Allen Matkins

Legal Breakfast Briefing 2011

TABLE OF CONTENTS

Land Use Law

Michael Patrick Durkee (speaker)
Partner, Co-Chair, Firmwide Land Use Group
mdurkee@allenmatkins.com
(415) 273-7455
www.landusenavigators.com
www.sustainablecommunitieslaw.com

Thomas P. Tunny
Senior Counsel
ttunny@allenmatkins.com
(415) 273-7449

Walnut Creek Office
Allen Matkins Leck Gamble Mallory & Natsis LLP
200 Pringle Avenue, Suite 300
Walnut Creek, CA 94596

I. LAND USE LAW – ITEMS FOR DISCUSSION

A. GHG EMISSIONS/CEQA/SUSTAINABLE COMMUNITIES UPDATE

1. Legislation and Regulations

⊡ ***AB 32.*** As most people know, the process of directly regulating GHG emissions began in California with the adoption of AB 32 in 2006. AB 32 requires the California Air Resources Board (CARB) to establish regulations designed to reduce California's statewide GHG emissions to 1990 levels by 2020. Those regulations are to be set forth, in part, in a "Scoping Plan." CARB's draft Scoping Plan includes, for example, the recently-proposed GHG emissions cap and trade program. However, earlier this month, a San Francisco judge rejected CARB's environmental review of its draft Scoping Plan. The Judge ruled that CARB had violated CEQA by not adequately studying alternatives to the proposed Scoping Plan.

⊡ ***The Attorney General Litigation.*** After the passage of AB 32, a debate quickly ensued regarding the manner in which state and local agencies were required (or not) to evaluate the significance of GHG emissions under CEQA. At first, local agencies generally responded in one of three ways: (1) An assessment of project emissions, but no analysis of significance; (2) No analysis; (3) An assessment of project emissions *and* an attempt at determining significance. Attorney General Brown brought several lawsuits seeking GHG emissions analysis under CEQA.

⊡ ***SB 97.*** SB 97, passed into law in 2007, required the California Natural Resources Agency to adopt new CEQA Guidelines to address the analysis and mitigation of the potential effects of GHG emissions. The Resources Agency fulfilled that requirement and those Guidelines became effective in March 2010. The Guidelines include the following:

ᔓ Generally, the new GHG Guidelines seek to apply CEQA's existing basic rules for impact analysis to the topic of greenhouse gas emissions, specifying in several instances, for example, that determinations on greenhouse gas emissions must be supported by substantial evidence, just like other CEQA determinations.

ᔓ When adopting thresholds of significance, a lead agency may adopt thresholds previously adopted or recommended by other public agencies or recommended by experts, provided the decision to adopt such thresholds is supported by substantial evidence (CEQA Guidelines § 15064.7(c)); the Bay Area Air Quality Management District (BAAQMD) GHG thresholds described below are an example.

ᔓ Lead agencies must consider feasible means, supported by substantial evidence and subject to monitoring and reporting, of mitigating the significant effects of GHG emissions related to a project (CEQA Guidelines § 15126.4(c)). BAAQMD has created numerous GHG emissions mitigation measures, such as such as residential energy efficiency measures, bike/pedestrian measures, recycling measures, locating local-serving retail within ½ mile of the project, providing accessible transit service, and employee telecommuting programs.

- Appendix G (the sample Initial Study form) now includes a GHG emissions section that asks two GHG emissions questions:

(1) Whether the project will generate GHG emissions, either directly or indirectly, that may have a significant impact on the environment; and

(2) Whether the project would conflict with any applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases.

- ***BAAQMD Thresholds of Significance.*** In June 2010, BAAQMD was the first air district in California to establish quantifiable GHG emissions thresholds for use in determining levels of significance in a GHG emissions analysis. The new GHG thresholds, which apply to all projects for which a Notice of Preparation was published, or environmental review commenced, on or after June 2, 2010, are very stringent. In December 2010, the California Building Industry Association (CBIA) filed a legal challenge against the BAAQMD CEQA thresholds. BAAQMD's thresholds are as follows:

- GHGs from projects other than stationary sources (that is, fixed sources of emissions that are subject to permitting by the air districts) are deemed to be "significant" if they exceed 1,100 metric tons of carbon dioxide equivalents per year, or 4.6 metric tons of carbon dioxide equivalents per year per resident or employee in the project's service population.

- However, if the project complies with a "Qualified Greenhouse Gas Reduction Strategy," the GHG emissions are deemed to be not significant, and the numerical thresholds would not apply. A Qualified Greenhouse Gas Reduction Strategy must meet the criteria set forth in the recently-adopted Section 15183.5 of the CEQA Guidelines. These criteria include requirements for quantification of existing and projected GHGs; development of a level of cumulative GHG emissions, including those from the project, that based on substantial evidence, would not be considered significant for CEQA purposes; specification of measures and standards that would ensure that this level is achieved; and monitoring to track progress in achieving it.

- GHGs from "stationary sources" are significant if they exceed 10,000 metric tons per year.

- At the plan level (for instance, a city or county's general plan), GHG emissions associated with the adoption of the plan are deemed to be significant if they exceed 6.6 metric tons of CO2 equivalents per year per resident or employee in the service population. As with projects other than stationary sources, the numerical criteria otherwise applicable to plans can be avoided if the plan complies with a Qualified Greenhouse Gas Reduction Strategy under CEQA Guidelines Section 15183.5.

- BAAQMD also adopted new mechanisms for evaluating non-GHG related risk and hazard thresholds for the siting of new stationary sources and for new sensitive receptors. It also adopted lower thresholds of significance for annual emissions of reactive organic gases (ROG), nitrogen oxides (NOx) and particulate matter (PM-10) for exhaust, and set a standard for exhaust-related particulates (PM-10 and PM-2.5) and for fugitive dust.

- ***SB 375.***

  - SB 375 was passed into law in 2008. SB 375 requires CARB to develop regional greenhouse gas emission reduction targets for passenger vehicles and light trucks. CARB is to establish targets for 2020 and 2035 for each region covered by one of the State's 18 metropolitan planning organizations (MPOs). In most cases, an MPO is the regional Council of Governments (Association of Bay Area Governments (ABAG), San Joaquin Council of Governments (SJCOG), etc.). In the Bay Area, the MPO is a combination of ABAG and the Metropolitan Transportation Commission (MTC). In September 2010, CARB adopted its regional targets, with the Bay Area set at a seven percent (7%) reduction for 2020 (from 2005 levels) and fifteen percent (15%) for 2035 (also from 2005 levels).

  - SB 375 also requires each MPO to adopt a Sustainable Communities Strategy (SCS), which is an integrated land use and transportation plan for the MPO's relevant area that meets the targets set out by CARB. If it is not possible for the MPO to meet CARB's targets, the MPO must prepare an Alternative Planning Strategy (APS) that shows how the target *could* be met. (This is just one way in which SB 375 appears to lack meaningful enforcement mechanisms.) The MPO must incorporate its SCS into its updated Regional Transportation Plan (RTP).

  - While the substantive requirements of SB 375 and the SCS's are clear, the ultimate impact of the legislation is not as clear. As stated above, if an MPO cannot meet CARB's targets, the only consequence is that the MPO must adopt an APS. Moreover, even when the MPO adopts an SCS, there is no enforcement mechanism requiring local governments to then comply with the SCS. As most people know, local governments control local transportation and land uses through their general plans and zoning. However, nothing in SB 375 or elsewhere in the law requires local general plans and zoning to incorporate or even be consistent with the relevant SCS.

2. Caselaw

- ***Save the Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521.** Substantial evidence of a fair argument existed that an ordinance prohibiting certain retailers and establishments from distributing plastic bags may have a significant environmental impact and thus an EIR had to be prepared. Petition for Review to the California Supreme Court has been granted.

- ***Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 351.** The City of Sunnyvale prepared an EIR for a proposed road extension using 2020 conditions as the "baseline," rather than present day conditions, as the baseline. The court held that while deviations for the normal baseline standard of existing conditions is possible, the record in this case did not contain substantial evidence to support a decision to deviate to the year 2020. The city's failure to analyze the project's impacts based on existing conditions constituted a prejudicial abuse of discretion.

- ***Jones v. The Regents of the University of California* (2010) 183 Cal.App.4th 818.** The court upheld the EIR for a Long Range Development Plan for Lawrence

Berkeley National Library against the challenge that its range of alternatives was insufficient. The court found the range of alternatives was adequate, and an off-site alternative was not necessary because it would not meet the project's primary objective of creating a campus-like setting with existing facilities.

☐ ***Committee for Green Foothills v. Santa Clara County Board of Supervisors*** **(2010) 48 Cal.4th 32.** The County originally certified a Program EIR for a plan by Stanford to add buildings to its campus. Later, when granting a subsequent approval for the same project, the County certified an SEIR for part of the approval and found that no further environmental review was necessary for the other part of the approval. The County filed one NOD for the entire approval, including its no additional environmental review finding. Petitioner argued, and the court of appeal agreed (in the context of a demurrer), that the County's decision was subject to CEQA's 180-day statute because the allegation was that the County had not properly determined that no additional environmental review was necessary. The Supreme Court held that the 180-day statute applies only when an agency completely ignores CEQA, and here the County did not. According to the Court, "[f]or purposes of the CEQA statutes of limitation, the question is not the substance of the agency's decision, but whether the public was notified of that decision."

☐ ***Stockton Citizens for Sensible Planning v. City of Stockton*** **(2010) 48 Cal.4th 481.** In this case, the City filed and posted an NOE following a project approval. The petitioner, like the petitioner in *Committee for Green Foothills*, argued that the underlying approval was invalid; therefore, an NOE could not be filed. The Court, consistent with its decision in *Committee for Green Foothills*, held that the substance of the agency's decision was irrelevant. Under CEQA, as long as the NOE is properly filed and posted and authorized by statute, then the 35-day statute applies.

B. PLANNING, ZONING AND SUBDIVISION MAPS

☐ ***Building Industry Association of Central California v. County of Stanislaus*** **(2010) 190 Cal.App.4th 582.** County's "farmland mitigation" program, designed to aid in mitigating the loss of farmland resulting from residential development by requiring the permanent protection of farmland through agricultural conservation easements granted in perpetuity, did not conflict with Civil Code section prohibiting a local governmental entity from conditioning the issuance of land use approvals on the granting of conservation easements, because actual grant of the conservation easement under the FMP was voluntary. Court found that county demonstrated a reasonable relationship between mitigation requirement and any adverse public impacts attributable to new residential development, where agriculture was the leading industry in the county; county's favorable climate, flat land, available water and low-cost power, while essential to agriculture's role in the local economy, also make the county attractive for urban development and threatened agricultural uses, with potential permanent loss of productive agricultural land. FMP requirements did not exceed county's police power. BIA is seeking Review by the California Supreme Court.

- ***Lot Line Adjustments***

  - Trial court upholds Napa County's allowance of multiple (sequential) lot line adjustments and allows them to be treated as "ministerial" under CEQA.

  - Napa County was authorized to allow sequential lot line adjustments. Napa County's authority to make land use decisions derives from its police power, not from statute. The planning and zoning law, not the Subdivision Map Act, controls "use." Lot line adjustments are not subdivisions.

  - Napa County is authorized to characterize lot line adjustments as ministerial. There is an absence of an express or implied Map Act directive that lot line adjustments must be treated locally as discretionary. Section 66412 expressly provides that other exclusions are to be characterized locally as discretionary.

- ***AB 208***. Assembly Member Felipe Fuentes (D-Sylmar) has introduced legislation that would grant a statutory 24-month extension to all tentative or vesting tentative maps, and parcel maps for which a tentative or vesting tentative map has been approved, that have not expired as of bill's effective date (likely to be July 2011) and would expire before January 1, 2014.

C. STATE BUDGET ISSUES

- ***Redevelopment Agencies.*** Governor Brown has proposed to do away with local redevelopment agencies by July 1, 2011. His proposal includes the statutory elimination of redevelopment agencies that will protect obligations for existing projects and will divert $1.7 billion to the State's General Fund in 2011-12 for Medi-Cal and trial courts. There will be $210 million leftover for distribution to schools, cities, and counties, according to their proportionate share of current property tax. In subsequent budget years, after deducting for existing debt obligations, the remaining tax increment property tax will go to the cities, counties, and schools. There will be a $50 million exception in the amount currently going to enterprise special districts which are fee supported – this will go to counties.

- ***Williamson Act County Subvention Payments.*** Governor Brown's proposed budget proposes to revert the $10 million General Fund appropriated in 2010-11 for the Subventions for Open Space Program (SB 863 – Chapter 722, Statutes of 2010) to the General Fund, and to provide ongoing funding of $1,000, which is in-lieu of the statutory appropriation contained in Government Code sections 16100 and 16140. The Governor's Budget Summary document states that "The Budget eliminates the current-year appropriation for Williamson Act subventions and does not provide ongoing state funding. The program will thus be a local program. Funding provided from the redevelopment agencies tax shift could help counties continue this program on their own."

D. DEVELOPMENT AGREEMENTS

⊡ *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435.

☙ Plaintiff was not required to engage and exhaust the town's administrative process before seeking judicial remedies where there was no remedy available to plaintiff in the administrative process. Administrative mandamus was not the exclusive remedy available to plaintiff where town's anticipatory breach of development agreement did not involve a quasi-judicial determination. Contractual provision stating that neither party would be in default for a cause beyond the reasonable control of the parties, including "governmental restrictions imposed or mandated by governmental entities other than Town," did not excuse town from performing where town's grant assurances to the Federal Aviation Administration caused FAA to express reservations concerning development project.

☙ Trial court properly instructed the jury to determine the parties' intent concerning the definition of FAA rules. Because a court's task in interpreting a contract is to ascertain the intent of the parties, federal law concerning whether a grant assurance is technically a rule of the FAA is relevant only if the parties considered such federal law when they entered into the contract. Developer's acknowledgment of FAA funding and participation in matching funding did not amount to a consent to the FAA's restrictions. Refusal of town manager and deputy town manager to comply with terms of development agreement to achieve the ends of this agreement until the FAA's objections were resolved was a repudiation of the contract. Evidence did not support town's claim that it desired to comply with the development agreement in good faith where town officials were actively working with the FAA to terminate developer's right under the agreement to build the project.

II. LAND USE LAW – ITEMS NOT DISCUSSED

A. CEQA

⊡ **Public Resources Code § 21094** governs the use of a tiered EIR for a project that is consistent with a program, plan, policy, or ordinance, for which an EIR has already been prepared and certified. New subsection (a)(2) allows a lead agency for a project using a tiered EIR to incorporate by reference the statement of overriding considerations made for the prior EIR, if: (1) the agency determines that the project's significant impacts on the environment are not greater than or different from those identified in the prior EIR; (2) all applicable mitigation measures from the prior EIR are incorporated into the project; (3) the prior finding of overriding considerations is not based on a determination that mitigation measures should be identified and approved in a subsequent environmental review, and (4) the agency determines that a mitigation measure or alternative found to be infeasible in the prior EIR remains infeasible based on the criteria of Public Resources Code § 21081(a)(3). In addition, the prior EIR cannot have been certified more than three years prior to the date the findings are made for the later project.

⊡ **CEQA requires specified state agencies to perform**, at the time of adoption of a rule or regulation requiring the installation of pollution control equipment or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance. CEQA authorizes the use of a focused environmental impact report for a project that consists solely of the installation of pollution control equipment required by the specified state agencies. Public Resources Code sections 21159, 21159.1 and 21159.4 were amended to require that the above environmental analysis be performed for a rule or regulation that requires the installation of pollution control equipment or a performance standard or treatment requirement adopted pursuant to the California Global Warming Solutions Act of 2006, including those for rules and regulations requiring the installation of pollution control equipment adopted by the State Energy Resources Conservation and Development Commission and the California Public Utilities Commission. The bill authorizes the use of the focused environmental impact report for a project that consists solely of the installation of pollution control equipment or other components that are necessary to complete the installation of that equipment that reduces greenhouse gas emissions in compliance with a rule or regulation adopted pursuant to the California Global Warming Solutions Act of 2006.

⊡ **New Public Resources Code § 21094(e)** concerns the analysis of cumulative effects in a tiered EIR. If an agency uses a tiered EIR and determines that a cumulative effect has been adequately addressed in the EIR certified for the program, plan, policy, or ordinance, that cumulative effect need not be examined in the later EIR, mitigated negative declaration, or negative declaration. The agency can avoid the repetitive analysis of a cumulative effect if it makes either of the following determinations: (1) the cumulative effect has been mitigated or avoided as a result of the prior EIR and findings were made to that effect, or (2) the cumulative effect has been examined at a sufficient level of detail in the prior EIR to enable the effect to be mitigated or avoided by site-specific revisions, the imposition of conditions, or by other means in connection with approval of the later project. For any new significant cumulative effect, the agency must consider whether the incremental effects of the new project are cumulatively considerable. If the agency determines that such incremental

effects are significant when viewed in connection with the effects of past, present, and probable future projects, the incremental effects of a project must be deemed cumulatively considerable.

⊡ **Public Resources Code § 21167.8** provides for a mandatory settlement meeting in any CEQA suit, to be conducted concurrently with judicial proceedings without postponing any time limits in the litigation. The amendment to this section adds that judicial proceedings in a CEQA suit also run concurrently with mediation conducted under Government Code § 66032. Similarly, Government Code § 66032 was amended to clarify that while time limits of judicial proceedings are generally tolled during a mediation, CEQA suits are an exception. Public Resources Code § 21167.10 was also added, however, to allow for mediation to be conducted prior to filing a CEQA suit, with the limitations periods tolled until the mediation is completed. Section 21167.10 provides that a person wishing to bring an action under CEQA may file a notice with the lead agency and the real party in interest requesting mediation, within five business days of the lead agency filing a notice of determination. If the lead agency does not respond to the request for mediation within five business days of receiving it, the request is deemed denied. The statute of limitations for bringing a CEQA suit is tolled until the mediation is complete.

⊡ **New Public Resources Code § 21167.4(d)** allows the California Attorney General to move for an expedited schedule for resolution of a CEQA case.

⊡ **New Public Resources Code § 21167.11** creates a right for a party in a CEQA suit to bring a motion, before the hearing on the merits, to request sanctions of up to $10,000 for a frivolous claim. A frivolous claim is defined as "totally and completely without merit." The court may impose sanctions on attorneys, law firms, or parties to the suit.

⊡ **Public Resources Code § 21177** allows an organization formed after the approval of a project to bring a CEQA lawsuit if a member of the organization objected to the approval of the project. Section 21177 was amended to require a member of the organization bringing a CEQA lawsuit not only to have objected to the project, but also to have specifically commented on the grounds for CEQA noncompliance that are alleged in the organization's lawsuit or to have agreed with or supported the comments of another person regarding those specific grounds for noncompliance.

⊡ **Public Resources Code § 21089** was amended to authorize the lead agency, in lieu of providing an interested party and a public agency with a notice, response, or document, to notify the interested party or public agency of the availability of the notice, response, or document on the lead agency's internet web site.

⊡ ***Center for Biological Diversity v. County of San Bernardino*** **(2010) 188 Cal.App.4th 603.** The trial court originally awarded CBD a reduced amount of fees under the private attorney general statute (Code of Civil Procedure § 1021.5) based on their limited success at trial; they lost on two CEQA claims and won on one non-CEQA claim. On remand from the Court of Appeal, plaintiffs moved for fees incurred on the appeal, and for supplemental fees incurred at the trial court level based on their greater success on appeal on the CEQA claims. The lower court determined it lacked jurisdiction to hear the supplemental fees mater because CBD had dismissed its appeal of the postjudgment order on fees and the order was final. The

court of appeal agreed with CBD that the lower court's jurisdictional finding was in error. It concluded that "[a] motion for *supplemental* fees based on greater success on appeal does not challenge the original fee order and poses no jurisdictional impediment." (Emphasis in original.) Also, the Court agreed with CBD that the lower court abused its discretion with regard to the amount of the award of attorney fees for appellate work. The Court noted that "[w]here unrefuted evidence shows that qualified local counsel is unavailable, it is error to base the allowable lodestar hourly rate on local rates without regard to reasonable hourly rates charged by competent counsel outside the local legal market."

⊡ ***California Oak Foundation v. The Regents of the University of California* (2010) 188 Cal.App.4th 227.** The court of appeal addressed claims under the Alquist-Priolo Act and CEQA. First, the court found that the Regents were justified in concluding that the Alquist-Priolo Act's prohibition on building over an active fault did not apply. The Foundation challenged the EIR on several grounds: the baseline didn't include information from a geotechnical report released after circulation of the DEIR; the project description was not detailed enough; the statement of objectives was too broad; the discussion of project alternatives did not discuss a separate alternative for each element of the Integrated Projects; impacts to the oak trees in the Memorial Grove were not considered biological impacts; and the treatment of archaeological resources was insufficient. The Foundation also asserted that certification of the FEIR by the Committee on Grounds and Buildings was an improper delegation of lead agency responsibility of the Regents; approval of funding for studies equated to approval of the project prior to compliance with CEQA; the EIR should have been circulated; and both the findings and statement of overriding considerations lacked supporting substantial evidence.

⊡ ***Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830.** Sonoma County approved a development permit for Hines' neighbor, allowing construction of a single-family home and garage within the statutorily-defined Coastal Zone, subject to a 50-foot setback from the edge of riparian vegetation in an adjacent natural drainage. The County applied a categorical exemption under CEQA Guidelines section 15303 for its approval. The Court first held that substantial evidence supported the Commission's decision that no substantial issue existed. The Court then held that CEQA does not apply to the Coastal Commission's determination that the appeal did not raise a substantial issue – "the Coastal Commission did not 'approve' the project, they simply left the County's decision undisturbed." Further, Hines had failed to exhaust his administrative remedies at the County level by failing to raise the issue of the Section 15300.2 exemption while the County was considering the project.

⊡ ***Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305.** A municipal services agreement between the Scotts Valley Band of Pomo Indians of California and the City of Richmond did not constitute a project for the purposes of CEQA. The agreement required the tribe to make payments in exchange for fire, police and public works services and the city to support the tribes fee-to-trust application submitted to the federal government. The court found the agreement was not a project because the city had no authority over the fee-to-trust application, casino construction, or public works programs and the potential construction of fire facilities was too speculative to constitute a project.

☒ ***Juana Briones House v. City of Palo Alto*** **(2010) 190 Cal.App.4th 286.** A provision of the Palo Alto municipal code requiring a 60-day delay prior to the issuance of a demolition permit did not render the act discretionary. The city properly treated the demolition permit as ministerial and exempt from environmental review under CEQA. The court found that under the municipal code the issuance of the demolition permit was ministerial because 1) the decision involved only the use of fixed standards or objective measurements; and 2) the city did not have the authority to impose conditions on approval of the permit that would render it discretionary.

☒ ***City of Santee v. County of San Diego*** **(2010) 186 Cal.App.4th 55.** An agreement between the county of San Diego and the Department of Corrections under which the county identified potential locations for a state prison reentry facility in exchange for preference in the awards of state financing of county jail facilities did not constitute a commitment to a definite course of action. As such, the holding of Save *Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, did not require the county to conduct environmental review prior to entering into the agreement.

☒ ***Tomlinson v. County of Alameda*** **(2010) 188 Cal.App.4th 1406.** The CEQA Guidelines section 15332 infill exemption only applies to projects within the limits of a city.

☒ ***Nelson v. County of Kern*** **(2010) 190 Cal.App.4th 252.** The county of Kern was the lead agency under Surface Mining and Reclamation Act and CEQA and thus was required to conduct environmental review of the entire proposed mining and reclamation plan, not just the reclamation plan, as advocated by the county.

☒ ***Communities for a Better Environment v. South Coast Air Quality Management District*** **(2010) 48 Cal.4th 310.** A Negative Declaration containing evidence that a proposed project would contain between 201 and 420 pounds per day of additional NOx emissions, in light of the district's NOx threshold of 55 pounds per day constituted evidence that the project would have substantial air quality impacts and thus an EIR should have been prepared.

☒ ***Communities for a Better Environment v. City of Richmond*** **(2010) 184 Cal.App.4th 70.** The EIR prepared for Chevron's Energy and Hydrogen Renewal Project failed CEQA's informational purpose because the project description was inadequate with respect to whether the project would enable the refinery to process heavier crude, and the EIR failed to properly establish and analyze baseline conditions.

☒ ***Cherry Valley Pass Acres and Neighbors v. City of Beaumont*** **(2010) 190 Cal.App.4th 316.** In defining the baseline for a water impact analysis, a lead agency could rely upon an adjudicated groundwater right.

☒ ***Center for Biological Diversity v. County of San Bernardino*** **(2010) 184 Cal.App.4th 1342.** The County of San Bernardino presented insufficient evidence of economic and technological infeasibility to support its decision to reject a project alternative that could

feasibly mitigate the air quality impacts of an open air composting facility by approximately 80 percent.

⊡ ***Katzeff v. California Department of Forestry and Fire Protection*** **(2010) 181 Cal.App.4th 601.** Once imposed, an agency must state its basis, supported by substantial evidence, for cancelling or nullifying a mitigation measure, even if the proposed act is many years after the mitigation measure is imposed.

⊡ ***Melom v. City of Madera*** **(2010) 183 Cal.App.4th 41.** A CEQA document is not mandated to address urban decay merely because the project contains a retail supercenter. The holding in Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, does not require this analysis for every CEQA document. Like most CEQA issues, whether an impact analysis is required is determined based upon the specific facts of each situation.

⊡ ***San Joaquin River Exchange Contractors v. State Water Resources Control Board*** **(2010) 183 Cal.App.4th 1110.** Final staff report prepared by Central Valley Regional Water Quality Control Board Staff for basin plan amendments qualifies for an EIR-equivalent document because basin planning is a certified regulatory program under CEQA.

⊡ ***Friends of Glendora v. City of Glendora*** **(2010) 182 Cal.App.4th 573.** Local agencies may impose a fee for the filing of an appeal of a CEQA decision so long as that fee is reasonable.

B. GENERAL PLAN, SPECIFIC PLAN, ZONING, & OTHER LOCAL PLANNING

⊡ ***AB 2136 (Caballero)*** – This bill amended existing law requiring each county and city to adopt a general plan that includes a circulation element consisting of the location of existing and proposed major thoroughfares, transportation routes, terminals, military airports and ports, and other local public utilities and facilities by renaming the circulation element the "Circulation and Transportation Element."

⊡ ***AB 2756 (Blumenfield)*** – This bill amended the planning and zoning law to make it unlawful for a person to conduct, or cause to be conducted, any mobile billboard advertising by parking any vehicle or wheeled conveyance that carries, conveys, pulls, or transports any sign or billboard for the primary purpose of advertising on any public street, or other public place within the city or county in which the public has the right to travel.

⊡ ***SB 1319 (Pavley)*** – This bill authorized local agencies to authorize one or more pilot projects that will result in the re-subdividing or consolidation of, or redevelopment of, small parcels on previously disturbed lands that are of lesser value as wildlife habitat, but are not conducive to acquisition for large-scale renewable energy systems, pursuant to existing law.

⊡ ***Watsonville Pilots Association v. City of Watsonville, et al.*** **(2010) 183 Cal.App.4th 1059.** A city acting as its own Airport Land Use Commission is subject to all of the substantive requirements under the State Aeronautics Act. The city should have considered a low growth alternative as part of its general plan update as it would meet most general plan update objectives.

C. MAP ACT

⊡ ***Do not undo your Vesting Tentative Map's vested rights.*** When approving a Vesting Tentative Map, local agencies may apply "only those ordinances, policies, and standards in effect at the date the local agency has determined that the [map] application is complete." (Gov. Code §§ 66498.1, 66474.2.) Therefore, your conditions of approval should include a condition that states, in effect, the following: "This Vesting Tentative Map approval is granted subject to only those ordinances, policies, and standards in effect on _____, 20__ [the date the application for this Vesting Tentative Map was complete]."

⊡ ***Know the "one bite of the apple" rule.*** During the during the five-year period following recordation of a Final Map or Parcel Map for a subdivision, a city or county may not require as a condition to the issuance of any building permit or equivalent permit for such single- or multiple-family residential units in the project, conformance with or the performance of any conditions that the city or county could have lawfully imposed as a condition to the previously approved Tentative or Parcel Map. (Gov. Code § 65691.) Also, the city or county may not withhold or refuse to issue a building permit or equivalent permit for failure to conform with or perform any conditions that the city or county could have lawfully imposed as a condition to the previously approved Tentative or Parcel Map. In other words, the city or county gets only "one bite of the apple" (*i.e.*, one opportunity to impose conditions of approval) when approving a Tentative Map and until five years after the recordation of a Final Map or Parcel Map. This limitation against the city or county does not apply if a failure to do impose the condition would place the residents of the subdivision or of the immediate community, or both, in a condition perilous to their health or safety, or both; or if the condition is required in order to comply with state or federal law. The Tentative Map should have a condition of approval that states this one-bite-of-the-apple rule.

⊡ ***Preserve your ability to challenge future fees or fee adjustments.*** Sometimes, unlike the situation described above, a city or county seeks to apply a future fee or a future fee adjustment on your project; that is, a fee or fee adjustment that the city or county did not know the specifics about at the time of the Tentative Map approval. Subdividers and developers need to make sure that they have a condition of approval that preserves their right to legally challenge any such future new fees or fee adjustments if and when the city or county seeks to impose them.

⊡ ***Secure your ability to extend the life of your Vesting Tentative Map.*** The Map Act gives subdividers the ability to extend the life of a Vesting Tentative Map through the filing of multiple (Phased) Final Maps. Under Government Code section 66452.6 of the Map Act, each filing of a phased Final Map extends the expiration of the Vesting Tentative Map by 36 months if the subdivider is required to expend $178,000 (or whatever the statutory amount is at that time) or more for off-site improvements. This ability to extend the life of your Vesting Tentative Map should be secured through the Map's conditions of approval.

D. TAKINGS

⊡ ***Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,*** **130 S.Ct. 2592 (2010).** The plaintiffs challenged a Florida Department of Environmental

Protection's approval of permits to restore a portion of beach eroded by several hurricanes. The U.S. Supreme Court affirmed the Florida Supreme Court's holding that the approval of the permits did not unconstitutionally deprive plaintiffs of littoral rights without just compensation where there could be no taking unless petitioner could show that, before the Florida Supreme Court's decision, littoral property owners had rights to future accretions and to contact with the water superior to the State's right to fill in its submerged land. The most interesting aspect of this case is the controversial suggestion by Justice Scalia that courts are capable of "judicial takings," an idea that most experts thought had been long rejected. This is an issue that could become an important development in the area of takings law, and should be watched carefully.

E. MISCELLANEOUS

☒ ***Proposition 26***. In November, 2010, California voters approved Proposition 26, which requires a two-thirds supermajority vote in the State Legislature to pass many fees, levies, charges and tax revenue allocations that under the state's previous rules could be enacted by a simple majority vote. Supporters of Proposition 26 called it the "Stop Hidden Taxes" initiative, saying that certain fees and levies imposed by the Legislature amount to taxes, and therefore should require the same supermajority vote required to enact income or sales tax increases. Opponents expressed concern that Proposition 26 could make implementation and funding of climate change programs much more difficult. This result was particularly surprising where voters rejected a measure on the same ballot that would have repealed AB 32.

☒ ***AB 2717 (Skinner)*** – This bill amended existing law authorizing the State Coastal Conservancy to undertake projects and award grants, to include as "projects" low-impact development techniques that integrate storm-water management into site planning and design to reduce runoff, increase onsite infiltration, or filter pollutants at or near the source. This bill would also require the State Coastal Conservancy to cooperate with certain entities for purposes of coastal and marine water quality protection and enhancement, and to meet the California Ocean Protection Act.

☒ ***SB 1023 (Wiggins)*** – This bill authorized local agency formation commissions to approve or conditionally approve an expedited reorganization of specified districts into a community services district, with the same powers, duties, obligations, liabilities, and jurisdiction of the district proposed to be dissolved, unless the governing body of the district proposed to be dissolved files a resolution of objection with the commission.

☒ ***Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection*** **(2010) 187 Cal.App.4th 376.** Although the case resulted in an opinion from the Supreme Court clarifying the California Department of Forestry and Fire Protections' duties in relation to timber harvest plans, such a result was insufficient to qualify the unsuccessful petitioner as the prevailing party for the purposes of the private attorney general doctrine under Code of Civil Procedure section 1021.5.

☒ ***Environmental Protection Information Center v. California Department of Forestry and Fire Protection*** **(2010) 190 Cal.App.4th 217.** The court enunciated three principles: (1) under the element of "necessity of private enforcement," exhaustion of administrative remedies does not satisfy any prelitigation settlement requirement; (2) attempts at

prelitigation settlement must be considered when evaluating whether private enforcement was necessary, but it is not dispositive; and (3) in evaluating whether a petitioner had limited success warranting a reduction in attorney's fees, the fact that all of the causes of action are based on the same administrative record does not mean that all of the claims are necessarily related for purposes of Section 1021.5.

⊡ ***Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33.** In preparing an urban water management plan ("UWMP"), the agency may rely upon reasonable assumptions, supported by substantial evidence. A reviewing court should apply deference to the agency's decision. The issue is not whether or not there are more reasonable assumptions which should have been incorporated into the UWMP, but whether or not substantial evidence supported the agency's choice.

Environmental Law

David D. Cooke, (speaker) Partner, Co-Chair, Firmwide Environmental and Natural Resources Group
dcooke@allenmatkins.com, (415) 273-7459

Sandi L. Nichols, Partner, Co-Chair, Firmwide Environmental and Natural Resources Group
snichols@allenmatkins.com, (415) 273-7454

Eileen M. Nottoli, Of Counsel
enottoli@allenmatkins.com, (415) 273-7481

Cathy Hongola, Associate
chongola@allenmatkins.com, (415) 273-7470

Kamran Javandel, Associate
kjavandel@allenmatkins.com, (415) 273-7473

San Francisco Office
Allen Matkins Leck Gamble Mallory & Natsis LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111

Kathryn D. Horning, Senior Counsel
khorning@allenmatkins.com, (619) 235-1516

San Diego Office
Allen Matkins Leck Gamble Mallory & Natsis LLP
501 West Broadway, 15th Floor
San Diego, CA 92101

ENVIRONMENTAL LAW – ITEMS FOR DISCUSSION

I. Air and Greenhouse Gases

A. Legislative and Administrative Developments

1. ***Federal Greenhouse Gas Emissions Reporting***. New federal regulations will require large sources and suppliers of greenhouse gases (GHGs) to submit annual GHG emissions reports to the EPA. A rule requiring mandatory reporting of GHGs (40 C.F.R. Part 98) was promulgated in 2009 and requires major GHG emitters (suppliers of fossil fuels or industrial GHGs, manufacturers of vehicles and engines, and facilities that emit at least 25,000 metric tons of GHGs per year) to make annual GHG emissions reports.

   The first deadline (for reporting CY2010 GHG emissions) is March 31, 2011, except that reporting of confidential business information is due by August 31, 2011. (75 Fed. Reg. 81337 (Dec. 27, 2010)). Meanwhile, EPA will consider – and is accepting comments on – whether this information, when reported, should be made publicly available or must be kept confidential. Nevertheless, the remaining data must be reported as originally scheduled.

   As of the date these materials were prepared, EPA had not yet made the tools necessary for uploading the emissions data available to those that are required to report. Although EPA estimated that the software would be ready sometime in February, those that must report emissions would be wise to prepare to upload data manually.

2. ***Revisions to California GHG Reporting Regulation***. In December 2010, the California Air Resources Board (CARB) approved revisions to the state's GHG reporting regulations that are expected to become effective for reporting in 2012. The revisions were necessary to align with new federal reporting requirements and support a GHG cap-and-trade program. Because emissions levels may now have monetary implications under the new cap-and-trade program, the revisions to reporting regulations are designed to maximize accuracy and reliability of reported data. The new regulations modify report timing, thresholds, and monitoring methodology.

3. ***California Cap-and-Trade Program***. In December 2010, CARB adopted regulations establishing the details of a cap-and-trade program for California sources of GHG emissions. The cap-and-trade program is slated to achieve about 20% of the GHG emission reductions needed to meet the requirements of AB 32, which mandates a rollback of GHG to

1990 levels by 2020. That makes it the largest single GHG reduction program in the state.

The idea behind the program is to maximize the efficiency and minimize the cost of achieving GHG reductions by letting the market set the price for allowances – sources that can reduce GHG emissions at a cost lower than the allowance price will do so and sell their allowances, whereas sources for which GHG emission reductions cost more than the allowance price will buy allowances instead.

Under the cap-and-trade program, covered sources are assigned a cap on their GHG emissions, and the cap declines every year, on a roughly straight-line rate of about 2-3% per year. Each source must obtain "allowances" issued by CARB, or approved "offsets," equal to the amount of their emissions each year. One allowance is equal to the right to emit one ton of carbon dioxide (CO2) or its equivalent in global warming potential each year.

The first phase of the program is scheduled to go into effect in 2012, covering electricity generation and large industrial sources (25,000 metric tons of CO2 equivalents per year [MTCO2E] or more). In 2015 other sources, including transportation fuels and natural gas, along with smaller industrial sources, will be added to the program.

Each year a source must obtain allowances equal to the amount of its GHG emissions for that year and, after the end of each three year period, it must ensure that it has surrendered to CARB allowances equal to the amount of their GHG emissions over that period. There are severe penalties for failure to surrender the required allowances.

In order to give sources a "soft start" to living with cap-and-trade, sources will be given "allowances" for free at the beginning, with the starting amount generally based on their historical emissions, subject to some "benchmarking" by CARB to normalize for fuel efficiency. The regulations call for a transition thereafter to quarterly auctions as the main source for acquisition of allowances, although there are also provisions for continuing free distribution of allowances to sources in industries that are relatively high emitters and that are particularly vulnerable to "leakage" – i.e., flight to states that do not regulate GHG emissions.

Allowances are freely tradable; they can be banked (i.e., acquired in one year and stored for use in later years); and, in order to expand the market for them, one does not have to be a covered source of GHG emissions to own them.

Up to 8% of a source's allowance requirement can be met through offsets, which are excess GHG emission reductions elsewhere outside the cap-

and-trade program. Currently, allowable offsets are limited to a few programs within the United States, but the sources of offsets are expected to grow over time. Offsets are very controversial, as it can be difficult to ensure their authenticity, and there are strict criteria in the regulations for approval of offsets for use in the California program.

CARB estimates that if the price of allowances stays within a range of about $15 - $30 per ton, the adverse impact of the program on the California economy will be essentially non-existent. The projected impacts grow as hypothetical prices climb toward $100 per ton. The program includes some measures to keep the price from climbing too high, including: (a) requirements that sources surrender, in a sort of "down-payment," at least 30% of the required allowances each year, in order to avoid a rush on the market at the end of the three-year reckoning periods; (b) limits on the number of allowances anyone can hold in excess of the amount they need to cover their emissions, in order to prevent hoarding; and (c) creation of a reserve containing up to 5% of the total inventory of allowances, from which sources can acquire allowances at a fixed price starting, in 2012 dollars, at about $45 per ton.

Recent judicial obstacles. The decision to set up a cap-and-trade program was formalized in 2008 in CARB's "Scoping Plan" for implementing AB 32. In a tentative decision filed January 24, 2011, *Association of Irritated Residents v. California Air Resources Board*, CPF-09-509562, San Francisco Superior Court Judge Ernest Goldsmith rejected a claim that the Scoping Plan fails to comply with AB 32, but held that CARB violated CEQA by failing adequately to consider alternatives to the cap-and-trade program in its Functional Equivalent Document (FED) (similar to an EIR) for the Scoping Plan, and enjoined CARB's implementation of the programs in the Scoping Plan – of which cap-and-trade is only a part – until CARB sufficiently analyzes alternatives and certifies a new, adequate FED.

4. ***New Federal Permit Requirements for GHG Emissions***. EPA rules requiring permits for certain GHG emissions sources went into effect on January 2, 2011, implementing a mandate flowing from the 2007 decision of the U.S. Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that GHGs fall within the Clean Air Act's (CAA) definition of "air pollutants." EPA's strategy has been to regulate GHG emissions through its "prevention of significant deterioration" (PSD) program. PSD permits subject source facilities to (among other things) stringent requirements that they use the "best available control technology" (BACT).

GHGs are typically emitted in exponentially larger volumes than other pollutants regulated under the CAA. For example, the PSD thresholds for "major" sources of "traditional" pollutants requiring a PSD permit range from less than ten tons to up to 100 tons per year, whereas the most

common definition of a major source of GHG emissions is 25,000 MTCO2E. Thus, the addition of GHGs as regulated pollutants under the PSD program would drastically increase, to unmanageable proportions, the number of source facilities subject to CAA permitting and BACT requirements if the traditional thresholds were used. In an attempt to solve this problem, EPA published a "Tailoring Rule" (75 Fed. Reg. 31515 (June 3, 2010)), that substantially raises the threshold emissions levels triggering permitting requirements for GHGs. Under the Tailoring Rule, the new permitting requirements will only impact the largest GHG emitters, for now. However, the rule also provides for a phased approach that will gradually subject increasingly smaller facilities to permitting requirements. In November 2010, EPA published its "PSD and Title V Permitting Guidance For Greenhouse Gases" that focuses on how permitting agencies should determine what technologies are feasible for limiting GHG emissions from regulated sources.

5. ***Proposed legislation could take power to regulate GHGs out of EPA's hands***. The "Defending America's Affordable Energy and Jobs Act" was introduced by a group of Republican senators on January 31, 2011. The bill would prevent EPA from regulating GHGs without a specific grant of authority to do so from Congress. It would also prohibit judicial action to limit GHG emissions under common law theories such as nuisance (*see American Electric Power Co., Inc. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009) cert. granted, 178 L.Ed.2d 530 (2010), discussed further below). The bill would allow regulation of car and truck emissions to continue under the management of the Department of Transportation rather than EPA.

   On the same day, a group of Democratic senators presented a bill, the "EPA Stationary Source Regulations Suspension Act," that would, as the name suggests, suspend EPA's regulations regarding GHG emissions from stationary sources for two years, until 2013. Should either of these bills pass through Congress, President Obama reportedly will veto it.

B. Cases

1. ***American Electric Power Co., Inc. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009), cert. granted, 178 L.Ed.2d 530 (2010)**. On December 6, 2010, the Supreme Court accepted review in a case that will determine whether emitters of GHGs may potentially be held liable for damages and be subject to judicially-imposed emissions caps under a federal common law nuisance theory. The case was originally brought in the Southern District of New York by several states, the City of New York, and environmental NGOs claiming that the six large electric utility defendants' carbon dioxide emissions contributed significantly to globing warming and, therefore, constituted a public nuisance.

The District Court dismissed the case, holding that it raised non-justiciable political questions as to if and how the defendants' emissions should be regulated. The Second Circuit reversed, holding that the claims are justiciable, that they are governed by the federal common law of nuisance, and that they are not preempted by governmental regulation of GHG emissions. The Solicitor General filed a brief in support of the petition for certiorari, reasoning that the EPA's new GHG emissions regulations displace the common law grounds for the plaintiffs' claim. Resolution of the case on appeal to the Supreme Court will have implications on similar cases in the Fourth, Fifth, and Ninth Circuits dealing with claims of GHG emissions as nuisances.

II. Site Cleanup and Superfund

A. Regulatory Developments

1. ***Underground Storage Tank Cleanup Fund (USTCF) Audit***. In February 2010, the State Water Resources Control Board (SWRCB) undertook a Performance Audit as required under the 2010 Budget Act. Since 2008, the USTCF cash reserves have been falling below prudent levels, resulting in insufficient cash to satisfy all valid USTCF claims and significantly delaying reimbursements for UST-related cleanup costs. Public workshops were held and a Cleanup Fund Task Force was created to address the problem. The Cleanup Fund Task Force Report in 2010 concluded, among other things, that (1) the USTCF needs to manage cash flow better; and (2) there was a lack of incentive to get cases cleaned up quickly and efficiently.

   SWRCB directed that groundwater monitoring at UST sites be immediately reduced to semi-annual vs. quarterly, saving an estimated $30 million.

   SWRCB also directed regional water quality control boards (RWQCBs) and Local Oversight Programs (LOPs) to complete their review of all cases by June 2010 and either close the cases if warranted by site conditions, or determine what needs to be done to obtain case closure. As a result of this and other measures, approximately 1,300 UST sites were closed by RWQCBs and LOPs between May 19, 2009 and June 30, 2010.

   SWRCB has accelerated its review of pending petitions for closure of UST cleanups.

2. ***SWRCB Draft Underground Storage Tank Low-Threat Site Closure Policy***. In a further effort to manage the USTCF, in September/October 2010, the SWRCB circulated a Draft UST Low-Threat Closure Policy, intended to provide objective guidance to RWQCBs and LOPs for the efficient closure of UST sites throughout California.

Numerous comments were received from the agencies and the policy is undergoing revision. In particular, the acceptable concentrations of certain contaminants (e.g., benzene) are still undergoing analysis for purposes of evaluating risks from vapor intrusion and direct contact with soil.

The Draft Low-Threat Closure Policy contemplates closure for sites that meet all of the following criteria:

- The unauthorized release consists only of petroleum;
- The unauthorized release from the UST has been stopped;
- The unauthorized release occurred in soils composed of clay, silt, sand, gravel or some combination of those;
- Soil or groundwater affected by the unauthorized release have been investigated to determine conformance with applicable criteria in the policy, including an identification of water supply wells, surface water bodies, and human and other biological receptors that may be impacted by the unauthorized release at the site;
- Free product has been removed to the extent practicable;
- If groundwater is affected by the unauthorized release, the current extent of the affected groundwater which exceeds the maximum contaminant level (MCL) for the constituents of petroleum and certain additives must be stable or decreasing and must be no closer than 250 feet from the nearest drinking water well (subject to certain other distance limitations);
- The site and the groundwater affected by the unauthorized release are within the service area of a public water system;
- Sites with any occupied building or any future occupied building that may be built overlying the unauthorized release shall meet one of three criteria, including soil thickness between the contaminant source and the building foundation; measured petroleum soil vapor concentrations below or adjacent to the building or potential building are less than applicable screening levels; or criteria acceptable to the regulatory agency.
- Where soil containing petroleum constituents is located in an area where direct human contact may occur, contaminant concentrations must be below specified levels or agency-approved mitigation measures must be implemented.

The SF-RWQCB is already considering sites for "low-threat" closure, based upon many of the factors set forth in the draft policy, but based also on its own Environmental Screening Levels (ESLs) for evaluation of risks associated with vapor intrusion (discussed below).

3. ***Vapor intrusion*** continues to be an important – sometimes the driving – factor in soil and groundwater cleanups, particularly at sites impacted by chlorinated solvents or aromatic hydrocarbons associated with petroleum leaks. Vapor intrusion is the phenomenon by which contaminated soil gas rises through the soil column and works its way into interior spaces of buildings through foundation cracks and utility openings. This outline highlights three particularly newsworthy developments in vapor intrusion.

   Methods to prevent vapor intrusion into new buildings constructed over contaminated soil or groundwater are well understood and increasingly common. Typically, an impermeable vapor barrier is installed below the building slab, frequently accompanied with a subslab system of vapor collection pipes that draw in soil gases and vent them, passively or actively, to the atmosphere. In some cases, podium construction is utilized to provide an extra margin of safety.

   Addressing vapor intrusion into existing buildings raises more complex concerns, exemplified by the U.S. EPA's handling of the problem in August 2010 in its supplemental Record of Decision at the "MEW" Superfund Site in Mountain View. There, a groundwater contamination plume has migrated from its source to commercial and residential areas of Mountain View. EPA long ago imposed cleanup requirements for soil and groundwater. It has now imposed new requirements to mitigate the risk of vapor intrusion in both new and existing buildings. The requirements for new buildings are similar to those described above. For existing commercial buildings, the EPA is offering a choice:

   - The "Preferred" remedy is to retrofit with sub-slab or sub-membrane ventilation systems. This requires drilling through floors and foundations or installation from the perimeter of the building footprint.

   - Alternative remedy - Active Indoor Air Ventilation. Under this approach, operational adjustments would be made to HVAC systems if they are capable of increasing air exchange rates sufficiently, and if the property/building owner agrees in a recorded document running with land to use, operate and monitor the system to meet performance criteria. Sealing of all "direct and leaking conduits" – i.e., floor and foundation openings and cracks – would also be required.

   For existing residential buildings, Active Indoor Air Ventilation is not an acceptable choice, and the only remedy is active sub-slab or sub-membrane ventilation.

For both commercial and residential buildings the following additional requirements apply:

- Monitoring requirements (soil vapors and indoor air).

- "Institutional" and related controls in the form of one or more of the following: (a) Long term management of development in the affected region through design requirements and Master Plan. (b) Adoption of planning and permitting procedures for new construction on affected properties, including referral to EPA for approval. (c) Creation of a mapping database ensuring that prospective purchasers, including developers, are informed of appropriate construction requirements. (d) Recorded agreements between property owners and responsible parties notifying potential transferees of site conditions and of obligation to operate and maintain HVAC systems if that is the remedy approved for the site. (e) Where agreements are not reached, recorded environmental covenants (deed restrictions) on affected properties that EPA can enforce as a third party beneficiary. (f) Notification of EPA and responsible parties of changes in building ownership or configuration. (g) Provision of access to affected properties by EPA and responsible parties in order to install, maintain and operate the remedy.

The projected costs are significant:

- HVAC remedy – capital costs are low but operating costs are significantly higher and energy intensive; transactional costs could be very high.

- Retrofit remedy – capital costs calculated to be in range of $253,000 - $403,000 per building; much lower transactional costs.

Likely and potential impacts:

- Increased costs for responsible parties.

- Increased headaches for property owners.

- Property owner claims against responsible parties for installation and operational costs, diminution in value of properties, disruption of operations and relationships with tenants.

- Potential surge in toxic tort claims due to heightened awareness.

- Increased development costs.

- Other agencies following suit.

4. ***Increasing stringency of indoor air quality standards***. The SF-RWQCB recently announced that it is actively considering the adoption of new "environmental screening levels" (ESLs) that include indoor air quality standards roughly one to two orders of magnitude more stringent than current levels. The consequence of adopting these new screening levels would likely be a significant increase in the number of existing buildings at which vapor intrusion remedies (retrofits, HVAC operational techniques, deed restrictions) will be required. Thus now, while the old standards still apply, would be a good time to attempt to lock in vapor intrusion remedies with the RWQCB. (In some cases, it may be too late – significantly, for example, one of EPA's justifications for its relatively stringent cleanup requirements at the MEW site was its anticipation that the RWQCB was preparing to "ratchet down" on indoor air quality standards, even though it had not done so at the time the MEW decision was reached.)

   Due to staffing shortfalls and funding concerns, it is uncertain when the new standards will be adopted, but they are under current consideration.

5. ***Objective standards for evaluation of the vapor intrusion risk in real property transactions***. In 2010 the American Society for Testing and Materials (ASTM) revised its Standard E2600-10: "Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions." E2600 provides a relatively objective basis for assessment of vapor intrusion risks. ASTM developed the standard for voluntary use in real estate purchase and sale, financing, and leasing. The typical user is a prospective purchaser, or lender to a purchaser, of commercial or industrial property that is not a source of contaminated soil vapors.

   E2600 does not meet EPA's standards for "all appropriate inquiries" that a prospective purchaser must make in order to avoid Superfund liability. As a result, E2600 would be used in conjunction with a Phase I Environmental Site Assessment (ASTM Standard E1527).

   The standard guides an "environmental professional" through a two-tiered screening process for developing advice to a user, such as a prospective purchaser or lender, as to whether contaminated soil vapors do exist, are likely to exist, cannot be ruled out, or can be ruled out at the subject property.

   - The "Tier 1 Screen" uses "Phase 1"-type information – governmental records regarding contamination of neighboring properties, a site visit, information obtained from the user (prospective purchaser or lender), etc. Records searches should include properties within 1/3 of a mile from the boundaries of the subject property if the concern is VOCs or SVOCs, and 1/10 of a mile if the concern is petroleum hydrocarbons.

- Only "reasonably ascertainable" information must be obtained. The standard defines "reasonably ascertainable" to mean information that is publicly available for the cost of photocopying, "practically reviewable" (i.e., in a format that does not require excessive review time), and readily accessible (i.e., within 20 days, an approximate time period for a response to a Freedom of Information Act or Public Records Act request).

- The standard also lists certain standard environmental and historical record sources that must be consulted (federal and state hazardous waste disposal and generator lists, cleanup site lists, fire insurance maps, local street directories, aerial photographs, and USGS topographic maps).

Information is then synthesized to determine the likelihood of a risk of vapor intrusion at the subject property in light of:

- The hydrogeologic relationship between the subject property and the neighboring contaminated source site. If the source site is "upgradient" (i.e., upstream of the subject property), the risk is higher; if it is "downgradient" (downstream), the risk is much lower; if it is "cross-gradient" (to the side of the subject property) it depends on the distances and the width of the plume.

- The prospective use of the subject property. The higher the use (i.e., residential, versus industrial) the more stringent the indoor air standards, and hence the greater the risk of a problem.

- The type of contaminant. Some travel faster than others.

- The distance of the source location to the subject property boundary.

- The characteristics of the soil. The more porous (sandy) the soils, the easier it is for soil vapors to move.

- The depth to groundwater. In general, the shallower the groundwater, the shorter the distance the soil vapors have to travel to reach overlying structures.

- The presence of vapor conduits (natural or man-made) in the soil (such as loose gravel formations and sewer lines).

- The status of the cleanup of the source property. If soil vapors are already being extracted under a cleanup order, the risk to neighboring properties is lower.

Users may then decide to proceed to a "Tier 2 Screen" if vapor intrusion cannot be ruled out in Tier 1. A Tier 2 Screen may involve both non-

invasive review of data collected from subsurface investigations at source sites as well as "invasive" data collection at the subject property, at its boundary, or offsite.

Upon completion of the Tier 1 (and if applicable Tier 2) Screens, the vapor encroachment determination is made:

- The standard prescribes "critical distances" from the subject property for data analysis and/or testing: For VOCs and other non-petroleum contamination, 100 feet between the subject property boundary and the outer edge of the contaminated soil or groundwater plume; for most petroleum contamination, 30 feet between the subject property boundary and the outer edge of the contaminated soil or groundwater plume. The environmental consultant can exercise judgment to modify these distances.

- If the distance between the boundary of the subject property and the outer edge of the contaminant plume exceeds the applicable "critical distance," the environmental consultant may determine that a vapor intrusion condition is unlikely, subject to consideration of site-specific factors such as subsurface conduits ("preferential pathways") for migration of contaminants.

- If the distance between the boundary of the subject property and the outer edge of the contaminant plume is less than the applicable "critical distance," then the consultant may determine that a vapor intrusion condition at the subject property exists or is likely, depending upon the relationship between the source site and the subject site (upgradient, downgradient or cross-gradient).

B. Cases

Most of these cases involve applications of the principles set down by the Supreme Court in its landmark 2009 decision in *Burlington Northern & Santa Fe Railway Co. v. United States*.

1. ***Team Enterprises, LLC v. Western Investment Real Estate Trust,* 721 F.Supp.2d 898 (E.D. Cal. 2010)**. The federal district court found that plaintiffs failed to allege facts sufficient to find a manufacturer of dry cleaning equipment liable as an "arranger" under CERCLA for cleanup costs. The court found that the equipment manufacturer's knowledge of how a waste might be discarded was insufficient to prove it planned for the disposal. It therefore lacked the required intent under CERCLA to be held liable as "arranger."

2. ***Hinds Investments v. Team Enterprises,* 2010 WL 922416 (E.D. Cal. Mar. 12, 2010)**. In an action similar to *Western Investment Real Estate Trust* (above), the court dismissed an action against the manufacturer of

dry cleaning equipment that was specifically designed to discharge PCE-bearing wastewater into open drains. It concluded that allegations that the equipment manufacturer knew how the machine operator would dispose of the waste did not rise to the level of intentional disposal required by the U.S. Supreme Court to find the manufacturer liable under CERCLA as an "arranger for disposal."

3. ***Celanese Corp. v. Martin K. Eby Construction Co., Inc.*, 620 F.3d 529 (5th Cir. 2010)**. A methane pipe owner brought suit against a contractor who had inadvertently damaged its pipe, allowing methane to escape. The Fifth Circuit concluded that, under Burlington Northern, the contractor could only be found liable as an arranger under CERCLA "if it took intentional steps or planned to release methanol" from the pipes. The court found that even if the contractor had consciously disregarded its duty to investigate the incident which caused the damage, such facts were insufficient to establish arranger liability under the Supreme Court precedent.

4. ***United States v. Washington State Department of Transportation*, 716 F.Supp.2d 1009 (W.D. Wash. 2010)**. The Washington district court found WSDOT liable to EPA as an "arranger" under CERCLA because it had designed, constructed, and operated drainage systems intended to collect highway runoff which drained into nearby water bodies. The court found "designing" the drainage systems was "an action directed to a specific purpose" of discharging "the highway runoff into the environment," and because WSDOT had "the ability to redirect, contain or treat its contaminated runoff," it was liable as an "arranger."

5. ***ITT Industries, Inc. v. Borgwarner, Inc.*, 700 F.Supp.2d 848 (E.D. Mich. 2010)**. In a legally and factually detailed analysis, the Eastern District of Michigan rejected arguments from defendants concerning divisibility of CERCLA response costs following Burlington Northern. Defendants failed to meet their burden (1) to show their predecessor's operations were geographically contained, or (2) to establish divisibility based on the types of contaminants released. The court noted there was no "reasonable basis" for dividing the costs of investigating some contaminants from the cost of investigating other similar contaminants.

6. ***United States v. Iron Mountain Mines, Inc.*, 2010 U.S. Dist. LEXIS 44331 (E.D. Cal. May 6, 2010)**. The court held that the U.S. Supreme Court's ruling in Burlington Northern that "apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm," did not mandate that district courts must revisit decided cases to apportion harm.

7. ***City of Colton v. American Promotional Events, Inc.*, 614 F.3d 990 (9th Cir. 2010), cert denied, __ U.S. __, 178 L.Ed.2d 480 (2010)**. The City

of Colton failed to comply with the National Contingency Plan (NCP), which is a collection of federal regulations governing the process for cleanup of Superfund sites, in connection with its response to alleged contamination of the groundwater with perchlorate. The City's "response" costs consisted mainly of establishing alternative water supplies. As a result of its failure to comply with the NCP with respect to its past remediation efforts, the City was not only denied recovery of the costs of those efforts, but was also denied a declaration of its entitlement to recovery of future "response" costs – despite its "assurances of future compliance with the NCP." As a result of this holding, the City will be unable recover from alleged responsible parties any of its estimated $80 million in past and future costs.

III. Water

A. California's Revised Construction Storm Water Permit

1. ***Permit Requirement***: As of July 1, 2010, compliance with the new, 285-page Construction Storm Water Permit is required for construction activity resulting in a land disturbance of *one acre or more, or less than one acre but part of a larger common plan of development or sale*. Construction activity includes clearing, grading, excavation, stockpiling, and reconstruction of existing facilities involving removal and replacement. Construction activity does not include routine maintenance such as, maintenance of original line and grade, hydraulic capacity, or original purpose of the facility. The goal is to reduce sediment entering rivers, lakes, streams and bays.

2. "***Legally Responsible Persons***": The Legally Responsible Person (LRP) or a person legally authorized to sign and certify on behalf of the LRP is required to obtain permit coverage. The LRP is the person who possesses the title to the land upon which the construction activities will occur. (For linear projects, such as underground or overhead utilities, the LRP is the person in charge of the utility company, municipality, or other public or private company or agency that owns or operates the linear underground/overhead project.)

3. ***Risk Levels***: Projects are classified into risk levels (Risk Level 1, 2 or 3), depending upon their potential to discharge sediment and on their proximity to sensitive receiving waters. Risk Level 1 projects pose low sediment and low receiving water risk. Higher risk projects (Risk Levels 2 and 3) are subject to increased requirements. Sediment risk is determined by use of an equation with factors for rainfall erosivity, soil erodibility, and topography erosion. The permittee may use the SWRCB map and table to calculate the topography erosion factor, or conduct a site-specific assessment. Risk to the receiving waters and overall project risk level are then calculated and determined using SWRCB tables.

4. ***Electronic Document Submission***: The Permit Registration Documents (PRDs), as well as all permit compliance documents, must now be submitted electronically onto the SWRCB website, Storm Water Multiple Application and Report Tracking System (SMARTS). The required submittals include the Notice of Intent (NOI), the Storm Water Pollution Prevention Plan (SWPPP), which must contain detailed maps of the project showing the location of the "best management practices" (BMPs), discharge points, and other features; the Site Assessment (Risk Level calculation); Site Map; Certification Statement; and (if applicable) Post-Construction Calculations.

5. ***Public Access To Documents***: The electronic filings on the SMARTS database (including the SWPPP, Site Map, and reports of any exceedances of applicable Numeric Action Levels (NALs) or violations of Numeric Effluent Limits (NELs), among other things), as well as failures to report when required, will be readily accessible to the public on the SMARTS website. Consequently, it is likely that citizen enforcement actions will increase, exposing the permittee to significant civil penalties and attorney's fees under the federal Clean Water Act.

6. ***Qualifications to Develop and Implement SWPPPs***: The Permit now requires that the SWPPP be developed by a Qualified SWPPP Developer (QSD) and be implemented by a Qualified SWPPP Practitioner (QSP). QSDs and QSPs must have a specific professional registration or certification. Both are required to attend SWRCB-approved training courses by September 2, 2011.

7. ***Best Management Practices***: Prior permits required that permittees employ BMPs to minimize loss of sediment but did not require any specific BMPs. The new Permit requires specific tasks that must be performed for housekeeping, managing non-storm water, controlling run-on and run-off, controlling erosion, and controlling sediment, including linear sediment controls. Inspections to ensure that no non-storm water is being discharged and that BMPs are in good order must be conducted regularly with more frequent inspections for Risk Level 2 and 3 projects. Records must be kept of these inspections.

8. ***Numeric Action Levels and Numeric Effluent Limits***: In addition to the filing of required documents, Risk Level 2 and 3 projects are subject to numeric action levels (NALs) for pH and turbidity. Any exceedances of applicable NALs require the permittee to determine if corrective action is required based upon the daily average discharge. Risk Level 3 projects, and non-compliant Risk Level 2 projects, are also subject to numeric effluent limits (NELs) for pH and turbidity based on the daily average discharge. While NAL exceedances do *not* generally constitute permit violations (although failure to implement BMPs resulting in an

exceedance could be a violation), exceedances of NELs *do* constitute a permit violation.

9. ***Sampling And Reporting Frequency***: Samples must be taken three times per day from each discharge point during storms producing precipitation of one-half inch or more at the time of discharge. There are strict requirements as to when the samples must be taken, and the time within which the data (especially for exceedances of NALs and NELs) must be reported on SMARTS. All permittees must prepare a *Construction Site Monitoring Program* and conduct pre-storm, daily, and post-storm inspections of BMPs and conduct quarterly non-storm water inspections. Risk Level 2 and 3 project permittees must also have a QSP prepare a written *Rain Event Action Plan (REAP)* 48 hours prior to each likely rain event; the QSP is responsible for implementation of the REAP.

10. ***Post-Construction Requirements***: The new Permit sets certain standards for sediment discharge after completion of the project. These post-construction standards are intended to replicate the pre-project water balance through various methods. Beginning September 2, 2012, the unfinished portion of any project must meet post-construction standards for sediment discharge unless the discharges are to a municipal separate storm sewer system (MS4) with an approved Storm Water Management Plan. Permittees must also keep records relating to permit compliance for at least three years.

11. ***Permit Termination***: Once a project is completed, and when final stabilization has been reached and BMPs and construction materials and wastes have been removed, a *Notice of Termination* (NOT) may be filed. The NOT becomes effective upon approval from the RWQCB. In addition, the new Permit allows a discharger to terminate permit coverage for portions of a construction project if those portions have been sold to another owner. The Permit is not transferable, so the responsibility to obtain permit coverage, update the SWPPP, and comply with permit requirements becomes that of the new owner. The seller must notify the new owner about its responsibilities concerning the permit, and must notify the SWRCB by submitting the new owner's name, address, and phone number on the Change of Information (COI) form for the termination to be processed. The seller must also disclose the state of construction, primarily if construction activity is ongoing, or if the post-construction requirements are completed.

12. ***Sanctions for Noncompliance***: Local Regional Water Quality Control Boards and the SWRCB are empowered to bring enforcement actions for failure to comply with the new Permit. Violations are subject to administrative penalties of up to $10,000 per violation and to civil penalties of up to $25,000 per violation if the matter is referred to the Attorney General. Private citizens may bring enforcement actions

("citizen suits") under the federal Clean Water Act and seek civil penalties up to $37,500/day per violation, as well as attorney's fees.

B. Draft Industrial Storm Water General Permit

On January 28, 2011, the SWRCB issued a new Draft Industrial Storm Water General Permit for the permitting, sampling and reporting of storm water discharges associated with Industrial Activities. The new proposed permit is highly controversial and would impose stringent new requirements that many experts contend are technologically and economically infeasible or otherwise unattainable. Some of the key proposed changes are discussed below.

1. ***Numeric Action Levels and Numeric Effluent Limits***: The new draft Industrial General Permit incorporates USEPA benchmark values as NALs, and also sets NELs. Unlike the Construction Storm Water Permit, which uses a five-year, 24-hour compliance storm event, the proposed Industrial Permit establishes a 10-year, 24-hour compliance storm event, and regulates Total Suspended Solids for any treatment-related BMP.

2. ***Reporting***: All data must be electronically filed into SMARTS.

3. ***Qualifications***: SWPPPs must be prepared and implemented by QSDs and QSPs, and must include specific details and narrative descriptions (a who, what, when, where, why, how regarding BMPs)

4. ***Best Management Practices and Inspections***: Dischargers must implement specific minimum BMPs throughout their facilities, including good housekeeping (with weekly inspections of all outdoor areas associated with industrial activity, storm water discharge locations and drainage and other specified areas), preventative maintenance (including weekly inspections of equipment to detect and prevent leaks), spill response procedures, material handling/waste management (including daily inspection and cleaning of outdoor material/waste handling equipment or containers), employee training, recordkeeping and quality assurance, erosion and sediment control (including management of all run-on and run-off). Some experts opine that the proposed daily and weekly inspection requirements could result in an increase from 13 inspections to an estimated 350 inspections for some facilities, thereby significantly increasing the investment of time and expense for industrial storm water compliance.

5. ***Other Periodic Inspections***: Quarterly (changed from annual) visual inspections and updating of SWPPP and BMPs as needed; summary and status of correction actions and SWPPP revisions to be included in Annual Report; and at least monthly containment area inspections.

6. ***Sampling Frequency and Criteria***: Sampling frequency inspections increased to first eligible storm event per quarter (not just October to May wet season). Sampling to be increased based upon compliance history.

   Qualifying storm events would be based upon storm water discharges during operating hours (not just daylight hours, as under current permit), when a storm produced ¼ inch of rainfall (not ½ inch, as in Construction Storm Water Permit). Likely will require an on-site rain gauge.

   Measurements for pH and electrical conductivity must be made in the field using a calibrated metering device; therefore facilities will need staff trained to implement the device.

7. ***No Exposure Certifications***: Light industry would no longer be exempt from permit requirements; a "No Exposure Certification" (NEC) would need to be submitted, along with a fee, on an *annual* basis. This could give rise to increased enforcement by the agency or by citizen groups for failure to obtain a permit if it is determined that permit coverage is necessary, resulting in exposure to significant administrative or civil penalties (like the Construction Storm Water Permit).

SWRCB will be holding workshops in February and holding a hearing on March 29 in Sacramento, with additional comments due by April 18, 2011. Industry associations are submitting comments; other current permit holders are also encouraged to submit comments.

ENVIRONMENTAL LAW – ITEMS NOT DISCUSSED

I. Air and Greenhouse Gases

A. ***Motor Vehicle Fuel Efficiency and Emissions Regulations***. The EPA and National Highway Transportation Safety Administration have been working together to develop a National Program of harmonized regulations aimed at improving motor vehicle fuel efficiency and reducing GHG emissions. In May 2010, the agencies published a Final Rule (75 Fed. Reg. 25323 (May 7, 2010)) establishing standards for light duty vehicles for model years 2012-2016. The new standards would require regulated vehicles to "meet a combined average emissions level of 250 grams of carbon dioxide per mile, equivalent to 35.5 miles per gallon . . . ." EPA estimates that these standards will cut emissions by 960 metric tons and save 1.8 billion barrels of oil over the life of the cars. President Obama, in a May 21, 2010 memorandum, urged additional coordinated steps to be taken towards production of "a new generation of clean vehicles."

In response, the agencies issued a notice of intent to publish further standards for model years 2017-2025 (75 Fed. Reg. 62739 (Oct. 13, 2010)) and proposed the first-ever fuel economy and GHG emissions standards for medium- and heavy-duty trucks (75 Fed. Reg. 74151 (Nov. 30, 2010)). EPA estimates that, if adopted, the proposed truck standards would cut GHG emissions "by nearly 250 metric tons and save about 500 million barrels of oil over the lifetime of the vehicles sold in model years 2014-2018."

B. ***Bay Area Air District Adopts Groundbreaking CEQA Thresholds of Significance for Greenhouse Gas Emissions***. (Also discussed in Land Use Briefing). On June 2, 2010, the Bay Area Air Quality Management District (BAAQMD) became the first regulatory agency in the nation to approve guidelines that establish thresholds of significance for GHG emissions from proposed development projects. The guidelines also establish levels of significance associated with other toxic emissions. These actions mark a significant development in the way GHG and other pollutant emissions are regulated indirectly in California through the project approval process. A more detailed discussion can be found at: http://www.allenmatkins.com/emails/Alert_LandUse_GHGEmissions_June2010/alert.htm

C. ***Association of Irritated Residents v. United States Environmental Protection Agency*, 09-71383 (9th Cir. Feb. 2, 2011)**. In an opinion filed on February 2, 2011, the Ninth Circuit held that the EPA acted arbitrarily and capriciously when it approved revisions to California's State Implementation Plan (SIP) required under the CAA. The Act requires states to submit SIPs for each region of the state, ensuring that it meets National Ambient Air Quality Standards (NAAQS). In 2003, California determined that there were deficiencies in its prior South Coast Ozone SIP and that a plan update was necessary. The state submitted SIP

revisions to the EPA in 2004. EPA determined that portions of the plan were inadequate but that the agency would not need to take further action because the existing SIP already contained the elements that would be disapproved (despite the fact that California had shown that the existing plan was insufficient). Thus, in 2009, EPA finalized action on the SIP revisions, approving in part and disapproving in part, but requiring nothing further from the state for compliance.

The Ninth Circuit found the EPA action arbitrary and capricious, noting that "EPA is mistaken that its duties under the Act end upon approval. Instead, EPA had an affirmative duty to evaluate the existing SIP and determine whether a new attainment demonstration was necessary to ensure California satisfies Act's attainment requirements." The court remanded the issue to the EPA for further proceedings consistent with its opinion.

D. ***Sierra Club v. Jackson*, 2011 U.S. Dist. LEXIS 5316 (Jan. 20, 2011)**. A federal district court judge denied EPA's request for an extension of time to establish emissions standards for industrial boilers and sewage incinerators. Boilers burn coal, oil, or biomass to produce steam which, in turn, is used in energy production or industrial processes. The Clean Air Act requires EPA to regulate certain air toxics emissions, including industrial and institutional/commercial boilers. On April 29, 2010 EPA proposed three separate rules that, in combination, would establish standards to address emissions of mercury, particulate matter, and carbon monoxide from boilers. EPA estimated that the regulations would result in annual reductions of 1,500 tons of total air toxics. EPA received over 4,800 individual comments in response to the proposed rules. Industry commenters suggested that compliance would impose huge costs ($20.7 billion) and could result in substantial job loss (337,703 jobs). EPA based its request for an extension of its December 16, 2010 deadline to issue final rules – a deadline already established by a court order – on concerns about the time required to respond to comments it received and the possibility that they "may materially affect important decisions relating to source categorizations and coverage for the final emissions standards." Delaying the adoption of the rule would delay implementation of new standards to April 2012, long after the established deadlines. The court turned EPA down, holding that EPA failed to establish that it was impossible to meet the existing deadline, and, since the December 2010 deadline had come and gone, gave EPA instead a very short extension to February 21, 2011 to adopt the final rules.

II. Cleanup, Superfund and RCRA

A. ***California Dept. of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910 (9th Cir. 2010)**. In this case of first impression, the federal appellate court held that, for purposes of determining CERCLA liability, the "owner" at the time cleanup costs are incurred and not the owner at the time the cost recovery lawsuit is filed, will be liable. The court found that a contrary ruling would create incentives for delay and undermine CERCLA's goal of

encouraging settlement, by requiring a cost recovery suit to be filed in order to determine "owner" status.

B. ***City of Emeryville v. Robinson*, 621 F.3d 1251 (9th Cir. 2010)**. City and former owner and operator of pesticide plant reached a court-approved settlement in the federal district court concerning contamination of certain property referred to as "Site A." The settlement provided that the settling defendants were entitled to "such protection as is provided in § 113 of CERCLA." The City later filed suit against the same former owner and other potentially responsible parties ("PRPs") in state court in connection with contamination found on an adjacent piece of property, referred to as "Site B." The Site B PRPs filed state law contribution claims against the former owner. The former owner, in turn, filed an action in federal district court to enforce the settlement and extinguish any contribution claims against it in the state court action. This case held that the Site B PRPs had the right to intervene in the settlement enforcement action, and found that section 113(f) did not protect the former owner against cross-claims for contribution and equitable indemnity asserted in the state court action. The court also found California's good faith settlement statutes did not bar the Site B PRPs' claims because they had no notice of the earlier settlement agreement.

C. ***United States v. Aerojet General Corp.*, 606 F.3d 1142 (9th Cir. 2010)**. In a case of first impression in the Ninth Circuit, the court found that non-settling PRPs have the right to intervene and oppose a consent decree with the government that could bar private party contribution rights under CERCLA sections 113(f) (conferring a right to contribution) and 113(i) (conferring a right to intervene).

D. ***American Intern'l Specialty Lines Ins. Co. v. United States*, 2010 U.S. Dist. LEXIS 65590 (C.D. Cal. June 30, 2010)**. In an action filed by an insurer for a munitions manufacturer for a cost recovery under CERCLA, the district court held the United States liable as an "owner" of facilities at which disposal of hazardous substances took place, and as an "arranger" for disposal of hazardous substances. It did so on the ground that United States owned the rocket engines and the perchlorate within them from the outset; continued to own them during the manufacturing process; and received the finished refurbished engines, all with knowledge that processing would lead to hazardous wastes.

E. ***United States v. Apex Oil*, 579 F.3d 734 (7th Cir. 2009), cert denied 2010 U.S. LEXIS 6286 (Oct. 4, 2010)**. The EPA was granted an injunction requiring Apex Oil to clean up a contaminated site. Apex argued that the government's claim to an injunction, under RCRA, was discharged in a prior bankruptcy. The Seventh Circuit rejected Apex's argument and drew a distinction between cases in which a claim gives rise to a right to a payment because an equitable decree cannot be executed, and a claim merely imposing a cost on the defendant. Apex took the position that because it no longer engaged in oil refining, it would have to pay a third-party to undertake the cleanup, rendering the equitable remedy of the injunction unobtainable by Apex directly. Where an equitable remedy is unobtainable, a money judgment may be obtained; and, a claim for a money

judgment is dischargeable in bankruptcy. The Seventh Circuit also noted, however, that while Apex would incur costs as a result of the injunction, RCRA itself does not authorize monetary relief and the injunction obtained by the EPA did not entitle the EPA to any payment from Apex. The injunction was not, therefore, discharged in the prior bankruptcy.

III. Commercial Office Buildings.

A. ***Commercial Comfort Cooling and Refrigeration Units***. A new Air Resources Board regulation applies to commercial refrigeration units using 50 or more pounds of greenhouse warming potential ("GWP") refrigerants. GWP refrigerants include chlororfluorocarbons, hydrochlorofluorocarbons, hydrofluorocarbons, perflourocarbons, any compound or blend with a GWP value of 150, and any EPA ozone depletion substance. The new regulation requires registration, audits, and timelines to repair any leak. Systems with leaks that cannot be repaired within the time frame must prepare a retrofit or retirement plan which must be completed within six months. Systems within the South Coast Air Quality Management District are subject to a new District regulation with similar requirements.

B. ***Proposed Mandatory Commercial Recycling***. Cal Recycle held a workshop on January 19, 2011, to discuss its proposed regulation requiring businesses that generate four cubic yards or more of trash per week to (1) recycle their solid waste by subscribing to a recycling service; (2) source-separate their material; and (3) self-haul to a recycling facility or have their material processed in a mixed-waste processing facility that yields diversion results comparable to source separation. The proposed regulations would also establish general criteria for monitoring of businesses and includes assessing whether businesses are subscribing to and participating in recycling services, and notifying businesses that are not in compliance with these regulations.

The proposed regulations would also require each local jurisdiction to implement a commercial recycling program by July 1, 2012, which provides education, outreach and monitoring of businesses subject to the Commercial Recycling Regulation.

IV. Green Chemistry.

A. ***DTSC Regulations***. The Department of Toxic Substances Control (DTSC) will soon issue its initial green chemistry regulations. DTSC is required to issue regulations to: list chemicals that have the potential to harm consumers or the environment; prioritize products containing those chemicals (based on their volume in commerce, the extent of public exposure, and how the product is disposed); require manufacturers to perform a detailed "alternatives assessment" to determine if a viable, safer alternative exists; and establish various regulatory responses such as required labeling, end-of-life management and use restrictions.

There has been significant and divisive debate among the various interest groups on the draft regulations.

B. ***OEHHA Regulations***. The Office of Environmental Health Hazards Assessment (OEHHA) issued proposed regulations in December 2010, which specify the hazard traits and environmental and toxicological endpoints and other relevant data that are to be included in the Toxics Information Clearinghouse (TIC) to be developed by DTSC. DTSC is required by law to establish the TIC on the Internet for use by governmental agencies and the public to evaluate the hazards associated with the use of chemicals in consumer products. OEHHA was required to identify the hazard traits and environmental and toxicological endpoints and any other relevant data that are to be included in the clearinghouse by January 1, 2011.

V. Nanomaterials

DTSC has formally requested manufacturers to provide information regarding the chemical and physical properties and other information on six specified nanomaterials:

- Nano Silver
- Nano Zero Valent Iron
- Nano Cerium Oxide
- Nano Titanium Dioxide
- Nano Zinc Oxide
- Quantum Dots

California law authorizes state agencies to request such information to determine how these chemicals may affect public health and the environment. Manufacturers (including importers) must provide the requested information by December 21, 2011.

VI. Product Regulation

Battery Chargers. The California Energy Commission (CEC) is likely to relax its proposed stringent energy efficiency standards for battery chargers used in a variety of consumer products, including cell phones. The California Air Resources Board supported the proposed standards, but industry had strongly objected to them because they would result in a need to redesign almost all regulated products at considerable cost. The CEC is likely to revise its standards to more closely match those of the Department of Energy.

VII. Proposition 65.

A. ***Notices***. Private citizen groups continue to bring enforcement actions against companies that sell consumer products for alleged violations of the warning requirement under Proposition 65 (formally known as The Safe Drinking Water and Toxic Enforcement Act of 1986). Lead, a Prop 65-listed carcinogen and toxin, continues to be the primary target of these enforcement actions (391 notices) but the additional "trendy" chemicals targeted in 2010 were di-2-ethylhexyl phthalate (DEPH) with 86 notices and cadmium with 18 notices. Targeted products included luggage tags, footwear, exercise mats, wallets, purses, tote bags, belts, and jewelry.

B. ***Attorney General Letter on Payments in Lieu of Penalties***. On December 22, 2010, the Attorney General sent a letter to Proposition 65 plaintiffs' counsel to express concerns about payments in lieu of penalties. While the Attorney General was not prepared to offer guidelines on the use of payments in lieu of penalties, the letter did recognize that Proposition 65 anticipated that a significant portion of any penalty payment should go to the OEHHA, and the lack of penalties in settlement of Prop 65 cases therefore deprives OEHHA of these funds. It further suggested that payments should be directly related to the alleged violation.

C. ***Faux Leather (Vinyl)***. The Center for Environmental Health (CEH) entered into a settlement for $1.693 million with a group of retailers and suppliers to settle claims for alleged failure to provide warnings for exposure to lead in faux leather fashion accessories such as handbags, wallets, belts, and footwear. The settlement requires that surface coatings not exceed 90 parts per million (ppm) and lead in vinyl not exceed 600 ppm (300 ppm by December 1, 2011). CEH has initiated lawsuits against additional retailers and suppliers to enforce Prop 65.

D. ***Artificial Turf***. Two of the largest makers and distributors of artificial turf settled with the Attorney General for close to $500,000 for alleged failure to warn of exposure to lead in artificial turf. The companies agreed to reduce lead to less than 50 ppm. The Attorney General was concerned about alleged exposure to children playing on turf, and had settled last year with another turf manufacturer.

E. ***Cadmium in Jewelry***. CEH brought suit against several retailers and suppliers of fashion jewelry for alleged exposure to cadmium, a Proposition 65 reproductive toxin, which is used in pigments (especially red and yellow). CEH alleged exposure via hand-to-mouth behavior. The Consumer Product Safety Commission has initiated studies to determine the appropriate tests for, and acceptable levels of, cadmium in children's jewelry.

F. ***Grilled Chicken***. In August 2010, an appellate court ruled that Proposition 65 warnings for grilled and flame-broiled chicken were not preempted by the federal Poultry Products Inspection Act. A plaintiffs group sued several restaurants for alleged exposure to PhIP, a Proposition 65 carcinogen, which is produced when chicken is cooked. A trial court must now determine what level of PhIP requires

a Prop 65 warning. Although the Attorney General is not a party to the litigation, a former Deputy Attorney General testified that the levels of PhIP in grilled chicken did not pose a significant risk for which warnings would be required.

G. ***New Listings***. OEHHA listed 4-methylimidazole as a carcinogen under Proposition 65, effective January 7, 2011. According to the National Institute of Health, 4-methylimidazole is used in the manufacture of pharmaceuticals, photographic and photothermographic chemicals, dyes and pigments, agricultural chemicals, and rubber, and is a by-product in several food products, including caramel coloring, soy sauce, Worcestershire sauce, wine, ammoniated molasses, and caramel-colored syrups. OEHHA has also proposed a No Significant Risk Level for 4-methylimidazole of 16 micrograms/day.

VIII. Water

A. EPA Jurisdiction and Enforcement under the Clean Water Act, 33 U.S.C. §§ 1251 et seq.

EPA Drafts Clean Water Protective Guidance Clarifying Test for Jurisdiction Over Wetlands. The EPA has sent to the White House's Office of Management and Budget a new draft guidance document to clarify the test for determining jurisdiction under the federal Clean Water Act ("CWA"). Following the U.S. Supreme Court's decision in *United States v. Rapanos*, 547 U.S. 715 (2006), two competing legal tests for jurisdiction were established. Under Justice Kennedy's "significant nexus" test, wetlands are subject to the CWA if they have a "significant nexus" to traditionally navigable waters, meaning that they significantly affect the chemical, physical, and biological integrity of other jurisdictional waters. Under Justice Scalia's "continuous surface connection" test, jurisdiction would only be triggered when a continuous surface connection exists between wetlands and traditional waters. EPA's pending guidance adopts Justice Kennedy's "significant nexus" test for determining CWA jurisdiction for U.S. Army Corps-issued section 404 dredge-and-fill permits and section 402 NPDES permits. It is unclear when the EPA will release the document. Additionally, the guidance document does not address the CWA's scope over waste treatment systems or prior converted croplands, issues that will be the subject of future guidance documents. Legislation has previously been introduced to clarify EPA's jurisdiction under the CWA, but none has come up for a vote in either chamber.

***Pre-Enforcement Judicial Review of Compliance Orders Not Available Under the Clean Water Act--Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010)**. Plaintiffs, owners of an undeveloped lot in Idaho, filled in a portion of their property to build a house. The EPA unilaterally determined the property was a wetland and that plaintiffs had violated the CWA by filling without first obtaining a CWA section 404 permit, and issued a compliance order. On appeal, the Ninth Circuit held that the property owner's federal court lawsuit challenging CWA jurisdiction was an improper effort to obtain pre-enforcement judicial review of the administrative compliance order, even though failure to comply with the order could potentially

subject plaintiffs to significant civil penalties. The court concluded that plaintiffs must wait until the EPA first proves in a lawsuit that the CWA was violated before any penalty for noncompliance with the administrative order could be assessed. Alternatively, the landowners could apply for a fill permit, and file a lawsuit to appeal its denial.

EPA Develops Clean Water Act Enforcement Action Plan. The EPA has developed a Clean Water Act Enforcement Action Plan ("Action Plan") to improve enforcement performance and transparency, and modernize the EPA's use of technology. The Action Plan has three main elements: (1) to focus on source *categories* posing the biggest threat to water quality and public health, including mining companies, large livestock farms, municipal wastewater treatment plants and construction companies, rather than specific facilities with individual permits; (2) to strengthen oversight of individual state permitting and enforcement programs by setting standard expectations for acceptable performance and potentially taking direct enforcement action where state performance is lacking, including stepping in to issue an enforcement action to preempt a citizen suit; (3) to improve accountability and transparency by required electronic reporting into a publicly-available database.

***Northwest Environmental Defense Center v. Brown*, 617 F.3d 1176 (9th Cir. 2010)**. The Ninth Circuit ruled that stormwater runoff from logging roads is subject to CWA permitting requirements when it is systematically collected in ditches, culverts and channels and is then discharged into streams and rivers. EPA's failure to adopt a permitting process for logging roads could subject owners and operators of those roads to enforcement actions and citizens suits seeking significant civil penalties.

B. Pesticide Regulations

EPA Drafts New Pesticide General Permit. In *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), the court rejected EPA's rule exempting pesticide discharges in compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) from CWA permitting requirements. Consequently, in 2010, the EPA issued a draft pesticide General Permit covering four categories of biological and chemical pesticide discharges when a residue remains— (1) mosquito and other flying insect pest control in or above standing or flowing water; (2) aquatic weed and algae control in water and at water's edge; (3) control of aquatic nuisance animals; and (4) aerial pesticide applications to forest canopies where a portion of the pesticide is unavoidably applied over and deposited to water. The EPA's General Permit directly applies only to pesticide discharges where the EPA (and not a state) is the permitting authority, but state-adopted general permits cannot be less stringent than the core aspects of the EPA's General Permit.

C. Concentrated Animal Feeding Operation (CAFO) Regulations

***Assateague Coastkeeper v. Alan and Kristin Hudson Farm*, 2010 U.S. Dist. LEXIS 73525 (D. Md. 2010)**. Environmental groups brought an action under the citizens suit provisions of the Clean Water Act against the owners of a chicken farm and an "integrator" who contracted with the owner to raise the integrator's chickens. The court dismissed some of the plaintiffs from the suit because they had not been properly identified strictly in accordance with statutory requirements for plaintiff's notice of intent to sue. The court also held that the integrator was properly named as a defendant because the CWA imposes liability on both the party who actually performed the work and the party with control over performance of the work. The complaint alleged that the integrator owned the chickens, provided feed, medications and supplies, and controlled care of the chickens; such allegations were sufficient to state a claim.

EPA Implementation Guidance on CAFO Regulations—CAFOs That Discharge or Are Proposing to Discharge. The EPA has published guidance specifying the kinds of operations and circumstances triggering CAFO's duty to apply for NPDES permit coverage for discharging or proposing to discharge pollutants into waters of the United States. CAFOs may self-certify that a permit is not required, but the objective assessment should consider both possible sources of pollutants at the CAFO, pathways for the pollutants from the CAFO to reach waters of the United States, manmade aspects of the CAFO, as well as climate, hydrology, topography and other characteristics beyond the CAFO's control. The EPA is expected to issue proposed rules by May 2011 that would require all CAFOs to submit detailed information to the EPA about their operations.

D. Regulation of Fireworks Displays

***Gualala Festivals Committee v. California Coastal Commission*, 183 Cal.App.4th 60 (2010)**. The appellate court determined that a proposed fireworks display over the Gualala River estuary was a "development" within the meaning of the California Coastal Act (which defines "development" to include discharge or disposal of any gaseous, liquid or solid waste), thereby requiring the display promoters to obtain a Coastal Development Permit from the California Coastal Commission before discharging the fireworks. Because the debris resulting from a fireworks display would include casings, internal structure components and chemical residue, the display discharged gaseous and solid waste within the meaning of the statute.

San Diego Regional Water Quality Control Board's Draft General Permit for Public Fireworks Displays. Following lawsuits brought by a local environmental group against Sea World and a local community group in La Jolla for fireworks displays allegedly violating the CWA, the Regional Water Quality Control Board, San Diego Region, drafted a General Permit regulating residual firework pollutant discharges to waters covered under the CWA (e.g., San Diego Bay), which is currently out for public comment. If adopted, the General Permit would establish

waste discharge requirements for the discharge of pollutant wastes associated with public displays of fireworks to surface waters in the San Diego Region. If implemented, sponsors of public fireworks displays would be required to implement a best management practices (BMP) plan to clean up the debris left after the fireworks show is over, and submit a post-firework event report to the San Diego RWQCB containing information on the event and the BMPs implemented.

E. Recycled Water.

The State Water Resources Control Board held a hearing in December 2010 to discuss the findings of the expert panel report on contaminants of emerging concern ("CECs"). Recycled water is a critical component to help meet California's future water needs. Although the State Board adopted a recycled water policy in 2009, many have raised concern about CECs such as pharmaceuticals, personal care products, nanomaterials and other contaminants found in drinking water. Local agencies have objected to expanding requirements to monitor for CECs while environmental groups are concerned that existing requirements are not sufficient. Although there is no specific announcement on changing the 2009 policy, the concern about the presence of these constituents will likely continue to be at the forefront on recycled water use.

F. Regulation of Chemicals in Water

Hexavalent Chromium. OEHHA has proposed a public health goal ("PHG") of 0.02 parts per billion (ppb) for hexavalent chromium. A PHG is the level of a chemical contaminant in drinking water that the agency has determined does not pose a significant health risk. The prior proposed level had been 0.06 ppb. OEHHA explained that new research has shown that young children and other sensitive populations are more susceptible than the general population to health risks from exposure to carcinogens. While a PHG is not a regulatory level for cleanup of groundwater or surface water contamination, it will likely influence regulatory agencies with authority to oversee site remediation. In addition, the PHG will serve as guidance for developing the nation’s first drinking water standard specifically for chromium 6. The current California drinking water standard is 50 ppm for total chromium, which includes both chromium 6 and less-toxic chromium 3. The public comment period closed January 31, 2011.

Perchlorate. OEHHA proposed a revised draft PHG of 1 ppb for perchlorate in drinking water which is significantly lower than the existing PHG for perchlorate of 6 ppb set in 2004. Although a public health goal is not an enforceable regulatory standard, and is designed to provide scientific guidance for revising the existing state drinking water standard for perchlorate of 6 ppb, it will likely influence cleanup levels at contaminated sites. The proposed new PHG is lower than the existing goal because it incorporates new information about the effects of perchlorate on infants. A hearing is scheduled on the draft perchlorate PHG for February 23, 2011 in Sacramento. Additionally, although no federal standard for

perchlorate in drinking water currently exists, on February 2, 2011, the United States EPA announced that it will develop such a standard, reversing the position taken by the previous Administration. The EPA will examine costs and benefits of potential standards before developing a formal rule for perchlorate.

Federal Stormwater Permit for Construction Activities. On December 1, 2009, the EPA published a rule establishing numeric limits on the turbidity of stormwater discharges from large construction sites, requiring monitoring to ensure compliance, and requiring implementation of best management practices related to erosion and sediment controls, soil stabilization controls, and pollution prevention measures. Following a lawsuit challenging certain numeric limits, EPA acknowledged that it had improperly interpreted certain data applicable to those limits.

On December 17, 2010, EPA sent its proposed 2011 Construction General Permit to the White House Office of Management and Budget for review. The EPA's Construction General Permit applies to federal properties and in a few states that do not issue their own permits. It also acts as a baseline level of stormwater runoff mitigation procedures that states which do issue permits must follow when issuing stormwater permits associated with construction projects, generally of one square acre or larger. Meanwhile, the building industry is meeting with the EPA, requesting that the EPA include language in the general permit that allows trading or offsets in the permitting process in order to attain compliance at a lower cost.

G. Water Rights

***South Carolina v. North Carolina*, __ U.S. __, 130 S.Ct. 854 (2010)**. The United States Supreme Court recently allowed two private water users, an interstate water-supply joint venture and an energy company, to intervene in a dispute between South Carolina and North Carolina over rights to water in the Catawba River, because they each established a compelling interest in protecting the viability of their interests; the energy company operated dams and reservoirs to generate electricity for the region and any equitable apportionment of the river would need to take into account the energy company's needs, and the bi-state water supplier depended upon authority from both states. The dissent by Chief Justice Roberts, joined by three others, called the result "unprecedented," that equitable apportionment of an interstate waterway was a sovereign dispute and once the water is allocated between the states, a private entity's interest in its particular share of the state's water was an intramural dispute to be decided by each state on its own.

Natural Resources Law

James T. Burroughs (speaker)
Partner
jbourroughs@allenmatkins.com
(415) 273-7482

San Francisco Office
Allen Matkins Leck Gamble Mallory & Natsis LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111

NATURAL RESOURCES LAW – ITEMS FOR DISCUSSION

I. WETLANDS LAW AND REGULATION

A. Federal Developments

- Whither go thou, thy 9th Circuit?

Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006)

> Declared by the 9th Circuit that Justice Kennedy's concurring opinion in *Rapanos* (547 U.S. 715, 2006) provided the "*controlling rule of law*," meaning that in cases where wetlands jurisdiction under the Clean Water Act is not obvious, said wetlands are jurisdictional only if they have a "*significant nexus*" to the chemical, physical and biological integrity of traditional navigable waters.

Amended *City of Healdsburg*, 496 F.3d 993 (9th Cir 2007)

> Declared by 9th Circuit that what it meant to say is that "Justice Kennedy's concurrence provides the controlling rule of law *for our case*."

Effectively Amended by *Northern California River Watch v. Wilcox*, 2011 U.S. App. LEXIS 1752 (9th Cir. January 26, 2011). (*SEE ATTACHED*)

> Declared by 9th Circuit that what it really meant to say in *City of Healdsburg* is that the Kennedy significant nexus standard applied to that case, but the 9th Circuit "did not, however, foreclose the argument that Clean Water Act jurisdiction may also be established under the [*Rapanos*] plurality standard."

What does this all mean?

- The significant nexus standard appears to be limited to the facts of the City of Healdsburg case ("*for our case*"), but what about other wetland fact patterns?

- By embracing the *Rapanos* plurality standard for jurisdiction (in addition to Kennedy's significant nexus standard), what would happen if the Corps/EPA were to decline jurisdiction by reference to the plurality standard?

- Where do tributaries fall out in this jurisdictional mix? *See Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210 (D. Oregon 2009).

- EPA's "Guidance-itis"

  Since *Rapanos* (2006), the Corps and EPA have failed to promulgate new regulations governing the jurisdictional reach of the term "waters of the United States."

  However, they have issued joint agency "guidance" on this subject. *See* "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (U.S. EPA, U.S. Army Corps of Engineers, December 2, 2008).

  Failing to resolve all outstanding issues, however, EPA is reportedly prepared to issue additional "guidance" on this issue. Reports are that this new guidance will seek to provide further clarity on the application of the significant nexus test.

  Legal issue: the enforceability of EPA's "guidance," and the extent to which it is entitled to deference – if at all – by reviewing courts. *See National Mining Association v. Lisa Jackson*, 2011 U.S. Dist. LEXIS 3710 (D. D.C. January 14, 2011). (*SEE ATTACHED*)

B. <u>State Developments</u>

- State Water Resources Control Board's New Wetlands Rulemaking

  The SWRCB is proposing to adopt "Wetland Area Protection Policy and Dredge and Fill Regulations," and has recently issued a Notice of Preparation of an EIR in connection with this proposed rulemaking. (*SEE ATTACHED*)

  - Regulations would assert (reaffirm?) state regulatory jurisdiction over "isolated wetland" – *i.e.*, wetlands that are not jurisdictional under the federal Clean Water Act.

  - Regulations would also define "wetlands" in a manner that is significantly broader than the 3-parameter approach utilized by the Corps of Engineers.

Legal issue: whether the SWRCB has statutory authority to regulate the "fill" of wetlands. Arguably, in the absence of a "water of the United States," the Porter-Cologne Act's definition of "waste" does not extend to wetlands "fill" because the SWRCB/RWQCB's permitting authority extends only to the discharge of "waste." This issue has not been tested yet in the courts.

II. ENDANGERED SPECIES

- *Northern California River Watch v. Wilcox,* 2011 U.S. App. LEXIS 1752 (9th Cir. January 26, 2011)

  This case resolved a long-simmering issue as to whether plants that are listed under federal law as either endangered or threatened received protection under the Endangered Species Act when they occur in wetlands and other "waters of the United States," *even if* the listed plants are "taken" in an action that does not require a Section 404 permit from the Corps of Engineers.

  Held: "waters of the United States" are not "areas under Federal jurisdiction" for federal Endangered Species Act purposes, meaning that there is no prohibition on the "take" of federally-listed plants simply by virtue that they occur in a "water of the United States." Instead, their protective status arises only in the context of a related federal permit (*e.g.*, a Section 404 permit). The court did not foreclose the possibility, however, that the U.S. Fish and Wildlife Service might adopt regulations to address this issue.

- "Critical Habitat"

  Arizona Cattle Growers' Assn. v. Salazar, 606 F.3d 1160 (9th Cir. June 4, 2010)

  Held: critical habitat designations for listed endangered species based on a finding of "occupied habitat" need not necessarily require evidence that the habitat is continuously occupied by the subject species.

  Home Builders Assn. of Northern California v. USFWS, 616 F.3d 983 (9th Cir. August 9, 2010)

  Held: Reaffirms holding in *Arizona Cattle Growers' Assn.* that in taking into account the economic impact of a proposed critical habitat designation, the USFWS need only account for the economic consequences of the critical habitat designation itself, not the designation in addition to the economic impacts associated with the listing of the species for which the critical habitat is being designated, nor the economic impacts associated with all other related regulatory consequences of the proposed critical habitat designation.

III. NEPA

- There is new Council on Environmental Quality "Guidance" endorsing the use of "mitigated FONSI's." *See* Nancy H. Sutley, Chair, "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact" (CEQ January 14, 2011). (*SEE ATTACHED*)

IV. BCDC's PROPOSED BAY PLAN AMENDMENT: CLIMATE CHANGE

The San Francisco Bay Conservation and Development Commission is considering proposed amendments to the Bay Plan that would address the possibility of sea level rise associated with climate change. (*SEE ATTACHED*)

The proposed policies are stated to be advisory only, and would not change or alter the reach of BCDC's jurisdiction (*i.e.*, the Bay, salt ponds, managed wetlands and land within 100 feet of the Bay). If adopted, however, the policies could have an effect on land use planning and decision-making by Bay-area local governments. For example, the BCDC planning exercise includes mapping various sea level rise scenarios.

Michael P. Durkee | Biography

Michael P. Durkee
Partner

Walnut Creek

925.943.5551

mdurkee@allenmatkins.com

Focus

Land Use, Environmental & Natural Resources

Litigation

Mike Durkee is Co-Chair of the firm's California Land Use Practice. He is resident in our Walnut Creek office, where he practices land use, elections, and local government law in both administrative and judicial proceedings. Mike represents developers, builders, property owners, cities, counties, special districts, and interest groups in all aspects of California local government, elections, and land use entitlement, review, and approval processes. He has transactional and litigation expertise in the laws and processes regarding the California Environmental Quality Act (CEQA), local governance, general plans, specific plans, planning, zoning and development, vested rights (common law, development agreements, vesting maps), exactions (fees/dedications), the Subdivision Map Act, Williamson Act, and local elections (initiative, referendum, recall). Mike also serves as an expert on these topics, and has been involved in several law-changing CEQA litigation matters.

Mike has been instrumental in the creation, coordination, and implementation of overall entitlement strategy (including defense tactics) for some of California's most controversial development projects, including the San Jose Giants Ballpark Proposal, the Buck Center for Aging and Research, Black Point, Buck Mountain Ranch, and the North Livermore Initiative. He is widely recognized for his expertise in effective negotiation and resolution. Mike has extensive expertise regarding "value-enhancing" entitlements and is considered one of the state's top creative land-use minds. He regularly handles the coordination with city/county staff regarding the planning of the project, the negotiation and drafting of all agency documents for legal compliance and tactical advantage, the coordination of all environmental, planning, and engineering consultants and their reports, and the transition into litigation when necessary.

Mike's Land Use litigation practice includes representing landowners, developers, builders, businesses and governmental agencies in state and federal courts.

Mike frequently teaches land use seminars throughout California for builders' groups, cities and counties, the University of California Extension, and the State Bar of California. He is a co-author of *Ballot Box Navigator* (Solano Press 2003), and *Land-Use Initiatives and Referenda in California* (Solano Press 1990, 1991), and the principal author of *Map Act Navigator* (1999-2011). Mike writes the "Ask the Map Act Expert" column for the trade journal *California Surveyor*. He is a former member of the Advisory Board

of *The California Land Use Law and Policy Reporter*, and the State Assembly Local Government Committee's "Subdivision Map Act Advisory Group."

Mike runs the site, www.landusenavigators.com, a preeminent online resource about California land use issues. He was recognized as a Northern California Super Lawyer by the *California Super Lawyers* magazine in 2004, 2005, 2006, 2009, and 2010 and is the recipient of the 1992 "Outstanding Instructor" award from the U.C. Davis Extension Land Use Program. In late 2010 he launched the blog www.sustainablecommunitieslaw.com.

Educational History:

Mr. Durkee received his Bachelors of Science degree from the University of California, Davis in 1981 and was graduated with Distinction from McGeorge School of Law, University of the Pacific, in 1984.

David D. Cooke | Biography

David D. Cooke
Partner

San Francisco

415.274.7459

dcooke@allenmatkins.com

Focus

Land Use, Environmental & Natural Resources

Litigation

David Cooke is a partner in the Litigation Department of our San Francisco office, and he serves as co-chair of the firm's Environmental and Natural Resources Group. His practice is concentrated primarily in environmental litigation and environmental regulatory and transactional counseling, with a particular focus on hazardous waste and contaminated property disputes (including federal and state statutory or common law enforcement, contribution, cost recovery, and natural resource damage actions); counseling and negotiations involving the investigation, remediation, disposition and re-use of contaminated properties, groundwater and surface water bodies; regulatory, permitting and enforcement issues and actions arising under the Clean Water Act and related state laws; land use and litigation matters under CEQA and NEPA; counseling and regulatory compliance problems under RCRA and the California hazardous waste laws; permitting and variance matters, enforcement actions, and citizen suits under the federal Clean Air Act and state air quality laws; transportation planning and air quality litigation under the federal Clean Air Act; compliance and enforcement matters involving hazardous materials management and release reporting; and environmental insurance and policyholder-side environmental insurance coverage litigation. David's environmental litigation practice encompasses all phases of litigation, through trial and appeal.
David's practice includes also general commercial and business litigation, often involving real property-related disputes. In addition, his litigation and counseling experience includes a wide range of matters involving such diverse areas as eminent domain, trademark and copyright, admiralty law, construction defects, defamation, personal injury, and prison conditions law.

David was admitted to the California Bar in 1980 and to the District of Columbia Bar in 1991. He is a member of and/or involved in the American Bar Association, the Bar Association of San Francisco, and the California Bar—Environmental Law Section. David is also admitted to practice before the United States District Courts for the Northern, Eastern and Central Districts of California, and the United States Court of Appeals for the Ninth Circuit.

David D. Cooke | Biography

David D. Cooke – *continued*

Prior to joining Allen Matkins in 2000, David was a partner at Beveridge & Diamond LLP in San Francisco. He began his legal career with Brobeck Phleger & Harrison, also in San Francisco, where he became a partner in 1988.

David has been recognized as a Northern California Super Lawyer in Environmental Litigation in 2008, 2009 and 2010 and as one of the Top 100 Super Lawyers in Northern California in 2009 and 2010.

David is a founding director of Episcopal Community Services of San Francisco, Inc. (ECS), which provides shelter and support services for homeless and impoverished individuals and families in San Francisco, and he is particularly active in the development and oversight of its innovative supportive housing programs.

Educational History:

David received his B.A. from the University of Virginia, with highest distinction, and his J.D. from the University of Virginia.

James T. Burroughs | Biography

James T. Burroughs
Partner

San Francisco

415.273.7482

jburroughs@allenmatkins.com

Focus

Land Use, Environmental & Natural Resources

Jim is a partner in the firm's San Francisco office, where he specializes in environmental and land use law. He manages the permit entitlement process for proposed projects, and specializes in federal, state and local permits involving environmental and natural resource issues. This typically includes compliance with CEQA, NEPA, wetlands, endangered species, streams and rivers, stormwater discharges, coastal development rules and all related enforcement actions and litigation matters. For large-scale projects, Jim's responsibilities will include development of a permitting strategy, managing environmental consultants and engineers in assembling permit support analyses, negotiations and appearances before the various permitting agencies, interactions with other interested parties and individuals, and resolution of any permit condition compliance issues.

Previously, Jim served as the General Counsel for the California State Resources Agency (1994 - 1996) and Chief Deputy Director of the California Department of Forestry and Fire Protection (1996 - 1997). He was directly involved in developing strategic actions in response to the listing of several federal and state endangered or threatened species and was responsible for two major revisions to the California Environmental Quality Act Guidelines. During this time, he also served as a Commissioner on the San Francisco Bay Conservation and Development Commission, was a Member of the Board of the State Coastal Conservancy, and a Commissioner ex officio for the California Coastal Commission. Throughout, Jim continues to write and lecture on environmental law and regulation.

Educational History:

Jim completed his undergraduate work at Whitman College and received his J.D., magna cum laude, from Georgetown University School of Law, where he was awarded the Order of the Coif.