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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

THE INTERSECTION OF CEQA, INFILL DEVELOPMENT AND THE LOS ANGELES ZONING CODE

By Alexander DeGood

For years, planners, developers and the lawyers and consultants needed to bring projects to fruition have discussed and analyzed both the imperative to encourage development in areas with existing infrastructure, and how best to do so in the face of California's often byzantine land use and environmental review processes. In fact, the intertwined concepts of smart growth and infill development have long since leapt from the planner's desk into the general public consciousness, driven both by a general understanding that development cannot and should not center on bulldozing the next patch of grass, to the market dynamic created by a certain percentage of residential buyers who increasing eschew a traditional suburban lifestyle.

The purported benefits of infill development are many—placing density on underutilized lots served by existing infrastructure, proximity to existing (and future) transit lines, and the revitalization of older, urban areas, just to name a few. Indeed, given California's decision to eliminate redevelopment (notwithstanding minor subsequent tinkering around the edges), the need to formally encourage infill development is perhaps more pressing than ever.

Recent developments in California law, some still in the implementation phase, hold the potential to alter how quickly and easily "infill" projects receive approval and are constructed.

First, effective February 2013, the California Environmental Quality Act (CEQA) Guideline § 15183.3 was added to streamline the environmental review of defined "infill" projects.

Second, in September 2013 Governor Brown signed SB 743, which: (i) created a new, narrowly-tailored CEQA exemption for certain projects that are consistent with an applicable Specific Plan, (ii) provided that certain infill projects do not have to analyze parking or aesthetic impacts, and most importantly, (iii) mandated new CEQA Guideline sections that eliminate Level of Service as an accepted methodology for analyzing project transportation impacts. While (i) and (ii) have taken effect, (iii) remains in the development stage, with the Office of Planning and Research releasing a "Preliminary Discussion Draft" of new Guidelines on August 6, 2014.

This article briefly examines how these CEQA changes (and still pending new Guidelines) may or may not prove impactful when it comes to approving and constructing infill projects, increasing density, and revitalizing older urban areas statewide. Are these changes enough to smooth the approval process for a critical mass of infill developments? Are there other changes needed? And what can localities do themselves to encourage the kind of unified, denser urban environments so many say they want? To address the last question, it is instructive to take a brief look at efforts currently underway in Los Angeles, the state's largest city, to draft and implement the most ambitious update of its zoning code in the city's history, and (incredibly) its first comprehensive update since 1946. If fractious, multi-faceted Los Angeles can alter its code to incentivize development more suited for a modern, denser urban environment, it could well be a blueprint for many localities statewide.

The Recent Background—Senate Bill 375

In some respects, California has recently been at the leading edge of thinking about planning and infill development in a holistic manner. AB 32, California's landmark climate change law, passed in 2006, led to the passage of SB 375 in 2008. SB 375 starts from the basic premise that to reduce greenhouse gas

(GHG) emissions, transportation, housing, and land use plans must be integrated to arrive at planning decisions that result in fewer vehicle miles traveled. To integrate these planning pillars, SB 375 mandates the creation of Sustainable Communities Strategies (SCSs) as part of each Metropolitan Planning Organization's (MPO) Regional Transportation Plan (a plan required by federal law). The California Air Resources Board reviews each MPO's adopted SCS to determine whether the SCS, if implemented, would reduce GHGs to meet the regional GHG targets

Yet for all of SB 375's mandates that MPOs must view planning holistically as part of their preparation of Regional Transportation Plans, it is in most respects still a law without teeth for local planning purposes. It may provide the framework and underpinning for smart growth policies, yet it does not and cannot mandate the zoning policies local governments actually implement. Gov't Code § 65080(b)(2)(K). Planning in California remains a local endeavor.

CEQA looms over all planning, and SB 375 did not fundamentally alter CEQA's basic requirements. However, it did create certain streamlining incentives if a project is either a Transit Priority Project (TPP) or a residential or mixed-use project that meets certain criteria. In short, such projects must, among other requirements, be:

> …consistent with the general use designation, density, building intensity and applicable policies specified for the project area in [ ] a sustainable communities strategy. Pub. Res. Code § 21155(a) and 21159.28(a).

SB 375 thus attempts to incentivize development, much of it transit-oriented, that aligns with the overall principles and designations of a region's SCS. The streamlining provisions are helpful if a project qualifies, ranging from a full CEQA exemption for TPPs that meet a host of requirements, to the elimination of growth-inducing impacts, cumulative impacts, and a reduced density alternative from CEQA review for qualifying residential or mixed-use residential projects.

CEQA Guideline Section 15183.3

SB 375's streamlining requirements are myriad, and difficult to meet. Unlike the streamlining implemented by SB 375, the streamlining provided by Guidelines § 15183.3 is not limited to TPPs or residential and residential mixed-use projects. Further, § 15183.3's requirements, while not insubstantial, are not particularly onerous, provided that there is sufficient documentation that has previously analyzed a project's potential environmental impacts, as detailed below.

To qualify for § 15183.3 CEQA streamlining, a project must: (1) be located in an urban area on a previously developed site or that adjoins developed urban areas on at least 75 percent of the site's perimeter, (2) satisfy several performance standards as detailed in Appendix M of the Guidelines, and:

> …(3)…be consistent with the general use designation, density, building intensity and applicable policies specified for the project area in [ ] a sustainable communities strategy.

Appendix M requires all non-residential projects to maintain on-site renewable power generation, and requires that residential projects in close proximity to high-volume roadways and stationary pollution sources implement measures, such as enhanced air filtration, to protect residents from the effects of air pollution. Appendix M imposes further requirements on residential, commercial and office projects with respect to either proximity to major transit stops or high-quality transit corridors (1/2 mile for a residential project, 1/4 mile for an office building) or location within a "low vehicle travel area," which is an area "that exhibits a below average existing level of travel" per various metrics based upon the type of project. Commercial projects also qualify if they are located within 1/2 mile of 1,800 households and do not have a single-building floor plate greater than 50,000 square feet. Given that Appendix M defines a "high-quality transit corridor" as "an existing corridor with fixed route bus service with service intervals no longer than 15 minutes during peak commute hours," § 15183.3's transit proximity requirements encompass a tremendous amount of urban land, as most major urban streets have fixed bus service that meets this definition.

On the surface, § 15183.3's requirements seem fairly easy for many urban properties to meet, with one potentially large exception. Recall that SB 375 cannot mandate that local governments adopt any of the land use plans created through its Sustainable

Communities Strategies. As such, many localities will not maintain General Plans and zoning codes that align with:

> …the general use designation, density, building intensity and applicable policies specified for the project area in [ ] a sustainable communities strategy.

Potential projects will then often be faced with a dilemma, as an attempt to adhere to § 15183.3's requirements to receive a CEQA streamlining benefit could in many cases require applications for zone changes and General Plan amendments to achieve alignment with an adopted but unimplemented (by the lead agency) SCS. Section 15183.3 provides no relief from such potential local requirements. Perversely, many projects may conclude that it is easier to undertake full, traditional CEQA review and stay within the confines of a locality's current zoning than it is to avail themselves of § 15183.3 but have to obtain approval of one or more legislative actions to align local land use and zoning with an SCS.

Section 15183.3's threshold requirements do not, in and of themselves, result in any CEQA streamlining or exemptions. Rather, CEQA relief depends upon the extent to which a project's impacts have been previously analyzed and mitigated in a prior Environmental Impact Report (EIR) for a "planning level decision." Such a decision is defined in (f)(2) as the "enactment or amendment of a General Plan or any General Plan element, community plan, specific plan or zoning code."

If the prior planning level decision EIR addressed the potential effect of an infill project as a significant effect, the infill project need not analyze the effect, "even when that effect *was not reduced to a less than significant level* in the prior EIR."

Further, an infill project's effects need not be analyzed even if the prior planning level EIR did *not* analyze the effect, if the lead agency finds that "uniformly applicable development policies or standards" would "substantially mitigate" the effect. Note that this does not mean that the uniform policies have to *fully* mitigate the project's effects. Rather, they must "substantially lessen the effect, but not necessarily below the level of significance." 15183.3(d)(1)(E).

Finally, even if a prior planning level decision EIR does not address all of the potential impacts of an infill project and the project's impacts cannot be substantially mitigated by applicable development standards, an infill project generally would only need to prepare an infill EIR. Such an EIR need analyze only the significant effects not substantially mitigated by applicable development standards or that are either new or more significant effects than those analyzed in a planning level decision EIR.

Assuming there is no conflict between an adopted SCS and the land use designation and zoning of the locality in which a project seeks approval, § 15183.3 has the potential to be a powerful tool for infill development, provided that a project can rely upon a prior planning level EIR. This is a potentially large caveat, however. The extent to which planning level EIRs address the impacts of particular projects varies greatly. It some cases, EIRs prepared for general, community and specific plans do provide a level of analysis that will encompass many of the potential impacts of a project, particularly if an individual project is consistent with existing land use designations and zoning. In such cases, land use and planning impacts and related impacts, such as population and housing and public services, will likely have been addressed.

Such EIRs generally do not address or account for the potential traffic impacts of an individual project, however. Many General Plan EIRs address traffic globally, and make assumptions regarding future traffic generation as a whole, comparing future overall traffic to an existing baseline. In doing so, these EIRs identify significant traffic impacts, but may not assign the impacts to particular types of projects. Further, it is unclear to what extent a lead agency can determine that a prior planning level EIR studied the potential impacts of a particular project. Per the guideline, such a determination is subject to the substantial evidence test upon review by a court, but absent reported cases construing instances where a lead agency made such a determination, it is difficult to assess what would constitute a reasonable determination (absent the obvious example where a prior EIR directly contemplated something very similar to a project at issue).

Despite these issues and questions, to the extent that planning level EIRs can eliminate some areas from study for an infill project, the streamlining is highly beneficial. Preparing a targeted, infill EIR that is only required to address one or two issues (to the extent there remain unmitigatable impacts) is far preferable than preparing a full, traditional EIR. In

addition, given that § 15183.3 requires proximity to transit or project location in lower-traffic areas, it is possible that infill projects in such locations would benefit from traffic assumptions that take into account higher than average transit use in the immediate project area, potentially further reducing traffic impacts and speeding project review and approval.

The (Hopeful) Death of LOS?

The fact that many infill projects that seek to utilize § 15183.3's CEQA streamlining will still have to study and mitigate traffic impacts leads to the next piece in the CEQA reform puzzle—traffic analysis methodology. Perhaps no single traditional CEQA metric is more responsible for inhibiting infill development, and providing ammunition, both legally and politically to project opponents, than the use of Level of Service (LOS) as the standard traffic impact methodology. LOS, which measures traffic impacts via the flow of traffic through intersections in close proximity to a project, perversely disincentivizes infill development, which is the very type of development that can result in lower per capita traffic generation and lower vehicle miles traveled. The main problems with LOS as a standard traffic impact methodology have long been known, and include:

> (1) LOS punishes infill projects because the surrounding street system is often already at capacity, and thus adding relatively little traffic triggers transportation impacts.
>
> (2) LOS standards result in physical improvements to mitigate impacts so that traffic flows better. Such mitigations actually encourage more driving and induce additional vehicle travel.
>
> (3) LOS punishes dedicated transit priority lanes because they take away general roadway space and worsen LOS, even though transit improves total mobility and person-throughput.
>
> (4) LOS categorizes pedestrians and bicycles as obstructions and impediments to traffic movement, rather than modes of transportation that have particular value in denser urban environments.

In many respects, LOS methodology is a "perfect storm" aligned against infill development, as it: (i) punishes any additional traffic generation, even if the infill use generates less traffic and fewer vehicle miles traveled than less dense suburban development, (ii) discounts alternative modes of transportation, and (iii) punishes the use of existing transit infrastructure and disincentivizes construction of future transit infrastructure. Further, LOS provides opponents of infill projects specifically and greater density in general with a clear, easy impact on which to focus to advance the argument that increased density is undesirable.

In the face of such obvious prejudice against the very development the state would like to encourage, California passed SB 743 which, among other provisions, mandates that:

> …automobile delay, as described solely by Level of Service or similar measures…*shall not be considered a significant impact on the environment*[.] (emphasis added)

The law directs the Governor's Office of Planning and Research (OPR) to develop new CEQA Guidelines that implement this vision, and provide guidance for the types of metrics that can replace LOS.

OPR released draft guidelines in August 2014, and is still finalizing them. The draft guidelines attempt to address the primary deficiencies with LOS methodology, and are a dramatic departure from business as usual in the analysis of transportation impacts. The draft guidelines state that:

> …generally, transportation impacts of a project can be best measured using vehicles miles traveled. Proposed Guidelines § 15064.3(b)(1).

Further, in an attempt to unify the new proposed guidelines with the mandates and planning efforts of SB 375, the draft guidelines state that:

> …development projects [ ] within one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor generally may be considered to have a less than significant transportation impact. Similarly, development projects that result in net decreases in vehicle miles traveled, compared to existing conditions, may be considered to have a less than significant transportation impact.

The import for infill projects is obvious, as the proposed guidelines reverse the negative impact of LOS and replace that outdated metric with standards that actively incentivize infill, transit-proximate development. All is not wine and roses, however. Much as SB 375 does not mandate any zoning or planning actions by localities, SB 743 permits localities to maintain LOS standards within their General Plans and zoning codes. Thus infill projects that may clearly avoid transportation impacts under CEQA pursuant to the new guidelines may still have to undertake LOS analysis pursuant to a lead agency's planning policies.

SB 743 does not address how a project that does not cause a transportation impact under CEQA but does impact LOS under a lead agency's General Plan is supposed to reconcile the incongruity. It appears possible that an infill project may have to implement the very roadway capacity enhancements that SB 743 discourages to remain in conformance with a lead agency's General Plan. Doing so could then perversely cause a significant transportation impact under CEQA, as the draft guidelines state that:

> …to the extent that a transportation project increases physical roadway capacity for automobiles in a congested area…the transportation analysis should analyze whether the project will induce additional automobile travel compared to existing conditions. Proposed Guideline § 15064.3(b)(2).

Such a catch-22 is obviously not insignificant to individual project applicants. Further, at a minimum many project applicants will now have to prepare two sets of traffic analyses to address requirements under CEQA and local planning documents. Nonetheless, SB 743 is a giant conceptual leap forward that will almost certainly have a trickle-down effect on local planning documents. The death of LOS as an acceptable transportation analysis metric is almost certainly upon us, slow as the death may turn out to be, as local planning documents and policies throughout the state eventually change to align with CEQA's methodology.

Los Angeles—Incentives Outside of CEQA

Local governments that want to encourage infill development and target density in areas with the infrastructure to support it need not wait for further CEQA reform, however. In Los Angeles, market forces combined with revised zoning have unleashed a wave of dense residential development downtown. Planners and private sector developers trace downtown's emergence as a major residential neighborhood to 1999, when the city passed an Adaptive Reuse Ordinance (ASO) that made it much easier to convert older, vacant official and commercial buildings into apartment and condo complexes. In the ten years after passage of the ASO, 14,561 units were created using its procedures. Re. Code LA Zoning Evaluation Report, p. 52. Significant commercial development has followed, and downtown Los Angeles now houses approximately 50,000 people, with over 5,000 residential units currently under construction.

Yet for all of its success, downtown Los Angeles remains a dizzying hodgepodge of dozens and dozens of conflicting and often overlapping zones, plans, and restrictions. The current version of the city's zoning code dates to 1946, with amendments, additions, unclear procedures, and exceptions swelling it to hundreds of unmanageable pages. Faced with a code that is inconsistent, unfocused and badly outdated, Los Angeles has embarked on a sweeping overhaul, and is starting the process with a complete revamp of downtown zoning, with an eye toward building on recent success to create a more streamlined, unified approach to density and infill development.

Los Angeles plans to release its proposed new, streamlined downtown zoning later in 2015. Among the items likely to be included: an expanded, revised ARO that would apply to office and other non-residential uses, rather than simply apartments and condos, eliminating minimum average residential unit sizes to permit a wider range of residential products, revising the requirements for the transfer of floor area rights between parcels, expanding some affordable housing incentives to all residential development, and revising parking ratios downward, coupled with "unbundled" parking and a unified method to submit and approve alternative parking plans. None of this requires the application of the CEQA streamlining discussed above (although every little bit helps). As a policy matter, Los Angeles is saying it wants more density in its central core, where transit options are plentiful and a car-free (or car-limited) lifestyle is not only possible but desirable.

Conclusion

Thus goes the push and pull of policy changes at the state and local level. Not every city wants the density of downtown Los Angeles or San Francisco, but those that fight infill, transit-proximate development appear to be fighting a losing battle. CEQA reform happens in fits and starts, and the streamlining and policy changes outlined above will not transform the California planning landscape overnight, both because of limitations in scope and the enduring primacy of local control of land use policy. But these steps are real and will be impactful. The movement inward is here to stay.

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REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE FINDS THAT DELISTING THE GNATCATCHER AS THREATENED UNDER THE ENDANGERED SPECIES ACT MAY BE WARRANTED

The U.S. Fish and Wildlife Service (FWS) has found that a petition to delist the Coastal California gnatcatcher (*Polioptila californica californica*) as a threatened subspecies under the federal Endangered Species Act may be warranted. The FWS listed the subspecies as threatened in 1993, prompting development of massive land conservation programs that for decades have regulated the use of millions of acres of land in southern California. The petition asserts that the listing of the Coastal California gnatcatcher as a distinct subspecies is not based on the "best scientific data available," a requirement of the Endangered Species Act, and that DNA evidence establishes that the Coastal California gnatcatcher is not a subspecies at all, but rather simply part of the gnatcatcher species *Polioptila californica*, a common bird ranging from Ventura County in southern California to the southern tip of Baja California, Mexico.

Background

When the FWS first listed the gnatcatcher, it relied largely on analysis of morphological features, such as feather coloration of museum specimens, by Dr. Jonathan Atwood who petitioned for the listing. During the listing process, several scientists called for genetic analysis to determine whether gnatcatchers in southern California were a distinct subspecies.

In 2000, Professor Robert Zink of the University of Minnesota and other scientists (including Dr. Atwood) published an analysis of gnatcatcher mitochondrial DNA (which is transmitted to offspring by females) concluding that the Coastal California gnatcatcher was not a distinct subspecies.

In 2003, the FWS proposed to reclassify the Coastal California gnatcatcher as a "distinct population segment" under the Endangered Species Act, rather than a subspecies. During this process, the FWS reviewed Dr. Zink's 2000 analysis and ultimately concluded that while it cast doubt on earlier work on the taxonomy of the gnatcatcher, the earlier morphological analyses sufficed to require more genetic work to be completed before deciding whether a change in taxonomy would be warranted.

In 2008, Professor John Skalski of the University of Washington and others provided a statistical analysis of the earlier morphological work and concluded it did not show the Coastal California gnatcatcher to be a subspecies.

A petition to delist the gnatcatcher was filed in 2010 based on the Zink and Skalski analyses. The FWS denied that petition in 2011, continuing to rely on its earlier taxonomy review, seeing analysis of mitochondrial DNA as insufficient reason to change the gnatcatcher's classification as a subspecies, and suggesting that a nuclear DNA analysis should be done.

The Current Petition to Delist

In May 2014, several landowner groups filed another petition to delist the gnatcatcher, this time based on a 2013 peer-reviewed and published paper by Dr. Zink and others analyzing nuclear DNA of gnatcatchers throughout the species' range from southern California to the tip of Baja California—the very type of analysis the FWS suggested would resolve the issue. Based on their study, Dr. Zink and his colleagues concluded that there is no genetic basis for maintaining a subspecies classification for the southern California gnatcatchers and, instead, members of this putative subspecies should be considered part of the same taxonomic group as the common species *Polioptila californica*.

Finding of the U.S. Fish and Wildlife Service

On December 31, 2014, the FWS issued its 90-day finding, the first step in the delisting process, concluding that the petition presents "substantial scientific or commercial information indicating that the [delisting] may be warranted." The FWS therefore initiated a review of the status of the Coastal California gnatcatcher. Toward that end, the FWS has requested scientific and commercial data and other information regarding the gnatcatcher. The FWS

added that, based on its status review, it will later issue a 12-month finding that will address whether the delisting is warranted. In an accompanying press release, the FWS elaborated that it:

> …is particularly interested in receiving new morphological, genetic or other relevant information about the bird; analyses or new interpretations of existing morphological, genetic or other information; the methods, results and conclusions of 2000 and 2013 research by Robert Zink et al., on which the 2014 petition heavily relies; and information related to consideration of the coastal California gnatcatcher as a Distinct Vertebrate Population Segment (DPS) under the ESA.

The deadline for comments on the FWS finding and the delisting petition was March 2, 2015.

Conclusion and Implications

The 1993 listing of the gnatcatcher led to approval and implementation of habitat conservation plans and natural community conservation plans governing land use and conservation of broad swathes of southern California. At great cost, several hundred thousand acres of the coastal sage scrub habitat of the gnatcatcher and other species have been set aside for conservation under these plans.

If the FWS, more than three decades later, finds that that listing was unwarranted because the Coastal California gnatcatcher is not and never was a subspecies, as then supposed, but rather a quite common bird, one irony is that those plans almost certainly will remain in place regardless, particularly as they were designed to also cover other species under the gnatcatcher's umbrella. If the gnatcatcher is delisted, landowners at least would no longer need authorization from the FWS to take the species. It is possible, though, that the FWS could list the gnatcatcher as a distinct population segment (the 2013 Zink study, however, also concludes there is no basis for that), in which case the need for authorization from the FWS would persist. (David Ivester)

DEPARTMENT OF CONSERVATION RELEASES DRAFT ENVIRONMENTAL IMPACT REPORT FOR FRACKING

On January 14, 2015 the California Department of Conservation, through its Division of Oil, Gas and Geothermal Resources (DOGGR), published a Draft Environmental Impact Report (EIR) titled "Analysis of Oil and Gas Well Stimulation Treatments in California." The Draft EIR analyzes the impacts of well stimulation treatments, including hydraulic fracturing (commonly known as "fracking"), performed in a manner consistent with the DOGGR's proposed permanent regulations.

The public review period for this Draft EIR began on January 14, 2015 and will end on March 16, 2015. DOGGR is directed by Senate Bill 4 to certify the EIR on or before July 1, 2015.

Background

On September 20, 2013, California Governor Jerry Brown signed into law Senate Bill 4, to provide regulation and oversight to the practice of well stimulation treatment in the energy industry. Well stimulation treatment is a technique in which water is mixed with sand and chemicals, and the mixture is injected at high pressure into a wellbore to create small fractures from which hard-to-reach oil and gas deposits can be extracted.

Senate Bill 4 imposes requirements on oil and gas well operators and suppliers, including the application for permits, public disclosure of chemicals used, public notices, and new civil penalties for violations. The bill also requires groundwater and air quality monitoring. The new regulatory and oversight mechanisms involve multiple state and district agencies. These include the Department of Toxic Control Substances (DTSC), State Air Resources Board, State Water Resources Control Board, Division of Oil, Gas, and Geothermal Resources, and the Natural Resources Agency.

Overview of the Draft EIR

The EIR evaluates well stimulation treatments of existing and future oil and gas wells in the State at a

programmatic level. Therefore, the degree of specificity under the EIR's programmatic analysis is inherently less detailed than a site specific analysis since the exact activities associated with future well stimulation treatments of either existing or newly drilled wells at any particular location cannot be predicted without speculation.

For the purposes of this EIR the "project" is defined as all activities associated with a stimulation treatment that could occur either at an existing oil and gas well, or at an oil and gas well that is drilled in the future expressly for the purposes of a stimulation treatment.

At a programmatic level of analysis, the EIR concludes that project could have the potential to cause significant and unavoidable impacts to aesthetics, air quality, biological resources, cultural resources, geology, soils and mineral resources, greenhouse gas emissions, land use and planning, risk of upset/public and worker safety, and transportation and traffic. Notably, the project assumes that well stimulation treatment permits will satisfy specific standards for resource protection, including standards for water recycling, habitat protection, surface water protection and groundwater protection. The project also assumes implementation of the mitigation measures recommended in the EIR, as applicable at a site-specific level of analysis, to avoid or minimize potential impacts to certain categories of environmental resources.

Significantly, the EIR acknowledges that new regulations and additional mitigation measures are possible:

> In the future, decisionmakers will need to consider if the proposed permanent regulations, the mitigation measures and standards for resource protection recommended in this EIR, and other State regulatory actions prescribed by [Senate Bill] 4 are sufficient to reduce potential environmental effects to an acceptable level. Further legislative or rulemaking actions may be warranted in the future if it is determined that additional measures should be taken to minimize environmental effects that have not been predicted, or have been underestimated in their severity, in this EIR.

Although this EIR functions as a Program EIR in all respects, some of its programmatic level analysis is more detailed than the rest. In particular, the document evaluates three particular oil and gas fields (the Wilmington, Inglewood, and Sespe Oil and Gas Fields) at a greater level of detail.

Objectives of the EIR include the following:

> (1) To provide DOGGR and other applicable regulatory agencies with information which may be necessary to efficiently and effectively evaluate future permit applications for proposed oil and gas well stimulation practices, during or following well completion, in order to ensure a consistent approach to California Environmental Quality Act compliance.
>
> (2) To identify and develop impact avoidance and mitigation strategies to address any significant environmental effects directly, indirectly or cumulatively resulting from well stimulation practices that are not already sufficiently addressed by the proposed regulations addressing well stimulation treatments to be adopted by DOGGR.
>
> (3) To facilitate on-going coordination between DOGGR and other federal, state, regional and local agencies having regulatory authority over well stimulation practices.

Conclusion and Implications

The Environmental Impact Report seeks to provide an objective public information analysis of environmental impacts associated with well stimulation treatments and hydraulic fracturing, which have recently been the topic of widespread debate. Although well stimulation treatments and hydraulic fracturing have been used as a production stimulation method in California for more than 30 years, with the increase in the development of horizontal shale gas wells in various regions of the United States, hydraulic fracturing has become the focus of significant attention. Interested parties should make an effort to submit public comments or attend one of six scheduled public comment meetings which will be held throughout the state. This opportunity is likely to be the last occasion to shape California's final hydraulic fracturing regulations, which are scheduled to take effect on July 1, 2015.

The Draft EIR can be accessed at: http://www.conservation.ca.gov/dog/SB4DEIR/Pages/SB4_DEIR_Home.aspx (Jonathan Shardlow)

STATE WATER RESOURCES CONTROL BOARD PROPOSES NEW GRAZING REGULATIONS TO PROTECT WATER QUALITY

Starting in late 2014, the State Water Resources Control Board (SWRCB) began collecting stakeholder input for the development of water quality regulations related to livestock grazing practices. This effort strives to provide the Regional Water Quality Control Boards (RWQCBs) with more tools to ensure water quality standards are met, while taking into account possible regional differences. While early in the process, the SWRCB's focus is currently on compiling public input from a wide variety of stakeholder groups during a series of focused listening sessions that will lead to an initial draft proposed plan.

Background

In California, more than 40 million acres of rangeland support a $3 billion dollar industry producing food and fiber. Well-managed livestock grazing operations can provide benefits to the environment, such as reducing fuels for wildfires and improving grassland habitat, while also providing benefits to the economy, and California and out-of-state consumers. However, the SWRCB has stated that grazing operations can contribute to the impairment of water quality and impact beneficial instream uses by eroding hillsides and stream banks, discharging bacteria from feces, and increasing the temperature of streams by trampling or eating riparian habitat and reducing shade.

The SWRCB has identified the need to support well-managed grazing while still protecting local water quality and other beneficial uses. To address this challenge, the SWRCB is looking to new methods of regulation because currently no statewide structure for regulating nonpoint source pollution exists. Under existing legal authority, water quality regulation derives from the federal Clean Water Act, the state Porter-Cologne Water Quality Act, and California's Nonpoint Source Policy. Pursuant to these legal structures, RWQCBs regulate nonpoint sources within their region through various permitting authorities. However, according to the SWRCB, these regional regulations can lead to complicated permitting variations and inconsistencies across the state.

Grazing Regulatory Action Plan

To address the challenges described above, the SWRCB and RWQCBs formed a work team to develop the statewide Grazing Regulatory Action Plan (GRAP). The work team is led by the Lahontan RWQCB (Region 6) with additional participants from the other eight RWQCBs (North Coast, San Francisco Bay, Central Coast, Los Angeles, Central Valley, Colorado River, Santa Ana, and San Diego RWQCBs) and the SWRCB's Division of Water Quality and Office of Public Participation.

The SWRCB identified GRAP's goal as facilitating efficiency and statewide consistency in developing and implementing strategies, while at the same time accounting for regional differences in hydrology, topography, climate and land use. GRAP will consider alternatives to ensure that grazing has minimal negative impacts on water quality, as well as thoughtful consideration of the costs of compliance to the regulated grazing community.

The GRAP process will occur over the next two years with the first phase of listening sessions occurring from 2014-2015. The second phase will compile comments and suggestions from the sessions to create an initial proposal, environmental scoping document pursuant to the California Environmental Quality Act, and then broader outreach and public comment on the initial proposal through 2015. The third phase, scheduled for 2016, will involve the creation of the final drafts of the proposal and supporting environmental documents. After that, the SWRCB will consider adoption of the final GRAP and, if adopted, begin implementing the water quality standards attainment plan.

Focused Listening Sessions

The SWRCB believes that participation of interested stakeholders throughout the development of the GRAP is necessary to its success. Since this project began in November of 2014, the GRAP work team is performing the initial step of engaging stakeholder groups in "focused listening sessions" to solicit comments on developing the GRAP.

The SWRCB identified the objectives of the first series of public outreach sessions to include discussion of the statewide issue of water quality impairments associated with grazing, soliciting input on the types of grazing management practices that have been effective, and hearing concerns and suggestions or other feedback on the SWRCB's approach for the project.

These focused listening sessions occurred in November of 2014 in Sacramento, and included representatives from environmental and environmental justice groups, ranching and related industries, government and local public agencies, as well as academia.

Further public participation was provided at Regional Stakeholder Meetings in January of 2015, held in more remote areas of California including San Luis Obispo, Redding, and Bishop. The purpose of the Regional Stakeholder Meetings was to share comments from the initial focused listening sessions and gather feedback on prior comments and on the GRAP from a broader group of more geographically remote stakeholders.

Another listening session is scheduled with tribal stakeholders in early 2015. After this final session, all comments will be incorporated into the initial proposal, scheduled to be available for public comment by the end of 2015.

Conclusion and Implications

As a supplement or an alternative to the RWQCBs using their permitting authority to regulate nonpoint source pollution regionally, the SWRCB is exploring the use of the GRAP as a new regulatory plan to enhance environmental benefits from grazing. Wary of all new regulation, ranchers are concerned that these new plans and rules will limit their production activities or cause adverse economic impacts to the ranching industry.

Through the phased GRAP planning process, the SWRCB will explore potential ways to protect both water quality and the industry. The SWRCB's early efforts to gain input on how to most efficiently address the water quality concerns and be flexible to the regional differences is intended to allow all stakeholders an opportunity to be heard. Stakeholders are encouraged to share their comments now and throughout the GRAP process so that these comments and suggestions can be incorporated into any proposals before the final plan goes before SWRCB for possible adoption in the next few years.

For more information on GRAP visit: http://www.waterboards.ca.gov/water_issues/programs/nps/grap.shtml (Katie R. O'Ferrall, Meredith Nikkel)

LAWSUITS FILED OR PENDING

DISTRICT COURT FINDS SOLAR PROJECT OWNER MAY INTERVENE IN TRIBAL CHALLENGE TO BLYTHE PROJECT

The U.S. District Court for the Central District of California has allowed solar project owner NextEra Blythe Solar Energy Center LLC (NextEra) to intervene in the Colorado River Indian Tribe's (CRIT) challenge to the U.S. Department of the Interior's (DOI) approval of the Blythe Solar Project. [*Colorado River Indian Tribes et al. v. U.S. Department of the Interior*, ___F.Supp.3d___, Case No. 5:14-cv-02504 (C.D. Cal Jan. 2, 2015).]

Background

The Blythe Solar Project (Project) is a proposed $1.13 billion solar development with a capacity of 485 megawatts, proposed to be located on over 4,000 acres of federal land managed by the U.S. Bureau of Land Management (BLM) just northwest of Blythe in Riverside County, California. An earlier iteration of the Project was approved by BLM in 2010. After the Project changed owners and was modified, BLM issued a notice of intent to prepare an Environmental Impact Statement (EIS). The draft EIS was released in early 2014, and the final EIS was issued in May 2014. On August 1, 2014, BLM issued a Record of Decision approving the right of way grant for the Project. CRIT filed its lawsuit challenging BLM's Project approval in December 2014.

CRIT has alleged that the Project site is within the ancestral homelands of its members and that their culture and religion is connected to the physical environment of the area. CRIT asserts that the EIS failed to comply with the National Environmental Policy Act (NEPA). CRIT alleges that the EIS failed to fully identify the cultural resources that may be impacted by the Project and failed to include information about buried cultural resources that had been identified during construction of other, similar projects. CRIT also asserts that the Project does not conform to various requirements under the Federal Land Policy and Management Act (FLPMA) and the California Desert Conservation Act (CDCA) concerning preservation of environmental and cultural resources.

CRIT filed its lawsuit against BLM, the agency that approved the project, as well as various federal officials within BLM and the Department of Interior. The owner of the Project, NextEra, filed a motion to intervene in the case.

The District Court's Order

The District Court granted NextEra's motion to intervene in the case, allowing NextEra until February 3, 2015 to file its response to CRIT's complaint.

Intervention in federal cases is governed by Federal Rule of Civil Procedure, Rule 24. Under Rule 24(a)(2), intervention must be granted to anyone who:

> …claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(b) provides for permissive intervention to anyone who "has a claim or defense that shares with the main action a common question or law or fact."

Historically, the rule governing intervention as of right was interpreted to provide that only federal defendants were allowed to intervene and there was a "categorical prohibition on intervention on the merits, or liability phase, of NEPA actions." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011) (*en banc*) (*Wilderness Society*). The rationale for the prohibition was that NEPA provides only environmental protection, and that entities with purely economic interests were, therefore, not proper parties in a NEPA case. That prohibition was removed in 2011 with the Ninth Circuit's *en banc* decision in the *Wilderness Society* case. In *Wilderness Society*, the Ninth Circuit Court of Appeals did away with the requirement that only federal defendants can intervene as of right, and as a result, the plain language of Rule 24(a) governs such intervention.

In the context of the evolution of the interpreta-

tion of the rules governing intervention, NextEra was granted status as a defendant-intervenor.

Conclusion and Implications

With the removal of these historic barriers to intervention in NEPA cases, NextEra was well positioned to be granted intervention status in this case, which impacts a Project over which they have a significant interest. NextEra filed its answer to the complaint on February 2, 2015. (Kristen Castaños)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT HOLDS MUNICIPALITIES MUST PROVIDE REASONS FOR DENYING WIRELESS SERVICE FACILITY APPLICATIONS PURSUANT TO THE TELECOMMUNICATIONS ACT

T-Mobile South, LLC v. City of Roswell, ___U.S.___, Case No. 13–975 (Jan. 14, 2015).

The U.S. Supreme Court addressed the question of whether, and in what form, localities must provide reasons when they deny telecommunication companies' applications to construct cell phone towers. The court held that, under the federal Telecommunications Act of 1996 (Telecom Act), localities must provide or make available their reasons, but that those reasons need not appear in the written denial letter or notice provided by the locality. Justice Sotomayor delivered the majority opinion.

Facts and Procedural Background

In February 2010, T-Mobile South, LLC, applied to build a new 108-foot tall cell phone tower in Roswell, Georgia. The city's planning and zoning division reviewed T-Mobile's application and issued a memorandum to the city council concluding that the application met all of the requirements set out in the city's ordinances. At the city council's public hearing, however, councilmembers voiced opinions that the tower would be aesthetically incompatible with the natural setting and that its proximity to other homes would adversely affect the neighbors and the resale value of their properties.

The city denied the application. Its brief notification of the denial contained no elaboration as to its reasons for the decision. Four days prior to T-Mobile's deadline to contest the opinion, the city published detailed minutes from the meeting at which the request was denied. T-Mobile filed suit in federal District Court, alleging that denial of the application as not supported by substantial evidence in the record, and would prohibit the provision of wireless service in violation of the Telecommunications Act.

The District Court interpreted the Telecom Act to require that a written denial letter or notice describing reasons for the denial, explained in enough detail to allow a reviewing court to evaluate them against the record. The court thereby concluded that the city had violated the Telecom Act. The Eleventh Circuit Court of Appeals reversed, following the circuit-split minority rule that it is sufficient if the explanations are contained in a different written document to which the applicant has access. The appellate court found that under this rule, the statutory requirements were satisfied because T-Mobile had its own transcript as well as a written letter stating that the application had been denied and informing T-Mobile that it could obtain access to the minutes of the hearing. The court did not consider the issue of *when* the city provided its written reasons to petitioner. The U.S. Supreme Court reversed.

The Supreme Court's Decision

The Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iii), provides that a locality's denial of a cell phone tower siting application "shall be in writing and supported by substantial evidence contained in a written record."

Denials Require Justification

The Court first analyzed whether the statute requires localities to provide reasons when they deny applications, and held it does. In order to determine whether a locality's denial was supported by substantial evidence, as Congress directed, courts must be able to identify the reasons why the locality denied the application. It would be considerably more difficult for a reviewing court to determine whether a locality had violated these substantive provisions, the court reasoned, if the locality were not obligated to state its reasons. The Court also found support for this conclusion in the term of art "substantial evidence," which requires that the grounds upon which an administrative agency acts must be clearly disclosed, and courts cannot conduct proper review unless they

are advised of the considerations underlying the action under review. The city argued that a reason-giving obligation would deprive it of local zoning authority, but the Court found Congress had intended to place specific limitations on the traditional authority of state and local governments regarding cell phone tower siting applications. It added that the reasons need not be elaborate or even sophisticated, but simply clear enough to enable judicial review.

Timely Justification

Next, the Court assessed whether the reasons must appear in the same writing that conveys the locality's denial of an application, and held they do not. The Court again looked to the statutory text and found no language imposing any requirement that the reasons be given in any particular form. The only requirement was that the locality's reasons are stated clearly enough to enable judicial review. The Court also added a timing requirement: the locality must make its reasons available at "essentially the same time" it issues its denial. The Court reasoned that a locality cannot burden the judicial review process by delaying release of its reasons for a substantial time after it conveys written denial, especially given that the statute provides an entity adversely affected by a locality's decision only 30 days to seek judicial review of the decision. This was fair to the municipality, the Court opined, in light of the lax requirement that the denial itself need only be issued within a "reasonable period of time," interpreted by the Federal Communications Commission to mean between 90 and 150 days depending on the type of siting application.

T-Mobile's Arguments

The Court rejected T-Mobile's four arguments. First, T-Mobile argued that the word "decision" in the statute connotes a written document that itself provides all the reasons for a given judgment. The Court noted that "decision" can also mean something short of a statement of reasons explaining a determination. Second, T-Mobile argued that other provisions in the Telecom Act use the word "notify" when the Telecom Act means to impose only a requirement that a judgment be communicated. But the Court found that "notify" is a verb that does not in itself reveal what is being notified. Third, T-Mobile contended that the substantial evidence requirement itself demands that localities identify their reasons in written denials. The Court found that though "substantial evidence" requires localities to give reasons, the phrase says nothing about the document in which those reasons must be stated or presented to a reviewing court. Finally, T-Mobile invoked the statutory requirement that any adversely affected person shall have their challenge heard by a court on an expedited basis. As long as the reasons are provided in a written record, however, and as long as they are provided in a manner that is clear and prompt enough to enable judicial review, there is no reason to require that those reasons be provided in the denial itself.

The Concurring and Dissenting Opinions

Justice Alito filed a concurring opinion. He agreed that Congress, by using the term "substantial evidence," intended to invoke administrative law principles such as the requirement that agencies give reason. He wrote that three other principles applied here. First, a court must uphold a decision if the agency's path may reasonably be discerned. Second, even if a locality has erred, a court must not invalidate the locality's decision if the error was harmless. Finally, a court must remand errors to the agency except in rare circumstances.

Justice Roberts, joined by Justice Ginsburg and Justice Thomas in part, dissented. The dissent took issue with the timing requirement, which it pointed out was nowhere in the text of the statute. It found such requirement unnecessary for judicial review, given that a reviewing court can carry out its function just as easily when the record is submitted any time before—or even some time after—the lawsuit is filed. The dissent was not persuaded by the majority's rationale that the company whose application is denied needs the time to carefully consider whether to seek review. After all, "cell service providers are not Mom and Pop operations." According to the dissent, the city fully complied with its obligations under the statute. Like the majority, however, the dissent rejected T-Mobile's contention that the term "decision" inherently demands a statement of reasons. Given the commonplace nature of express requirements to give reasons, even within other provisions Telecom Act, the dissent found the lack of an express requirement telling. It found the statute to demand nothing more than what it says: a written document communicating a town's denial.

The dissent concluded that providing written reasons in some form, be it meeting minutes or other, was justified by the statutory text. But requiring a town to make those reasons available "essentially contemporaneously" with its decision was not. The concern about an applicant needing to make a considered decision whether to seek judicial review might have force if towns routinely made these decisions in secret, closed-door proceedings, or if applicants were unsophisticated:

> But the local zoning board or town council is not the Star Chamber, and a telecommunications company is no babe in the legal woods.

Here, T-Mobile had brought its own court reporter, ensuring it had a verbatim transcript of the meeting before the minutes were even finalized.

Justice Thomas wrote separately to express his concern about the Court's eagerness to reach beyond the bounds of the dispute to create a timing requirement. Just as the Court has been unwilling to impose procedural requirements on federal agencies absent a statutory command, he reasoned, so it should be—and perhaps more so—with municipalities.

Conclusion and Implications

The dissent noted that its was not a "the sky is falling" dissent. It was unclear whether the decision was a bad break for the city, given that the court left open the question of remedy; it may be that the failure to comply with the "in writing" requirement as construed by the Court can be excused as harmless error in appropriate cases.

Importantly, the Court resolved the conflict over whether a town must provide a statement of reasons with its final decision, apart from the written record: it need not. The opinion is available at: http://www.supremecourt.gov/opinions/14pdf/13-975_8n6a.pdf (Gwynne Hunter, Laura Harris)

NINTH CIRCUIT AFFIRMS U.S. FOREST SERVICE'S DECISION TO IMPLEMENT THE 'LITTLE SLATE' TIMBER THINNING PROJECT

Alliance for the Wild Rockies v. Brazell, *Unpub.*, Case No. 14-30050, (9th Cir., Jan. 2, 2015).

The Ninth Circuit Court of Appeals has issued an *unpublished* opinion upholding the lower court's decision affirming the U.S. Forest Service's decision to implement the Little Slate Project, an approximately 2,600-acre timber thinning sale within the Nez Perce National Forrest.

Background and Decision

The plaintiffs, Alliance for the Wild Rockies and Friends of the Clearwater, appealed a U.S. District Court decision granting summary judgment in favor of the U.S. Forest Service and the U.S. Fish and Wildlife Service. In particular, the plaintiffs contended that the District Court erred when it affirmed the Forest Service's decision to implement the Little Slate Project, which proposes a 2,598-acre timber thinning sale within a 36,000-acre project area in the 2.2 million-acre Nez Perce National Forest.

Background

The plaintiffs claimed that the Forest Service and the Fish and Wildlife Service violated the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA), and the federal Endangered Species Act (ESA) by failing to properly account for the project's impact on several species that live in the project area (fisher, goshawk, pileated woodpecker, and bull trout) and those species' habitat. The Ninth Circuit disagreed.

The Ninth Circuit's Decision

The National Forest Management Act Claim

First, the court considered whether the Forest Service violated NFMA in developing the Little Slate Project. NFMA requires the Forest Service to comply with the Nez Perce Forest Plan when designating and implementing site-specific projects in the forest. The court observed that although the Nez Perce Forest Plan requires the Forest Service to monitor "management indicator species" (including fisher, goshawk, and pileated woodpecker) populations at the forest level, nothing in the plan requires the Forest Service to conduct site-specific monitoring before imple-

menting individual projects, such as the Little Slate Project. Consistent with the plan's requirements, the Forest Service evaluated the impact of the Project on management indicator species by considering how the project would affect those species' habitats. Therefore, the Forest Service did not violate NFMA in failing to conduct population surveys of the management indicator species.

The National Environmental Policy Act Claim

Second, the court held that the Forest Service and Fish and Wildlife Service did not violate NEPA. After reviewing the Environmental Impact Statement (EIS) prepared for the project, the court was satisfied that the agencies took the requisite "hard look" at the project's potential impacts on species. For instance, the EIS "closely examines" the project's potential impact on fisher, goshawk, pileated woodpecker, and bull trout by considering how the project will degrade or improve those species' critical habitat. This analysis includes a discussion of cumulative impacts.

The Endangered Species Act Claim

Lastly, the court held that the agencies satisfied their obligations under the federal Endangered Species Act. In its Biological Opinion related to the Little Slate Project, the Fish and Wildlife Service concluded that the project would not jeopardize bull trout (the only listed species relevant to the court's decision), or adversely modify its critical habitat. As required by the ESA the Fish and Wildlife Service based this conclusion on the "best scientific and commercial data available." Furthermore, substantial evidence supports the agency's "no jeopardy" conclusion because the record shows that the project, while temporarily disrupting some bull trout habitat, will have a long-term positive impact on many of the streams in which the bull trout live and reproduce. Thus, the Biological Opinion is sufficient under the Endangered Species Act.

Conclusion and Implications

Although the appellate court's decision is *unpublished*, the case represents an important victory to the U.S. Forest Service and the U.S. Fish and Wildlife Service with respect to its decision to implement the Little Slate Project. The case also demonstrates the deferential standard of review that the courts apply under many federal environmental laws, including NFMA and NEPA. The unpublished decision is available here: http://cdn.ca9.uscourts.gov/datastore/memoranda/2015/01/02/14-35050.pdf (Laura Harris)

NINTH CIRCUIT UPHOLDS DENIAL OF TRIBE'S APPLICATION TO OPERATE MULTIPLE CASINOS

Redding Rancheria v. Jewell, ___ F.3d ___, Case No. 12-15817, (9th Cir. Jan. 20, 2015).

In a split decision, the Ninth Circuit Court of Appeals has affirmed a U.S. District Court's judgment in favor of the Department of the Interior's (Department) denial of the application of the Redding Rancheria (Tribe) to operate multiple casinos on "restored lands."

Legal Background

The key statutory provisions governing the Tribe's gaming activities are a portion of the Indian Gaming Regulatory Act (IGRA). Congress passed IGRA in 1988 "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. IGRA permits Indian tribes to conduct gaming on tribal lands subject to certain limitations. Section 2719(a) prohibits tribes from gaming on lands taken into trust after IGRA's 1988 passage date, but that section includes certain exceptions. One of those exceptions allows restored tribes to game on any land taken into trust as part of a "restoration of lands," which the court in the decision refers to as the "restored lands exception." According to the court, there was no dispute in this case that the Tribe is a "restored tribe" within the meaning of the statute. The issue was whether the land in question was "restored land."

The Department promulgated a series of rules to implement these provisions. Under the Department's interpretation, lands qualify as "restored" and can thus be used for gaming purposes only if the tribe es-

tablished a sufficient relationship to the land in what the regulations identify as "modern," "historical," and "temporal" connections to the Tribe's original land. 25 C.F.R. § 292.12. A tribe can demonstrate a "temporal" connection if the tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition "and the tribe is not gaming on other lands." 25 C.F.R. § 292.12(c). The Tribe filed its application within 25 years of recognition, but as discussed in more detail below, the application was denied because the tribe was operating a casino on other lands.

Factual Background

In 2003, the Tribe submitted a request to the Department to take into trust 152 acres so that the Tribe could construct a casino. It later amended its application to include an additional 80 acres. The Tribe informed the Department that it was willing to close its current gaming facilities once its new facility was built. The Department denied the Tribe's application in 2010, finding that, under the applicable regulations, the Tribe could not conduct gaming on newly acquired lands because it was already gaming on other lands.

The Tribe brought suit in the U.S. District Court for the Northern District of California, challenging the Department's determination that the 152 acres are not covered by the restored lands exception to the IGRA. The court granted summary judgment in favor of the Department. On appeal, the Tribe argued that the regulations were arbitrary and capricious in limiting tribes to one casino on restored lands. The Tribe further argued that even if the limitation was reasonable, the Department improperly denied its application because the Tribe had offered to close the first casino so that the application would not result in more than one casino.

The Ninth Circuit's Decision

The Ninth Circuit Court of Appeals upheld the reasonableness of the regulation itself, but directed the Department to consider whether the regulation bars the Tribe's moving its casino operation from the old casino to a new one.

The Regulation Is Reasonable

The court began its analysis of this first issue by explaining that the restored lands exception was not intended to give restored tribes an open-ended license to game on newly acquired lands. Instead, its purpose was to promote parity between established tribes, which had substantial land holdings at the time of IGRA's passage, and restored tribes, which did not.

The court further explained that IGRA allows a tribe to game on any lands that were acquired as part of its first request for lands after regaining federal recognition, but it limits gaming on lands acquired as part of subsequent requests. Once a restored tribe builds a casino, it cannot build additional casinos on newly acquired lands. According to the court, without this limitation restored tribes would be able to expand their gaming operations indefinitely. This would give them an unfair advantage over established tribes.

In light of these policy rationales, the court concluded the Department reasonably implemented the restored lands exception here.

The Department Should Have Considered the Tribe's Offer to Move All Gaming to the New Casino

The court's analysis of this second issue began with a discussion of the applicable standard of review. An agency's decision is arbitrary and capricious if it ignores important considerations or relevant evidence on the record. The court stated that the Department did not address the Tribe's willingness to close its current casino in order to move its gaming operations to one on newly restored lands.

The court further explained that allowing a restored tribe to move a casino does not appear to conflict with the statutory purpose of ensuring parity among restored and established tribes. According to the court:

> Restored tribes, if allowed to operate an indefinite number of casinos on newly restored lands, would of course have an advantage over established tribes, but it is not clear that allowing restored tribes to move a casino to a different location would necessarily have the same effect. (Slip Op. at 17.)

After reviewing the record on this issue, the court concluded by saying that the Department's interpretation "lack[ed] explanation or justification." As such, the court vacated the trial court's grant of summary

judgment as to this issue, with instructions to remand to the agency to address whether the Tribe should be permitted to construct a new casino to replace the existing one.

Conclusion and Implications

This case may be of relatively limited application, given that its fact-specific analysis and holdings pertain to restored tribes seeking to operate multiple casinos on restored lands. Nonetheless, it is relevant in other federal agency decisionmaking contexts because it discusses many facets of the standards a court will apply in evaluating a federal agency's interpretation of its own regulations. This case can be accessed at: http://cdn.ca9.uscourts.gov/datastore/opinions/2015/01/20/12-15817.pdf (Scott Birkey)

DISTRICT COURT DENIES SUMMARY JUDGMENT BASED ON SUCCESSOR'S POTENTIAL KNOWLEDGE OF CERCLA LIABILITIES

Housing Authority of the City of Los Angeles v. PCC Technical Industries, Inc., ___F.Supp.3d___, Case No. CV 11-01626 FMO (C.D. Cal. Dec. 15, 2014).

On December 15, 2014, a U.S. District Court Judge denied a motion for summary judgment by GK Technologies, Inc. (GK) in a suit for environmental cleanup costs of a former steel mill site. The court acknowledged that GK had no direct or indirect liability under the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA). However, questions remained as to successor liability stemming from GK's acquisition and eventual dissolution of Southwest Steel Rolling Mills, Inc. (Southwest). Citing evidence that GK may have been aware of Southwest's liability for environmental contamination, the court ruled that it may be liable as a successor based on its express assumption of Southwest's liabilities.

Background

The lawsuit by the Housing Authority of the City of Los Angeles (HACLA) stemmed from the environmental contamination of a 21.1-acre property in Los Angeles (Site). The Site was developed in 1938 for steel processing and, for an approximately seventy year period from 1938 to 2008, was used for various industrial operations and subject to multiple owners. In 1969, Automation Industries, Inc. incorporated Southwest as a wholly-owned subsidiary to operate a steel mill on the Site. The Site was transferred to Cascade Steel Rolling Mills, Inc. in 1976 for roughly 9 months, at which point it was deeded back to Southwest.

In April 1978, GK Technologies, Inc. (GK) became the great-grandparent of Southwest via acquisition and merger. One year later, Southwest transferred the Site to Shama, a general partnership (Shama), and thereafter became GK's inactive corporate subsidiary. Southwest dissolved in 1993 and filed a Certificate of Dissolution in which a majority of its directors declared under penalty of perjury that "adequate provision for the payment of unpaid debts and liabilities has been made in that GK Technologies…has assumed payment of all known debts and liabilities of Southwest Steel Rolling Mills, Inc."

HACLA purchased the Site in 2008 to redevelop as mixed use public housing. In 2011, it filed suit against ten former owners of the Site, including GK as the agent, successor, or assignee of Southwest. HACLA alleged, among other things, that each former owner contributed to the release of hazardous substances in violation of CERCLA. It pursued GK under the theory of successor liability, contending that GK expressly assumed any liability that Southwest may have for contamination at the Site.

The District Court's Decision

The court explained as an initial matter that GK, as the party moving for summary judgment, has the burden of showing that there is no genuine dispute as to any material fact. The court also noted that while CERCLA is silent on the matter of successor liability, the Ninth Circuit ruled that the statute authorizes it. GK would be liable for Southwest's alleged contamination of the Site if it expressly or impliedly agree to assume the liability.

GK presented several arguments against succes-

sor liability for Southwest's alleged contamination of the Site. It argued that summary judgment was proper because the Certificate of Dissolution proved it only assumed Southwest's "known" liabilities. This, according to GK, did not include CERCLA liability. The court found this argument unpersuasive and recited several factors that potentially proved GK's knowledge of the Site's environmental contamination when it assumed Southwest's liabilities.

First, the court noted that the Site was strewn with contaminants such as debris, slag, and scrap metal shavings in 1979. GK acquired Southwest just one year before, in 1978. Next, the court remarked that GK and Southwest both employed the same high-level officer. Eugene Swartz was Southwest's Vice President and Chairman of the Board of Directors from 1969 to 1979. In this capacity, he had oversight authority of the Site's operation as a hot steel rolling mill. Swartz went on to serve as GK's Vice President from 1978 to 1982, and as a GK Director from 1982 to 1992. Based on his dual employment, the court made the reasonable inference that Swartz was aware of possible environmental contamination related to Southwest's activities on the Site, and that he shared this knowledge with GK. Finally, the court pointed to evidence that in 1992, before GK assumed all of Southwest's known liabilities, GK's corporate parent, General Cable Company (General Cable), contemplated environmental liability in a major corporate restructuring plan. The court surmised that this provision may have resulted from environmental contamination claims from General Cable's companies. Taken together, the court determined the facts could prove that GK was aware of a potential CERCLA claim at the time it assumed Southwest's liabilities.

GK's second contention was that CERCLA liability did not arise until after HACLA purchased the Site in 2008. It argued, therefore, that the liabilities could not have been "known" in 1993, when GK assumed Southwest's liabilities. The court found this interpretation overly constrictive. It reiterated that the relevant knowledge was that of facts necessary for CERCLA liability, not the knowledge of CERCLA liability itself. If GK had such knowledge, then HACLA's claims would exist at the time GK assumed Southwest's known liabilities.

Finally, GK argued that even if were liable, its liability would be limited to the assets it received from Southwest in the dissolution. GK cited several provisions of the California Corporations Code, which the court found inapplicable. The statutes dealt with collecting assets of a dissolved corporation that were improperly distributed to shareholders where, as here, HACLA was pursuing GK on a theory that it expressly assumed Southwest's liabilities, not as Southwest's former shareholder.

Conclusion and Implications

The District Court's decision clarifies the "knowledge" requirement for successor liability under CERCLA. GK's potential knowledge of Southwest's CERCLA liability was central to the court's inquiry. Though it did not contribute to the Site contamination or reference environmental contamination in its assumption of Southwest's liabilities, GK's potential knowledge was sufficient to defeat summary judgment and potentially impose successor liability. Because of the interests at stake, the District Court's decision could serve as an incentive for other parties to expressly disclaim environmental liabilities in asset purchase and sale agreements. (Mae K. Hau, Duke McCall III))

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS COUNTY'S ABANDONMENT OF PUBLIC RIGHT-OF-WAY IN THE FACE OF CEQA AND STREETS AND HIGHWAYS CODE CHALLENGES

DeLucchi v. County of Colusa, *Unpub.*, Case No. C069632 (3rd Dist. Jan. 14, 2015).

In an *unpublished* decision, the Third District Court of Appeal upheld a trial court decision holding that the County of Colusa's (Colusa) decision to vacate a public right-of-way was valid.

Background

Plaintiff Gerald DeLucchi (DeLucchi) is the owner of approximately 60 acres of property in Colusa County that is used for a private duck hunting club. The property was part of a subdivision map recorded in 1910, and includes a portion of Lot 923 of that subdivision. The owner at the time of the subdivision dedicated miles of public rights-of-way providing access to the mapped parcels, including Lot 923. There is some dispute over whether Colusa ever accepted the public rights-of-way and the court refers to them as "purported rights-of way," but this question is not in issue in the case.

When DeLucchi purchased the property in 1996, he determined that there was no recorded road access to the property. In August 1996, DeLucchi executed written agreements with the owners of neighboring properties for private rights of access in perpetuity.

In 2005, however, DeLucchi began having disputes with the neighboring property owners over access, which resulted in multiple lawsuits. In 2009, DeLucchi secured limited access pursuant to the private agreements while the actions were pending.

In 2010, DeLucchi filed a new lawsuit against neighboring landowners and Colusa, seeking to protect access along the purported public rights-of-way. After this lawsuit was filed, the Colusa Department of Public Works recommended that the board of supervisors vacate the purported public rights-of way at issue in the lawsuit. Public Works cited three public benefits to vacating the purported rights-of-way: (1) avoidance of litigation costs Colusa would incur as a defendant in the pending lawsuit; (2) removing Colusa as a likely arbiter of future disputes between landowners regarding the rights-of-way and property access; and (3) better insuring that the agricultural and recreational uses of the affected properties remain unchanged over time.

Pursuant to Streets and Highways Code § 8320, Colusa proceeded to abandon the purported rights-of-way. In so doing, Colusa determined that the abandonment was exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines §§ 15061(b)(2) and (3), because there were no physical changes proposed and the abandonment would have no significant effects on the environment.

DeLucchi filed a lawsuit challenging Colusa's decision to abandon the purported rights-of-way, asserting that Colusa did not properly find that abandonment met the requirements of the Streets and Highways Code and that Colusa failed to comply with CEQA.

The trial court disagreed with DeLucchi, upholding Colusa's decision to abandon the purported rights-of-way. DeLucchi appealed.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision, concluding that Colusa properly abandoned the rights-of-way.

Standard of Review

The court first analyzed the standard of review. The court noted that, typically, abandoning rights-of-way is a legislative act, subject to an arbitrary and capricious standard. Where the party opposing the abandonment has a direct property interest, however, that decision can be considered a "judicial" decision, subject to a substantial evidence standard. The court did not reach a conclusion on which standard should apply, finding that the challenge failed under any standard of review.

Nonmotorized Transporation Argument

The court then considered an argument that DeLucchi raised for the first time on appeal—that the abandonment is void because Colusa did not find that the purported rights-of-way cannot be used for nonmotorized transportation. The court dismissed this argument, concluding that it was forfeited for failure to raise in the administrative proceedings and in the trial court. The court also concluded, however, that DeLucchi cited no authority to support his assertion that Colusa's resolution was required to find that the rights-of-way cannot be used for nonmotorized transportation. In *dicta*, the court stated that this section of the law applies where rights-of-way have been designed for motorized traffic. As a factual matter, the court noted that the purported rights-of-way were dedicated in 1910, when motorized transportation was rare, and therefore could not have been designed for motorized traffic. Ultimately, the court concluded DeLucchi was barred from raising this argument.

The Right of Way Challenge

The court then turned to the merits of DeLucchi's arguments. First, the court disagreed with DeLucchi's assertion that Colusa's action was not supported by substantial evidence. The county was required to find that the right-of-way is unnecessary for present and prospective public use and the abandonment is in the public interest. (Streets & Hwys Code, § 8324(b).) The court cited to evidence in the record that the purported rights-of-way are not necessary for present or prospective use. In particular, the court noted that the rights-of-way did not lead to any public land, landowners in the area relied on private easements, there were no proposed development plans for which the rights-of-way would be useful, and neither Colusa nor the general public used the rights-of-way prior to abandonment.

The court also held that Colusa properly found that abandonment was in the public interest, concluding that avoiding litigation costs is a public benefit justifying abandonment.

CEQA Claims

As to the CEQA claims, the court held that Colusa properly concluded that CEQA did not apply because there is no potential for the activity to cause a direct or reasonably foreseeable indirect physical change in the environment. The court found the purported rights-of-way do not connect two county roads, some are discontinuous, they are on private land used for private purposes, and some are impassable for months of the year. Based on this, they do not serve a circulation need and abandonment would not result in any impacts.

Conclusion and Implications

The court upheld Colusa's decision to abandon the purported public rights-of-way. The court did not reach a conclusion about the applicable standard of review, but applied the more lenient substantial evidence test to conclude that Colusa's decision was proper. Of note is the court's broad interpretation of the types of public benefit that can support abandonment of a public right-of-way—here, the avoidance of litigation costs. (Kristen Castaños)

FIRST DISTRICT COURT HOLDS PETITIONER DID NOT RECEIVE PRIMARY RELIEF SOUGHT—WAS NOT A PREVAILING PARTY UNDER CATALYST THEORY IN CEQA LITIGATION

Washoe Meadows Community v. Cal. Dept. of Parks and Recreation, *Unpub.*, Case No. A139197 (1st Dist. Dec. 30, 2014).

In *Washoe Meadows Community* the First District Court of Appeal in an unpublished opinion reversed the trial court's decision and held that petitioner was not a successful party under the "catalyst theory" of Code of Civil Procedure § 1021.5 because petitioner had not obtained the primary relief sought in its the lawsuit. Thus, petitioner could not recover its attorney's fees incurred in bringing the action. The court noted that the outcome of petitioner's concurrent parallel case might change that result, but until that second case was decided, petitioner's arguments lacked merit.

Facts and Procedural History

In 1984, California acquired 777 acres of land in the southern Tahoe Basin, which encompassed part of the Upper Truckee River. The Department of Parks and Recreation (Department) was charged with managing this property. The State Park and Recreation Commission (Commission), located within the Department, preserved most of the acreage as a state park, and designated the remainder as a recreation area to allow continued operation of a preexisting golf course. In the 1990s, erosion of the riverbed raised concerns about wildlife habitat and sediment flow into Lake Tahoe. The Department decided to implement a project that would reroute sections of the river and relocate part of the golf course. The project would restore some of the golf course to natural habitat, reclassifying it as state park land, while simultaneously transferring twice as many acres of state park land to the recreation area, some of which would be developed as part of the golf course.

In order for the project to go forward, the Commission was required to adjust the classification of land within the state park and recreation area, modifying the boundary between the two units. The Commission was also required to amend the General Plan for the recreation area. The parks Department released a draft Environmental Impact Report (EIR) for the project in August 2010. A year later, after public comment, the final EIR was released. The Department's certification of the EIR did not include the required California Environmental Quality Act (CEQA) findings and did not contain a statement of overriding considerations or a mitigation, monitoring and reporting program. In October 2011, the Department and Commission issued approvals for the project.

Washoe opposed the proposed General Plan amendment and boundary adjustment. It also challenged the Department's failure to make CEQA findings, issue a statement of overriding considerations, or approve a mitigation monitoring and reporting program. In November 2011,

Washoe I and *Washoe II*

Washoe filed a petition to set aside the October 2011 project approvals (*Washoe I*). In January 2012, the Department and Commission took steps to correct procedural defects in the October 2011 project approvals. Washoe objected to the notice provided for the 2012 approvals, the validity of those approvals, and the adequacy of the EIR. In February 2012, Washoe filed a second petition to set aside the January approvals (*Washoe II*). This petition alleged insufficiency of the EIR, violation of the Wildlife Conservation Law, a lack of jurisdiction to issue the new approvals, and violations of the Bagley-Keene Open Meeting Act.

In February 2013, the parties executed a stipulation in which they agreed that the October 2011 approvals were not supported by CEQA findings, a statement of overriding considerations, or a mitigation monitoring and reporting plan; that those approvals had no continuing effect in light of the January 2012 approvals; that Washoe would dismiss *Washoe I* as well as its claim in *Washoe II* that the Department lacked jurisdiction in January 2012 to reconsider the 2011 approvals; and that Washoe would retain the right to seek attorney's fees for work performed in *Washoe I*.

Washoe filed a memorandum of costs, and the court granted a motion to strike those costs on the ground that Washoe had not presented sufficient evidence to establish it was the prevailing party. Washoe then filed a motion for attorney's fees, which the court granted in part. Washoe appealed both orders, but later abandoned the cost appeal, leaving only the issue of the Department and Commission's challenge to the order awarding Washoe attorney's fees.

The Court of Appeal's Decision

The Catalyst Theory Test

The respondent agencies contended the fee award could not stand because Code of Civil Procedure § 1021.5 allows only a "successful party" to recover fees, and Washoe was not a successful party within the meaning of the statute. The Court of Appeal agreed.

Under § 1021.5, a court may award attorney's fees to a successful party. A plaintiff who does not obtain judicial relief may nevertheless be entitled to 1021.5 fees under the "catalyst theory," which permits an award absent judicial resolution:

> …if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation. (*Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 560 (2004.)

To recover under the catalyst theory, a plaintiff must establish that: (1) the lawsuit was a catalyst motivating defendants to provide the primary relief sought, (2) the lawsuit was meritorious and achieved its catalytic effect by threat of victory, not by nuisance or threat of expense, and (3) plaintiff reasonably attempted to settle the litigation prior to filing the lawsuit.

The court reached only the first element of the test, whether Washoe had obtained the primary relief it sought in *Washoe I*. The court determined it had not. The petition had sought to set aside the certification of the EIR and stop the project. The primary goal of the action was not to correct the approval deficiencies, but to prevent or alter the plans to relocate the golf course as part of the project. Although the January 2012 approvals included findings, a statement of overriding considerations, and a mitigation monitoring and reporting plan, the end result was the same—certification of the same EIR, amendment of the General Plan, adjustment of land boundaries, and approval of the same version of the project. In the court's opinion, Washoe had effectuated only a "limited do-over." Washoe did not obtain the primary relief it sought; at most, it caused the agencies to reissue resolutions that were substantively the same as those challenged by the litigation, while adopting environmental documents they had planned to adopt anyway.

The Trial Court's Legal Error

The court did not apply the abuse of discretion standard to the trial court's decision, finding that it had no discretion to award such fees unless the statutory criteria had been met as a matter of law. Even under the abuse of discretion standard, however, it would reach the same conclusion. In catalyst cases, the defendant must have provided plaintiff with the primary relief sought, and that did not occur here. In light of this error, the trial court's decision was an abuse of discretion.

Conclusion and Implications

As an *unpublished* decision, the case does not have precedential value. Nevertheless, the court's reasoning regarding the catalyst theory of recovery serves as a reminder that in order to recover under that theory, the petitioner's lawsuit must have caused the primary relief it sought. The Court of Appeal noted that Washoe's primary claims are still pending in *Washoe II*, and that at the conclusion of that case, the court will be in a position to assess whether Washoe is a successful or prevailing party. It noted that nothing in its decision should be construed as limiting Washoe's ability at that time to seek attorney's fees under § 1021.5 to the extent appropriate. At this stage, such fees were not appropriate. The *unpublished* opinion is available at: http://www.courts.ca.gov/opinions/nonpub/A139197.PDF (Gwynne Hunter, Laura Harris)

LEGISLATIVE UPDATE

The section is designed to apprise our readers of potentially important land use legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication.

Environmental Protection and Quality

AJR 4 (Dodd)—This measure would urge the President of the United States and the Secretary of the U.S. Department of the Interior to designate the area known as the Berryessa Snow Mountain region, encompassing more than 350,000 acres across the Counties of Napa, Mendocino, Lake, Solano, and Yolo, as the Berryessa Snow Mountain National Monument.

AJR 4 was introduced in Assembly on January 8, 2015, and, most recently, on February 12, 2015, was ordered to a third reading in the Committee on Water Parks & Wildlife.

AB 243 (Wood)—This bill would require that indoor and outdoor medical marijuana cultivation to be conducted in accordance with state and local laws and best practices related to land conversion, grading, electricity usage, water usage, agricultural discharges, and similar matters, and require state agencies to address environmental impacts of medical marijuana cultivation and coordinate with cities and counties and their law enforcement agencies in enforcement efforts. This bill would further require regional water quality control boards throughout to the state to address discharges of waste resulting from medical marijuana cultivation and associated activities.

AB 243 was introduced in the Assembly on February 5, 2015, and, most recently, on February 6, 2015, was printed and may be heard in committee on March 8, 2015.

AB 291 (Medina)—This bill would amend the California Environmental Quality Act (CEQA) to authorize a local agency, for certain water projects, to file a notice of approval or determination for a project subject to CEQA with the county clerk of the county in which the local agency's principal office is located in lieu of the county clerk of each county in which the project is located and would, if the local agency exercises this authorization, require the local agency to file the notice with the Office of Planning and Research.

AB 291 was introduced in the Assembly on February 11, 2015, and, most recently, on February 12, 2015, was printed and may be heard in Committee on March 14, 2015.

AB 300 (Alejo)—This bill would enact the Safe Water and Wildlife Protection Act of 2015, which would require the State Coastal Conservancy to establish and coordinate the Algal Bloom Task Force, in consultation with the Secretary of the Natural Resources Agency, to review the risks and negative impacts of toxic blooms and microcystin pollution and to submit a summary of its findings and recommendations to the secretary by January 1, 2017.

AB 300 was introduced in the Assembly on February 12, 2015, and, most recently, on February 13, 2015, was printed and may be heard in Committee on March 15, 2015.

AB 311 (Gallagher)—This bill, like SB 127 below, would amend the California Environmental Quality Act to require a public agency, in certifying the environmental impact report and in granting approvals for projects funded, in whole or in part, by the Water Quality, Supply, and Infrastructure Improvement Act of 2014, (Proposition 1), including the concurrent preparation of the record of proceedings and the certification of the record of proceeding within five days of the filing of a specified notice, to comply with specified procedures. The bill would further require the Judicial Council, on or before July 1, 2016, to adopt a rule of court to establish procedures applicable to actions or proceedings seeking judicial review of a public agency's action in certifying the environmental impact report and in granting project approval for those projects that require the actions

or proceedings, including any appeals therefrom, be resolved, to the extent feasible, within 270 days of the certification of the record of proceedings.

AB 311 was first introduced in the Assembly on February 12, 2015, and, most recently, on February 13, 2015, was printed and may be heard in Committee on March 15, 2015.

AB 320 (Wood)—This bill would amend existing law to prohibit a person from using the title "environmental engineer" unless the person is licensed as an engineer, and set forth the intent of the Legislature that the Board for Professional Engineers, Land Surveyors, and Geologists in the Department of Consumer Affairs be responsible for defining environmental engineering through rulemaking and that the board adopt standardized examination materials applicable to environmental engineering, as specified.

AB 320 was first introduced in the Assembly on February 13, 2015, and, most recently, on February 13, 2015, was printed and read for the first time.

AB 323 (Olsen)—This bill would amend the California Environmental Quality Act to extend indefinitely the exemption for projects to repair, maintain, or make minor alterations to an existing roadway, as defined, carried out by a city or county with a population of less than 100,000 persons to improve public safety and that meets other specified requirements.

AB 323 was introduced in the Assembly on February 13, 2015, and, most recently, on February 13, 2015, was read for the first time and printed.

SB 122 (Jackson)—This bill would amend the California Environmental Quality Act to create a detailed new alternative method for preparation of the administrative record that would require record preparation concurrently with the preparation of a negative declaration, mitigated negative declaration, environmental impact report, or other environmental document for projects.

SB 122 was introduced in the Senate on January 15, 2015, and, most recently, on February 5, 2015, was referred to the Committee on Environmental Quality.

SB 127 (Vidak)—This bill would amend the California Environmental Quality Act to require a public agency, in certifying the Environmental Impact Report and in granting approvals for projects funded, in whole or in part, by the Water Quality, Supply, and Infrastructure Improvement Act of 2014, (Proposition 1), including the concurrent preparation of the record of proceedings and the certification of the record of proceeding within five days of the filing of a specified notice, to comply with specified procedures. The bill would further require the Judicial Council, on or before July 1, 2016, to adopt a rule of court to establish procedures applicable to actions or proceedings seeking judicial review of a public agency's action in certifying the environmental impact report and in granting project approval for those projects that require the actions or proceedings, including any appeals therefrom, be resolved, to the extent feasible, within 270 days of the certification of the record of proceedings.

SB 127 was introduced in the Senate on January 20, 2015, and, most recently, on February 5, 2015, was referred to the Committees on Environmental Quality and the Judiciary.

SB 173 (Nielsen/Vidak)—This bill amend the Sustainable Groundwater Management Act to define a "de minimis extractor" as a person who extracts, for domestic purposes, ten acre-feet or less per year.

SB 173 was introduced in the Senate on February 5, 2015, and, most recently on February 6, 2015, was printed and may be acted upon on or after March 8, 2015.

SB 180 (Jackson)—This bill would, on July 1, 2017, replace the greenhouse gases performance emission standards for baseload generation with greenhouse gases performance emission standards for primary generation and secondary generation, as defined. This bill would further require, among other things, the Public Utilities Commission, by June 30, 2017, through a rulemaking proceeding and in consultation with the State Energy Resources Conservation and Development Commission and the State Air Resources Board, to establish a greenhouse gases emission performance standard for all primary generation of load-serving entities, and a separate standard for secondary generation.

SB 180 was first introduced in the Senate on February 9, 2015, and, most recently, on February 10, 2015, was printed and may be acted upon on or after March 12, 2015.

SB 189 (Hueso)—This bill would create the Clean Energy and Low-Carbon Economic and Jobs Growth Blue Ribbon Committee, comprised of 7 members appointed by the Governor, the Speaker of the Assembly, and the Senate Committee on Rules, as provided, the purpose of which is to advise state agencies on the most effective ways to expend clean energy and GHG related funds and implement policies in order to maximize California's economic and employment benefits.

SB 189 was first introduced in the Senate on February 9, 2015, and, most recently, on February 10, 2015, was printed and may be acted upon on or after March 12, 2015.

Public Agencies

AB 149 (Chavez)—This bill, commencing January 1, 2017, would amend the Urban Water Management Planning Act to require an urban water supplier to update its urban water management plan at least once every five years on or before December 31 in years ending in six and one.

AB 149 was first introduced in the Assembly on January 15, 2015, and, most recently, on February 2, 2015, was referred to the Committee on Water, Parks & Wildlife.

AB 266 (Cooley—This bill would establish within the Department of Consumer Affairs a Bureau of Medical Marijuana Regulation, under the supervision and control of the Chief of the Bureau of Medical Marijuana Regulation, and would require the bureau to license and regulate dispensing facilities, cultivation sites, transporters, and manufacturers of medical marijuana and medical marijuana products, subject to local ordinances, including making conditional licenses subject to the restrictions of the local jurisdiction in which a dispensing facility operates or proposes to operate.

AB 266 was first introduced in the Assembly on February 10, 2015, and, most recently, on February 11, 2015, was printed and may be heard in Committee on March 13, 2015.

AB 313 (Atkins)—This bill would amend existing law related to Enhanced Infrastructure Financing Districts to, among other things: (i) authorize the enhanced infrastructure financing district to finance the acquisition, construction, or rehabilitation of housing for persons of very low income for rent or purchase, and (ii) require the infrastructure financing plan to be prepared by the district to contain provisions providing for specific actions if any dwelling units are proposed to be removed or destroyed either in the course of private development that is financed by the district or by public works construction resulting from the infrastructure financing plan, including, without limitation, the construction or rehabilitation, for rent or sale to persons or families of low or moderate income, of an equal number of replacement dwelling units at affordable housing cost within the territory of the district and providing relocation assistance to persons displaced by any public or private development occurring within the territory of the district.

AB 313 was first introduced in the Assembly on February 12, 2015, and, most recently, on February 13, 2015, was printed and may be heard in Committee on March 15, 2015.

AB 335 (Patterson)—This bill would amend existing law to require the California Air Resources Board and air pollution control and air quality management districts to adopt regulations classifying minor violations, define the term "notice to comply," and require a representative of those agencies, who in the course of conducting an inspection detects a minor violation, to issue a notice to comply, as specified.

AB 335 was first introduced in the Assembly on February 13, 2015, and, most recently, on February 13, 2015, was printed and read for the first time.

SB 208 (Lara)—This bill would require a regional water management group, within 90 days of notice that a grant has been awarded under the Water Quality, Supply, and Infrastructure Improvement Act of 2014, (Proposition 1) for a project included in an integrated regional water management plan that responds to climate change and contributes to regional water security, to: (i) provide the state entity administering the grant with a list of projects to be funded by the grant funds where the project proponent is a nonprofit organization, as defined, or a disadvantaged community, as defined, or the project benefits a disadvantaged community and (ii) require the state entity administering the grant, within 60 days of receiving the project information, to provide advanced payment of 50 percent of the grant award for those projects that satisfy specified criteria and would require

the advanced funds to be handled, as prescribed.

SB 208 was first introduced in the Senate on February 11, 2015, and, most recently, on February 12, 2015, was printed and may be acted upon on or after March 14, 2015.

SB 209 (Pavley)—This bill would require the Department of Conservation, no later than January 1, 2018, and on an ongoing basis thereafter, to offer continuing educational opportunities for lead agency employees to become certified, as appropriate, by the department to inspect surface mining operations, and prohibit a lead agency that operates a surface mining operation from having an inspection performed by a lead agency employee, as specified, unless that employee has become certified as a surface mining operation inspector within the previous two years.

SB 209 was first introduced in the Senate on February 11, 2015, and, most recently, on February 12, 2015, was printed and may be acted upon on or after March 14, 2015.

(Paige Gosney)

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