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Articles

Important Developments in Natural Resources and Land Use Law During 2001 - Part 1

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"There is a certain relief in change, even though it be from bad to worse; as I have found in travelling in a stage-coach, that it is often a comfort to shift one's position and be bruised in a new place."
Washington Irving, Wolfert's Roost (1855)

Last year's legal developments were broad in scope and are certain to affect businesses and governments across California. The summaries below describe both sharp departures from past practices (e.g., the Army Corps of Engineers ("Corps") cannot base jurisdiction on the migratory bird rule) and more gradual trends that are changing development and regulatory practices throughout the state (e.g., new requirements for standard urban stormwater mitigation plans). The California Environmental Quality Act ("CEQA"), the cornerstone of land use practices in California, continues to evolve, both through case law and legislation. Water supply and water quality, redevelopment and housing, and environmental cleanup issues were the subjects of a spate of legislation.

This article includes summaries of cases, administrative opinions, other regulatory developments and new legislation. The summaries are intended to convey the highlights of a particular legal development. We strongly urge the reader to seek a more detailed and comprehensive analysis of any summary that appears to apply to a project or issue at hand. We welcome all questions or comments concerning the summaries. Our firm offers depth and experience in land use and natural resource matters, and we look forward to assisting you in navigating the evolving regulatory landscape.

Several of the summaries describe legal developments that are discussed in greater detail in other Client Updates and Articles published by Sheppard Mullin. Those Client Updates and Articles are noted, where applicable. The Client Updates and Articles may be viewed at the firm's website, www.sheppardmullin.com.

Natural Resources Clean Water Act

1. Isolated Ponds Not Subject To Corps Jurisdiction Under Clean Water Act

The year got off to a brisk start when, on January 9, 2001, the United States Supreme Court issued its long-awaited decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). In a 5-4 decision, the Court rejected the Corps' argument that isolated ponds, some only seasonal, wholly located within the State of Illinois, fell under the definition of navigable waters because they serve as habitat for migratory birds. The Corps' regulations define navigable waters for purposes of the Clean Water Act to include isolated water bodies "the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." 33 CFR § 328.3(a)(3) (1999). The earlier Corps interpretation specified that if the

waters "are or would be used as habitat by other migratory birds which cross state lines . . . ," then these waters could affect interstate or foreign commerce and are jurisdictional. 51 Fed. Reg. 41217 (Nov. 13, 1986). The Court held that such an interpretation exceeded the Corps' authority under the Clean Water Act and impermissibly limited the states' traditional power over land use. (See Client Update entitled "Solid Waste Agency of Northern Cook County v. Army Corps of Engineers" available on Sheppard Mullin's website, www.sheppardmullin.com.)

2. Corps And EPA Seek To Narrow The Scope Of ***SWANCC***

The Corps and the United States Environmental Protection Agency ("EPA") quickly responded to *SWANCC* when, on January 22, 2001, the two agencies issued a joint policy memorandum to their field offices regarding the scope of agency jurisdiction under the Clean Water Act in light of the *SWANCC* decision. The joint policy memorandum limits the potential impact of *SWANCC* through narrow interpretations of the Supreme Court's ruling. It specifies that field staff should no longer rely on the use of waters or wetlands by migratory birds as the sole basis for assertion of regulatory jurisdiction under the Clean Water Act. According to the memorandum, a water body must have all three characteristics – it must be nonnavigable, isolated and intrastate – for it to escape agency jurisdiction.

3. RWQCBs To "Fill The Gap" Left By SWANCC

Following *SWANCC*, the Chief Counsel for the State Water Resources Control Board ("State Water Board") issued a memorandum clarifying that while *SWANCC* raised questions about the authority of the Regional Water Quality Control Boards ("RWQCBs") to regulate isolated waters, including wetlands, under the Clean Water Act, the State possesses its own authority to regulate such waters under the Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act") and under CEQA. The January 25, 2001 opinion urges state agencies and regional boards to "fill the gap" left by *SWANCC* in regulating wetlands. The Porter-Cologne Act authorizes the state and regional boards to regulate "discharges of waste" to "waters of the state," which are defined broadly as "any surface or groundwater, including saline waters, within the boundaries of the state."

4. Corps Issues Regulatory Guidance Letter On Compensatory Mitigation

On October 31, 2001, the Corps issued Regulatory Guidance Letter No. 01-1 which addressed compensatory mitigation. The Regulatory Guidance Letter ("RGL") authorizes using preservation of existing wetlands to earn credits when preservation is used in conjunction with establishment, restoration, rehabilitation and enhancement activities. In some instances, permanent preservation of existing wetlands and other aquatic resources may be authorized as the sole basis for generating mitigation credits. The RGL also authorizes the use of vegetated buffers, including upland areas, as compensatory mitigation. Vegetated buffers need not be as wide as some technical literature suggests; buffers of 50 feet on each side of a stream are normally adequate. Since its publication, the RGL has met stiff criticism from the environmental community, which argues that the RGL did not respond adequately to an earlier National Academy of Sciences study criticizing the Corps for failing to monitor mitigation projects. The Corps is seeking comment on the RGL from other federal agencies up until March 1, 2002 and the RGL's terms may change.

5. RWQCB Adopts SUSMPs For Santa Clara Valley

The California RWQCB, San Francisco Bay Region, adopted Order No. 01-119 for the Santa Clara Valley, which amended an earlier order reissuing waste discharge requirements under the National Pollution Discharge Elimination System ("NPDES"). The order brought the reissued NPDES permit into compliance with the State Water Board decision in *Cities of Bellflower et al.*, (NPDES Case No. CAS614001 (2000)) which authorized the imposition of Standard Urban Stormwater Mitigation Plans or "SUSMPs" to achieve stormwater discharge goals. SUSMPs are development standards intended to limit the volume and flow of stormwater runoff from new residential and commercial developments by requiring that developers incorporate design features that will contain, filter and/or treat a specified percentage of anticipated runoff from a site following a rain event. SUSMPs contain a list of Best Management Practices ("BMPs") and numeric design criteria that target post-construction conditions in most new development and redevelopment projects. Examples include the use of catch basins, grassy swales, wetlands and wet ponds to capture and filter stormwater. The Santa Clara Valley permit requires that each entity must incorporate water quality and watershed protection principles and policies into its general plan. The San Francisco Bay RWQCB's actions follow similar actions in Los Angeles, San Diego and part of Orange County.

6. "Deep Ripping" Not Exempt From Clean Water Act

In a case closely watched by agriculture interests and developers, the Ninth Circuit Court of Appeals addressed the exemption for normal farming activities under the Clean Water Act. The Ninth Circuit ruled in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), that the practice of deep ripping is not a normal farming activity and is not exempt from regulation under the Clean Water Act. Deep ripping involves dragging four- to seven-feet long prongs behind a bulldozer in an attempt to break up soil so that the land can be drained to accommodate vineyards, orchards and other agricultural uses. The court followed Ninth Circuit precedent in deciding that redepositing materials, including plain dirt, can constitute the "addition of a pollutant" under the Clean Water Act. Because of the United States Supreme Court's decision in *SWANCC*, the court reversed the district court's finding that a Clean Water Act violation had occurred in one single vernal pool. The Corps had conceded in briefing that it had no jurisdiction over the vernal pool at issue. Vernal pools are generically defined in the opinion as "pools that form during the rainy season, but are often dry in the summer." The plaintiff's request for a rehearing before a Ninth Circuit panel was denied, and the plaintiff is expected to file an appeal to the United States Supreme Court.

7. Corps Reissues And Modifies Nationwide Permits

The Corps published a notice in the Federal Register proposing to reissue and modify the Corps' nationwide permits ("NWPs") and the general conditions for those NWPs. 66 Fed. Reg. 42070 (Aug. 9, 2001). The stated purpose of the Corps' proposal was to simplify the NWP program and to avoid confusion by having all NWPs and general conditions take effect on the same date and, five years later, to expire on the same date. The final rule, published on January 15, 2002, departs in some significant ways from the proposed rule. Please contact us if you have questions about the new nationwide permits.

8. Irrigation Canals Considered "Waters Of The United States" For Purposes Of Clean Water Act Jurisdiction

The Ninth Circuit ruled in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), that the routine application of an aquatic herbicide into an irrigation canal constituted a discharge of a pollutant into waters of the United States, and was thus prohibited without a NPDES permit. The defendant had argued that the irrigation canal into which it sprayed Magnacide H to kill weeds was not a water of the United States because

the canals are a closed system, isolated from natural streams by gates. Based in part on evidence that water from the irrigation canals had been discharged into a nearby stream and had killed trout and steelhead, the court held that the canals were nonetheless tributaries of natural streams and thus subject to Clean Water Act jurisdiction. Water agencies may now be required to obtain a NPDES permit for the routine application of aquatic herbicides because irrigation systems that at some point interact with a natural stream may be considered waters of the United States for purposes of the Clean Water Act.

9. Corps Issues Final Rule Reinstating "Tulloch Rule"

On January 17, 2001, the Corps issued a final rule that defined the phrases "discharge of dredged material" and "incidental fallback" in an attempt to clarify the Corps' jurisdictional limit under Section 404. 66 Fed. Reg. 4550 (January 17, 2001). The rule defines incidental fallback as the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same location from which it was initially removed. This narrow definition excludes any fallback that takes place in either large volume, or in a location that differs from the original excavation location. The Corps has faced a barrage of litigation regarding the validity of regulating incidental fallback wherein the courts have concluded that the Corps does not have the authority to regulate incidental fallback material as a discharge under Section 404. *American Mining Congress v. Corps*, 951 F.Supp. 267 (D. D.C 1997); aff'd sub nom, *National Mining Association v. Corps*, 145 F.3d. 1339 (D.C. Cir. 1998). That litigation resulted from the Corps' adoption of the "Tulloch Rule", which defined the term "discharge of dredged material" as including "any addition, including any redeposit, of dredged material, including excavated material, into waters of the U.S., which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the U.S." 66 Fed. Reg. 4551 (emphasis added).

In addition, the final rule eliminated a proposed rebuttable presumption that specified activities are subject to regulation and instead stated that the "use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States is likely to result in regulable discharges of dredged material." 66 Fed. Reg. 4552 (Jan. 17, 2001). As a result of this change, the Corps has effectively maintained the same policy embodied in the previous assumption, but has removed the project applicant's burden to formally rebut the presumption. (See Client Update entitled "U.S. Army Corps of
Engineers Narrows the Impact of Recent Court Decisions that Attempt to Limit Clean Water Act Jurisdiction" available on Sheppard Mullin's website, www.sheppardmullin.com.)

Endangered Species Act

1. USFWS Acted Arbitrarily When It Issued Incidental Take Statement Without Evidence That The Activity Would Kill Or Injure Listed Species

The Ninth Circuit Court of Appeals ruled that the United States Fish and Wildlife Service ("USFWS") acted arbitrarily in issuing an incidental take statement when it had no rational basis to conclude that a take would occur incident to an otherwise lawful activity. At issue in *Arizona Cattle Growers Association v. United States Fish and Wildlife Service et al.*, No. 99-16102 (9th Cir. Dec. 17, 2001), were incidental take statements issued by the USFWS for cattle grazing permits on lands managed by the Bureau of Land Management and the United States Forest Service. In its decision, the Ninth Circuit ruled that despite language in the USFWS' internal handbook on Section 7 consultations, neither the Endangered Species Act ("ESA") nor its regulations require issuance of an

incidental take statement regardless of whether incidental takings will, in fact, occur. The court found that the USFWS acted arbitrarily when it issued an incidental take statement for protected species when there was insufficient evidence that the species existed on the property. Speculative evidence that a species may be present did not meet even the low bar required of the USFWS under the ESA. The USFWS violated the Administrative Procedure Act in purporting to impose conditions on the lawful use of land without showing that the species was present, the court said.

The court noted that prospectively regulating land that is merely capable of supporting a protected species is not justified by the ESA or its regulations. The USFWS may reinitiate consultation if evidence later develops that a protected species is present on the land. The court also ruled that the USFWS acted arbitrarily in placing conditions on the incidental take statement that lacked a rational connection to the take and that failed to provide a clear standard for determining when the authorized take had been exceeded. The USFWS had imposed a condition on an incidental take statement for the loach minnow that take would be exceeded if "ecological conditions did not improve." (See Article entitled "New Court Decision on Section 7 Issues" available on Sheppard Mullin's website, www.sheppardmullin.com.)

2. Ninth Circuit Keeps Oregon Salmon Listing Intact Temporarily, Putting On Hold A District Court Ruling That NMFS Cannot Distinguish Between Wild Salmon And Genetically Identical Hatchery Salmon In Making ESA Listing Determination

The Ninth Circuit Court of Appeals stayed an Oregon District Court ruling that invalidated the listing of Oregon coastal coho salmon as threatened under the ESA. *Alsea Valley Alliance v. Evans*, No. 01-36071 (9th Cir. Dec. 14, 2001). The Ninth Circuit ordered that the matter be briefed this spring. The Oregon District Court had ruled in *Alsea Valley Alliance v. Donald L. Evans*, 161 F.Supp.2d 1154 (D. Or. 2001), that the National Marine Fisheries Service ("NMFS") could not legally distinguish between hatchery salmon and wild salmon in determining whether a given population of salmon was threatened under the ESA. The Oregon District Court concluded that NMFS violated the Administrative Procedure Act by arbitrarily distinguishing between wild coho salmon, which were protected under the listing, and hatchery raised coho, which were not protected. That ruling potentially challenged the legal foundations for all salmon and steelhead listing decisions in California, to the extent those decisions were based on NMFS' Hatchery Policy. NMFS chose not to appeal the District Court ruling, but several environmental and conservation organizations filed a lawsuit challenging the decision. (See Client Update entitled "Oregon Ruling Casts Doubt on Threatened Status of California Salmon and Steelhead" available on Sheppard Mullin's website, www.sheppardmullin.com.)

3. USFWS Must Assess Economic Impacts From Critical Habitat Designation, Not Just From Listing Of Species Under ESA

On May 11, 2001, the Tenth Circuit Court of Appeals issued an important ruling on economic analyses for critical habitat designations under the ESA. In *New Mexico Cattle Growers Association v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), the Tenth Circuit rejected the USFWS practice of dismissing most economic considerations in designating critical habitat. Under the ESA, when the USFWS lists a species as endangered or threatened, it must "concurrently" designate critical habitat. In practice, the designation of critical habitat lags behind the listing decision. The USFWS traditionally evaluates economic impacts in making listing determinations but not in making critical habitat designations. The court rejected this approach. Consequently, the court set aside the critical habitat designation of the southwestern willow flycatcher and instructed the USFWS to issue a new critical habitat designation taking into account economic impacts.

4. Consultation Now Required Under ESA When Destruction Or Adverse Modification Of Critical Habitat Diminishes Value Of Critical Habitat For *Either* Survival *Or* Recovery Of Listed Species

The Fifth Circuit Court of Appeals ruled in *Sierra Club v. United States Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), that the USFWS and NMFS relied on an invalid regulation in declining to designate critical habitat for the threatened Gulf sturgeon. The regulation at issue, 50 C.F.R. § 402.02, was invalid because it conflicted with the ESA over the circumstances under which consultation was required for the destruction or adverse modification of critical habitat. Specifically, the court ruled that the regulation set the bar too high when it defined "destruction or adverse modification" as a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival *and* recovery of the species. Critical habitat, as defined in the ESA, uses the term "conservation," which is a "much broader concept than mere survival." In other words, the ESA requires consultation where an action affects *recovery alone*; it is not necessary for an action to affect both the *survival and recovery* of a species before the consultation obligation arises. The agencies have not yet decided whether to apply the ruling outside of the Fifth Circuit.

California Endangered Species Act

1. Fish And Game Commission Denies Petition To List California Tiger Salamander Under CESA

The California Fish and Game Commission ("Commission") agreed with testimony provided by Sheppard Mullin attorneys and voted 2 to 1 not to accept a petition to list the California tiger salamander ("CTS") as endangered under the California Endangered Species Act ("CESA"). The petition to list the CTS sought protection for the CTS statewide, though it emphasized that the Sonoma County and Santa Barbara County populations are particularly vulnerable. The decision was a major victory for agricultural interests, including the wine industry, and for developers. The Commission found that the petition did not provide sufficient population abundance and trend information to conclude that the CTS was in danger of becoming extinct throughout all, or a significant portion of, its range. The Commission encouraged the petitioner, the Center for Biological Diversity, to augment its petition with population abundance information. In rejecting the petition, the Commission voted against the recommendation of the California Department of Fish and Game.

Land Use And CEQA
CEQA Case Law Developments

1. City Council-Sponsored Initiative Measures Not Exempt From CEQA

The California Supreme Court ruled in *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal.4th 165 (2001), that an initiative proposed and placed on the ballot by a city council was not exempt from compliance with CEQA. In this case, the city council, without undertaking any environmental review pursuant to CEQA, directed the preparation and placement on the ballot of an initiative to remove certain properties from the city's Register of Historical Landmarks. The initiative passed and this action was filed alleging that the city's failure to comply with CEQA invalidated the initiative. In its analysis, the court distinguished initiatives that are generated by a city council from those that are sponsored by the voters and merely placed on the ballot by a city council acting in a ministerial capacity as required by law. The court found that CEQA Guidelines section 15378, which excludes from the definition of a "project" proposals submitted to the voters, was intended to apply only to ministerial actions. This interpretation is consistent with Public Resources Code section 21080(b)(1) which exempts ministerial actions, and with the holding in *Stein v. City of Santa Monica*, 110 Cal.App.3d 458 (1980), which determined that placing a voter-sponsored initiative on the ballot is a ministerial act. The court found that

the city council's actions in this case were discretionary. Consequently, the city was required to comply with CEQA, including, if necessary, preparation of an EIR.

2. County Violated CEQA Because EIR Inadequately Discussed Baseline Water Conditions and Other Water Issues

The Sixth District Court of Appeal in *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal.App.4th 99 (2001), determined that an EIR for a Carmel residential development proposal did not comply with CEQA because of the EIR's inadequate treatment of water supply issues. The EIR's discussion of the baseline water use violated CEQA because it failed to describe the "existing environment" at the time the environmental review process began. Instead, the court noted that the EIR relied on "self-serving" statements of baseline water use by the project proponents that were based on data collected toward the end, not the beginning, of the environmental review process. The baseline data was also flawed because it was not based on actual use, but was instead based on one of a number of methodologies for calculating water use. The county's use of that methodology was not adequately explained in the EIR, the court noted. The EIR was also inadequate because it discussed an important mitigation component, the acquisition of water pumping rights on an offsite parcel, only after the comment period closed. While that information was provided in errata and was made available to the county before the county approved development permits, that information should have been circulated for public review, especially given the atmosphere of concern about water shortages in the area. The acquisition of riparian rights as a basis for a long-term water supply was introduced late in the process as well, which changed the EIR such that it deprived the public of a meaningful opportunity to comment. The court found no abuse of discretion with respect to the EIR's discussion of traffic issues.

3. EIR For Airport Expansion Found Inadequate

In *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland*, 91 Cal.App.4th 1344 (2001), the First District Court of Appeal invalidated the Port of Oakland's certification of an EIR for the Airport Development Plan. The court found the EIR deficient for several reasons. First, the court concluded that the scientific data used in the analysis of the toxic air contaminant impacts was outdated, thus undermining the EIR's ability to provide a reasoned, good faith effort at full disclosure of the increase in toxic air contaminant emissions from the project. Second, the court determined that the Port should have attempted to quantify the amount of mobile source emissions from the project operations and conduct a health risk assessment to determine if any significant health impacts would occur. Third, the court found that the EIR had failed to adequately address the noise impacts from nighttime air cargo operations. Specifically, the court made clear that the EIR's reliance on the CNEL metric as the sole criterion to evaluate the significance of the project's noise impacts inappropriately excluded consideration of the potential sleep disturbance impacts on area residents resulting from nighttime flights. In reaching this conclusion, the court acknowledged the expert opinion that supported the need for this noise analysis, public concern about nighttime noise impacts, and the CEQA standards of significance, which recognize a site-sensitive threshold for evaluating noise impacts. Petitioners' also claimed that the project description was inadequate for failing to include certain elements related to potential runway improvements, thereby segmenting the project in violation of CEQA. The court rejected this argument because the record demonstrated that these potential runway improvements were only concepts referenced in outdated planning documents. Additionally, the court observed that the record contained no evidence to suggest that the Port was taking any steps to implement these undefined ideas and thus they could not be considered reasonably foreseeable consequences of the project under review.

4. Earlier Adopted Mitigation Measures May Be Deleted; EIR Must Address Alternatives For Uncertain Water And Wastewater Resources

In *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, 91 Cal.App.4th 342 (2001), the First District Court of Appeal considered a multi-faceted challenge to the Napa County's certification of an EIR prepared for an updated specific plan for the development of approximately 3,000 acres, including the Napa County Airport. The court overturned certain aspects of the EIR certification and upheld other aspects. First, the court rejected petitioner's claim that mitigation measures adopted with the original specific plan could not be deleted. The court ruled that a governing body may delete an earlier adopted mitigation measure so long as the governing body states a legitimate reason for doing so and supports the reason with substantial evidence. In this case, the evidence in the record supported a finding that certain traffic mitigation measures were infeasible. Second, the court found the traffic analysis adequate even though the criteria for determining the level of significance evolved over time because the EIR analysis contained both the traffic impact calculations and an explanation of the reasons supporting the analysis.

Third, the court opined that the EIR's growth inducing impact discussion should include a general analysis of the housing needs generated by the project's commercial uses including the number, type, and probable location of housing units required for project workers, and the ability of identified communities to accommodate any anticipated growth. Because these impacts are speculative, however, a detailed analysis was not required. While the EIR itself did not adequately analyze these impacts, the court found that the Market and Jobs/Housing Analysis appended to the updated specific plan fulfilled this requirement. The court also found that mitigation measures for these speculative impacts need not be included in the EIR. Fourth, the court found the EIR's discussion of water sources and wastewater treatment resources inadequate because it failed to address alternatives given the acknowledged uncertainty of the options analyzed in the EIR.

5. "Initial Study" Not Required To Determine Whether City's Residential Rental Code Enforcement Program Was Categorically Exempt

In *Apartment Assn. of Greater Los Angeles v. City of Los Angeles*, 90 Cal.App.4th 1162 (2001), the city determined that its permanent code enforcement program for residential rental units was categorically exempt from environmental review under CEQA. Petitioners argued that the city was required to prepare an initial study prior to reaching this determination. The Second District Court of Appeal held that, generally, CEQA does not require an agency to prepare an initial study prior to making a determination that a project is categorically exempt from environmental review. Although the city did not prepare an initial study, the city had relied on a report analyzing the results of the interim code enforcement program to support its determination with respect to the permanent controls. The court found that the city had proceeded in accordance with CEQA in reaching its decision on the categorical exemption and that its determination was supported by substantial evidence. The court observed that, once the city had acted in accordance with CEQA and on the basis of substantial evidence, the burden shifted to the petitioners to provide substantial evidence that the project could potentially cause a significant adverse environmental impact. Since the petitioners failed to meet this burden, the court upheld the city's categorical exemption determination.

6. Request For Attorney Fees By Non-Profit Association Defending CEQA Challenge Denied

The Fourth District Court of Appeal in *Jobe v. City of Orange*, 88 Cal.App.4th 412 (2001), upheld the trial court's denial of attorney fees to a non-profit high school association (the real party in interest) that had successfully defended a CEQA challenge seeking to set aside the City of Orange's approval of the expansion of a high school. To qualify for attorneys' fees under Code of Civil Procedure section 1021.5, a party, among other criteria, must show that the action enforced an important right affecting the public interest and conferred a significant benefit on the public. The association argued that in defending the action it had advanced the right to education for thousands of students and saved taxpayers the expense of these students' education. Moreover, because it is a nonprofit, the association asserted that its interest in expanding the high school was purely public, not economic, and it was thus entitled to recover attorneys' fees under section 1021.5. The court held that, although the association was a non-profit organization, it was properly denied attorney fees because it had a significant pecuniary interest in the physical expansion of the high school it owned and operated and had not shown that its legal costs transcended its financial interest.

General Land Use

1. County's Decision On Size Of Buffer Zone Supported By Substantial Evidence

In *Placer Ranch Partners v. County of Placer*, 91 Cal.App.4th 1336 (2001), the Third District Court of Appeal considered whether, as part of its general plan update, the county could validly establish a one-mile buffer zone around the county's landfill even though no scientific evidence was presented in support of the one-mile restriction. Petitioners, the owners of the buffer zone, asserted that no substantial, scientific evidence supported a buffer zone of this size. In reviewing the administrative record, the court noted that numerous public policy and health and safety arguments in support of the buffer were made during testimony at the county hearings on the matter. Even without scientific evidence to justify the one-mile buffer size, the court found the evidence in the record supporting the buffer to be substantial and relevant. Thus, the court held that the county did not abuse its discretion by imposing the one-mile buffer zone, because it was reasonably related to the public welfare and a valid exercise of the county's police power.

2. Tree-Trimming Ordinance For Protection Of View Corridors Upheld Against Takings And Due Process Challenges

The Second District Court of Appeal ruled that the City of Rancho Palos Verdes' view protection ordinance was a valid exercise of the city's police power and did not unconstitutionally take the property of a landowner, or deprive him of his due process rights, when it ordered him to trim pine trees that blocked the views of an adjacent landowner. In *Echevarrieta v. City of Rancho Palos Verdes*, 86 Cal.App.4th 472 (2001), the court denied the landowner's claims that the view protection ordinance deprived him of property without just compensation. The court ruled that the ordinance did not violate the takings clause of the Fifth Amendment because it did not compel a physical invasion of the owner's property, nor did it deprive him of his reasonable investment-backed expectations. Under the ordinance, the landowner whose views are blocked is responsible for the cost of all tree trimming or tree removal activities.

3. City's Condemnation Of Property Did Not Deprive Owner Of Due Process

The Fourth District Court of Appeal upheld a trial court ruling granting an ex parte order for immediate possession of property being leased as a Vietnam veteran's homeless service center. The owner of the property in *Israni v. Superior Court of San Diego*, 88 Cal.App.4th 621 (2001), challenged the order on the grounds that it denied him his due process rights. The court ruled that although the owner did not receive notice of the ex parte

application prior to the issuance of the order, the owner did receive notice and an opportunity to be heard prior to the effective date of the order. The court also upheld the trial court's determination that there was substantial evidence in the record to support the city's determination that it had an immediate need for possession of the property. The owner had claimed that the court's refusal to stay the Order of Immediate Possession constituted a hardship because it deprived him of the value of tenant improvements made to the property by a Vietnam veteran's group. The court rejected that claim, noting that the lease between the parties addressed the issue and awarded the value of improvements to the tenant in the event of condemnation. It also noted that to do otherwise would constitute a windfall for the property owner.

4. Housing Inspection Fee Does Not Require Voter Approval Under Cal. Const., Art. XIIID

The California Supreme Court in *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal.4th 830 (2001), considered whether a housing inspection fee imposed on residential rental property was subject to the voter approval requirement under article XIIID of the California Constitution. Under article XIIID, added by Proposition 218 in 1996, local governments must follow specific notice and hearing procedures and obtain local voter approval before imposing any tax, assessment, fee, or charge on real property. In 1998, the City of Los Angeles adopted an ordinance requiring all residential rental properties with two or more units to undergo regular inspection, and for all owners of such buildings to pay a "service fee" of $12 per unit per year to finance the cost of inspection and enforcement. Petitioners argued that the housing inspection fee was unenforceable because it was enacted without complying with article XIIID. The Supreme Court held that article XIIID did not apply to the inspection fee because the fee is imposed on landlords by virtue of their ownership of a business, rather than as landowners. The court focused on the plain language of article XIIID, which refers to fees imposed upon a parcel of property or upon any person "*as* an incident of property ownership" rather than "*on* an incident of property ownership." The court interpreted the language "as an incident of property ownership" to mean fees that burden landowners *as landowners* and not in their capacity as business owners, such as a landlord.

5. RWQCB May Order Dairy To Abate Wastewater Discharge Violations Without Prior Hearing

The Third District Court of Appeal in *Machado v. State Water Resources Control Board*, 90 Cal.App.4th 720 (2001), considered whether a dairy, which had been issued a cleanup and abatement order by the RWQCB, was deprived of due process for not being allowed a hearing before the order was issued. The dairy had committed several violations of the RWQCB guidelines, including discharging manure and wastewater into a ditch that ultimately drained into the Sacramento-San Joaquin Delta. The RWQCB issued a cleanup and abatement order requiring the dairy to: (1) abate the discharge; (2) comply with previously issued orders; (3) submit certain reports; and (4) conduct daily inspections. The dairy argued, among other claims, that its due process rights were violated because it was not afforded a hearing before the issuance of the cleanup and abatement order. The court held that due process did not require the RWQCB to provide the dairy with a hearing before the issuance of the cleanup and abatement order. In balancing due process factors, the court held that the dairy was afforded process of law because: (1) the cleanup and abatement order did not impose criminal or civil penalties, nor did it shut down the dairy or otherwise prevent its operation; (2) the dairy had an informal opportunity to dispute the determination that led to the order, an opportunity to petition the State Water Board for review of the order, and the right to challenge the order through a petition for mandate; and (3) the state's interest in preventing the injury to public health and safety justified the need for immediate action to clean up or abate the waste discharge.

The dairy also argued that the reporting requirements in the RWQCB's order violated the dairy's Fifth Amendment right against self-incrimination. The court found the dairy's Fifth Amendment claim unripe for failure to specify the person whose rights were violated by the order or to allege an actual, threatened violation. Moreover, the court distinguished the regulatory requirements of the Porter-Cologne Act, which are intended to protect the environment, from criminal statutes designed to impose punishments for criminal activities. Thus, the court held that the Fifth Amendment may not be invoked to avoid the reporting requirements of the RWQCB order.

6. Inclusionary Housing Ordinance Does Not Result In A Taking

The First District Court of Appeal in *Home Builders Association v. City of Napa*, 90 Cal.App.4th 188 (2001), petition for cert. filed, No. 01-893 (U.S. Dec. 11, 2001), considered whether an inclusionary housing ordinance resulted in an unconstitutional taking. The City of Napa enacted an inclusionary housing ordinance requiring residential developers to: (1) set aside 10 percent of all newly constructed units for "affordable" housing; or (2) dedicate land or construct affordable units on another site (the "alternative equivalent proposal"); or (3) pay an in-lieu fee. In addition, the ordinance permits a developer to appeal for a reduction, adjustment or complete waiver of obligations "based upon the absence of any reasonable relationship or nexus between the impact of the development and. . . the inclusionary requirement." Petitioners argued, among other claims, that the ordinance resulted in an unconstitutional taking.

The Court of Appeal held that the ordinance did not amount to a taking because (1) the ordinance is facially valid since it permits a developer to appeal for a reduction, adjustment or complete waiver of the ordinance's requirements; and (2) the ordinance substantially advances the legitimate governmental interest of creating affordable housing for low and moderate income families. The court further rejected petitioner's argument that the ordinance was invalid under the heightened standard of judicial scrutiny invoked in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The court noted that the standard of review in *Nollan* and *Dolan* was inapplicable as the facts of those cases involved the validity of a particular land use bargain between a governmental agency and a person seeking a permit to develop his or her land, while this case involved an ordinance that applied to *all* development in the city.

7. Permit Applications Not Deemed Approved Under Permit Streamlining Act Where CEQA Compliance Is Incomplete

In *Eller Media Company v. City of Los Angeles*, 87 Cal.App.4th 1217 (2001), the court considered plaintiff's claim that its permit applications for several billboard structures should have been deemed approved pursuant to the Permit Streamlining Act (Gov. Code Section 65920 *et seq*.; "Streamlining Act") because the City failed to act on the applications within the time limits specified in the Streamlining Act. The time limits in the Streamlining Act for approval or disapproval of a permit application, however, are triggered by an agency's compliance with CEQA. The Streamlining Act's time limits begin to run from the certification of an EIR, the adoption of a negative declaration, or a determination that the project is exempt from CEQA. Because the city had not taken any of these necessary actions under CEQA prior to the filing of this lawsuit, the court held that the Streamlining Act's time limits had not begun to run. Therefore, the plaintiff had not stated a cause of action pursuant to the Streamlining Act. The court also dismissed plaintiff's allegations that the city failed to make timely CEQA determinations as insufficient to state a cause of action because CEQA time limits are not mandatory and CEQA contains no "deemed approved" provisions.

8. Under Coastal Zone Management Act, California Coastal Commission Has Review Authority Over Offshore Federal Oil And Gas Lease Extensions

In a United States District Court decision concerning the authority of the California Coastal Commission ("Coastal Commission") to review oil and gas lease extensions within the coastal zone, the court in *State of California v. Norton* (No. C 99-4964 (N.D. Cal. 2001)), ruled that lease extensions, like lease sales, are federal activities under the Coastal Zone Management Act. As such, the federal Minerals Management Service must provide a consistency determination to the Coastal Commission prior to carrying out the lease extensions. The Coastal Commission may either concur or not concur with that consistency determination. The court determined that lease extensions were intended to be covered by amendments to the Coastal Zone Management Act that specifically included lease sales. The court noted that by approving the extensions, the Minerals Management Service requires the leaseholders to perform certain activities, such as spudding exploratory wells, that directly affect the coastal zone. The court also found that under the National Environmental Policy Act ("NEPA"), the Minerals Management Service was required to provide an explanation as to why the lease extensions were categorically exempt from NEPA. In January 2002, the Department of the Interior filed an appeal brief, and the matter is expected to be heard by the Ninth Circuit.

9. Short Statute of Limitations Properly Applied To Action Challenging Utility's Imposition Of Water Fee

In an important case concerning the applicable statute of limitations for challenging fees and service charges, the California Supreme Court ruled in *Utility Cost Management v. Indian Wells Valley Water District*, 26 Cal.4th 1185 (2001), that the 120-day statute of limitations contained in the Mitigation Fee Act (Government Code Sections 66000-66025; the "Fee Act") barred an action challenging a water service fee. The plaintiff, representing a community college district, had argued that the general three-year statute of limitation applied because the fee was a capital facilities fee and not subject to Government Code section 66022, which governs challenges to development fees. The Supreme Court noted that the Fee Act generally addresses fees that are concerned with development, but that other fees not specifically related to a development project, such as fees for water connections, sewer connections and capacity charges, are also covered by the Fee Act. Despite the plaintiff's characterization of the water fee as a capital facilities fee, the fee fit within the definition of a capacity charge (defined as a charge for a facility that is of benefit to the person or property charged), which is expressly covered by the Fee Act. Moreover, the short statute of limitations applied to the *enactment* of the improper fee, not to the date it was imposed on a ratepayer. The plaintiff argued that a 120-day statute of limitations made it practically difficult to determine whether a newly enacted fee was excessive, but the court noted that entities are partially protected from being caught unaware of new fees because utilities are obligated to provide information on capital fees to those who request it.

For more information, please see Part 2 of Important Developments in Natural Resources and Land Use Law During 2001.