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to a development based on its aesthetic impacts are sufficient to create a "fair argument" that the project "may" have a significant impact under CEQA.

WATER RIGHTS, POLICY AND SUPPLY

Page 12 OEHHA has issued a draft framework to help the State Water Resources Control Board harness and analyze data to meet the state's mandate of a human right to water.

Page 12 The California Department of Water Resources has finalized a list of groundwater basins around the state that will have to develop plans to curb pumping in order to comply with the Sustainable Groundwater Management Act.

CEQA

Office of Planning and Research Proposes Update to CEQA Climate Change Advisory

The Governor's Office of Planning and Research (OPR) has issued a draft updated advisory on analyzing climate change impacts in reviews under the California Environmental Quality Act (CEQA). OPR has also updated a related technical advisory on evaluating transportation impacts under CEQA.

The update is the first since OPR released a climate change advisory in 2008. The advisory, which provides non-binding advice to agencies conducting CEQA reviews, incorporates changes in the law, regulation, science and case law related to climate change and CEQA, according to OPR. The advisory also incorporates recent changes OPR made to its overall CEQA Guidelines [see **Brown Administration Issues Revisions to Proposed CEQA Guidelines Changes**, July 30, 2018 and **Office of Planning and Research Issues Major Update to CEQA Guidelines**, December 17, 2017].

Among its advice in potential approaches to analyzing greenhouse gas (GHG) emissions under CEQA, the draft update counsels agencies to tread carefully when determining whether a project's GHG emissions are significant, and therefore must be mitigated.

"Lead agencies should not dismiss a

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proposed project's direct and/or indirect climate change impacts without careful consideration, supported by substantial evidence," according to OPR.

It also sets out possible ways an agency could set the threshold for what constitutes significant GHG emissions from a project:

- Use a threshold based on efficiency rather than an absolute number, which "would allow lead agencies to compare projects of various types, sizes, and locations equally, and determine whether a project is consistent with the state's reduction goals;"
- Use a threshold that compares the project's consistency with locally or regionally-approved plans, regulations or policies that cut GHG emissions; and
- Use an absolute numerical or quantitative threshold of GHG emissions that is based on compliance with statewide GHG reduction goals.

While agencies may use a threshold based on the project's compliance with state GHG reduction goals, it may be challenging to calculate it based on how much GHG emissions the project would cut as compared to a "business as usual" (BAU) scenario; "Correlating the project-level percentage reduction with the statewide goals may be difficult to achieve in practice and thus this [BAU] threshold may not be readily implemented," according to OPR.

The advisory also provides guidance on how to develop mitigation measures to reduce any significant impacts to below significant levels. It recommends agencies develop a "loading order" of mitigation measures, starting with on-site measures, such as project design. After that, agencies could look at off-site mitigation, such as a local or regional GHG mitigation projects or carbon credits.

"CEQA does not prohibit off-site mitigation measures, but lead agencies must support with substantial evidence in the record their determination that mitigation will be effective and fully enforceable," according to OPR.

The advisory includes an appendix summarizing some of the guidance in OPR's separate and newly updated Technical Advisory on Evaluating Transportation Impacts from CEQA. Among the suggestions OPR makes is for agencies to avoid truncating or discounting vehicle trips by, if possible, estimating the full extent of short-term and long-term vehicle travel from a project regardless of jurisdictional boundaries.

In a second appendix attached to the climate change advisory, OPR sets out parameters for an agency to streamline GHG analysis under CEQA for certain transportation projects and projects that cut vehicle miles traveled (VMT). The streamlining would apply to the GHG emissions from the operation of the project, not construction-related GHG emissions.

Residential and commercial development projects which meet the following criteria may be considered to have less-than significant GHG emissions related to transportation and building energy:

- The project results in below threshold VMT either without mitigation or after mitigation. For residential and commercial developments the threshold would be generating vehicle travel 15 or more percent below existing per capita resident/employee levels measured against the region or city. For retail developments, the threshold would be any reduction in VMT;
- The project does not use fossil fuels, but only electricity;
- The project uses only appliances certified by the U.S. Environmental Protection Agency under its Energy Star program; and
- The project is "in alignment" with state Title 24 energy efficiency building standards in effect when the project is being built.

Transportation projects, such as transit or active transportation projects, could also qualify for streamlining because they tend to cut GHG emissions by reducing VMT, according to OPR.

OPR is accepting public comment on the draft climate change advisory until March 15, 2019. It is specifically seeking comments answering the following two questions: "Are there any important points that we missed that we should address? Do you have any suggestions on how to clarify the topics that we did address?"

—Fiona Smith

CLIMATE CHANGE

State Issues First Inventory and Climate Plan for Natural and Working Lands

The California Air Resources Board (CARB) has released its first ever plan for tackling climate change through improvements to natural and working lands (NWL). It also released its first inventory of the carbon footprint of the state's land and plants, showing that in recent years, largely due to wildfires, they have released more carbon than they've sequestered.

"California's natural and working lands, and the multitude of benefits they provide, are changing and, in many areas, deteriorating or disappearing," according to CARB's draft California 2030 Natural and Working Lands Climate Change Implementation Plan. These lands cover more than 90 percent of California and include rangeland, forests, woodlands, wetlands and coastal areas, grasslands, shrubland, farmland, riparian areas, and urban green space," according to CARB. "They provide life sustaining resources including clean air and water, food, and fiber.

They are also a major carbon sink. For example, CARB's new NWL inventory shows that in 2014, California lands held an estimated 5.5 billion metric tons of ecosystem carbon above and below ground. Between 2001 and 2014 NWL lost an estimated 170 million metric tons (mmt) of carbon, or a six percent reduction, largely due to wildfire, according to CARB.

The draft plan sets a preliminary target for the state to get 15 to 20 mmt of carbon dioxide equivalents (CO_2e) in GHG reductions from NWL by 2030. The eventual goal is to reach net zero or negative GHG emissions. The 2030 target follows the one CARB set in its scoping plan setting out the state's overall strategy to get GHG emissions to 40 percent

below 1990 levels by 2030. By comparison, the scoping plan calls for the state's cap-and-trade program to achieve 236 mmtco2e in reductions and for mobile source reductions to account for 67 mmtco2e by 2030 [see **Air Resources Board Approves Plan to Meet 2030 Climate Change Goal**, December 20, 2017].

"To achieve the deep GHG reductions needed to avoid the most catastrophic impacts of climate change, the state must boldly and immediately increase its efforts to conserve, restore, and manage, natural and working lands," according to the plan.

It calls for the state to "more than double the pace and scale of state-supported land activities by 2030" and "strive to increase fivefold the acres of cultivated lands and rangelands under state-funded soil conservation practices, double the rate of state-funded forest management or restoration efforts, triple the rate of state-funded oak woodland and riparian restoration, and double the rate of state-funded wetland and seagrass restoration through 2030."

The plan breaks the specific GHG reduction efforts into four categories: conservation, forestry, restoration and agriculture.

Under conservation, the plan calls for a 50 to 75 percent reduction in the annual rate of land conversion by "directing new growth to existing communities without displacing current residents."

Under forestry, the plan would include projects to improve forest health and reduce wildfire severity, such as prescribed fire and mechanical thinning. It would also include less intensive logging regimes, reforestation and increased use of biomass that would otherwise be ground up or burned. The plan sets specific restoration goals for different types of ecosystems, including riparian areas, oak woodlands, wetlands, seagrass and montane meadows. It also calls for a 20 percent expansion of the urban forest canopy.

For agriculture, the plan would increase the use of compost and agroforestry, which involves integrating trees, shrubs and other woody plants into farmscape. It would boost prescribed or rotational grazing, as it "may increase carbon sequestration on working rangelands by preventing overgrazing and increasing grass productivity." It would also call for more cover cropping, mulching, no-till and reduced till practices on farms to help with carbon sequestration.

"The level of effort suggested in this plan will require productive collaboration and work across jurisdictional boundaries," according to the draft plan. "Success will also rely on engaging willing landowners and local, regional, and tribal stewards; forming new partnerships; advancing innovations in technology; and supporting bioresource markets."

"Intensifying efforts through multiple financial tools and investment sources and new, innovative approaches, in addition to augmenting established effective practices, will help the state achieve these goals," according to the plan. "Success will require research, investment, and actions from agencies and landowners beyond the state's jurisdiction."

In a nod to the draft plan in his recently proposed budget, Gov. Gavin Newsom called for more than doubling annual spending on California Department of Food and Agriculture's (CDFA's) Healthy Soils program to $18 million. It would implement soil conservation projects on 500,000 acres by 2030 and sequester 5.3 million tons of carbon, according to the budget [see **Newsom Proposes First Budget, Cap-and-Trade Spending Plan**, January 28, 2019].

The California Environmental Protection Agency (CalEPA), CDFA, the California Natural Resources Agency and the Strategic Growth Council will work with CARB to implement the NWL strategies through existing and potentially new programs, according to the plan.

The agencies, led by CARB, also set out the next priorities for integrating NWL policies into larger climate change work at the state level, including:

- "Develop an estimate of the full potential for natural and working lands to contribute to our climate goals, including carbon neutrality;"
- As called for in the 2018 law SB 901, "develop a historic baseline of GHG emissions from California's natural fire regime reflecting conditions before modern fire suppression … to better understand the level of carbon loss expected from naturally occurring fire;" and
- "Consider other mechanisms for driving additional actions in this sector including but not limited to: new markets and funding mechanisms such as green loans; policy levers such as mitigation and carbon banking; and regulatory changes such as regulatory alignment or revisions of the California Environmental Quality Act."

CARB is accepting public comment on the draft plan until Friday, February 8, 2019.

—Fiona Smith

Legislative Analyst's Office Report Recommends Revisiting Some State Climate Policies

The effectiveness of many of the state greenhouse gas (GHG) reduction programs are not clear and the Legislature should consider requiring better program evaluations and reducing the economic costs of the state's numerous climate initiatives, according to two reports issued by the Legislative Analyst's Office (LAO).

The 2017 law AB 398 called on the LAO to report on the economic costs and benefits of programs aimed at meeting the state's ambitious climate goals. In response, the LAO issued one report taking an overview of the state's entire climate policy and did a second more detailed report examining GHG reduction policies in the transportation sector. The office will issue future reports looking at other specific sectors within climate policy such as electricity generation and short-lived climate pollutants, according to LAO.

Overview of California Climate Policies

"The broad scope of state climate policies, the wide variety of benefits and costs they generate, and the complicated interactions between them make it chal-

lenging to estimate their effects," according to the LAO.

The challenges include controlling for variables unrelated to climate policy, according to the LAO.

"Many different factors affect the costs and benefits of meeting the state's GHG limits, including economic conditions, technological changes, and federal policies that would have otherwise occurred in the absence of state climate policies," according to the report.

It is also difficult to assess the effects of the policies because certain GHG emissions are not included in the state's GHG inventory, according to the LAO. The inventory includes all in-state emissions plus emissions from imported electricity, but it does not include biofuels, "upstream" oil production emissions from imported gasoline, and the emissions from goods that are imported into California, such as cement, according to the LAO.

Emissions from leakage, in which production shifts out of state, and carbon offsets achieved through out-of-state GHG reduction projects, are also not accounted for. While emissions from natural and working lands are also not included in the inventory the 2016 bill SB 859 directed CARB to develop an inventory for natural working lands. The agency recently released it draft Natural and Working Lands Climate Change Implementation Plan and inventory [see **State Issues First Climate Plan for Natural and Working Lands**, January, 28, 2019].

The LAO identifies areas for the Legislature to consider focus on:

- Rely more on economy-wide carbon pricing, such as cap-and-trade, to get GHG reductions at a lower cost;
- Employ non-carbon pricing or "complementary" policies, "only in circumstances when they are well-targeted and justified to ensure they are achieving benefits that carbon pricing would not." Examples include policies that promote innovation and that reduce traditional air pollutants;
- Focus on policies "most likely to encourage GHG reductions in other jurisdictions to maximize the overall GHG reduction benefits for California;" and
- Improve the ability to evaluate GHG policies by requiring additional information in statewide GHG inventory reports, making more use of independent reviewers to assess policies, requiring early planning of retrospective evaluations and increasing policy transparency.

Climate Policies Related to Transportation

Of all the sources of GHG emissions in the state, transportation is the largest piece—accounting for 39 percent of emissions in 2016, according to the LAO. And vehicle emissions are on the rise rather than declining [see **CARB Calls for More Action to Cut Vehicle Use and Meet Climate Targets**, December 14, 2018].

Within transportation, 69 percent of emissions are from passenger vehicles, 22 percent from heavy-duty vehicles and the remainder come from ships, airplanes and rail.

In its report on transportation climate policies, the LAO analyzed the many programs aimed at cutting GHG emissions from transportation, dividing them into four categories—light-duty vehicles, heavy-duty vehicles, low carbon fuels and vehicle-miles traveled.

Its overall findings in regard to the transportation programs were that:

- The overall economic impacts and benefits of the policies are unclear and the Legislature may want to ensure "a more consistent evaluation" of policies;
- The large number of programs creates challenges including: making it complicated to isolate any one program's effect, emission reductions from one policy could offset those from a different policy and administrative costs are higher;
- The policies are relatively costly although ones that reduce co-pollutants, encourage innovation or ensure zero-emission vehicle (ZEV) infrastructure is built may be worth it. The Legislature could consider modifying or eliminating some of the higher-cost programs, such as the Low Carbon Fuel Standard and ZEV rebates, and relying more on cap-and-trade or a carbon tax to get less costly emission reductions; and
- It is also hard to assess whether the programs are having any effects on transportation emissions in other jurisdictions.

—Fiona Smith

ENFORCEMENT AND LITIGATION

Regulators To Crack Down on Violators of Pesticide Training and Application Rules

The California Department of Pesticide Regulation (DPR) has announced plans to increase enforcement of rules related to the training and licensing of pesticide applicators in the wake of three recent legal settlements.

In what DPR called the "most egregious" of the three cases, it alleged that the Visalia-based company P&L Marketing Inc. took and copied parts of DPR's California Agricultural Pesticide License Exams to share with customers taking its test preparation classes.

"Part of DPR's function is to ensure that pesticides, including those used in agriculture, are handled properly and the individuals handling them are properly trained and licensed," said Teresa Marks, chief deputy director and current acting director of DPR, in a statement. "These exams are a way of ensuring that applicators have the required knowledge of how to apply pesticides in a manner that does not adversely affect themselves, other individuals, or the environment. People who cheat the system can inadvertently endanger the public."

The company admitted to the cheating and has agreed to pay a $50,000 fine, according to DPR. The agency "has re-written many exams to continue to ensure the integrity of its examination process and will be increasing its focus on this issue in the future," according to

DPR.

The other two settlements involved Daniel Ourtiague, who admitted to submitting false information in applications to renew his qualified pesticide applicator license, and Richard Garriott, who admitted to falsifying continuing education certificates related to pesticide use.

—Fiona Smith

California, Feds Reach $500 Million Settlement with Fiat-Chrysler over Car Emissions

The state of California and the U.S. Department of Justice have reached a more than $500 million settlement with Fiat Chrysler Automobiles N.V. (FCA) over allegations the company used software tricks to flout diesel engine emission standards.

Like in the recent case of Volkswagen, prosecutors say that FCA installed defeat devices in vehicles so that the required pollution controls would only operate when the car was undergoing testing. [see: **State Reaches Final $153 Million Settlement with Volkswagen Over Diesel Emissions**, July 30, 2017].

The California Air Resources Board (CARB) and the U.S. Environmental Protection Agency (EPA) detected the problem in FCA vehicles through new testing instituted in the wake of the Volkswagen scandal. CARB and EPA detected emissions violations, including excess nitrogen oxides (NOx), involving more than 100,000 EcoDiesel Ram 1500 and Jeep Grand Cherokee vehicles in model years 2014 to 2016, according to the proposed consent decree. In Re: *Chrysler-Dodged-Jeep EcoDiesel Marketing*, Consent Decree, 3:17-md-02777-EMC, U.S. District Court, Northern District of California, filed January 10, 2019.

The settlement resolves all civil violations, but does not resolve FCA's potential criminal liability, according to the EPA announcement.

The overall deal imposes $305 million in civil penalties on FCA, of which CARB will get $45.8 million in penalties and $19 million to fund mitigation for the excess pollution. The California attorney general's office will separately get $13.5 million for costs and for alleged violations of California consumer protection laws, including the Unfair Competition Law.

Under the agreement, FCA must recall and repair vehicles with defeat devices and offer car owners an extended warranty at an estimated cost of $105 million. The company must continue to test vehicles over five years to ensure they continue to meet emission standards. It must also make internal company improvements to avoid future violations, including hiring an auditor to ensure it properly implements the consent decree. The costs of the vehicle repairs and mitigating the excess air pollution outside of California, is estimated to cost between $60 to $80 million, according to EPA.

The company has separately reached a $300 million settlement of claims filed by those who owned or leased affected vehicles, according to EPA.

The consent decree is subject to court approval and the Department of Justice has opened a 30-day public comment period on the settlement.

—Fiona Smith

State Water Board Faces Lawsuits Over Plan to Cut San Joaquin River Diversions

The State Water Resources Control Board (SWB) has been sued over its plan to help fish by cutting water diversions from the San Joaquin River—several lawsuits were filed by water districts saying the cuts go too far and another lawsuit filed by fishing and environmental advocates argues it doesn't do enough to help imperiled fish.

In December, SWB voted to approve its first update in decades to the Lower San Joaquin River and Southern Delta portion of the Bay-Delta Water Quality Control Plan. The aim was to reverse a crash in fish populations, particularly salmon, in the rivers that flow out through the Sacramento-San Joaquin River Delta.

The plan sets updated flow objectives for the San Joaquin River and, for the first time, sets objectives on its three main tributaries—the Stanislaus, Tuolumne and Merced Rivers.

It calls for 40 percent of the rivers' unimpaired flows, meaning flows without human diversion, to remain intact. Under the 40 percent standard, average annual instream flows between February and June would increase by 288,000 acre-feet of water, or by 26 percent compared to current flows. It also sets salinity standards for water flowing through the South Delta in order to protect water used to irrigate crops in that region. SWB left open the opportunity for affected water users to reach a comprehensive voluntary agreement in which they would lessen the hit to their water supplies in exchange for projects to improve fish habitat [see **State Water Board Approves Cuts to San Joaquin River Water Use to Aid Imperiled Fish**, December 16, 2018, **State Water Board Advances Plan to Cut Water Use in Rivers Feeding Bay-Delta**, July 30, 2018 and **State Water Resources Control Board Proposes Dramatic Increase in San Joaquin River Flows**, September 30, 2016].

Environmental groups have been seeking an update to the water flow standards for years, and point to a 2010 SWB flow criteria report that concluded 60 percent of flows must stay in rivers to ensure a healthy fishery. Affected water districts have strongly opposed the plan, arguing it will be economically devastating and that it fails to address other stresses on fish apart from lack of water. Now those water districts have filed multiple lawsuits alleging the SWB plan violates the California Environmental Quality Act (CEQA), Porter-Cologne Water Quality Control Act and the California and U.S. Constitutions.

Meanwhile, the Pacific Coast Federation of Fishermen's Associations (PCFFA), North Coast Rivers Alliance and the Winnemem Wintu Tribe filed their own lawsuit arguing the plan is flawed because it fails to give fish enough water.

Water District Lawsuits

The SWB failed to follow the processes laid out in Porter-Cologne for protecting all beneficial uses of water among other violations, according to the lawsuits filed by water districts.

Claims related to CEQA include that the SWB improperly split the plan up into multiple phases, failed to fully disclose and analyze project impacts, failed to consider a reasonable range of alternatives and adopted inadequate mitigation measures.

The suits also include claims that the SWB has violated the plaintiff's Constitutional due process rights, by in effect altering their water rights, and violated their right to compensation for a taking of property. The suits also claim the SWB is in violation of Article X Section 2 of the California Constitution which bars the waste or unreasonable use of water.

Lawsuits have been filed by the San Joaquin Tributaries Authority—a joint powers authority made up of the Modesto Irrigation District, Turlock Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District and the city and county of San Francisco. *San Joaquin Tributaries Authority v. California State Water Resources Control Board*, Petition for writ of mandamus, CV62094, Tuolumne County Superior Court, filed January 10, 2019.

The Modesto Irrigation District also filed its own separate suit. *Modesto irrigation District v. California State Water Resource Control Board*, Petition for writ of mandate under CEQA and complaint, (no case number), Sacramento County Superior Court, filed on January 10, 2019.

The Santa Clara Valley Water District has also sued. *Santa Clara Valley Water District v. California State Water Resource Control Board*, Petition for writ of mandamus and complaint for declaratory relief, (no case number), Santa Clara County Superior Court, filed January 11, 2019.

The suits seek a temporary restraining order and an injunction blocking the plan from moving ahead.

In an announcement of its decision to file suit, the Modesto Irrigation District called the SWB plan "misguided and devastating" and said that while it is pursuing legal action, the plaintiffs are pursuing a parallel effort "to present a voluntary agreement for the State Water Board's consideration in the coming months."

Fishing and Environmental Advocates

The Pacific Coast Federation of Fishermen's Associations (PCFFA), North Coast Rivers Alliance and the Winnemem Wintu Tribe filed a joint lawsuit alleging that SWB violated CEQA, the federal Clean Water Act, the Porter-Cologne Water Quality Control Act and the public trust doctrine in approving the plan update. *North Coast Alliance v. State Water Resources Control Board*, Petition for writ of mandate and complaint, 34-2019-80002063, Sacramento County Superior Court, filed January 25, 2019.

In regards to CEQA, SWB improperly split the project up into phases—addressing flows in the San Joaquin River and its tributaries in this update and flows for the Sacramento River and its major tributaries at a later date, according to the complaint. The agency also failed to properly address potential mitigation measures in the plan related to improving agricultural irrigation practices and adopted an adaptive management plan that lacks adequate detail on implementation.

The lawsuit also alleges that another part of the plan update, the adoption of loosened salinity levels for the South Delta violates anti-backsliding provisions in both the federal Clean Water Act and Porter-Cologne.

The groups claim that the update violates the public trust doctrine which requires the state to protect the state's navigable rivers, lakes, shorelines and fish for the public benefit.

"The project impermissibly promotes a non-public trust use—farmland irrigation—over the needs and at the expense (indeed, potential extirpation)—of the Delta's imperiled fish and wildlife, as documented by the Delta Flow Criteria Report, found by the Board in Resolution 2010-0039, and confirmed by experts during the years of public comment on the project," according to the lawsuit.

The lawsuit is a "a long overdue wake-up call that the State Water Board must now do its job to prevent the imminent extinction of this irreplaceable fishery," said Noah Oppenheim, PCFFA executive director, in an announcement of the lawsuit.

—Fiona Smith

GOVERNOR

Newsom Proposes First Budget, Cap-and-Trade Spending Plan

Gov. Gavin Newsom has proposed a $209 billion budget, which includes $1 billion in cap-and-trade revenue spending and a revived plan to ensure clean drinking water in disadvantaged communities. The new governor would boost overall spending by $8 billion compared to the 2018-2019 budget and would set aside $6.2 billion for natural resources and $4.2 billion for environmental protection.

Cap-and-Trade Spending

The $1 billion cap-and-trade spending plan largely sticks to the spending priorities laid out in previous plans [see **Governor Signs $201 Billion 2017-2018 Budget and Cap-and-Trade Spending Plan**, July 30, 2018].

Under the state's cap-and-trade program, the state auctions pollution allowances and is required to spend the proceeds on GHG reduction efforts. Of the total, 60 percent of auction revenue must be spent on high-speed rail, affordable housing and sustainable communities grants, intercity rail capital projects and low carbon transit operations. The budget proposal covers the 40 percent of discretionary cap-and-trade funds. Newsom's $1 billion spending plan includes:

- $220 million to the California Air Resources Board (CARB) for implementation of AB 617, which limits localized air pollution in burdened communities;
- $200 million to CARB for its Clean Vehicle Rebate program;

- $132 million to CARB for clean trucks, buses, and off-road freight equipment;
- $50 million to CARB for its Enhanced Fleet Modernization program, school buses and transportation equity projects;
- $165 million to the California Department of Forestry and Fire Protection (CalFire) for healthy and resilient forests; and
- $40 million to the Strategic Growth Council for Transformative Climate Communities.

The plan gives a major boost in spending on healthy soils, giving the California Department of Food and Agriculture (CDFA) $18 million, up from $7 million last year. The funds will be used "to provide incentives to farmers for agricultural management practices that sequester carbon, including cover cropping, reduced till, and compost application," according to the budget summary. The spending comes on the heels of CARB issuing its draft Natural and Working Lands Climate Change Implementation Plan [see **State Issues First Inventory and Climate Plan for Natural and Working Lands**, January 28, 2019].

Newsom also creates a new funding category—allocating $27 million in cap-and-trade funds to the Workforce Development Board for a new Apprenticeships in the Green Economy program.

Drinking Water

Despite $3 billion in spending since 2010 on more than 600 projects to help water suppliers address the lack of safe and affordable drinking water "many local water systems in the state, particularly those serving small disadvantaged communities, consistently fail to provide safe drinking water to their customers," according to the budget.

To tackle the problem, Newsom is advocating a plan Gov. Jerry Brown and several legislators tried but failed to push through last year, as seen in SB 623.

The Safe and Affordable Drinking Water Program would create a new funding source for safe drinking water projects by imposing fees on water users, fertilizer purchases and dairies.

Newsom's budget allocates $4.9 million in one-time funding for the State Water Resources Control Board (SWB) and CDFA to start building the proposed program including: "(1) implementation of fee collection systems, (2) adoption of an annual implementation plan, and (3) development of a map of high-risk aquifers used as drinking water sources," according to the budget.

The budget also calls for spending $168.5 million in Proposition 68 funds on safe drinking water projects, $10 million in general fund money on emergency water supplies for disadvantaged communities and $10 million in general fund money for technical assistance to help water systems comply with drinking water standards.

Forestry and Fire

In the wake of another devastating series of wildfires this past year in California, Newsom is proposing to spend a total of $213 million on fire prevention projects, which includes money allocated in the cap-and-trade spending plan. It is part of a plan to invest $1 billion in such projects over the next five years, according to the budget. The money will go to fuels reduction, including prescribed burns, disposal of illegal and dangerous fireworks and implementation of recently enacted wildfire legislation [see **2018 Forestry and Fire Signed Legislation**, November 5, 2018].

The Newsom administration "will be reviewing additional potential actions to remove barriers and expedite these critical projects," according to the budget.

A further $20.5 million is allocated to implement legislation from last year dealing with wildfires, including:

- $9.2 million for the California Public Utilities Commission "to address workload associated with wildfire cost recovery proceedings, reviewing and approving enhanced wildfire mitigation plans, and oversight of investor owned utility compliance with legislative requirements to reduce the risk of utility caused wildfires;"
- $3.4 million in cap-and-trade revenue for CARB to improve "air quality and smoke monitoring, forecasting, reporting and modeling activities and support local air district public education efforts to align with the anticipated increase in prescribed burns and other fuels reduction activities;" and
- $7.9 million for SWB and the Department of Fish and Wildlife "to review timber harvest plan exemptions, and inspect, permit, and enforce projects that improve forest health and vegetation management activities to mitigate negative impacts on water quality, wildlife, and the environment."

The budget also sets aside $120 million in general fund money to add aircraft to CalFire's firefighting fleet, $109 million in the ongoing replacement of the department's aged helicopter fleet and $64 million to expand firefighting surge capacity through new fire engines, heavy fire equipment and fire crews.

Newsom, along with the Governors of Washington and Oregon, sent a letter to President Donald Trump asking him to double current federal funding for wildfire prevention and response in the three states.

Exide Battery Plant Cleanup

Newsom is proposing a one-time $50 million boost in spending on the cleanup of properties near the shuttered Exide lead acid battery recycling facility in Vernon. The state allocated $176 million in 2016 to test about 10,000 properties for lead contamination and so far, has tested roughly 8,500 properties and cleaned up 560 properties, according to the budget. The cash infusion aims to speed cleanup over the next two years by allowing the Department of Toxic Substances Control "to clean up approximately 700 additional high-risk properties in which lead contamination exceeds the state standard of 80 parts per million," according to the budget.

—Fiona Smith

LEGAL

California Supreme Court Takes on San Diego Development Dispute

The California Supreme Court has granted review of a case in which a La Jolla

property owner seeking to build a single-family home is locked in a dispute with the city of San Diego over the project's environmental review and permitting. *Bottini v. City of San Diego*, Review granted, S252217, California Supreme Court, filed October 29, 2018.

The landowners in questions sued the city after the city council ordered them to conduct a full environmental review of their proposed project under the California Environmental Quality Act (CEQA). A full review was necessary because the family behind the project, the Bottini's, had demolished a historic 19th Century cottage on the lot before applying for the permit, the city council concluded. The council move reversed a city staff determination that the project was exempt from CEQA because it was a project involving a single-family home.

In its decision affirming the superior court and siding with the Bottini's, the 4th District Court of Appeal noted that the "city itself had previously voted against designating that cottage as a historical resource, declared that the cottage was a public nuisance, and authorized the Bottinis to demolish the cottage." *Bottini v. City of San Diego*, Opinion, D071670, 4th District Appellate Court, filed September 18, 2018.

"The demolition of the cottage that previously existed on the Bottinis' property is not a component of the Bottinis' residential construction project for purposes of CEQA," the 4th District Court of Appeal ruled. "Rather, the cottage was demolished due to the city's determination that the cottage was a public nuisance in need of abatement—an event that occurred before the Bottinis applied for a [coastal development permit]."

The trial court and appellate court rejected other claims by the Bottini's that the city's action had violated the takings, due process, and equal protection clauses of the California Constitution. In its review of the case, the state high court will take on a larger question brought up by the *Bottinis*' claims—what is the proper test for determining a taking under the California Constitution?

The city argues that under the California Constitution, the correct test is set out in the California Supreme Court decision *Landgate, Inc. v. California Coastal Com'n* (1998) 17 Cal.4th 1006. In that case, the court concluded that there is no taking if the "government's conduct substantially advances a legitimate state interest."

But siding with the *Bottini's* on this point, the appellate court ruled that it should follow the lead of the U.S. Supreme Court, which disavowed the "substantially advances" test for takings under the *U.S. Constitution in Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528. Instead, courts should apply the three-prong test set out in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, according to the appellate court.

—Fiona Smith

9th Circuit Upholds California's Low Carbon Fuel Standard Again

The 9th U.S. Circuit Court of Appeals has, for the second time, upheld the legality of California's Low Carbon Fuel Standard (LCFS), rejecting claims that it discriminates against out-of-state fuel producers. *Rocky Mountain Farmers Union v. Corey*, Opinion, 17-16881, U.S. Court of Appeals, Ninth Circuit, filed January 18, 2019.

Crude oil and ethanol producers and trade associations including the Rocky Mountain Farmers Union and the American Fuel and Petrochemical Manufacturers Association, have been fighting to overturn the LCFS since the California Air Resources Board (CARB) first launched it in 2009. The LCFS is part of the state's battle against climate change and requires the state to reduce the carbon intensity (CI) of fuels by 10 percent from 2010 levels by 2020. Recently finalized amendments https://www.arb.ca.gov/fuels/lcfs/rulemakingdocs.htm require a 20 percent CI reduction from 2010 levels by 2030 [see **CARB Issues Another Round of Proposed Changes to Low Carbon Fuel Standard**, September 9, 2018].

CARB assigns CI scores to various fuel types based on their life-cycle greenhouse gas (GHG) emissions from extraction, refining, transportation as well as land use changes. Suppliers with higher CI fuels must buy credits from those that generate credits for fuels with lower CI scores.

In their lawsuit, fuel producers allege that the LCFS violates the U.S. Constitution on its face by interfering with interstate commerce in violation of the Commerce Clause. The LCFS sets CI levels that favor in-state fuel producers and unfairly penalize ethanol and crude oil produced elsewhere, the plaintiffs claim.

In a unanimous ruling, the 9th Circuit held that the 2015 version of the LCFS regulation does not discriminate and is a justifiable exercise of the state's police power. The same three-judge panel of the 9th Circuit ruled similarly in a previous appeal in which the plaintiffs made the same allegations regarding earlier versions of the LCFS [see **Ninth Circuit Reverses Trial Court and Determines that LCFS Does Not Violate Commerce Clause**, September 30]. *Rocky Mountain Farmers Union v. Corey*, Opinion, 730 F.3d 1070, U.S. Court of Appeals, Ninth Circuit, filed 2013.

"As *Rocky Mountain I* reflects, the Commerce Clause respects both the concerns of the national marketplace and the central value of local autonomy in our federal system," wrote Judge Ronald M. Gould for the court. "These principles require us to take into account the potential indirect effects of a state's regulation of in-state activities insofar as they may affect out-of-state commerce. However, the lens through which we view this analysis must reflect the fact that a state's ability to control its internal markets and combat local harms is squarely within its traditional police power."

In promulgating the LCFS, "California has attempted to address a vitally important environmental issue with vast potential consequences" for the state, Gould wrote.

"The Constitution does not require California to shut its eyes to the fact that some ethanol is produced with coal and other ethanol is produced with natural gas because these kinds of energy production are not evenly dispersed across the country or because other states have not chosen to regulate the production

of greenhouse gases," Gould wrote. "If the states are to remain a source of 'innovative and far-reaching statutes' that 'supplemen[t] national standards,' they must be permitted to submit the goods and services sold within their borders to certain environmental standards without having thereby discriminated against interstate commerce from states with lower local standards."

The court rejected a revived challenges to the 2011 and 2012 versions of the LCFS on Commerce Clause grounds, reversing the lower court and concluding that since the rules have since been repealed the challenges are moot.

The plaintiffs also argued that the LCFS violated the Constitution because it regulates "extraterritorially" and it "violates the federal structure of the Constitution."

The claim of extraterritorial regulation was addressed and rejected in *Rocky Mountain I* and is similarly rejected in regards to the 2015 version of the LCFS, the court ruled.

"Subjecting both in and out-of-jurisdiction entities to the same regulatory scheme to make sure that out-of-jurisdiction entities are subject to consistent environmental standards is a traditional

use of the state's police power; it is not an extension of 'police power beyond its jurisdictional bounds,'" Gould wrote.

As regards the claim that the LCFS violates the federal structure of the Constitution, the plaintiffs did not identify "which constitutional provisions or doctrine outside the Commerce Clause they believe govern their structural federalism claims, if any do," according to the opinion. Nevertheless, another 9th Circuit panel rejected this claim in a similar case challenging Oregon's version of the LCFS. *American Fuel & Petrochemical Manufacturers. v. O'Keeffe*, Opinion, 903 F.3d 903, U.S. Court of Appeals, Ninth Circuit, filed 2018.

"The *O'Keeffe* court held that 'irrespective of its constitutional basis, any such claim is necessarily contingent upon a finding that the [regulating state's] program regulates and attempts to control conduct that occurs in other states," Gould wrote [see **9th Circuit Upholds Oregon Program Modeled on California's Low Carbon Fuel Standard**, November 28, 2018].

Gould was joined in the opinion by Senior Judge Dorothy W. Nelson and Judge Mary H. Murguia.

Attorneys for the plaintiffs in the case were: Paul J. Zidlicky, Clayton G. Northouse and Erika L. Maley of Sidley Austin; John C. O'Quinn of Kirkland & Ellis; John P. Kinsey and Timothy Jones, of Wanger Jones Helsley.

Representing CARB were: M. Elaine Meckenstock, Jonathan Wiener, Myung J. Park, Gavin G. McCabe and Robert W. Byrne of the California attorney general's office.

Sierra Club, Conservation Law Foundation, Environmental Defense Fund and Natural Resources Defense Council, which all intervened in the case on behalf of CARB, were represented by: Sean H. Donahue of Donahue Goldberg & Weaver; Joanne Spalding of Sierra Club and David Pettit of Natural Resources Defense Council.

—Fiona Smith

Third District Holds That Lay Opinions on Aesthetic Impacts Sufficient to Meet Fair Argument Test

The Third District Court of Appeal has ruled that the objections of numerous non-expert residents of a small town to a development based on its aesthetic impacts are sufficient to create a "fair argument" that the project "may" have a significant impact under CEQA. The Court's opinion rejects a claim that the project's conformance to county zoning laws and historic design guidelines (HDG) is irrelevant to a CEQA claim, and that the County failed to provide any support for its argument that the residents' aesthetic opinions lacked foundational support. *Georgetown Preservation Society v. County of El Dorado*, Opinion, C084872, Third District Court of Appeal, filed December 17, 2018.

The case involved a proposed Dollar General Store to be built in the small downtown of the unincorporated gold rush era community of Georgetown in El Dorado County. Georgetown has been designated a state Historical Landmark. The proposed store would be 9100 square feet with a 12,400 square foot parking lot located on a 1.2 acre parcel made up of three combined lots in the historic downtown. The store, once constructed, would be surrounded by small, locally-owned businesses. Although the planned development had been modified to contain some elements designed to fit in with its surroundings, local residents complained that it was bulky and grossly out-of-place.

The project was presented first to the Planning Commission and then to the County Board of Supervisors. The project was supported by a Mitigated Negative Declaration after a full Environmental Impact Report (EIR) was deemed unnecessary. The local residents unsuccessfully raised their objections to both bodies.

After losing before the Board of Supervisors, opponents, organized as the Georgetown Preservation Society (Society), filed a lawsuit arguing that the project was inconsistent with the County General Plan and that it should have been supported by an EIR. The trial court judge ruled against the Society on most of its CEQA arguments and failed to consider its General Plan inconsistency argument. However, the judge did side with the Society's argument that opponents had presented evidence of adverse aesthetic impacts sufficient to show that there was a "fair argument" that the project might have a significant impact on the environment—the standard for requiring an EIR.

The County and the developer then filed this appeal with the Third District. The League of California Cities and the California State Association of Counties filed a joint amicus brief in support of the County and developer.

The Appellate Court's Opinion

On appeal the Third District dealt with the following three issues:

- The principal argument by the appellants and supporting Amici was that the trial court erred in failing to defer to the County's finding of conformance with the County's HDG. The appellants contended that the trial court's ruling improperly found that the unsupported aesthetic opinions of the opponents could be used to overcome the agency's own determination of HDG consistency.

  In rejecting this argument the Third District points out that a zoning determination cannot be used in lieu of a proper CEQA determination. CEQA and the state's planning laws have different purposes and different thresholds for determining the adequacy of a decision under them. A zoning or planning decision is subject to the "substantial evidence" test when challenged. So long as the decision is supported by substantial evidence it cannot be challenged by citing substantial evidence on the other side.

  In contrast a CEQA decision rejecting an EIR can be overturned if the challenger has submitted evidence that a "fair argument" exists that a proposed project "might" have an adverse environmental impact. If the fair argument test is met the matter is sent back to the lead agency for preparation of an EIR.

- The Third District next considered

whether the aesthetic opinions of the opponents in this case met the fair argument standard. The Court cites decisions of other courts holding that the opinions of lay critics as to aesthetics are sufficient to meet the standard. The Court agreed with the appellants that the mere existence of public controversy is insufficient as are a few "stray comments." However, said the Court, "The evidence here goes beyond a few people expressing concern about the aesthetics of the project." The Court notes that the significance of an activity may vary with the setting. The proposed project in this case might be found to be acceptable in an urban setting. However, in this small, rural historic downtown, the opponents ' comments on aesthetics were substantial enough to meet the fair argument standard.

• Finally, the Third District notes that the County made no explicit finding in the administrative record that any of those commenting lacked credibility or had an economic or other unusual interest in the outcome. Thus the County failed to support a challenge to any of the lay comments. The appellants tried to argue that imposing this obligation on the County improperly added a procedure or requirement not explicitly stated in CEQA. The Court noted that it is not saying that the County erred in not making such a finding. It is only saying that having declined to do so, it could not challenge any of the objector's aesthetic opinions from being considered in meeting the fair argument standard.

—Roger Pearson

WATER RIGHTS, POLICY AND SUPPLY

OEHHA Creates Framework to Track Progress on Human Right to Water

The Office of Environmental Health Hazard Assessment (OEHHA) has issued a draft framework to help the State Water Resources Control Board (SWB) harness and analyze data as it works to ensure that everyone in the state has access to clean drinking water.

SWB requested OEHHA develop a framework as part of the wider effort to meet the goals of the state's 2012 declaration of a human right to water. The declaration states in part that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." Pockets of disadvantaged communities, many in the Central Valley, suffer from a lack of clean water and overall more than 500,000 people in California were served by water utilities out of compliance with the Safe Drinking Water Act in 2018, according to a Pacific Institute report.

The framework creates a tool for SWB to track water quality, accessibility and affordability across the state's community water systems over time. The framework uses 13 indicators in three categories to measure progress and allows the indicators to be combined to create composite scores for different water systems. The framework has not yet been populated with data. The methodology could be expanded in the future to track similar data for state small water systems and private wells, according to OEHHA.

SWB is separately studying issues around water affordability and ways to help low-income people through rate assistance and rate design changes.

"In the long term, ensuring that California's human right to water is realized will require funding, technical assistance, and policy changes, and basic information on the availability of water, including a method to monitor, track, and assess the adequacy of water access, quality, and affordability across the state," according to OEHHA.

The agency is accepting public comment on the proposal until Monday, February 4, 2019.

—Fiona Smith

State Issues Final List of Most Basins Required to Control Groundwater Pumping

The California Department of Water Resources (DWR) has finalized a list of groundwater basins around the state that will have to develop plans to curb pumping in order to comply with the Sustainable Groundwater Management Act (SGMA).

In May, DWR issued a draft list of so-called basin prioritizations, classifying the state's more than 500 groundwater basins as either very low, low, medium or high priority [see **State Issues Proposed Update to List of Groundwater Basins Subject to Regulation**, May 28, 2018].

Under SGMA, communities overlying basins categorized as medium or high priority must form groundwater sustainability agencies and develop groundwater sustainability plans. Medium and high priority basins must stabilize their aquifer levels between 2040 and 2042. Basins in which water rights have been adjudicated are not subject to these SGMA requirements.

In this final list, DWR classified 458 basins and determined that 56 are either medium or high priority and therefore must develop sustainability plans. The final list altered about 10 percent of the categorizations as compared to the May draft list, according to DWR.

DWR is still working on categorizing the remaining 59 basins due to the fact that the agency changed those basin's boundaries in 2018, according to DWR. The agency expects to issue that list in the late Spring.

—Fiona Smith