California Environmental Law and Land Use Practice

Publication 102 Release 62 March 2015

HIGHLIGHTS

2014 Legislative Updating
- This release includes coverage of 2014 environmental and land use legislation.

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

Revised Chapters
- Ch. 54, Enforcement of Hazardous Waste Management Requirements.
- Ch. 57, Hazardous Waste and Cleanup Fees.
- Ch. 91, Solid Waste Facilities, has been revised and updated and is now titled Responsibilities of Regulated Parties Under Solid Waste Law.

Environmental Litigation


California Environmental Quality Act (CEQA)

Tribal Cultural Resources. 2014 Cal. Stats., ch. 532, established a new category of resources in CEQA called “tribal cultural resources” that requires consideration of tribal cultural values in addition to scientific and archaeological values when determining impacts and mitigation with respect to sites, features, places, objects, and landscapes with cultural value to California Native American tribes. The legislation includes provisions addressing consultation on mitigation, alternatives, and significant effects and confidentiality of information concerning tribal cultural resource. See § 21.11.

Water Quality

Stormwater Resource Planning. 2014 Cal. Stats., ch. 555, enacted the Stormwater Resource Planning Act. The Legislature found and declared that improved management of stormwater and dry weather runoff, including capture, treatment, and reuse by using the natural functions of soils and
plants, can improve water quality, reduce localized flooding, and increase water supplies for beneficial uses and the environment. See § 30.44[4].

**Water Quality, Supply, and Infrastructure Improvement Act of 2014.** 2014 Cal. Stats., ch. 188, the Water Quality, Supply, and Infrastructure Improvement Act of 2014, authorizes the issuance of bonds in the amount of $7.54 billion to provide funding to ensure more reliable water supplies, the restoration of important species and habitat, and a more resilient and sustainably managed water infrastructure. See § 31.09[3].

**Sustainable Groundwater Management Act.** The Sustainable Groundwater Management Act (2014 Cal. Stats., ch. 346) applies to all groundwater basins in California and provides for the creation of groundwater sustainability agencies. For discussion, see § 31.09[4].

**Lempert-Keene Act.** Provisions of the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act have been revised (2014 Cal. Stats., ch. 35). For example, amendments were made to definitions; administration of the Act; California’s oil spill contingency plan, which provides a blueprint for the state’s response to oil spills; and provisions ensuring financial responsibility of potential oil spillovers and those governing the funding of prevention and response programs. See §§ 33.60–33.68.

**Hazardous Waste and Toxic Substances**

**Exemption of Hazardous Waste Management Activities.** 2014 Cal. Stats., ch. 544, repealed Health & Safety Code § 25150.6 relating to the adoption of regulations to exempt hazardous waste management activity from statutory requirements. The legislation also enacted new Health & Safety Code § 25150.65, which provides that any regulation that was adopted before January 1, 2008, pursuant to former § 25150.6, remains valid unless repealed. See §§ 51.27, 53.04.

**Transport of Oil Cargo by Rail.** 2014 Cal. Stats., ch. 533, enacted provisions governing the transportation of oil cargo by rail. The legislation includes the requirement that a rail carrier prepare and submit to the Office of Emergency Services commodity flow data for the prior three months broken down by county and track route relevant to the 25 largest hazardous material commodities transported through the state, including tank cars loaded with oil cargo. See § 52.05[8].

**Treatment, Storage, and Disposal Facilities—Interim Status.** To address hazardous waste facilities that have been operating under interim status permits for long periods of time, 2014 Cal. Stats., ch. 833, provides that interim status granted for a facility before January 1, 2015, will terminate on January 1, 2020, or on the date DTSC issues a final permit decision on the application for a hazardous waste facilities permit, whichever is earlier. See § 53.13[5].

**Revised Chapter.** Ch. 54, *Enforcement of Hazardous Waste Management Requirements*, has been fully revised and updated. The revised chapter covers:

- Activities subject to enforcement; types of enforcement; powers of the Department of Toxic Substances Control; the role of state and local agencies; and trends in enforcement. See §§ 54.01, 54.02.
- Government investigative authority and methods, with coverage of investigative tools; inspections; monitoring, recordkeeping, and reporting requirements; information requests and administrative
subpoenas; and criminal investigations. See §§ 54.10–54.14.

- An overview of enforcement strategies, including discussion of the threshold issues for enforcement such as determining the class of violations and the type of violator. See § 54.20.

- Administrative enforcement, including coverage of enforcement orders requiring corrective action; the impositions of administrative penalties; the determination of penalty amounts; orders for less serious violations; remedial administrative authorities; and permit actions, such as the suspension and revocation of permits. See §§ 54.25–54.45.

- Civil enforcement. This Part covers injunctive authority; civil penalty authority; persons subject to liability; the determination of penalty amounts; settlement; and special enforcement situations, such as bankruptcy and enforcement at federal facilities. See §§ 54.50–54.56.

- Criminal enforcement. This Part covers the bases of criminal liability; persons subject to liability; determination of fines and imprisonment; settlement; and parallel civil and criminal proceedings. See §§ 54.60–54.65.

- Other enforcement authorities, such as enforcement by regional water quality control boards, Environmental Protection Agency enforcement; the independent enforcement authority of public prosecutors; and citizen enforcement. See §§ 54.70–54.74.

- Collateral effects of enforcement, with discussion of penalty assessments for criminal fines; disqualification for contracts; disclosure requirements; and tax and insurance consequences. See §§ 54.80–54.83.

**Revised Chapter.** Ch. 57, *Hazardous Waste and Cleanup Fees*, has been comprehensively revised and updated by attorneys at Pillsbury Winthrop Shaw Pittman. The revised chapter covers:

- The history and use of accounts and fees. See § 57.01.

- The distinction between fees and taxes, including coverage of Propositions 26 and 218. See § 57.02.

- The relationship between the Department of Toxic Substances Control and the Board of Equalization. These sections discuss the Memorandum of Agreement and the classification of waste class. See §§ 57.10–57.12.

- Issues surrounding confidentiality. See §§ 57.20–57.22.

- The various Hazardous Waste Control Law fees, including coverage of the generator fee and exemptions; the hazardous waste manifest fee; the environmental fee; the generator identification number verification fee; the waste classification fee; the disposal fee; the permit activity fee; the facility fee; and fees for tiered permit units, including permit-by-rule, conditional authorization, and conditional exemption tiers. See §§ 57.30–57.40.

- Hazardous Substance Account Fees, with discussion of collecting “costs” as opposed to “fees”; cost recovery; and site mitigation ac-
tivity fees. See §§ 57.50–57.52.

- Board of Equalization administrative procedures. This Part covers statutory authority and registration; returns and payments; determinations; challenging fee assessments; petitions for redetermination; board hearings; collection of fees and claims for refund; suits for refund; relief from penalties; and the Taxpayers’ Bill of Rights. See §§ 57.60–57.73.

- Settlement with the Department of Toxic Substances Control, including coverage of the Department’s authority; settlement guidelines and meetings; and Board action during settlement negotiations. See §§ 57.80–57.83.

**Underground Storage Tanks—Closure.** 2014 Cal. Stats., ch. 546, requires the owner or operator of an underground storage tank to permanently close that tank if the tank meets certain conditions. See § 58.21[10].

**Underground Storage Tanks—Penalties and Cleanup Fund.** 2014 Cal. Stats., ch. 547, provides for penalties against an owner or operator of an underground petroleum storage tank who provides false information or makes misrepresentations in any claim submitted to the Underground Storage Tank Cleanup Fund. Provisions addressing disqualification from receiving moneys from the Fund are also included. Further, the legislation establishes a Site Cleanup Subaccount and an expedited claim account. See §§ 58.21[11][f]–[h], 58.21[13][j]–[l].

**Medical Waste.** 2014 Cal. Stats., ch. 564, made significant changes to the Medical Waste Act, which subjects wastes typically generated by the medical industry to extensive regulation. See § 58.26.

**Land Use**

**Penalties for Violation of Coastal Act.** 2014 Cal. Stats., ch. 35, subjects landowners in violation of the public access provisions of the California Coastal Act to an administrative civil penalty, which may be assessed for each day the violation persists. See § 66.58[6].

**Scope and Limitations of Initiative and Referendum Power—CEQA Exemption.** In Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal. 4th 1029, the California Supreme Court found that, in contrast to statewide initiatives, which may be placed directly on the ballot, the Legislature created an indirect process for city and county initiatives which can only be submitted to voters if they have been presented to, but not enacted by, the local legislative body. The Court further held that CEQA compliance is not required before the legislative body submits an initiative to voters. See § 75.03[5][c].

**Wildlife Preservation**

**Habitat Restoration and Enhancement Act.** The Habitat Restoration and Enhancement Act, 2014 Cal. Stats., ch. 604, provides for substantial permitting efficiency and thus encourages increased implementation of voluntary, environmentally beneficial, small-scale habitat restoration projects. The Act includes provisions as to requesting approval of habitat restoration projects, approval of such requests, and suspension of projects. It also establishes the Habitat Restoration and Enhancement Account. See § 81.94.

**Climate Change**

**Regulation of Stationary Sources of Greenhouse Gas Emissions.** In Utility Air Regulatory Group v. EPA (2014) 134 S. Ct. 2427, 189 L. Ed. 2d 372, the U.S. Supreme
Court upheld only portions of EPA’s regulation of greenhouse gas emissions through limits in Title V permits under the Prevention of Significant Deterioration (PSD) program and through the Tailoring Rule. The Court held that, contrary to EPA’s interpretation, the Clean Air Act does not require regulation of stationary sources subject to the PSD program because EPA had regulated GHG emissions from mobile sources. EPA had no discretion to increase the number of sources subject to the new limits by setting numerical thresholds different from those in the Act, as EPA had attempted with the Tailoring Rule. See § 85.03[2][a][iv].

**Efforts to Compel Analysis of Greenhouse Gas Emissions.** In *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal. App. 4th 788, the Court of Appeal held that the City of San Jose did not violate CEQA guidelines for GHG emissions by failing to analyze such emissions when adopting an addendum to its 1997 environmental impact report for the City’s International Airport Master Plan. See § 85.03[2][c][ii][A].

**Challenges to Greenhouse Gas Emissions Mitigation Measures.** In *Rominger v. County of Colusa* (2014) 229 Cal. App. 4th 690, the court held that the County of Colusa had reasonably concluded that a subdivision project on industrial land would achieve a 35% reduction in GHG emissions below business-as-usual levels through compliance with statewide regulatory mitigation measures. And in *Sierra Club v. County of San Diego* (2014) 231 Cal. App. 4th 1152, the court found that the County of San Diego failed to implement a mitigation measure from its general plan. See § 85.03[2][c][ii][C].

**Solid Waste**

**Revised Chapter.** Chapter 91, *Solid Waste Facilities*, has been revised and updated. The chapter is now titled *Responsibilities of Regulated Parties Under Solid Waste Law*, and covers the following topics:

- An introduction to the responsibilities of regulated parties in California (Part A). See § 91.01.
- Solid waste generators (Part B), with sections on the storage of discarded solid waste pending collection; collection and transportation; recyclables scavenging; disposal bans; large venue events; and metallic discards. See §§ 91.10–91.16.
- Waste haulers and transporters (Part C), with sections on applicable regulations; compliance with local law; ownership of collected solid waste; discarded solid waste storage; transportation of waste and vehicle specifications and safety requirements; transporting waste tires and used tires; collecting, storing, and transferring mercury/rechargeable batteries; and household hazardous waste. See §§ 91.20–91.29.
- Manufacturers of solid waste (Part D), with sections on recycled plastic containers, trash bags, and first in the nation legislation placing bans on plastic shopping bags; production and sales bans, such as the ban on the manufacture and sale of mercury oxide button cell batteries; fees applicable to beverage containers; recycling incentive programs; handling fees for California Redemption Value (CRV) recycled containers; required notices applicable to packaging, labeling, and advertising; and product stewardship pro-
grams, such as the Architectural Paint Recovery Program and the stewardship program for discarded carpets. See §§ 91.40–91.99.

- Wholesalers and distributors of solid waste (Part E), with sections on redemption payments and refund value on beverage containers; recycled newsprint; and mercury thermostat collection. See §§ 91.100–91.102.

- Retailers (Part F), with coverage of take back requirements; fees; labeling and signage; and sales bans. The Part includes coverage of 2014 Cal. Stats., ch. 850, California’s state-wide ban on single use plastic shopping bags. See §§ 91.110–91.114.

- Consumers (Part G), with coverage of purchasing requirements applicable to commercial printers and publishers. See §§ 91.120–91.122.

- Miscellaneous businesses (Part H), including mandatory commercial recycling for businesses and multi-family residential units. See §§ 91.130–91.132.

- Local jurisdictions (Part I), with coverage of jurisdictions’ solid waste responsibilities, obligations, powers, and authority; grants and incentive payments; and local government programs, such as household hazardous waste collection programs. See §§ 91.140–91.173.

- State agency purchasing requirements (Part J), with coverage of requirements to purchase recycled oil, recycled tires, and recycled concrete. See §§ 91.180–91.189.
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   - White Publication Table of Contents
   - White Revision pages

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