

CalCIMA Annual Education Conference Follow-up

December 2014

Update: California Environmental Issues

After a productive and insightful conference, Hunton and Williams LLP would like to thank all attendees of this year's CalCIMA Annual Education Conference for a wonderful event. As a conference partner, we thought it would be useful to update you on several important issues raised at the conference which may affect your business.

Prop 65

As mentioned at the Environmental Committee Meeting, the Office of Environmental Health Hazard Assessment (OEHHA) recently released a new draft of proposed revisions to the "clear and reasonable" warning requirements under Proposition 65. The draft revises OEHHA's March 7, 2014, proposal, which was met with substantial opposition from business stakeholders. The new draft is also being met with significant opposition because business stakeholders believe it will be very difficult to manage, require more and more confusing warnings and be a more fertile ground for "Bounty Hunters" to bring damaging lawsuits. An initial letter submitted by the California Chamber of Commerce may be found [here](#).

Assembly Bill 52 to Expand CEQA

On September 25, 2014, Governor Jerry Brown signed Assembly Bill 52, which expands the reach of the California Environmental Quality Act ("CEQA") by requiring the lead agency on a proposed project to consult with any California Native American tribes affiliated with the geographic area. In addition, the legislation creates a broad new category of environmental resources, "tribal cultural resources," which must be considered under CEQA. This legislation has the potential to affect any party that may be subject to CEQA's requirements. Because all tribes affiliated with an area must be given an opportunity to consult, extended costly delays in the CEQA process are foreseeable. Also, the creation of a resource category that requires consideration of an object's or landscape's difficult-to-define "cultural" value complicates the evaluation of a project's impacts and will likely result in the increased adoption of burdensome mitigation measures.

Mining, Other Natural Resource and Energy Development and the San Gabriel Mountains National Monument

On October 10, 2014, President Obama designated roughly 346,000 acres of the Angeles and San Bernardino National Forests as the San Gabriel Mountains National Monument. The presidential proclamation prohibits mining or geothermal leasing, except under the Materials Act of 1947 (sand, stone, gravel). Existing operation, maintenance, replacement or modification of water resource, flood control, utility, pipeline or telecommunications facilities within the monument will not be affected. However, expansion or new development associated with these existing facilities may be prohibited by new regulations. The area will be managed by the Forest Service through implementation of regulations that will be developed consistent with the designation. Hunton and Williams highly recommends that anyone who has existing land or development rights within the designation should monitor and engage on these regulatory actions that will determine the ability to access, use and expand existing interests.

Selenium Water Quality Criteria

The US Environmental Protection Agency (EPA) is developing revised national aquatic life water quality criterion for selenium pursuant to the Clean Water Act. The EPA's draft revision focuses on fish tissue concentrations as opposed to water column measurements, which has been welcomed by industry stakeholders and opposed by environmental stakeholders, resulting in active federal litigation. See e.g., *Kentucky Waterways Alliance v. McCarthy*, No. 3:13-CV-01207 (W.D.Ky). Once finalized, the EPA's water quality criterion for selenium will provide recommendations to states and tribes on revising their applicable water quality standards. In California, the EPA, not the State Water Resources Control Board, establishes the water quality criteria for selenium (called objectives in California) pursuant to the California Toxics Rule (CTR). In August 2014, the EPA entered into a federal consent decree with environmental organizations to settle litigation associated with the CTR. See *Our Children's Earth Foundation v. EPA*, No. 3:13-CV-2857 (N.D.Cal.2014). As part of that settlement, the EPA has committed to proposing statewide numeric selenium water quality criteria in California by November 2016. CalCIMA members should monitor closely both the EPA's national selenium water quality criterion revision and the EPA's statewide promulgation of freshwater selenium water quality criteria in California.

California's Sustainable Groundwater Management Act

On September 16, 2014, California Governor Jerry Brown signed three companion bills, SB 1168, AB1739 and SB 1319, which compose the Sustainable Groundwater Management Act ("the Act"). The Act creates the first comprehensive framework for regulating groundwater in California, placing managerial and monitoring responsibilities in the hands of local agencies while also creating mechanisms under which state agencies may oversee and potentially even intervene in groundwater management. With the Act to go into effect on January 1, 2015, and numerous implementation deadlines, stakeholders throughout the state should prepare for increased regulation, oversight and possibly even litigation.

The Act requires that GSPs be designed to achieve "sustainable groundwater management" for the basin within 20 years of implementation. The plan must identify specific milestones to be achieved every five years, in order to reach the 20-year sustainability timeframe. "Sustainable groundwater management" is defined as the maintenance of groundwater use in a manner that does not cause "undesirable results." While the Act states its intention to preserve existing water rights where possible, the sustainable management of groundwater may override this goal. This results in a lack of clarity regarding the future allocation of water rights. Given that there are several stages in the implementation timeline, the potential for disputes and delay is high. Also, given the ability of groundwater adjudications to secure water rights, an increase in litigation may be on the horizon. Stakeholders may find that the most cost-efficient and effective way to protect their interests is by providing input during the GSP process, as well as the other notice and comment periods specified by the Act.

If you have any questions regarding these matters, please don't hesitate to contact a member of our environmental team.

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