California Environmental Law and Land Use Practice

Publication 102 Release 50 March 2009

HIGHLIGHTS

2008 Legislative Updating
• This release includes coverage of 2008 environmental and land use legislation.

Recent Case and Regulatory Updating
• Recent case law and regulatory developments have been added.

Climate Change Updates
• Coverage of new regional land use and transportation planning legislation has been added.
• An expanded section on recent climate change litigation is included.

Environmental Litigation

Recovery of Attorneys’ Fees — Necessity of Settlement Efforts. To recover attorneys’ fees under Code Civ. Proc. § 1021.5, the plaintiff in a “catalyst case” must have engaged in a reasonable attempt to settle its dispute with the defendant before litigation. In Vasquez v. State of California (2008) 45 Cal. 4th 243, the California Supreme Court held that this categorical rule does not apply in non-catalyst cases. See § 13.10[6].

California Environmental Quality Act (CEQA)

Project Approvals. In Save Tara v. City of West Hollywood (2008) 45 Cal. 4th 116, the California Supreme Court concluded that the city’s conditional agreement to sell land for private development, coupled with financial support, public statements, and other actions by its officials committing the city to the development, was an “approval” of the project that was required to have been preceded by preparation of an Environmental Impact Report. See § 21.03[1].

Regional Land Use and Transportation Planning — Application to CEQA. 2008 legislation [2008 Stats., ch. 728 (SB 375)] seeks to promote regional land use and transportation policies that contribute to the greenhouse gas emission reductions required under the California Global Warming Solutions Act of 2006. For coverage of SB 375 and its provisions govern-
ing CEQA streamlining and exemptions, see § 21.10.

Water Quality

Integrated Regional Water Management Planning Act. The Legislature, recognizing that local agencies can realize efficiencies by coordinating and integrating their assets and seeking mutual solutions to water management issues, enacted the Integrated Regional Water Management Planning Act [2007–2008 Stats., 2d Ex. Sess. ch. 1 § 4 (SB 1XX)] to encourage local agencies to work cooperatively to manage their water supplies. The legislation addresses “regional water management groups,” regional projects and programs, guidelines for the development of integrated plans, and funding for qualified projects and programs. See § 30.44[3].

Oil Spill Contingency Plan. 2008 legislation [2008 Stats., ch. 565] requires the Administrator of the Office of Spill Prevention and Response to submit an amended oil spill contingency plan that consists of both a marine oil spill contingency planning section and an inland oil spill contingency planning section. See § 33.63[1][a], [b].


Ballast Water Discharges. In Northwest Environmental Advocates v. EPA (9th Cir. 2008) 537 F.3d 1006, the Ninth Circuit held that the EPA’s promulgation of a regulation exempting from NPDES permit requirements certain discharges from vessels including discharges of ballast water was ultra vires, and the district court properly vacated the regulation. For discussion, including coverage of the subsequent district court opinion, see § 33.69[4].

Discharges From Recreational Vessels. Federal legislation [Pub. L. No. 110-288] provides that NPDES permits may not be required for a discharge that is incidental to the normal operation of a vessel if the discharge was from a “recreational vessel.” See § 33.71.

Effluent Limitations Guidelines. Coverage has been added on the U.S. EPA’s efforts to develop effluent limitations guidelines (ELGs) for the construction industry. In Natural Resources Defense Council v. U.S. EPA (9th Cir. 2008) 542 F.3d 1235, an action was brought challenging EPA’s decision not to issue ELGs and new source performance standards (NSPSs) after it had listed the construction industry in the plans issued under the Clean Water Act. The Ninth Circuit held that EPA was required to promulgate the ELGs and NSPSs after it listed the construction industry in the Effluent Guidelines Program Plan and that EPA lacked authority to remove the industry from the Plan. See § 33.82[1][c].

Air Quality

Regulations for In-Use Off-Road Diesel-Fueled Fleets. The California Air Resources Board has promulgated standards for in use off road diesel fueled fleet vehicles. See § 42.54[5].

Hazardous Waste and Toxic Substances

California Emergency Management Agency. 2008 legislation [2008 Stats., ch. 372] merged the Office of Emergency Services with the Office of Homeland Security to create the California Emergency Man-
Land Use

Affordable Housing — Density Bonuses. Provisions applicable to density bonuses, including legislation addressing a developer’s proposal for waiving or reducing certain development standards, have been revised [2008 Stats., ch. 454]. See § 60.100[7][a].

Housing Element of General Plan — Mandatory Rezoning. 2008 legislation [2008 Stats., ch. 728] addresses mandatory rezoning when a housing element’s inventory of land suitable for residential development does not identify adequate sites to accommodate the need for groups of all household income levels. The legislation includes a deadline for rezoning, extensions of the deadline, consequences for failing to rezoning, and enforcement provisions. See § 62.03[3][g].

Circulation Element of General Plan. Beginning January 1, 2011, on any substantive revision of the circulation element, the legislative body must plan for a balanced, multimodal transportation network that meets the needs of all users of streets, roads, and highways for safe and convenient travel in a manner that is suitable to the rural, suburban, or urban context of the general plan [2008 Stats., ch. 657]. See § 62.03[8].

Facial Takings. In Action Apartment Assn. v. City of Santa Monica (2008) 166 Cal. App. 4th 456, the court of appeal held that the Nollan/Dolan “rough proportionality” test did not apply to a facial takings challenge to a rent control ordinance. For discussion, see § 65.21[2].

Development Moratoria. In Monks v. City of Rancho Palos Verdes (2008) 167 Cal. App. 4th 263, the court found that a city resolution implementing a moratorium on construction in an ancient landslide area deprived plaintiffs’ land of all economi-
cally beneficial use and therefore effected a permanent taking of plaintiffs’ property. See § 65.22[3].

Coastal Regulation — Application for Development Permit — Notice Requirements. In North Pacifica LLC v. California Coastal Comm’n (2008) 166 Cal. App. 4th 1416, the court found that neither the California Coastal Act nor regulations promulgated under it provide a nullification remedy for violations by the Coastal Commission of notice requirements. Thus, the developer could not obtain a writ prohibiting the Commission from considering a citizen’s appeal challenging the validity of a development permit on the basis that the Commission did not comply with the regulation. See § 66.47[3].

Coastal Regulation — Permit Conditions. In Ocean Harbor House Homeowners Assn. v. California Coastal Comm’n (2008) 163 Cal. App. 4th 215, the court held that the Coastal Commission acted within its jurisdiction in imposing a mitigation fee on a homeowners’ association as a condition for a permit to build a seawall. See § 66.49[2].

Agricultural Preservation — Incorporation of Laws on Renewal of Williamson Act Contract. In County of Humboldt v. McKee (2008) 165 Cal. App. 4th 1476, the court found that because Williamson Act contracts renew automatically on each anniversary date, the parties enter into a new contract on each anniversary date. Thus, at the time of renewal all applicable laws and ordinances then in existence become part of the contract. See § 70.21[3A].

Agricultural Preservation — Rescission of Williamson Act Contract for Open Space Uses. Legislation [2008 Stats., ch. 503] provides that before rescinding a contract for the purpose of restricting land by an open space contract or by entering into an open space agreement, the city or county must determine that the parcel or parcels are large enough to provide open space benefits by providing habitat for wildlife, or preserving its natural characteristics, beauty, or openness for the benefit and enjoyment of the public. See § 70.24[4][c].

Agricultural Preservation — Resolution of Potential Material Breach. The Legislature has provided [2008 Stats., ch. 503] that if a potential material breach of a Williamson Act contract involves extinguating circumstances, the city or county and the landowner may agree to request that the Department of Conservation meet and confer with them for the purpose of developing a resolution of the potential material breach. See § 70.25[2][h].

Boundary Changes — Authority of Local Agency Formation Commission. The California Attorney General has concluded [2008 Cal. AG LEXIS 7] that a LAFCO has the authority to enlarge the boundaries of a proposed incorporation beyond those set forth in the petition for incorporation. See § 73.13[2][b].

Forestry Development

Timber Harvesting — Approval of Sustained Yield Plan. Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal. 4th 459 concerned challenges to regulatory approvals relating to the Headwaters Agreement between Pacific Lumber Company and the state and federal governments. The California Supreme Court found that (1) CDF did not properly approve an identifiable Sustained Yield Plan; (2) any newly submitted SYP had to include an adequate analysis of the cumulative impacts of Pacific Lumber’s timber harvesting activities at the individual planning watershed level consistent with the
Forest Practice Rules and sufficient to support Pacific Lumber’s long term sustained yield estimate; and (3) the state Incidental Take Permit was deficient inasmuch as it included “no surprises” clauses inconsistent with Pacific Lumber’s statutory duty to fully mitigate the impacts of its incidental take. For coverage, see §§ 80.13[5][c] (SYP approval), 80.13[9][c][l][v] (cumulative impacts), 81.55[2] (incidental take permit).

Climate Change

Recent Litigation. The section on climate change litigation has been updated and expanded. The section now includes coverage of:

- Statutory claims under the Clean Air Act, Endangered Species Act, National Environmental Protection Act, California Environmental Quality Act, and other statutes;
- Nuisance claims; and
- Preemption Litigation.

For complete coverage, see § 85.04.

Regional Land Use and Transportation Planning. In 2008 the Legislature enacted landmark legislation [2008 Stats., ch. 728 (SB 375)] seeking to promote regional land use and transportation policies that contribute to the greenhouse gas emission reductions required under the California Global Warming Solutions Act of 2006. Chapter 85, Climate Change, has been updated with discussion of:

- The land use and transportation policies set forth in SB 375;
- GHG reduction targets under SB 375;
- Regional planning to achieve the targets;
- Transportation funding allocation; and
- Provisions in SB 375 for CEQA streamlining and exemptions.

Tips as to whether the legislation will work to meet California’s GHG reduction goals is also included. For coverage, see § 85.07.

Green Building Standards. A new section has been added covering the July 2008 adoption by the California Building Standards Commission of green building standards. See § 85.32.

Solid Waste

Review of Local Planning. 2008 legislation [2008 Stats., ch. 343] revises provisions addressing review by the California Integrated Waste Management Board of local planning. The legislation includes provisions governing the annual report to the CIWMB, the Board’s monitoring of compliance with the “source reduction and recycling element” and the “household hazardous waste element,” and review of SRRE and HHWE implementation. See § 90.34[5], [6].


Heavy Metals in Packaging. Legislation [2008 Stats., ch. 575] provides for enforcement and penalties related to the presence of heavy metals in packaging. The legislation includes provisions allowing the Department of Toxic Substances Control to enter and inspect solid waste facilities and secure samples for testing; for a defense to the imposition of administrative or civil penalties; and subjecting violators to a fine and/or imprisonment. See § 91.139[5].

Mercury Thermostat Collection and Recycling. The Mercury Thermostat Col-

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