed by the agency. If none was filed or the notice of exemption is defective in some material manner, the filing period for action is limited to 180 days after the project is approved. Neither party contests that the 180-day statute of limitation applies in this case. The core dispute is when that period began to run. The Fifth District Court of Appeal held that the deadline for

filing a CEQA action turns on whether the administrative remedies covered by the Green Chemistry law regulations include review of CEQA issues or whether the standard CEQA exhaustion requirements are all that are needed to exhaust administrative remedies.

In this case, the Court determined that the administrative dispute resolution process for the Safer Consumer Products regulations did not include CEQA. The statute of limitations period starts running on the date the project is approved by the public agency and is not retriggered on each subsequent date that the public agency takes some action implementing the project.

***Jenkins v. Brandt-Hawley* (2022) 86 Cal.App.5th 1357**

This case involved a group of well-off, "NIMBY" neighbors living in one of the most expensive zip codes in the country — San Anselmo — trying to prevent their fellow neighbors from rebuilding a decrepit and dangerous residence on their property due to privacy and design aesthetics concerns. The Project involved the demolition of a 2,882 square feet one-bedroom Craftsman-style shingled bungalow built in 1909 and a small cottage built sometime later. The architect and two contractors all advised that the main house was not worth saving. The homeowners ("**Jenkins**") proposed to demolish the existing structures and build a 3,227.5 square-foot single-family residence. After extensive review with Planning Staff and neighbors, the Project was ultimately approved by the Planning Commission, subsequently approved by the City Council following an appeal. The City Council determined that the Project was categorically exempt under CEQA (Cal.Code Regs., titl. 14 §15303(a)) and consistent with the City's General Plan and Zoning laws.

The neighbors hired attorney Susan brandt-Hawley, who filed a lawsuit alleging violations of CEQA and the Town Municipal Code, including the General Plan. The Jenkins attorney sent a five-page single space letter asserting that the claims appear to be completely without merit and presented primarily or solely for the improper purpose of harassing the Jenkins. Brandt-Hawley refused to dismiss the lawsuit. The trial court ruled against Brandt-Hawley's client and then she appealed to the Appellant Court. There was an additional motion filed and withdrawn by Brandt-Hawley, but on the filing date the Jenkins' response pleading was due, Brandt-Hawley dismissed the lawsuit.

Jenkins then sued Susan Brandt-Hawley and her law firm for malicious prosecution. Brandt-Hawley filed a special motion to strike the complaint under Code of Civil Procedure §425.16 (SLAPP or Anti-SLAPP motion). The anti-SLAPP motion was heard by the trial court on May 12, 2021, who ruled that Jenkins had met their burden under an anti-SLAP analysis, demonstrating a probability of prevailing on their claim for malicious prosecution. It was appealed to the Appellant Court who likewise ruled against Brandt-Hawley ruling that the Jenkins had a probability of prevailing on a malicious prosecution claim because substantial evidence supported the Town's determination that the Project was categorically exempt from CEQA and that the attorney (Brandt-Hawley) could be inferred that she knew that failure to exhaust remedies under Public Resources Code §21777, barred a CEQA challenge and acted with malice in pursuing the case after learning it was untenable. Furthermore, the Appellant Court rejected the argument that a CEQA-related case should be insulated from malicious prosecution claims lacked merit because legitimate CEQA advocacy was not chilled.

***Committee for Sound Water & Land Development v. City of Seaside* (2022) 79 Cal.App.5th 389**

The Court of Appeal affirmed the trial court's ruling that a petition for writ of mandate filed under the California Environmental Quality Act ("**CEQA**") was time-barred because it was not filed within the tolled statute of limitations temporarily enacted due to the COVID-19 pandemic. The lawsuit centered around the certification of an EIR by the City of Seaside ("**City**") for a specific plan containing a proposal to redevelop part of the site of the former Ford Ord military base in Monterey County into a mixed-use project. The Seaside City Council certified the EIR on March 5, 2020, and filed a Notice of Determination the next day.

The Committee for Sound Water & Land Development ("**Committee**") filed its first writ petition on April 6, 2020. The Committee subsequently filed a request for dismissal without prejudice, which was granted on August 4, 2020. The Committee filed a second writ petition on September 1, 2020, that included eleven causes of action under CEQA and contending, among other things, that the EIR was deficient in its analysis of the project's environmental impacts. Both the City and the real party-in-interest filed demurrers. The real party's demurrer, which represents the central CEQA issue in this case, alleged the causes of action contained within the writ petition were time-barred pursuant to an emergency rule adopted by the Judicial Council that tolled the 30-day statute of limitations to August 3, 2020, nearly a month before the second writ was filed.

Meanwhile, the City alleged that the Committee's second writ petition constituted a sham pleading and should be dismissed due to the defense of laches. The City alleged that the second pleading constituted a method of circumventing procedural deficiencies within the first writ petition, because Petitioners had failed to request a hearing on the writ petition within 90 days of filing the petition as required by Public Resources Code section 21167.4, subdivision (a). The trial court sustained both demurrers without leave to amend. Committee appealed.

Typically, petitioners have 30 days to file a petition challenging the adequacy of the environmental review contained within an EIR. (Pub. Res. Code §21167€.) However, Governor Newsom declared a state of emergency on March 4, 2020, due to the pandemic. On April 6, 2020, the Judicial Council issued its first iteration of Emergency rule 9, which tolled all civil statutes of limitation until 90 days after the governor lifted the state of emergency. The Judicial Council received numerous comments concerning the indefiniteness of the new rule and thereafter amended the rule to toll statutes of limitation under 180 days from April 6, 2020, to a fixed date of August 3, 2020. On appeal, Committee argued the amended Emergency rule 9 was "unreasonable and arbitrary," constituting an "improper ex post facto law that cut off the Committee's access to courts." Committee also accused the Judicial Council of being "improperly influenced by lobbyists." The Sixth District Court of Appeals upheld the trial court's decision, reasoning that the effect of the revised Emergency Rule 9 effectively tripled the time period for filing suit against the project from 30 days to 90 days, representing a reasonable time to file a writ petition.

Attorney's Fees

***Dept. of Water Resources Environmental Impact Cases* (2022) 79 Cal.App.5th 556**

The Department of Water Resources ("**DWR**") initially proposed two tunnels to convey fresh water from the Sacramento River to pumping stations in the Sacramento San Joaquin Delta ("**Project**"). Lawsuits were brought by a number of organizations ("**Plaintiffs**") challenging the Project. The suits were coordinated at the trial court level. While the coordinated proceeding was pending, newly elected Governor Newsom announced that he did not support the dual-tunnel proposal and directed DWR to pursue a single-tunnel conveyance instead. DWR decertified its EIR and rescinded its project approvals, and the various lawsuits were voluntarily dismissed.

Following dismissal Plaintiffs moved for attorney's fees, arguing that their suits succeeded in causing DWR to voluntarily provide the relief they sought. The trial court denied the motions, concluding that it was not Plaintiffs' lawsuits that caused DWR to provide the relief. Plaintiffs appealed that denial, arguing that the trial court applied an incorrect legal standard and that its factual conclusion as to causation was unsupported. While the Court of Appeal rejected most of Plaintiffs' contentions, it agreed that the trial court erred in treating the Governor's policy directive as an external, superseding cause. It faulted the trial court for ending its analysis upon its observation that DWR's conduct was wholly determined by the Governor's direction. In the Court's view, the trial court was required to additionally consider whether the lawsuits caused the Governor to issue that direction, thereby still indirectly causing the result to be achieved. Plaintiffs had in fact offered evidence indicating that this had been the case, which DWR had not rebutted. Further, the Court of Appeal noted that DWR's decertification of the EIR had not been a foregone conclusion. The agency could have instead prepared some form of subsequent review for the revised single-tunnel project, only evaluating changes from the already-certified environmental review. Because the trial court viewed decertification as an expected consequence of the change in project it had failed to consider its significance or whether Plaintiffs' actions had been the catalyst for this result.

Similarly, DWR had initially sought to continue a validation action, arguing that the validity of bond financing was not dependent on whether one or two tunnels was used. DWR ultimately reversed course though. The trial court again failed to consider the significance or causation involved in the decision. The Court remanded the matter for further consideration by the trial court. It did not mandate that fees be awarded, but instead directed the lower court to consider the catalytic effect of Plaintiffs' actions on a case-by-case basis and determine the appropriateness of attorney fees in that light.

C. Regulatory Guidance

Best Practices for Analyzing and Mitigating Wildfire Impacts of Development Projects Under CEQA

In 2022, the California Attorney General became active in local land use issues concerning rural development and wildfire risk. The focus was the sufficiency of the CEQA documentation for projects which were located in higher fire risk areas. The Attorney General

also took the unusual step in October 2022 to issue a CEQA "best practices" memorandum. This Memorandum provided detailed background and recommendations for how local governments should be evaluating risk and mitigation – no small undertaking. This Memorandum sets the bar extremely high. It is inescapable that the Memorandum will be used as a metric for evaluating the legal sufficiency of CEQA documents. This can only increase the cost of CEQA documentation and increase the legal risk for potential projects in areas at risk from wildfires. This Memorandum and the expanded CEQA consciousness that comes with it addresses only a part of the problem. CEQA does not address existing rural land use patterns, nor does it solve the serviceability of existing roadway systems or sufficiency of local fire departments and Cal-Fire resources. These issues will need to be addressed by the Governor and the Legislature. For more information see:

- Best Practices for Analyzing and Mitigating Wildfire Impacts of Development Projects Under the California Environmental Quality Act (at https://oag.ca.gov/system/files/attachments/press-docs/Wildfire%20guidance%20final%20%283%29.pdf).
- Fire Hazard Planning Technical Advisory, 2020 Update (Aug. 2022, available at https://opr.ca.gov/docs/20220817-Fire_Hazard_Planning_TA.pdf; and
- Wildfire-Urban Interface Planning Guide: Examples and Best Practices for California Communities (Aug. 2022), available at https://opr.ca.gov/docs/20220817-Complete_WUI_Planning_Guide.pdf.

The California Environmental Quality Act ("**CEQA**") requires local jurisdictions considering development projects to prepare an environmental impact report ("**EIR**") or a mitigated negative declaration if the project may have a significant impact on the environment and is not otherwise exempt from CEQA. The "environmental checklist form" in Appendix G of the CEQA Guidelines, Section XX, directs lead agencies to assess whether projects located in or near state responsibility areas of lands classified as very high fire hazard severity zones, would:

1. Substantially impair an adopted emergency response plan emergency evacuation plan.
2. Due to slope, prevailing winds, and other factors, exacerbate wildfire risks, and thereby expose project occupants to pollutant concentrations from a wildfire or the uncontrolled spread of a wildfire.
3. Require the installation or maintenance of associated infrastructure (such as roads, fuel breaks, emergency water sources, power lines or other utilities) that may exacerbate fire risk or that may result in temporary or ongoing impacts to the environment; or
4. Expose people or structures to significant risks, including downslope or downstream flooding or landslides, as a result of runoff, post-fire slope instability, or drainage changes.

In addition, Section IX (g) of the checklist broadly directs lead agencies to consider whether a project will "expose people or structures, either directly or indirectly, to a significant risk of loss, injury or death involving wildland fires." Lead agencies must consider both on- and off-site impacts.

Several variables should be considered in analyzing a project's impact on wildfire risk, including:

Project Density

Project density influences how likely a fire is to start or spread, and how likely it is that the development and its occupants will be in danger when a fire starts. Fire spread and structure loss is more likely to occur in low-to-intermediate-density development. This is because there are more present to ignite a fire (as compared to undeveloped land), and the development is not concentrated enough (as compared to high-density developments) to disrupt fire spread by removing or substantially fragmenting wildland vegetation. The conflict here is that the very reason many people move to the foothills and mountains is to live in a low-density development.

Project Location in the Landscape

Project placement in the landscape relative to fire history, topography, and wind patterns.

Water Supply and Infrastructure

Analyze the adequacy of water supplies and infrastructure to address firefighting within the project site. The analysis should consider the potential loss of water pressure during a fire, which may decrease the available water supply and the potential loss of power, which may eliminate the supply.

Lead agencies are encouraged to develop thresholds of significance that either identity an increase in wildfire risk as a significant impact or determine, based on substantial evidence, that some increase in the risk of wildfires is not considered a significant impact.

Lead agencies must consider the wildfire risks, landscape, and development for new development. This includes the density of housing, topography, and water supply as well as evacuation routes.

D. Legislation

SB 118 (Chapter 10) California Environmental Quality Act: Public Higher Education: Campus Population

Deletes the requirement that environmental effects relating to changes in enrollment levels be considered in the EIR prepared for the long-range development plan. The bill provides enrollment or changes in enrollment, by themselves, do not constitute a project for purposes of CEQA. The bill authorizes courts to order a public campus or medical center to prepare a new, supplemental, or subsequent EIR if the court determines that increases in campus population exceed the projections adopted in the most recent long-range development plan and analyzed in the supporting EIR, and those increases result in significant environmental impacts. Should any court find that campus population exceeds previously planned growth, SB 118 requires that it must now give public higher education campus 18 months to remedy the problem before enjoining population increases. The law came in response to a court-ordered enrollment freeze

that affected U.C. Berkeley. SB 118 applied retroactivity to U.C. Berkeley, invalidating the trial court's enrollment cap.

SB 886 (Chapter 663) California Environmental Quality Act: Exemption: Public Universities: University Housing Development Projects

Builds on SB 118 by establishing a full statutory CEQA exemption for housing projects to be constructed for U.C., C.S.U. and California Community College students atop real property owned by a public college or university. However, applicable housing projects must meet stringent criteria to qualify. All buildings must be consistent with the applicable Long Range Development Plan, LEED platinum or better, meet a transit proximity or VMT standard, result in no net additional GHG emissions, and meet labor and wage requirements. The exemption also requires all construction impacts to be "fully mitigated consistent with applicable law." The law sunsets on January 1, 2030.

2. PLANNING, DEVELOPMENT, AND SUBDIVISION MAP ACT

A. Cases Pending

There is one relevant case pending at the California Supreme Court. The case and the Court's summary are as follows:

1. *Chevron U.S.A., Inc. v. County of Monterey*, S271869 (H045791; 70 Cal.App.5th 153; Monterey County Superior Court; 16CV003978)

Petition for review after the Court of Appeal affirmed the judgment in a civil action. The court limited review to the following issue: Does Public Resources Code section 3106 impliedly preempt provisions LU-1.22 and LU-1.23 of Monterey County's initiative "Measure Z"?

Monterey County adopted Measure Z through the initiative process, which added three new land use policies to the County's General Plan. The first new land use policy was not in issue, but LU-1.22 and LU-1.23 were challenged. LU-1.22 prohibits current oil and gas wells from using gas wastewater injection or oil and gases wastewater impoundment. LU-1.23 prohibited all new drilling of oil and gas wells anywhere in the county's unincorporated area. The trial court and the Sixth District Court of Appeal found these measures were preempted by state law, because they conflict with Public Resources Code section 3106, which not only permits and encourages the drilling of new wells and use of wastewater injection, but explicitly vests in the state the authority to permit this conduct.

B. 2023 Update

1. *Reznitskiy v. County of Marin* (2022) 79 Cal.App.5th 1016

The First District Court of Appeal dealt squarely with the issue of whether the Housing Accountability Act ("**HAA**") applies to a single-family residence or only to multi-family projects. Developers argued that the HAA applies to all housing projects, while local governments and the Department of Housing and Community Development ("**Department**") argued HAA only applies to residential projects of two units or more. After an extensive review of the legislative history and the amendments and proposed amendments to HAA, the Court determined HAA applies to multi-unit developments and does not apply to the construction of a single-family residence. The Legislature enacted the HAA (Gov. Code § 65589.5) 40 years ago as part of a broad legislative efforts to address California's housing crisis. The HAA was designed to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. As one way to encourage housing construction, HAA bars local agencies from denying any proposed "housing development project" unless the denial is based on objective criteria or the agency finds that the project would adversely impact public health or safety (Gov. Code § 65589.5, subd. (j)(1)).

In 2016, Plaintiffs applied to build a single-family home and accessory dwelling unit totaling 5,145 square feet on a 1.76-acre lot they own in San Anselmo. After receiving comments from

the Marin County's Community Development Agency ("**Agency**"), Plaintiffs removed the accessory dwelling unit and reduced the house's floor plan to 3,872 square feet. In February 2019, the Agency issued an administrative decision approving the project. The decision found the project was compatible with the surrounding neighborhood and consistent with the Marin Countywide Plan and the Marin County Code's mandatory findings for design review. Neighbors appealed the Agency's decision to the Planning Commission ("**Commission**"), arguing that the size of the project rendered it incompatible with the neighborhood and provided a survey showing the average size of the nearest 25 residences was 1,544 square feet, significantly smaller than Plaintiffs' proposed house. The Agency prepared a staff report recommending that its administrative decision be upheld. The Commission unanimously voted to grant the neighbors' appeal and deny the permit.

The Plaintiffs then appealed to the Board of Supervisors ("**BOS**" or "**County**"). Among other arguments, the Plaintiffs claimed that "further downsizing" of the project was unnecessary and that the project's denial violated the HAA. The Agency submitted a letter to the BOS recommending that the Project's denial be upheld, now agreeing that the Project was outsized for the neighborhood and would unduly impact the creek and environment. The letter concluded HAA applied to "large-scale housing projects such as mixed use, multiple residential unit projects, transitional and supportive housing," and the project did not qualify as "[such] a higher density residential project." The BOS upheld the Commission's decision denying the project. The resolution adopted by the BOS affirmed that the proposed residence was oversized and concluded that the HAA did not apply to the project. The Plaintiffs filed a writ of administrative mandamus in the trial court to challenge the County's denial of the project. In December 2020, the trial court denied the writ and Plaintiffs appealed to the Appellate Court.

The issue before the Court was did the Plaintiffs' proposal to build a single-family home qualified as a "housing development project." Government Code section 65589.5(j) requires that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards, in effect at the time the application was deemed complete, the local agency cannot disapprove the project or impose a condition that the project be developed at a lower density unless the local agency makes specific findings for an exception. There was no dispute in the case that the BOS did not make the required findings as the BOS found the proposal to build a single-family home did not qualify as a "housing development project" under HAA. Government Code section 65589.5(h)(2) provides a "housing development project" means a use consisting of any of the following: (1) residential units only; (2) mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use; and (3) transitional housing or supportive housing. There was no case law interpreting this statutory definition, with the closest case being *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1072, 1075 ("**Honchariw I**") holding that subdivision (j) is not limited to affordable housing projects. In passing, the Honchariw I court stated that since the project contemplated eight single-family homes, its anticipated use fell under subdivision (h) as residential units. (*Honchariw I*, at p. 1074)

The Court initially reviewed the statute and determined that the language was not dispositive in this case. The legislation did not explicitly define the words "housing," "development," or "project," either individually or collectively. Rather, the term "means a use" consisting of one of

three types, thus focusing on the purpose a project must have to be subject to subdivision (j)'s stricter requirements for disapproval. The County argued the Court should rely on the literal meaning of "units" to mean that it was intended to apply to two or more units vs. a single-family residence. The Court rejected this interpretation, stating if that was the interpretation, then in subdivision (h)(B) the Court must interpreted "mixed-use developments" to apply to only two mix-use developments, which is an absurd result and not the intention of the legislation. The Court then conducted an exhaustive evaluation of the legislative history, including amendments to the HAA and proposed amendments to HAA over the last 40 years. Thus, the Court affirmed the trial court's decision, concluding that single-family residence is not subject to HAA, and the BOS did not need to make the findings required by HAA to deny the Project.

2. ***Tran v. County of Los Angeles*** (2022) 74 Cal.App.5th 154

Henry Tran ("**Petitioner**"), the owner of a liquor store in an unincorporated area south Los Angeles, applied for a renewal of the store's conditional use permit ("**CUP**") for the sale of alcohol. The County Department of Regional Planning ("**Department**") processed the request and recommended certain limitations on the minimum size of liquor bottles and limited the hours when alcohol sales could occur to 10:00 pm. The Regional Planning Commission ("**Commission**") approved the CUP but modified it to increase the hours of alcohol sales back to 2:00 am. Utilizing the County's "call for review" procedures by one of the board members, the BOS voted to hear the Commission's decision and set the item for a public hearing. At the August 1, 2017, hearing, the BOS heard testimony from the public and the Department and voted to approve a motion of intent to approve the CUP that added the time for alcohol sales limitation the Department recommended of 10 p.m. On March 20, 2018, nearly eight months later, the BOS formally adopted findings and conditions of approval consistent with the August 1, 2017 decision. Petitioner filed suit, arguing the delayed final decision violated County Code section 22.240.060, subdivision E.4, which requires the BOS to act within thirty (30) days of the close of the public hearing. (County Code §22.240.060€(4) ["Decisions on appeals or reviews *shall* be rendered within 30 days of the close of the public hearing"(emphasis added).].) The trial court rejected the claim, holding that the BOS had rendered its decision on August 1, 2017, when it approved the motion of intent to approve the CUP with the modified hours requirements, and Petitioner appealed.

The Second District Court of Appeal reversed. The Court first focused on whether the Code's apparent requirement was directive or mandatory — essentially determining whether the statutory provisions include a consequence for the failure to comply — the latter being required for the court to have the authority to invalidate the governmental action. Relying on the inclusion of an additional subdivision that mandates the affirmation of the lower body's decision for the failure to timely act on the appeal, the Court held that the 30-day deadline to act was mandatory. Next, the Court considered whether the BOS's "decision" was "rendered" on August 1, 2017, with the motion of intent to approve and ultimately concluded it was not. It reasoned that because the right of judicial review and statute of limitations only flowed from the formality of adopting findings and the CUP with its final modifications of the BOS's final action on March 20, 2018, the August 1, 2017 decision did not "render" the BOS's "decision" as required by County Code section 22.240.060€(4). Thus, the Court ordered the trial court to issue a writ of mandate vacating the BOS' decision and deeming the Commission's decision affirmed.

3. *Protect Our Neighborhoods v. City of Palm Springs* (2022) 73 Cal.App.5th 667

Short-Term Rentals in Residential Zones

The Fourth District Court of Appeal wrestled with whether allowing short-term rentals in a single-family residential zone without a permit was consistent with a municipal zoning code. Since 2008, a Palm Springs ("**City**") city ordinance has expressly allowed the short-term rental of a single-family dwelling, subject to various conditions designed to protect the interests of neighboring residences and the City's interest in collecting transient occupancy taxes. In 2017, Palm Springs reenacted the ordinance with amendments. Among other things, the ordinance made a new finding that the ordinance was consistent with the City's zoning code.

Protect Our Neighborhoods ("**Petitioners**"), challenged the City's adoption of the amended short-term rental ordinance. Specifically, petitioners challenged the City's finding that the amended ordinance was consistent with the City's zoning code, arguing that short-term rentals are commercial in nature and not residential. Petitioners also argued that because the ordinance defines short-term rentals as an "ancillary and secondary use," single-family homes cannot be used exclusively as short-term rentals. The trial court ruled in favor of the City, and Petitioners appealed.

The Fourth District affirmed. The Court reasoned that though the language in the zoning code created a potential conflict, the City's longstanding interpretation that "Vacation Rentals" are allowed in residential zones was entitled to deference unless it was clearly erroneous or unauthorized. Whether a city decides to prohibit a short-term rental in a residential zone, or permit them by-right, or with a conditional use permit, is solely in the discretion of the City Council. The Court also rejected the claim that a single-family home could not be exclusively used for short-term rentals. It reasoned that even a "vacant" home retains its residential character, pointing to the zoning code's definition of "dwelling" as "'designed exclusively for residential occupancy' [citations], not whether anyone actually resides there."

4. *Hobbs v. City of Pacific Grove* (2022) 85 Cal.App.5th 311

Short-Term Rentals in Residential Zones

In 2010, Pacific Grove allowed "transient use of residential property for remuneration subject to licensing, taxes and other regulation." Licenses were issued upon application for a period of one year, subject to revocation for good cause. In 2016, the City capped the overall number of short-term rental licenses to 250 and further established a density cap of 15% per block. In 2017, the City ordinance included several provisions regarding the renewal or revocation of short-term rental ("**STR**") licenses. The ordinance gave the City Manager or his/her designee the authority to delay or deny issuance of an STR license for any reason. The STR license shall not be automatically renewed. Each applicant for a license was required to affirm the following language: "I understand this license expires on March 31 each year, renewal of this license is not guaranteed, and the penalty for operation without a license is 1005 forfeiture of rents received."

By 2018, the City had in fact issued 289 STR licenses, in excess of the 250-licensee maximum established by the Ordinance, and in certain areas, in excess of the 15% density limits. Accordingly,

in areas where short -term licenses exceeded the 15% cap per block, the City resolved to select licenses to "sunset" after a grace period following the scheduled expiration of their existing term. The City devised a random lottery as a means to avoid substantive favoritism in reducing the number of licenses in a fair and equitable manner. These licenses remained active past their existing term through April 2019 to afford licensees time to cease accept new bookings and prepare the property for alternative uses such as rentals for longer than 30 days.

In November 2018, Pacific Grove voters approved Measure M, which the city would prohibit and phase out, over an 18-month sunset period, all existing short-term rentals in residential districts, except in the City's Coastal Zone.

In 2013, Plaintiff Susan Hobbs inherited a single-family residence in Pacific Grove. She and her husband made $50,000 in repairs and improvements to what was then an unmaintained eyesore before making it available for rent. They obtained a short-term rental license in 2013, which they renewed annually until 2019. Plaintiffs alleges that the Ordinance violates plaintiffs' right to due process by arbitrarily limiting the number of homes that can be offered as short-term rentals and by subjecting them to random selection for nonrenewal of licensure. Plaintiffs also allege that Measure M violates their right to due process by prohibiting all homes outside the Coastal Zone from being offered as short-term rentals.

Plaintiffs moved for a summary adjudication of Count 2 (the Ordinance) by contending their economic interest in renting their vacation homes exclusively for transient visitors was an entitlement subject to state or federal constitutional protection as a matter of law. The Court, to the extent that the Plaintiff asserts a "vested right" in that particular economic use of the real property, they have neither right – beyond the expressly defined terms of their license.

Procedural Due Process

Plaintiffs argued that the very adoption of the Ordinance implementing a randomized process for selecting licenses that would not be renewed beyond the existing terms, rather than affording licensees an opportunity to be heard as to the merits of their particularly property usage offended procedural due process. However, procedural due process only applies to those governmental decisions which are adjudicative in nature. Legislative actions are not burdened by such requirements.

Substantive Due Process

For substantive due process purposes, plaintiffs asserted they had a fundamental right to allow guests to stay in their home, and right to rent their homes to overnight guests. The "substantive" component of the Due Process Clause protects rights that are so rooted in the traditions and conscience of our people as to be ranked as fundamental, and therefore cannot be deprived without compelling justification. The Court rejected their effort to frame their issue as one of associational freedom, where the short-term relationship previously negotiated via plaintiffs' property manager were plainly not of the social type. The Ordinance merely prevents Plaintiffs from operating as a commercial innkeeper in a residential district. Nothing in the record reflects any infringement of plaintiff's right to entertain guests, host overnight visitors, or rent the

premises for periods of 30 days for more. As to the infringement of plaintiffs' economic use of their property, the inherent policy power includes the board authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's border.

Vested Right

The Plaintiffs also argued they had a vested right to the use, but for a vested right their detrimental reliance must be at a minimum reasonable to justify estopping the city from enforcement of the licenses expressly limited term. Here the issuance of the license was explicitly limited to one year and subject to a renewal process that was not automatic.

5. *AIDS Healthcare Foundation v. City of Los Angeles* (2022) 86 Cal.App.5th 322

This case pitted the anti-corruption objectives of the Political Reform Act of 1974 ("**PRA**") (Government Code § 81000*, et seq.*) against the desire for certainly in real estate development provided in the 90-day statute of limitations period in Government Code sections 65009 and 66499.37. AIDS Healthcare Foundation ("**AHF**") challenged land use decisions by the Los Angeles City Council planning and land use management ("**PLUS**") committee that were made while two of its members allegedly were the beneficiaries of an extensive, ongoing bribery scheme direct at PLUS committee projects. AHF contended the three-year catch-all statute of limitations in Code of Civil Procedure section 338(a) applies to those PRA claims. The city of Los Angeles asserted the more specific 90-day statutes of limitation in Government Code sections 65009 and 66499.37 applied.

There was no dispute that there was rampant corruption as one council member has already pled guilty to federal charges for obstruction of justice while the other council member was indicted on corruption charges, including racketeering, bribery, and money laundering. The only issue was how to address the applications that the council members had tainted. The court determined that the 90-day statute of limitations applied to the challenged any land use decisions.

6. *County of San Bernardino v. Mancini* (2022) 83 Cal.App.5th 1095

April Elizabeth Mancini owns the Jah Healing Kemetic Temple of the Divine, Inc. ("**Church**"), whose adherents consume cannabis blessed by Church pastors as a "sacrament." The County of San Bernardino determined that the Church routinely sold cannabis products in violation of a county ordinance prohibiting commercial cannabis activity.

State Preemption

California law permits the use of marijuana, but does not mandate that local governments allow, or accommodate the existence of marijuana dispensaries. (*City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal App.5th 1078, 1081). California law does not limit the authority of a local jurisdiction to adopt and enforce local ordinance to regulate marijuana dispensaries or to completely prohibit their establishment or operation. (Business and Professions Code § 26200(a)(1).) Therefore, the County ordinance prohibiting commercial cannabis activity in the unincorporated areas of the County was not preempted by state law.

Religious Land Use and Institutionalized Persons Act of 2000 ("**RLUIPA**")

RLUIPA provides that a government land-use regulation that imposes a substantial burden on the religious assembly or institution is unlawful unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest (*International Church of the Foursquare Gospel v. City of San Leandro* (9th Cir. 2011) 673 F. 3d 1059, 1066). The Church bears the initial burden of showing the County's ordinance imposes a "substantial burden" on their religious exercise. A substantial burden exists where the governmental authority puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." It must be more than an inconvenience of religious exercise and instead must be akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.

The Church's only relevant religious practice is the use of blessed cannabis products, which its adherents consider to be their sacrament. However, the County ordinance did not prohibit the Church from possessing, blessing, or consuming cannabis products. The ordinance only bans commercial cannabis activity, including selling and dispensing cannabis, whether for profit or otherwise. A county ordinance prohibiting cannabis activity on unincorporated county land was not preempted by state law because California law did not limit the authority of local jurisdictions to regulate or prohibit dispensaries and the ordinance did not violate RLUIPA.

7. *Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842

A citizens' group ("**Save Lafayette**") petitioned for a writ of mandate, claiming that a 315-unit residential development in the City of Lafayette ("**City**") conflicted with the city's General Plan as it existed when the project was revived in 2018. The First Appellant District ruled that despite the lengthy delay between when the application was deemed completed and the certification of the EIR for the project, the City properly applied the General Plan and Zoning standards in effect when the application was deemed complete.

O'Brien Land Company, LLC ("**O'Brien**") applied in March 2011 for approval of a 315-unit apartment project. The City deemed the application complete on July 5, 2011. An EIR was prepared for the apartment project and the City certified the EIR on August 12, 2013. However, the City's Design Review Commission recommended that the Planning Commission deny the application for a land use permit.

O'Brien and City staff then began to consider a lower-density alternative to the apartment project, consisting of 44 or 45 single-family detached homes. As part of the discussions, O'Brien and the City entered an "Alternative Process Agreement" on January 22, 2014. The expressed purpose of the Alternative Process Agreement was to establish a process for considering the project alternative; to "suspend" the apartment project in the meantime; and to "preserve" all of the parties" "rights and defenses . . . with regard to the Apartment Project" until the City made a determination on the project alternative. After much delay, negotiations, and a referendum to downsize the property that was rejected by the voters, the City Council adopted a zoning ordinance that required lot sizes more than three times larger than those the voters had rejected. On June 15, 2018, O'Brien notified the City that it was terminating the Alternative

Process Agreement and requesting the City to resume processing the apartment project application.

Since the property had been rezoned for homes on large lots, was the City required to use the General Plan and zoning that was in place at the time that the application was deemed completed in 2011, or when O'Brien terminated the processing agreement in June 2018? The First District Court of Appeal held that that the Housing Accountability Act ("**HAA**") requires that the City must comply with the objective General Plan, zoning, and subdivision standards and criteria in effect at the time the application was deemed complete. (Government Code § 56589.5, subd (d)(5).)

Finally, the Permit Streamlining Act ("**PSA**") addresses processes for permitting housing and other development projects. One aspect of the PSA requires that public agencies specify upfront what information an applicant for a development project must supply, and then the agency must review applications for completeness within 30 days of receiving them. (Government Code § 65940, subd. (a)(1), 65943, subd. (a).) Upon resubmittal of the application, a new 30-day period begins, during which the City shall determine the completeness of the application. Whether the application was complete for purposes of the PSA was also relevant under the HAA, which incorporates by reference the PSA's definition of completed application. (Government Code § 65589.5 subd (h)(5).) Save Lafayette argued O'Brien's request to resume processing must be treated as a resubmittal and the application should be reviewed under the standards in effect on a new "deemed complete" date.

The Appellant Court rejected four arguments by Save Lafayette as to why it was not a resubmittal:

- The PSA nowhere states that an application was deemed withdrawn, deemed disapproved, or deemed resubmitted at a later date, if after the agency acts within the PSA's time limits, the applicant fails to perfect its right to a "deemed approval." (Government Code § 65956, subd. (b));
- The Legislature made clear in discussing resubmittals that the PSA refers to applications that were resubmitted after the lead agency made a finding that the application as originally submitted was incomplete;
- The PSA expressly addresses disapproval of applications for a development project. The lead agency must specify reasons for disapproval other than the failure to timely act in accordance with time limits of the PSA; and
- The HAA was designed to meaningfully and effectively curb the capability of local governments to deny, reduce the density for, or render infeasible housing development projects. Here the application was complete on the date when the City made that determination in 2011, rather than at some later date after the City had twice downzoned the project site to allow for much less housing development.

The City deemed the application complete in 2011, and HAA requires the project be assessed against the 2011 General Plan and zoning standards.

8. *Sheetz v. County of El Dorado* (2022) 84 Cal.Ap.5th 394

The case involves a petition for a writ mandate and complaint for declaratory and injunction relieve that challenged the validity of a $23,420 traffic impact mitigation fee imposed by the County for a building permit to construct an 1,854 square-foot single-family residence. Petitioner contended the Transportation Improvement Mitigation ("**TIM**") fee is invalid under the Mitigation Fee Act (Gov. Code section 66000 *et seq*.) and the takings clause of the United States Constitution.

Nollan/Dolan Doctrine

The Court reviewed the unconstitutional taxings doctrine under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("Nolan/Dolan"). The standard established in Nollan/Dolan for assessing takings claims in the context of land use exactions is commonly referred to as the Nollan/Dolan test, which is viewed as a type of heightened scrutiny. The Nollan part of the test is "essential nexus standard," i.e., there must be an essential next as between the government's legitimate state interest and the exaction imposed. The Dolan part of the test is the "rough proportionality" standard with regard to the "degree of connection between the exaction and the project impact of the proposed development." The requirements of Nollan/Dolan do not extend to development fees that are generally applicable to a broad class of property owners through legislative action.

Mitigation Fee Act

The court then reviewed the Mitigation Fee Act as set forth in Government Code section 66000 et seq ("**Act**"). The Act provides a statutory standard against which monetary exactions by local government are subject to for development projects. The Act provides uniform procedures for local agencies to follow in imposing development fees.

There are two ways that a local agency can satisfy the Act's "reasonable relationship" requirement for the imposition of development fees. (Government Code section 66001(a).) The adoption of development impact fees is a quasi-legislative act, which is under the standards of traditional mandate. The court will review only whether the action taken was arbitrary, capricious, or entirely lacking in evidentiary support, or whether it failed to conform to procedures required by law. The local agency has the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question. If the local agency does not produce evidence sufficient to avoid a ruling against it on the validity of the fee, the plaintiff challenging the fee will prevail. However, if the local agency's evidence is insufficient, the plaintiff must establish a requisite degree of belief in the mind of the trier of fact that the fee is invalid. In general, the imposition of various monetary exactions, such as impact fees, is accorded substantial judicial deference.

The TIM fee was adopted to implement the goals of the El Dorado County General Plan, which required the County to adopt impact fees to mitigate roadway impacts from new development. The County Department of Transportation ("**DOT**") prepared a detailed memorandum

explaining the purpose of the fee, the use to which the fee was to be put, and the methodology used to calculate the fee rate for each type of new development. The memorandum indicated that the fee rates were developed after consideration of a variety of factors, including the expected increase in traffic volumes (average daily vehicle trips) from each type of new development. To estimate the vehicle trips or trip generation rates attributable to new development project, the County relied on data published in the Institute of Transportation Engineers Trip Generation Manual.

The Court upheld the fee finding that the County met its initial burden to demonstrate that the County used a valid method for imposing the TIM fee. The method used established a reasonable relationship between the fee charged and the burden posed by Petitioner's development of a single-family residence.

9. *Old East Davis Neighborhood Association v. City of Davis* (2021) 73 Cap.App.5th 895

This case, decided December 20, 2021, concerned the relationship between individual projects and general plans. The Third District Court of Appeal held that a mixed-use project was consistent with the general plan, although a portion of the building was taller than other mixed-use buildings in the area, in light of recommendations to increase the density in the area and the project's location in an opportunity site where additional density was encouraged.

The project ("**Trackside**") constituted a four-story 47,983 square-foot mixed-use building, offering 8,950 square-feet of ground floor retail space and 27 apartment units on three upper floors. The half-acre site was zoned mixed use and sat in a "transition area" between the Downtown Core and the Old East Davis residential neighborhood. The Plaintiff contended the 47,900 square-foot building did not constitute an appropriate transition between Old East Davis neighborhood and the Downtown Core.

The Appellant Court stated the rule for review of a City Council's determination that a project is consistent with the General Plan carries a strong presumption of regularity. The City Council's determination can be overturned only if it abused its discretion — that is, did not proceed legally, its determination is not supported by the findings, or if the findings are not supported by substantial evidence. As to substantial evidence, the court reasoned that a determination of general plan consistency should only be reversed if a reasonable person could not have reached the same conclusion based on the evidence before the local governing body. Because policies in a general plan reflect a range of completing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its own policies in light of the plan's purposes. To that end, the reviewing court's role is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 677–678); *Sequoyah Hills Homeowners Assn. City of Oakland* (1993) 23 Cal.App.4th 704, 717.)
The City Council made a finding that, according to the General Plan, new buildings must "maintain scale transition," as well as provide an "architectural fit with existing scale for new development projects. There must be a scale transition between intensified land use and

adjoining lower intensity land use. The court acknowledged that Trackside's average density of 40 units per acre is encouraged by the General Plan and the City's B and 3rd Street Visioning Process. Trackside is in a transition area bordering the Downtown Commercial Area and is intended to provide space for intensified mixed-use projects. The Court therefore saw no abuse of discretion in the City's reliance on the increased building scale and height language in the general plan.

C. Legislation

AB 2097 (Chapter 459) Residential, Commercial, or Other Development Types: Parking Requirements

Prohibits public agencies from imposing minimum parking requirements on most residential and non-residential projects within one-half mile of major transit stops, though it does not affect requirements for electric vehicles or disabled accessible spaces that would otherwise apply. Limited exceptions exist, including where existing parking would be affected, although the exception does not apply to small projects (no more than 20 units) and projects of at least 20% affordable housing. Given that parking requirements are often costly and can impede the development of a project, AB 2097 has the potential to spur both residential and commercial development, and encourage denser, infill development near public transit.

AB 2011 (Chapter 647) Affordable Housing and High Road Jobs Act of 2022

Creates a streamlined, ministerial approval process for multi-family housing development projects proposed in commercial zones. AB 2011 allows developers to build to significantly greater heights and density, with smaller setbacks, than are often allowed under local zoning. AB 2011 requires 15% affordable units for lower-income households in rental projects, while providing an alternative option of achieving affordability by allowing a project to qualify with 30% moderate-income units if the project is an ownership project or 8% of the units for very low-income households and 5% of the units for extremely low-income households. Applicable projects must also satisfy labor and wage requirements, and be located on urban, infill sites. Further, local governments can insulate themselves from the ministerial process by establishing neighborhood plans, such as specific plans, within which the bill's benefits will largely not apply.

SB 6 (Chapter 659) Local Planning: Housing: Commercial Zones

Designates residential development to be an allowable use in commercial zones, provided that the project is on an urban, infill site and meets additional criteria. These include requirements relating to minimum density, public notice, site location and size, and consistency with the applicable sustainable community's strategy. The project must also meet labor and wage requirements, including hiring a skilled and trained workforce, and interested parties such as labor organizations are empowered by the bill to seek injunctive relief against a project if the developer does not comply. Compliance with the SB 6 criteria also renders a project consistent with applicable objective development standards under the Housing Accountability Act. Additionally, applicants must provide written notice of the project, and potential relocation assistance, to existing commercial tenants.

Thus, SB 6 and AB 2011 possess similarities and differences. Both new laws attempt to create more housing through an expedited process for the reuse of infill property zoned for retail, office, and parking in commercial zones. Thus, the net effect of both new laws is to erode a city or county's zoning powers in commercial districts statewide. Major differences include the fact that AB 2011 creates a streamlined, ministerial process, making it exempt from CEQA. SB 6, on the other hand, is subject to CEQA. AB 2011 requires affordable units, whereas SB 6 does not. AB 2011 allows developers to build to significantly greater heights and density, with smaller setbacks, than are often allowed under local zoning. SB 6, by contrast, generally defers to existing local zoning that applies to nearby parcels allowing residential use. Accordingly, AB 2011 will allow many more units to be built on the same site when compared to SB 6.

AB 2334 (Chapter 653) Density Bonus Law: Affordability: Incentives or Concessions in Very Law Vehicle Travel Areas: Parking Standards: Definitions

Density Bonus Law requires a city or county to provide a developer of a housing project with a density bonus and other incentives or concessions; if the developer agrees to construct specified percentages of units for lower income, very low income, or senior housing, among other things, and meets other requirements. This bill, with respect to the affordability requirements applicable to 100% lower income developments, will require the rent for the remaining units in the development be set at an amount consistent with the maximum rent levels for lower income households, as those rents and incomes are determined by the California Tax Credit Allocation Committee ("**CTCAC**"). Regarding the enforcement of equity sharing agreement for sale units, AB 2334 permits the local government to defer to the recapture provision of the public funding source.

For projects where 100% of all units are for lower income households, a local agency is required under the Density Bonus Law to increase the height of up to three additional stories, or 33 feet, if the project is located within one-half mile of a major transit and is prohibited from imposing any maximum controls on density on the project if the project is located with one-half mile of a major transit stop. The bill allows the above-described height increase if the project is located with a very low vehicle travel area. The provisions are limited to the Counties of Alameda, Contra Costa, Los Angeles, Marin, Napa, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Mateo, Santa Barbara, Santa Clara, Solano, Sonoma, and Ventura.

AB 2668 (Chapter 658) Planning and Zoning: Calculation of Density Bonuses

Authorizes until January 1, 2026, a development proponent to apply for a multi-family housing development that is subject to a streamlined, ministerial approval process and not subject to a conditional use permit ("**CUP**"), if the development satisfies specified objective planning standards. The new law clarifies that a development subject to these provisions is subject to a streamlined, ministerial approval process, and not subject to a CUP or any other non-legislative discretionary approval. The law also provides that a local government is required to approve a development if it determines that the development is consistent with objective planning standards. The law clarifies that the minimum percentage of total units that a development must dedicate is to be calculated before calculating any density bonus.

AB 916 (Chapter 635) Zoning: Bedroom Additions

Prohibits a city or county legislative body from adopting or enforcing an ordinance requiring a public hearing as a condition of reconfiguring existing space to increase the bedroom count within an existing dwelling unit. The new law applies these provisions only to a permit application for more than two additional bedrooms within an existing dwelling unit or the increasing bedroom count in an existing dwelling unit.

AB 682 (Chapter 634) Planning and Zoning: Density Bonuses: Shared Housing Buildings

Provides that a housing development eligible for a density bonus be provided under these provisions includes a shared housing building that will contain 10% of the total units for lower income households; contain 5% of the total units for very low-income households; is a senior housing development; or in which 100% of all the units are for lower income households, as described above. The new law prohibits a city or county from requiring any minimum unit size requirements or minimum bedroom requirements in conflict with the bill's provisions with respect to a shared housing building eligible for a density bonus under these provisions.

AB 2221 (Chapter 650) & SB 897 (Chapter 664) and – Accessory Dwelling Units and Junior Accessory Dwelling Units

Collectively make major changes to California law concerning accessory dwelling units ("**ADUs**") and junior accessory dwelling units ("**JADUs**"). For detached ADUs on a lot with an existing or proposed single family, 16-feet height limitations allowed. For a lot with an existing or proposed multi-family dwelling, an 18-feet height limitation is allowed. The new law also increases the height limit by 18 feet for ADUs within a half-mile walking distance of a major transit stop or a high-quality transit corridor. If attached to the primary dwelling, a height of 25 feet or the height limitation in the local zoning ordinance that applies to the primary dwelling, whichever is lower, is allowed.

Standards imposed on ADUs must be objective and must be approved or denied within 60 days upon an entity receiving an application. If a permitting agency denies an application, they must return in writing a full set of comments on how the application can be remedied. Construction of an ADU on a property does not trigger a requirement for fire sprinklers in the proposed or existing primary dwelling.

An objective standard is defined as a "standard that involves no personal or subjective judgment by a public official and is uniformly verifiable, as specified. The legislation prohibits a local agency from denying an application for a permit to create an ADU due to the correction of nonconforming zoning conditions, building code violations, or unpermitted structures that do not present a threat to the public health and safety and are not affected by the construction of the ADU.

3. LOCAL GOVERNMENT AND LOCAL GOVERNMENT ORGANIZATION

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

A. California Attorney General Opinions

1. California Attorney General Opinion. No. 18-902 – March 24, 2022

QUESTION: If a subdivider owns one parcel and subdivides that parcel pursuant to a parcel map (four or fewer parcels, then sells of the resulting parcels, and subsequently acquires a contiguous parcel and seeks to divide that parcel pursuant to a parcel map, should the local agency count the previously subdivided parcels as part of the second application.

CONCLUSION: Yes, the local agency should count the parcels created by the first subdivision as part of the second application.

2. California Attorney General Opinion No. 1102 – May 26, 2022

QUESTION: Under the Ralph M. Brown Act may legislative support staff of individual city council members attend a closed session to assist and advise their individual members in the performance of the members' duties?

CONCLUSION: No, as a general matter, legislative support staff of individual city council members may not attend a closed session. If a person on such staff has an official or essential role to play in a particular closed session, however, then that person may attend for that purpose. Furthermore, City council members may not share with their individual support staff, who were not permitted to attend a closed session, information obtained in that closed session until the city council has authorized the disclosure of such information.

B. 2023 Update

1. *Tracy Rural County Fire Protection Dist. v. Local Agency Formation Com. of San Joaquin County* (2022) 84 Cal.App.5th 91

In an action arising under the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, the Third District Court of Appeal determined that the Local Agency Formation Commission ("**LAFCO**") did not have the statutory authority to issue a resolution that adopted a governance model for fire services provided by the city and a county fire protection district. The resolution would have required the city to include detachment in all future annexation proposals in order for such a proposal to receive consideration. LAFCO possesses only those express (or necessarily implied) powers which are specifically granted to it by statute. (*City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, 550). None of LAFCO's powers give it the authority to order a specific detachment outside of a proposal for such a change or organization, and LAFCO may not initiate such a proposal on its own.

2. *S.F. Baykeeper v. City of Sunnyvale* (C.D. Cal. 2022) ___ F.Supp.3d ___ [2022 U.S. Dist. LEXIS 164053].

San Francisco Baykeeper ("**S.F. Baykeeper**") filed lawsuits against the cities of Sunnyvale and Mountain View under the citizen suit enforcement provisions of the Federal Clean Water Act ("**CWA**") to address the allegedly unlawful discharge of bacterial pollution by the two cities. The cities pursuant to their Municipal Separate Storm Sewer System ("**MS4**") discharge permits collect stormwater from the streets and other surfaces in the cities and discharge it directly to local creeks. Sunnyvale primarily discharges into Stevens Creek, Calabazas Creek and the Sunnyvale East Channel. Mountain View discharges into Stevens Creek. Flows from both cities subsequently drain into the San Francisco Bay. The cities do not treat stormwater prior to discharge. S.F. Baykeeper took three samples of the stormwater in January and February of 2019, which collectively showed that the stormwater discharges were contributing to exceedances of bacterial state water quality standards ("**WQS**"), in violation of the MS4.

The District Court addressed two primary issues: whether plaintiff S.F. Baykeeper had standing, and what the standard was for determining whether Stevens Creek and Calabazas Creeks were waters of the United States ("**WOTUS**") for purposes of the CWA. The Court determined that S.F. Baykeeper had organization standing, which permits it to sue on its members' behalf, without showing an injury to the organization itself. The test for organization standings is that: (1) at least one of its members would have standing to sue independently; (2) the interests pursued in the case are germane to the organization's purpose; and (3) neither the claims raised, nor the relief sought require individual members to participate. The court determined that S.F. Baykeepers met the test as its members use the affected area and are people for whom the aesthetic and recreational values of the value will be lessened by the challenged activity. Furthermore, the interests pursued were consistent with the organization's purpose and the remedies sought did not require individual members to participate.

Furthermore, the Court determined that Steven Creek and Calabazas Creek constituted WOTUS for the purposes of the CWA. While the water in the creeks often goes into the subsurface and the creeks dry up in the summer, the court determined they are tributaries of a WOTUS, and therefore, a WOTUS. The Court used the pre-2015 WOTUS guidelines in reaching its decision. Since the CWA does not define WOTUS, the definition has changed over the years and presents a continuously murky issue for the courts, property owners, and, as this case shows, municipalities. In December of 2022, the Environmental Protection Agency ("**EPA**") and the U.S. Army Corps of Engineers ("**Corps**") released a final pre-publication version of their revised definition of "Waters of the United States"("**WOTUS**"). The final rule is generally consistent with the pre-2015 definition of WOTUS but expands the definition to include "relatively permanent" waters and those that have a "significant nexus" to WOTUS.

C. Legislation

SB 1439 (Chapter 848) - Campaign Contributions: Agency Officers

The Political Reform Act of 1974 prohibits an officer of an agency from accepting, soliciting, or directing a contribution of $250 from any party, participant, or a party or participants' agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the

agency and for 3 months following the date of a final decision. The Act defined a "agency" for means any state or local government agency, except certain entities, including local government agencies whose members are directly elected by the voters. Previously prohibition would apply to nonelected positions of cities and counties, but not to elected positions (Council Members and BOS).

SB 1439 changes the definition of "Agency" to delete the exemption for elected positions of local government. Therefore, members of a City Council or BOS will be prohibited from receiving a campaign contribution of more than $250 on any pending matter before the Council or BOS for a license, permit or planning entitlement (zoning, condition use permit, Subdivision Map Act, Final Map, Parcel Map etc.). If the Council Member or BOS Member does receive a campaign contribution of more than $250, the official is required to recuse himself or herself from making or participating in making, or in any way attempting to influence the processing. The official must disclose on the record that the official received such a contribution. The prohibition not only applies to contributions accepted by local officials, but also to contributions solicited or directed by the local official, even if not received directly by that official.

SB 1439 also:

- Extends the time period from three months to 12 months after the date of the final decision;
- SB 1439 went into effect on January 1, 2023. However, with the 12-month prohibition after the date of the final decision, SB 1439 will impact contributions made in 2022;
- If a contribution is received during the 12 months after the date a final decision is rendered in a proceeding in violation of SB 1439, the officer may return the contribution within 14 days of accepting, soliciting, or directing the contribution. The officer needs only return the portion of the contribution in excess of $250; and
- In most circumstances, contributions made by two or more persons must be aggregated.

The Fair Political Practices Commission ("**FPPC**") is expected to release guidance, but in the interim, the best practice is to compile lists of contributions of more than $250 made in 2022 to members of a City Council or BOS and monitor this list for matters pending before those local officials, and all new matters moving forward. Additionally, business entities should not be involved with the solicitation of contributions to candidates by business entity employees, subcontractors, or vendors, as well as employees of such subcontractors or vendors where new restrictions are implicated to avoid aggregation of contributions.

Notes:

ABBOTT & KINDERMANN, INC.
ATTORNEYS AT LAW

CALIFORNIA LAND DEVELOPMENT GUIDES
CEQA Tips

Key Steps in Preparing Negative Declarations ("ND"):

- The "project" includes all onsite and offsite supporting infrastructure. *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818.
- Avoid relying upon a "naked" checklist. *Citizens Assn. for Sensible Development v. County of lnyo* (1985) 172 Cal.App.3d 151.
- Contact Native American tribes that have requested notification of projects regarding consultation. Pub. Res. Code, §§21080.3.1, 21080.3.2.
- When referring to independent documents, use specific citations. Guidelines, § 15152.
- Maintain written documentation of consultation with responsible/trustee agencies.
- Explain how existing regulations avoid or mitigate impacts to less-than-significant level.
- Do not rely on future studies alone as mitigation. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296.
- Use Guidelines § 15152 wherever possible as a streamlining tool.
- The applicant must agree to the mitigation measures before it is released for public review. Guidelines, § 15075.
- File the NOI and ND with all trustee and responsible agencies. *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482.
- The NOI must include the review period, hearing schedule if known, address of where the ND and all documents can be viewed. Guidelines, § 15072. Failure to maintain proof of posting can be fatal. *Burrtec Waste Industries, Inc. v. City of Colton* (2002) 97 Cal.App.4th 1133.
- Specify the location and custodian of documents which constitute the record of proceedings. Guidelines, § 15072.
- File and post the NOD. Pay the Fish and Wildlife fee. Fish & G. Code, § 711.4. CEQA Filing Fees can be found at: https://wildlife.ca.gov/conservation/ceqa/fees

Impact Fees as CEQA Mitigation Government Code sections 66000-66022:

- Funding strategy, including fees, which provides incomplete funding fails as full mitigation. *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342.
- Pre-existing fee program used in conjunction with ad hoc fees for projects that will have a later impact can constitute effective mitigation. Even though improvements may not be built until after project construction, the fee serves as effective mitigation. *Save Our Peninsula Committee v. Monterey County Bd of Supervisors* (2001) 87 Cal.App.4th 99.
- A fee program to mitigate traffic impacts may be insufficient when the record shows only a study to identify needed improvements, instead of a firm improvement plan. *Endangered Habitats League. Inc. v. County of Orange* (2005) 131 Cal.App.4th 777.
- A fee program to mitigate traffic impacts can be sufficient mitigation if the fees are a reasonable, enforceable part of an improvement plan that will actually mitigate the cumulative effects. *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173.
- Fee programs adopted without CEQA compliance may have limited CEQA benefits for later projects. *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026.
- State agencies are required to mitigate off-site impacts, usually by paying funds towards the construction of offsite improvements, whenever feasible. *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945.
- A lead agency is not required to impose inter-jurisdiction traffic mitigation if the affected agency does not have a fee program in place. *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912. Guidelines, § 15126.2.
- For more information see "Impact Fee Programs as Effective Tools for CEQA Mitigation: An Update" available at http://blog.aklandlaw.com

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SELECTED CEQA PROCEDURES & PRACTICES

Preliminary

- CEQA does not apply to project denials. Pub. Resources Code, § 21080(b)(5); Guidelines, § 15270.
- An advisory body may make recommendations based upon a draft ND or EIR. Guidelines, § 15051. A decision-making body cannot delegate duty to consider the ND/EIR & adopt findings. Guidelines, § 15051.
- Environmental documents should declare from the *outset* the relationship of the project to earlier CEQA documents and include all documentation. *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385; *Latinos Unidos de Napa* (2013) 221 Cal.App.4th 192.

Is It A Project?

- A loan by the city to an applicant in advance of CEQA review did not result in an impermissible commitment to a project in violation of CEQA. *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540.

Is It Exempt?

- Common Sense Exemption requires evaluation of the theoretical potentially direct or reasonably foreseeable indirect physical change in the environment as result of project "without regard to whether the activity will actually have environmental impact." Foreseeability requires causal connection between project and environmental effect. *Union of Medical Marijuana Patients v. City of San Diego* (2019) 7 Cal.5th 1171.

Environmental Setting

- Environmental setting description must meaningfully acknowledge the project's location and potential effects on regionally important sensitive areas and environments. *Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86.

Baseline

- Generally, the lead agency must use the existing physical conditions as the baseline for impact analysis, but may use a future baseline if it can show an existing conditions analysis would be misleading or without informational value. Guidelines, § 15125(a); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.

Thresholds of Significance

- A threshold of significance may assist lead agencies in determining a project's significant impact. However, compliance with the threshold by itself is not dispositive and does not relieve a lead agency of the obligation to consider project's environmental effect.

Impact Analysis

- Only the impact of the project on the environment must be analyzed under CEQA, unless the project "exacerbates" the effects associated with an existing physical condition. *California Building Industry Assn. v. BAAQMD* (2015) 62 Cal.4th 369. The court acknowledged specific circumstances where CEQA requires evaluation of existing hazardous conditions: airports, school construction and some housing projects. (*See* Guidelines, § 15126.2(a).)

GHG

- Lead agencies must consider feasible means to mitigate the significant effects of greenhouse gas. Guidelines, § 15064.4.
- A qualifying plan for the reduction of greenhouse gas emissions may be used in later cumulative impact analysis. Guidelines, §15126.4(c)(5).
- Lead agency may consider a project compliance with Statewide climate adaption planning or climate goals based on substantial evidence. Guidelines, § 15064.4(b)(3).
- Cal. Supreme Court identified three options for adequately analyzing GHG impacts:
  - Using data from Scoping Plan to establish relationship w/ specific project;
  - Tiering or streamlining through a CAP or SCS; or
  - Using an appropriate numerical threshold.

  Ctr. for Biological Diversity v. Dept. of Fish and Wildlife (2015) 62 Cal.4th 204.
- Mitigation for GHG emissions through carbon offsets must require that offsets are compliant with CARB's Cap-and-Trade offset protocols, or equivalent: (i) Real; (ii) Permanent; (iii) Quantifiable; (iv) Verifiable; (v) Enforceable, and (vi) Additional. *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467.
- The Court of Appeal held that insufficient evidence supported the use of the "efficiency metric" as a threshold of significance for evaluating impacts from greenhouse gas and climate change. *Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892.

Mitigation Measures

- Payment of school impact fees does not mitigate all indirect school related impacts. *Chawanakee Unified School District v. County of Madera* (2011) 196 Cal.App.4th 1016.

Alternatives

- Economic information in record insufficient to justify rejection of alternative. *Center for Biological Diversity v. County of San Bernardino* (2010) 184 Cal.App.4th 1342.

Recirculation

- Recirculation of the DEIR is required when:
  - identification of new avoidable impact resulting from the project or a mitigation measure;
  - substantial increase in the severity of an impact;
  - identification of a feasible MM or project alternative which would clearly lessen the project impacts, and the applicant elects not to implement; or
  - original DEIR was fundamentally flawed.
- Recirculation of ND required when a new avoidable impact is discovered, or impacts cannot be mitigated to a less than significant level.
- Recirculation is not required when:
  - Applying equally effective mitigation. Guidelines, §15075.
  - Amplifying / clarifying an EIR. Guidelines, §15088.

Notice

- Not every notice defect is prejudicial. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949.

Litigation

- Post the NODs for the full time-period to utilize the shorter statutes of limitation. *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154.
- Last minute document dump by opponents may not constitute exhaustion of administrative remedies. *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515.
- All project-related communications, including emails, must be preserved for the administrative record of proceedings. *Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733.
- If court finds CEQA document is deficient, the court has the discretion to fashion a remedy. PRC § 21168.9; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173; but see *Land Value 77, LLC v. Bd of Trustees of CSU* (2011) 193 Cal.App.4th 675.

The Water Supply/Subdivision Map Act/ CEQA Interface:

- Water supply determination for subdivisions of 500 or more DUs; Must consider SGMA compliance and groundwater supplies. Gov. Code, § 66473.7; Water supply analysis for 500 residential unit projects (or equivalent). See Wat. Code, §§ 10910-10915; Pub. Res. Code, § 21151.9.
- A development agreement including a subdivision of more than 500 DUs, must require compliance with Gov. Code § 66473.7. Gov. Code, § 65867.5.
- Mandatory consultation during general plan updates between water suppliers and cities/counties. Gov. Code, § 65352.5.
- A water supply assessment must account for the uncertainties associated with a project's proposed water supply. *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48.
- For assistance see *Guidebook for Implementation of Senate Bill 610 and Senate Bill 221 of 2001* available: https://water.ca.gov/LegacyFiles/pubs/use/sb_610_sb_221_guidebook/guidebook.pdf
- An EIR needs to address water availability. Less detailed is required for general plans and general plan amendments as compared to more definitive entitlements like specific plans and tentative maps. The lead agency may rely upon a separate water supply environmental document or an incorporation by reference of a water supply assessment. *See* Guidelines, § 15064(b)(2); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (*2007) 40 Cal.4th 412.

Important SMA References:

- Agencies must affirmatively address all factors in Gov. Code §66474 when approving map. *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91.
- Statement of the effect of a vesting map locking in development standards at the time the application is deemed complete. Gov. Code, §§ 66498.1, 66474.2. *Stonehouse Homes, LLC. v. City of Sierra Madre* (2008) 167 Cal.App.4th 531.
- Road standards in state responsibility areas. Pub. Res. Code, §§ 4290, 4291; C.C.R., tit. 14, §§ 1270-1273.11.
- Final Map "substantial conformity" doctrine. Gov. Code, §§ 66474.1, 66442(a).
- Extensions for eligible tentative maps. Gov. Code, §§ 66452.11, 66452.13, 66452.21, 66452.22, 66452.23, 66452.24, 66452.25, 65914.5, 65961.
- Extensions for tentative maps as a result of offsite improvement costs and phased final maps. Gov. Code, § 66452.6(a).
- Extensions for tentative maps in the event of moratoria and litigation. Gov. Code, § 66452.6(b-c), *Ailanto v. City of Half Moon Bay* (2006) 42 Cal.App.4th 572.
- Upon timely filing of final map by delivery to county surveyor or city engineer prior to expiration of tentative map, further processing of final map may occur after expiration date. Gov. Code, § 66452.6(d).
- Subdivider has right to declare phasing prior to and after tentative map approval. Gov. Code, § 66456.1.
- Processing of final maps & acquisition of offsite property through condemnation. Gov. Code § 66462.5.
- Effect of tentative map conditioned upon annexation. Gov. Code, § 66454.
- Effect of annexation on approved tentative and final map. Gov. Code, § 66413(a)-(b).
- Local agencies shall ministerially approve "urban lot splits" creating no more than two parcels that meet certain specified requirements. Gov. Code, § 66411.7.

Oak Woodlands Mitigation Under CEQA:

- Counties must determine if project will result in a significant impact due to oak woodland conversion. Pub. Res. Code, § 21083.4(b).
- Significant impacts can be mitigated by conservation easements, planting new trees, contribution to Oak Woodlands Conservation Fund, or other mitigation measures approved by the county. Pub. Res. Code, § 21083.4(b)(1)-(4).

Native American Tribe Consultation:

- Local agencies shall consult with a Native American tribe affiliated with the project area prior to releasing an ND, an MND, an EIR, or prior to the SB 35 streamlining process, if:
  (1) the tribe has made a written request to be notified of projects within the area affiliated with the tribe; and
  (2) the tribe requests consultation, in writing, within 30 days after receiving notice. Pub. Res. Code, § 21080.3.1.
- Confidential information submitted during the consultation or environmental review process must be kept in a confidential appendix to the environmental document unless the tribe consents to disclosure, in writing. Pub. Res. Code, § 21082.3(c)(1).
- Tribe and lead agency may agree to share confidential information with applicant. Pub. Res. Code, § 21082.3(c)(2).
- Lead agencies may summarize tribal comment letters in a general way and still maintain confidentiality. *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200.
- Lead agencies shall, when feasible, avoid damaging effects to tribal cultural resources. Pub. Res. Code, § 21084.3(a).
- No SB 35 streamlining if:
  (1) the tribal cultural resource site is on a national, state, tribal, or local historic register list; and
  (2) the agency and the tribe do not agree that no potential tribal cultural resource would be affected by the project. Pub. Res. Code, § 21080.3.1.
  (3) the agency and the tribe find that a potential tribal cultural resource could be affected by the proposed development and the parties do not have an agreement regarding the methods, measures, and conditions for treatment of those resources. Gov. Code, § 65913.4(b).
- State planning law provides for separate consultation steps for general plans. Gov. Code, § 65352.3.

Summary of Key Land Use Statutes
Impacting Affordable Housing

General Limitations on the Exercise of Local Land Use Powers

Prohibitions on discriminatory actions. Gov. Code, § 65008.

Findings required for project denials or excessive conditions. *Honchariw v.County of Stanislaus* (2011) 200 Cal.App.4th 1066; Gov. Code, § 65589.5; burden of proof is on the local agency. Gov. Code, § 65589.6.*

Affordable units, required by housing element, can be met through rental or for-sale units. Gov. Code, § 65589.8.

General Plans and Housing Elements

General Plans Gov. Code, § 65300 et seq. and Housing Elements Gov. Code, § 65580.*

Housing in the Coastal Zone. Gov. Code, § 65590.

Findings required when mandatory general plan element limits number of housing units. Gov. Code, § 65302.8.

Very low and low-income housing needs may be accommodated on sites designated for mixed-use if the sites allow 100% residential use and require at least 50% of the floor area as residential. Gov. Code, § 65583.2.

Limitations on the Exercise of the Planning and Zoning Powers

Regulatory streamlining for attached housing projects. Gov. Code, § 65589.4.

Duty to review housing projects for compliance with policies, standards in 30/60 days. Gov. Code, § 65589.5(j)(2).*

"Preponderance of the evidence" standard for judicial review of denial of housing project, or to reduce allowable densities. Gov. Code, §§ 65589.5(d), (i) and (j).*

Housing developments proposing up to two residential dwellings in single family zones shall be allowed by right when they meet certain specified requirements. Gov. Code, § 65852.21.*

Small home lot development that meets specified requirements shall be allowed within zones that allow multi-family uses. Gov. Code, § 66499.40.*

Accessory Dwelling Units must be allowed by-right in Single & Multi-Family zones. Gov. Code, § 65852.2.*

Zoning for manufactured housing. Gov. Code, §§ 65852.3-65852.5; mobilehome parks allowed in all residential zones. Gov. Code, § 65852.7.

Timelines for local government to rezone to accommodate the regional housing need extended; Penalties to local governments failing to timely accomplish rezone. SB 375 (Chapter 728, Statutes 2008). Gov. Code, § 65583(c)(l)(A) and (g); CUP exemption for Multi-Family projects. Gov. Code, § 65589.4.

Zoning consistent with the General Plan. Gov. Code, § 65860.

Limitations on reducing project density for certain parcels. Gov. Code, § 65863. ("No-Net-Loss")

Growth limitation ordinances. Gov. Code, § 65863.6.

Duty to zone sufficient land, and appropriate densities and standards to meet housing needs. Gov. Code, § 65913.1.

Density bonuses. Gov. Code, §§ 65915-65918*; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329; condominium conversion incentives. Gov. Code, § 65915.5.

Housing Crisis Act of 2019*

Housing projects that meet applicable General Plan, Zoning and subdivision standards cannot be denied unless written findings are made that the project would have a specific, adverse impact on public health or safety and there are no feasible means of mitigating or avoiding the impact. Gov. Code, § 65589.5(j)(1).

No more than 5 public meetings for projects that comply with all applicable standards. Gov. Code, § 65905.5(a).

"Affected Cities and Counties" shall not: (Gov. Code, § 66300.)

(1) change the land use designation or zoning of a parcel to reduce housing intensity in effect on January 1, 2018, unless there are concurrent changes applicable to other parcels that ensure no net loss in housing capacity;

(2) Impose a moratorium on housing development absent an imminent threat to public within the area subject to it;

(3) Impose or enforce design standards established on or after January 1, 2020, that are not objective standards;

(4) Impose limits or caps on approval of housing units either annually or any other time period, except where the limit was approved by voters prior to January 1, 2005, and located within a predominately agricultural county.

Subdivision Standards and Requirements

Subdivision standards not to preclude housing for all economic segments of the community. Gov. Code, § 65913.2.

Consideration of regional housing needs. Gov. Code, § 66412.3.

Mobilehome park conversions. Gov. Code, §§ 66427.1-66427.4.

Expiration date for certain housing development project entitlements extended for 18 months. Gov. Code, § 65914.5.*

CEQA

CEQA streamlining for projects consistent w/ Specific Plan. Gov. Code, §65457; Guidelines, § 15152, Append. M.

Streamlined housing approvals required for failure to meet RHNA goals. Gov. Code, § 65913.4.*

General criteria for CEQA exemption. PRC § 21159.21.

Specific exemptions for agricultural housing. PRC § 21159.22; low-income housing. PRC § 21159.23; infill housing. PRC § 21159.24; Project RoomKey (hotel, motel conversions) projects. Health and Safety Code, § 50675.1.2.*

Limitation on reducing residential density as a mitigation measure. PRC § 21159.26.*

Relief from certain findings for transportation impacts for qualifying infill projects. PRC § 21081.2.

Sustainable Communities (SB 375). PRC §§ 21155.2, 21159.28.

LAFCo

Consideration of the ability of the local agency to meet housing needs. Gov. Code, § 56001.

Litigation

Affordability requirements for for-sale projects can be challenged under MFA. *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193.

Affordability requirements in rental projects can be challenged under the Ellis Act. *Palmer/Sixth Street Associates, LP v. City of Los Angeles* (2009) 175 Cal.App.4th 1396.

**Most Significant Provisions*

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CALIFORNIA LAND DEVELOPMENT GUIDE
Wetlands

Water Quality Resources - Generally

- State Water Resources Control Board's Storm Water Program, including general permits for construction, industrial and municipal activities. (http://www.swrcb.ca.gov/water_issues/programs/stormwater/)
- Porter Cologne Water Quality Control Act. (http://www.swrcb.ca.gov/laws_regulations/docs/portercologne.pdf)
- Federal Clean Water Act. (http://www.epa.gov/lawsregs/laws/cwa.html)
- Check local codes and regulations for local guidance on federal and state requirements.

Wetlands/404 Permitting Process (33 U.S.C. § 1344)

- Nationwide Permit (NWP):
  1) Identify the NWP that applies. If no NWP applies, an individual permit must be acquired. (NWP based on acreage.)
  2) Check the applicable NWP to see if pre-construction notification is required and notify USACE, if necessary.
  3) Check to see if jurisdictional delineation is required and request jurisdictional delineation, if necessary.
  4) If the impacts are more than minimal, the applicant and the agency create a Mitigation Plan.
  5) In 2021, the USACE reissued 40 existing NWPs and issued one new NWP. The 41 NWPs became effective on February 25, 2022.
- Individual Permit:
  1) USACE recommends a preapplication meeting.
  2) Submit application and Mitigation Plan.
  3) USACE determines if the application is complete.
  4) USACE provides public notice of the project and the application.
  5) Applicant responds to any comments received.
  6) USACE issues draft and final permit decision.
  7) EPA may exercise veto power over USACE's decision.
- List of Nationwide Permits and conditions can be found Here.

The Rapanos Decision and New Regulatory Guidance

- *Rapanos/Carabell v. United States* (2006) 126 S.Ct. 2208 - Two different approaches to determining waters of the U.S. ("WOTUS"): -Justice Scalia's approach - USACE's jurisdiction limited to those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams, oceans, rivers, [and] lakes." Does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

-Justice Kennedy's approach - Navigable water exists when water possesses a "significant nexus" to water that are navigable in fact or could reasonably be made so. Look at factors including restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."

- *San Francisco Baykeeper v. Cargill Salt Division* (2007) 481 F.3d 700 - Adjacency of a non-navigable water body to water of the U.S. does not, by itself, trigger application of the CWA.
- *Northern California Riverwatch v. City of Healdsburg* (2007) 496 F.3d 993 - Court applied Justice Kennedy's significant nexus test and held that a pond constituted a WOTUS.
- In 2019, the Trump Administration finalized a new WOTUS rule that was significantly narrower in scope than the 2015 Final Rule. The Trump rule was struck down in 2021 in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency* (2021) 557 F.Supp.3d 949, with a U.S. District Court judge reinstating the pre-2015 interpretation of WOTUS. Meanwhile, the Biden Administration on January 18, 2023, published a final rule revising the regulatory definition of WOTUS. The final rule is generally consistent with the pre-2015 definition of WOTUS but expands the definition to include "relatively permanent" waters and those that have a "significant nexus" to WOTUS. The new Biden Administration rule has already been challenged in new lawsuits brought by the Attorney General of the State of Texas and numerous industry groups in federal court in Texas.
- California finalized its own state jurisdictional waters rule. The Office of Administrative Law approved the definition and procedures in September 2019. The rule became effective on May 28, 2020, and minor adjustments were made on November 18, 2021. Link to the final rule: (https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html)

Letters of Permission ("LOP") - Alternative 404 Permit

- USACE district develops list of categories to be authorized by LOP in coordination with state and federal fish and wildlife agencies, EPA, the state water quality agency, and if applicable, the state coastal commission. (33 C.F.R. 325.2(e).)
- LOP provides abbreviated permit procedures.
- Not all districts have developed LOP procedures.
- Sacramento District's LOP procedures can be found Here.

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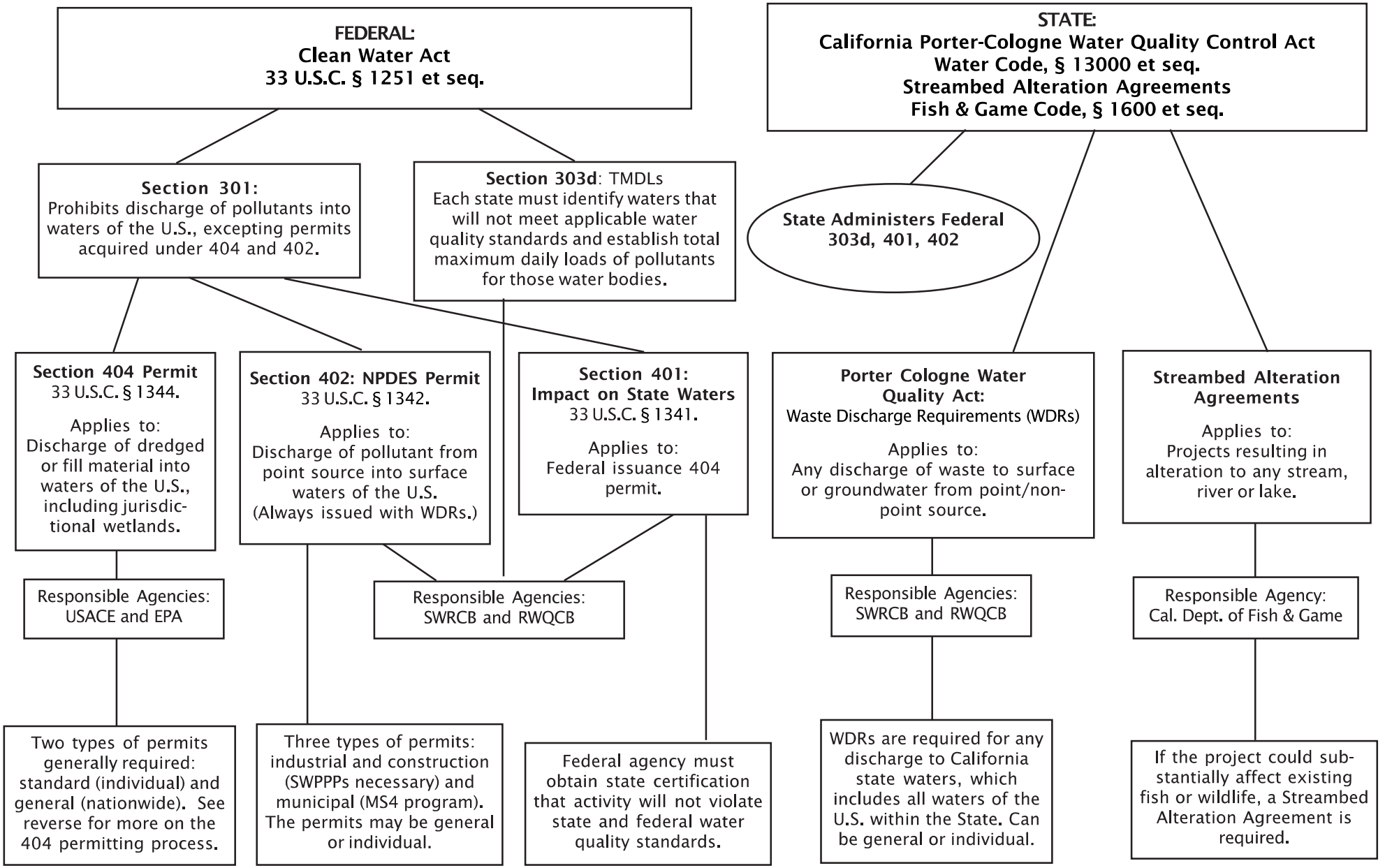
CALIFORNIA LAND DEVELOPMENT GUIDES
Water Quality and Wetlands
Overview of Federal and State Laws



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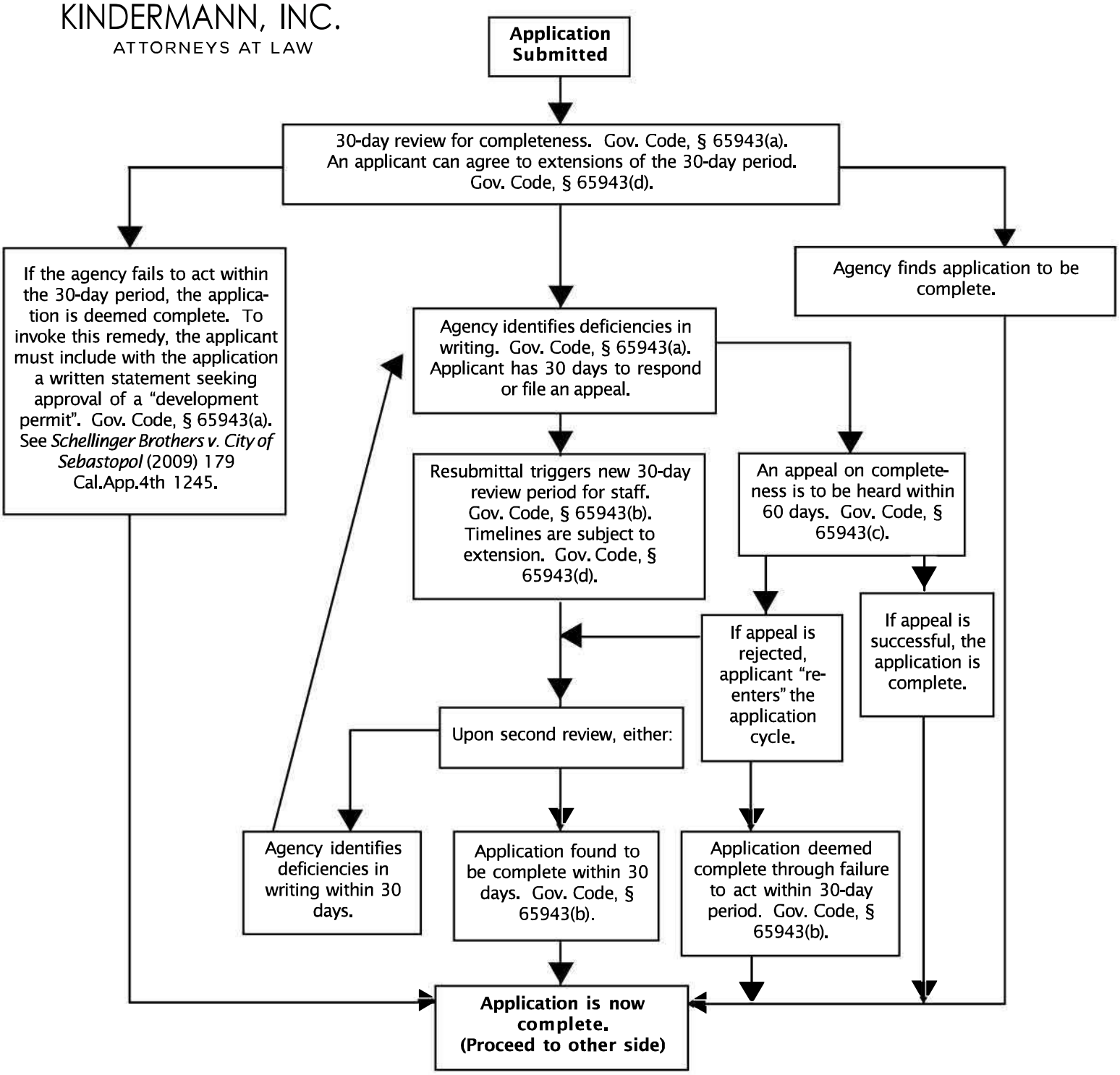
Permit & CEQA Processing



Notes:

- "PRC" = Public Resources Code; "Gov. Code" = Government Code; "Guidelines" = CEQA Guidelines; "SMA" = "Subdivision Map Act; "EIR" = Environmental Impact Report; "ND" = Negative Declaration; "PSA" = Permit Streamlining Act (AB 884)
- No application can be deemed incomplete for failure to execute a waiver of timelines. PRC § 21151.5(a)(3). See also Gov. Code, § 65940.5.
- A lead agency cannot require the equivalent of an environmental document for an application to be deemed complete. Gov. Code, § 65941(b).

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Permit & CEQA Processing

Application is now complete.

- Once an application is deemed complete, the lead agency has 30 days to determine whether an EIR, ND, or previous environmental document should be used. This period may be extended for 15 days with the consent of the lead agency and applicant. Guidelines § 15075; PRC § 21080.2.
- Timelines can be suspended or the application denied if the applicant unduly delays in providing information. Guidelines § 15234; PRC § 21083. See also Guidelines § 15234; PRC § 21080(b)(5).
- Locally adopted procedures can provide for mutually agreed upon extensions for NDs and EIRs. PRC § 21151.5(a)(4). The Guidelines interpret this as a permitted one-time extension for EIRs not to exceed 90 days. Guidelines § 15107.

If an ND is prepared, the lead agency has 180 days from the date the application is deemed complete to finish the ND.
PRC § 21151.5(a); Guidelines § 15107.

If an ND is prepared or categorical exemption is to be utilized, then the lead agency is to act within 60 days. Gov. Code, § 65950(a)(3), (4).
For tentative maps, the time period within which to act is 50 days from adoption of an ND or a determination that a categorical exemption applies. Gov. Code, § 66452.1(b).
When the commission acts in an advisory capacity, the legislative body generally acts within 30 days following the date it sets the matter for action. Gov. Code, § 66452.2.

"Immediately" following a decision to prepare an EIR, the local agency is to release an NOP. Guidelines § 15082(a).
The local agency then has 45 days to place an outside consulting firm under contract to prepare an EIR. This timeline can be extended.
PRC § 21151.5(b).
The lead agency has one year from deeming the application complete to complete the EIR. PRC § 21151.5(a).

Once an EIR is certified, the lead agency has 180 days to act on entitlements. Gov. Code, § 65950(a)(1). This is reduced to 120 days for certain mixed-use projects (Gov. Code, § 65950(a)(2)), 90 days for certain affordable housing projects (Gov. Code, § 65950(a)(3)). If an extension was obtained to complete an EIR, then the lead agency is to act within 90 days. Gov. Code, § 65950.1.
For tentative maps, the time period within which to act is 50 days from EIR certification. Gov. Code, § 66452.1.
When the commission acts in an advisory capacity, the legislative body generally acts within 30 days following the date it sets the matter for action. Gov. Code, § 66452.2.

Notes:

- An applicant is not protected as a third party beneficary under a lead agency-contractor EIR contract. *Lake Almanor Associates, LP v. Hoffman Broadway Group*, Inc. (2009) 178 Cal.App.4th 1194.
- PSA allows timelines for project approval and disapproval to be extended up to a maximum of 90 days, overturning *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1046. Gov. Code, § 65957. Note however, under the SMA, there is no 90-day cap. Gov. Code, § 66451.1(a).
- Failure to comply with PSA timelines may result in a project being deemed approved. Gov. Code, §§ 65956(b); 65957. The SMA provides for a separate "deemed approved" sanction. Gov. Code, § 66452.5. In order to invoke the "deemed approved" sanction, either the lead agency must provide a noticed hearing or the applicant complies with statutory steps for substitute notice. Gov. Code, § 65956(b). Projects "deemed approved" are subject to otherwise applicable appeal procedures. *Ciani v. San Diego Trust and Savings Bank* (1991) 233 Cal.App.3d 1604.
- If the right to take action on the application is delegated to an intermediate tribunal such as a planning commission, the PSA applies to the PC decision, but not to any subsequent appeals. Gov. Code, § 65922. Note, however, that the SMA provides for specific time frames for appeals. Gov. Code, § 66452.5.
- The PSA does not apply to projects involving legislative approvals. *Land Waste Management, Inc. v. Contra Costa County Board of Supervisors* 1990) 222 Cal.App.3d 950.
- A lead agency which misses the deadline to prepare an EIR can be sued for damages. *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215. Although this case involved an EIR, by analogy it should apply to failed processing of NDs. An applicant faces an uphill battle to reverse the lead agency's decision to seek additional CEQA review. *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245. The "deemed approved" provisions of the PSA are not triggered until the CEQA steps have been completed. *Eller Media Company v. City of Los Angeles* (2001) 87 Cal.App.4th 1217.

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