

2015 Environmental Law and Regulation Update

FOR

THE INDUSTRIAL ASSOCIATION OF CONTRA COSTA
COUNTY

DAVID COOKE

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

JANUARY 21, 2016

Topics

1. Air Quality
2. Climate Change and Energy
3. Water and Water Quality
4. Hazardous and Toxic Materials and Wastes
5. CEQA

Air Quality

New Federal ozone standard

- 10/1/15 – EPA lowers ground-level 8-hour primary ozone standard from 75 to 70 ppb (4th highest daily maximum averaged over 3 years)
 - Essentially equivalent to California AAQS
 - New standard went into effect 12/25/15
- Timeline:
 - October 2017 – EPA to publish final area designations
 - 2020-2021 – state implementation plans due for moderate and above non-attainment areas
 - 2020-2037 – attainment period (depending on severity of non-attainment)

New Federal ozone standard

- Bay Area classified as “marginal” non-attainment for 2008 standard but EPA expects it to attain 2015 standard by 2025 without additional controls
- Impact: NSR (including offsets), not PSD, will apply longer
- EPA projects that, outside of California, only 14 counties are expected to have ozone levels higher than the new 2015 standard by 2025. Nevertheless, 5 states (AZ, NM, ARK, ND, OK) have filed an action to block implementation of the new standard.

Supreme Court strikes down EPA power plant mercury emissions rule

- *Michigan v. EPA*, 5-4 decision, June 2015
- CAA requirement that regulation be “appropriate and necessary” requires consideration of costs of compliance as part of decision to regulate at all; cannot be deferred to later stage of formulating substantive regulatory limits.
- On remand, in December, Court of Appeals let rule remain in effect based on EPA representation that it would publish its approach to considering cost effectiveness within four months.

Cost-effectiveness under the Clean Air Act – *National Parks Conservation Ass’n. v. USEPA* (9th Cir. 2015)

- EPA regional haze plan for Montana required power plant to install two technologies (separated overfire air, or “SOFA,” and selective non-catalytic reduction, “SNCR”) as best available retrofit technology (“BART”) to reduce NOx. More expensive selective catalytic reduction (“SCR”) was not required.
- EPA provided only general conclusions regarding cost effectiveness of SOFA + SNCR (as opposed to SOFA alone or SOFA + SCR) relative to degree of visibility improvement associated with each approach.
- Held, in challenge by both plant and environmental group, EPA’s BART determination set aside as arbitrary and capricious for failure to adequately explain cost-effectiveness, even though “bright line” cost-effectiveness standard is not required.

New federal standards and requirements for petroleum refinery toxic emissions

- Belated product, under consent decree, of mandated residual risk review following adoption of refinery MACT 1 and 2 rules
- Numerous provisions. Key components:
 - Extensive fence-line monitoring of (fugitive) benzene emissions (including possible future real-time monitoring)
 - Process changes and pollution prevention measures to reduce emissions from smoking flares and pressure relief devices
 - New emission reductions from storage tanks and delayed coking units
 - Numerous technical amendments to NSPS to harmonize with MACT 2 rules
- Effective February 1, 2016. Fence-line monitoring to commence within 2 years, other rules within 3 years

BAAQMD Refinery Emissions Initiative

- 2014 Board resolution to:
 - Reduce refinery emissions of criteria pollutants by as much as 20% by 2020
 - Reduce toxics emissions health risk by 20%
- Comment period on first batch of rules closed November 23, 2015
- BAAQMD Board adopted first phase of rules in December 2015
 - Ammonia emissions from fluidized catalytic cracking units
 - ROG and TAC emissions from equipment leaks
 - Hex chrome emissions from all cooling towers and ROG emissions from petroleum refinery cooling towers
- Still to come:
 - PM and SO₂ emissions from petroleum coke calcining operations
 - Emissions tracking
 - New risk-based emissions limits
- Expected reductions 16%

Refinery emissions initiative – BAAQMD Goals

- Characterize emissions on an on-going basis
- Assess health risk to nearby communities and ensure that toxics emissions do not pose unacceptable health risk
- Identify areas for improvement of energy efficiency and emission reduction (esp. GHG emissions)
- Track changes in crude slate to facilitate review of impacts on emissions
- Ensure that refineries do not cause the region to fall out of attainment for SO₂ and PM_{2.5}

Reg 6, Rule 5 (new rule): Ammonia from Fluidized Catalytic Cracking Units (FCCUs)

- Ammonia is PM2.5 precursor
- Proposed rule would impose new ammonia emission limit from FCCUs of 10 ppmvd (@ 3% O₂), effective 1/1/18
- Control plan, equipment modification permit applications and continuous emissions monitoring plan would be due 1/1/17
 - Draft rule specifies minimum O₂ and NO_x monitoring requirements
- Alternative ammonia limit may be available based on optimization protocol:
 - Draft protocol, due (currently) 3/1/16, must demonstrate greatest achievable reduction in PM2.5 (including all condensable PM emissions) from FCCU
 - If approved by BAAQMD, refinery to complete demonstration of protocol by 12/31/16
 - Based on results of demonstration, refinery must propose optimized ammonia concentration as emission limit by 2/28/17
 - May not be used to avoid BACT requirements, other BAAQMD rule limits, or consent decrees
- District may add limits of condensable PM and SO₂ FCCU emissions in the future

Reg 8, Rule 18 (amendment): TOG emissions from equipment leaks

- Applies to refineries, bulk plants and terminals, and to chemical plants
- Current rule requires (in general) minimization within 24 hours and repair with 7 days of discovery of leaks from valves, pumps and compressors, connections and pressure relief devices, except for a proportion of “essential equipment” (components that cannot be taken out of service without shutting down the process unit) on a facility’s non-repairable list. Listing allows delay in repairs or replacement for 5 years or next scheduled turnaround, whichever is sooner.
- Proposed amendments would further limit fugitive organic emissions by imposing new leak detection and repair (LDAR) requirements for refinery equipment in heavy liquid service
 - Effective 1/1/18, refineries must routinely monitor heavy liquid equipment within their current LDAR program.
 - Rule would reduce generally by half the proportion of fugitive emissions points that may be listed as non-repairable
 - Organic emissions from equipment (including components on non-repairable lists) to be subject to mass emissions limit of 5 lb/day. No change to organics concentrations [100 or 500 ppm depending on equipment types] triggering leak minimization and repair.
 - Leak minimization, required within 24 hours after discovery, must go beyond cleaning, scrubbing or washing equipment (e.g., tightening or replacing nuts and bolts, installation of plugs or caps, injection of lubricants into packing)
 - Cause of “background” concentrations above 50 ppmv (50% of current allowable leak rate for valves and connections) must be identified.
 - Pumps and compressors must be visually inspected daily
 - Inspection frequency increased for components with recurring detected leaks
 - Increased recordkeeping and reporting requirements

Reg 11, Rule 10 (amendment) – Total Hydrocarbon Emissions from Petroleum Refinery Cooling Towers

- Rule's existing requirements for hex chrome leak monitoring, repair and minimization would be expanded to apply to THC from refinery cooling towers
- Defines Best Modern Practices to ensure that cooling tower heat exchanger equipment is kept corrosion free and in good working order, make regular visual and odor inspections, perform surrogate (e.g., residual chlorine) testing every shift, track biocides added to maintain water chemistry
- Daily monitoring of cooling tower water THC concentrations (weekly or biweekly for smaller towers)
- THC concentration limit: 84 ppb by weight (if water analyzed in a lab) or 6 ppm by volume (if monitored by continuous analyzer or other alternative method).
- Leak response required for exceedances – minimize within 5 days, repair within 21 days, otherwise speciate and quantify leaking THC's to ensure mass emissions below 15 lb/day and TAC emissions below BAAQMD acute and chronic trigger levels in Reg 2, Rule 5
- New recordkeeping requirements.
- Proposal would exceed or supplement federal MACT CC (40 CFR Part 63, subpart CC) requirements for organic HAP leaks at refineries.
- Recommended effective date 7/1/16

Reg 9, Rule 14 (proposed new rule): SO₂ emissions from Petroleum Coke Calcining Operations

- Would apply only to 2-kiln carbon plant at Phillips 66 Rodeo refinery
- Rule would impose two mass SO₂ emission limits
 - 144 lb/hour
 - 770 ton/year or 80% reduction
- Limits effective 1/1/19 and 1/1/20 (2 kilns)
- BAAQMD estimates cost effectiveness of \$3,096/ton
- Not yet adopted

Regulation 12, Rule 15 – Petroleum Refining Emissions Tracking (in process) – 2015 proposed version (withdrawn)

- Pollutant coverage
 - Criteria pollutants, air toxics, and GHG
 - “Air District staff will assess emissions of climate pollutants and the refineries’ abilities to make feasible improvements in their operations to reduce climate pollutants. We expect the refineries to make these changes in response to the economic incentives created by the AB32 Cap and Trade system. Air District staff may propose climate-specific rulemaking if these improvements are not made.”
- Source coverage
 - Includes mobile sources (ships and trains) during loading and unloading
 - Includes co-located auxiliary sources even if owned by others (e.g., hydrogen plants, terminals, cogeneration plants).

Regulation 12, Rule 15 – Petroleum Refining Emissions Tracking – Emissions Inventories (2015 proposed version)

- Would entail CEMs, emissions tests, emission factors, material balances, and empirical formulae.
- Inventory methods must comply with periodic published guidelines
 - Initial set of guidelines published in August 2015
- Monthly collection of data regarding physical and chemical characteristics of incoming crude (including API gravity; sulfur, nitrogen, acid, total reduced sulfur, vapor pressure, BTEX, and metals)
 - BAAQMD contends different emissions may result from light/sweet, heavy, and sour crude
- Inventories and crude slate reports would be due annually.

Regulation 12, Rule 15 – Petroleum Refining Emissions Tracking – Emissions Profiles (2015 proposed version)

- Refineries must prepare and submit a Petroleum Refinery Emissions Profile (“PREP”) summarizing emission rate and total emissions of each criteria and toxic pollutant and each GHG emitted from each source and from the refinery overall.
- Refineries can use any consecutive 12 month period in past 6 years for PREP.
- BAAQMD will compare annual emissions inventories to PREP to detect changes in emissions and attempt to determine cause (e.g., production fluctuations, changes in emissions due to changes in crude oil composition)
- Changes in inventory methods would result in changes to PREP.

Regulation 12, Rule 15 – Petroleum Refining Emissions Tracking – Health Risk Assessments (2015 proposed version)

- Refineries must prepare new facility-wide health risk assessments (HRAs) using the new and improved emissions inventories, in accordance with latest OEHHA HRA guidelines

Regulation 12, Rule 15 – Petroleum Refining Emissions Tracking – Air Monitoring (2015 proposed version)

- Refineries to develop and propose plans for fence-line and community air monitoring systems, in accordance with BAAQMD guidelines
- Fence-line system to be operational within 1 year after BAAQMD plan approval
- Community monitoring system to be operational within 2 years after approval
- Systems to be modified as necessary to comply with updated guidelines

Regulation 12, Rule 15 – Petroleum Refining Emissions Tracking – Energy Audit (2015 proposed version)

- BAAQMD concern that refineries might comply with GHG reduction requirements by purchasing credits through cap and trade rather than through actual reductions in energy use
- Rule requires audits of fuel usage and submission of most recent and updated energy management performance gap analyses (comparing refinery fuel usage to global set of about 300 refineries).

Regulation 12, Rule 15 – Petroleum Refining Emissions Tracking – Public participation (2015 proposed version)

- Each of the required reports to be available to the public on the BAAQMD website and subject to public comment procedures before BAAQMD approves, requires revisions or disapproves them:
- Allowance for trade secret protections

Regulation 12, Rule 16 – Petroleum Refining Emission Limits & Risk Thresholds (2015; withdrawn)

- Reduces risk management thresholds to incorporate new AB 2588 (Air Toxic Hotspot program) thresholds:

	Refinery-Wide Cancer Risk Levels	Refinery-Wide Non-Cancer, Acute and Chronic Hazard Indices
Public Notification	10 in a million	1.0
Mandatory Risk Reduction (development of BAAQMD-approved toxic risk reduction audit and health risk reduction plan, to be implemented within up to 5 years), plus notification	25 in a million	2.5
Unacceptable Risk Level (all of the above plus accelerated implementation of risk reduction measures)	100 in a million	10

- Previous thresholds required mandatory risk reduction at 100:1 million excess cancer risk and hazard index of 10, with no “unacceptable risk level” category.

Regulation 12, Rule 16 – Petroleum Refining Emissions Limits and Risk Thresholds (2015; withdrawn)

- By 12/31/16, BAAQMD to establish enforceable daily refinery-wide and source-specific hourly limits for SO₂ and PM_{2.5} based on potential-to-emit (PTE) data furnished by each refinery.
 - “NAAQS-consistent” hourly limits and protocol for defining them to be established by BAAQMD after public comment
- By 3/1/17, refineries must demonstrate “compliance with NAAQS” for SO₂ and PM_{2.5} through approved dispersion modeling or monthly air monitoring protocol
- Air monitoring study may be terminated after 1 year if max concentrations over background are < 20% of NAAQS; after 3 years if max concentrations over background are < 50% of NAAQS

Regulation 12, Rule 16 – Petroleum Refining Emissions Limits and Risk Thresholds – NAAQS compliance and ERPs (2015; withdrawn)

- Demonstration of “NAAQS compliance” must continue until APCO publishes determination of compliance
- Unless APCO has published compliance determination, refineries must submit Emission Reduction Plan (ERP) to achieve compliance with SO₂ and PM_{2.5} NAAQS within 2 years. Deadlines:
 - 3/1/17 if refinery does not attempt demonstration by modeling or monitoring
 - 180 days after refinery fails both modeling and monitoring demonstrations
- Draft ERP’s to be made available for public comment before approval; final approved plans to be published on BAAQMD website.

Regulation 12, Rule 16 – Petroleum Refining Emissions Limits and Risk Thresholds (2015; withdrawn)

- Emission Reduction Audit:
 - If ERP does not demonstrate NAAQS compliance in 2 years, refinery must submit Emission Reduction Audit identifying technically feasible emission reduction measures, computing cost-effectiveness, and setting forth schedule for implementation.
 - Maximum cost effectiveness limits apply:
 - \$35,000/ton SO₂
 - \$50,000/ton PM_{2.5}
(before inflation adjustments)

BAAQMD Refineries Initiative – what's coming up in 2016

- Final adoption of coke calcining rule
- New rulemaking processes for revised emissions tracking and emissions limits/risk threshold rules – as early as 1st quarter 2016
- Permit rule amendment:
 - Possible explicit requirement for permit amendment in event of change in crude slate

EPA's methane emission reduction rule for the oil and gas sector

- Applies to oil and natural gas extraction facilities, pipelines, and distribution facilities
- Proposal published September 2015, comment period closed December 4, 2015, final rule expected June 2016
- Calls for 40-45% reduction in methane emissions from oil and gas facilities from 2012 levels by 2025
- Updates 2012 sector NSPS to include methane as well as VOCs
- Requires control of methane and VOCs from fracked wells and natural gas transmission pipelines
- Reduces VOC ozone precursors and air toxics (BTEX)
- Requires:
 - Leak detection and repair
 - Capture of natural gas from completed fracked wells
 - Emissions limits from new and modified pneumatic pumps
 - Emissions limits from compressors and pneumatic controllers at natural gas transmission compressor stations

Startup, Shutdown and Malfunction

- May 2015 – EPA invalidated state and local rules regarding increased emissions during startup, shutdown and malfunction (SSM) events, either by providing that emissions standards did not apply or by providing for affirmative defense from civil or administrative penalties for violations
- Affects 36 states
- In California, affects only San Joaquin, Imperial and eastern Kern counties, which must revise rules for inclusion in revised SIP

Climate Change

Legal authority to regulate GHG emissions: *Utility Air Regulatory Group v. USEPA* (2014)

- Background:
 - *UARG* built on *Massachusetts v. EPA* (2007), which held that EPA has the authority under the Clean Air Act to regulate greenhouse gas emissions as “air pollutants.”
 - EPA started GHG regulation with mobile sources, then extended to stationary sources under PSD and Title V programs
 - EPA “tailored” statutory PSD thresholds for BACT application in light of different scale of GHG emissions compared to low statutory thresholds for regulating criteria and other air pollutants under PSD
- In *UARG* Supreme Court invalidated “tailoring” rule but held that EPA may regulate GHG emissions from sources already subject to PSD or Title V on account of some other type of regulated emission (“anyway” sources)
- Limitation results in power to regulate 83% instead of 86% of GHG emissions sources nationwide

BAAQMD response to *UARG v. EPA*

- BAAQMD canceled one Title V permit and three synthetic minor permits that were issued based only on GHG emissions.
- BAAQMD may consider lowering PSD threshold to a level below federal “anyway” source threshold of 75,000 tons CO₂e

Clean Power Plan

- First national standards for carbon emissions from existing power plants
- EPA projects 32% reduction in power plant carbon emissions by 2030 from 2005 baseline, plus 90% SO₂ and 72% NO_x reductions
- “Building blocks” underlying CPP strategy:
 - Reduce carbon emissions from coal-fired plants
 - Encourage increased generation from existing natural gas-fired plants in place of coal plants
 - Encourage increases in renewable sources.
- Sets CO₂ emission performance rates for fossil fuel- and natural gas-fired electric generating units
 - Interim performance rates imposed for 2022-2029
 - Final compliance by 2030
- Clean Energy Incentive Program rewards early investments in renewables and demand-side energy efficiency programs
- Mechanisms and “safety valve” to ensure reliability of power generation
- Went into effect December 22, 2015. 24 states immediately sued to invalidate it as “war on coal.” Stay of operation of rule during litigation denied by Court of Appeals in January 2016.

Clean Power Plan – state plans

- States may choose between emission rate-based goal (lb. CO₂/MWh) or mass-based goals (tons CO₂)
- States may choose between two plan types:
 - Emission standards plans – source-specific emission limitations that add up to compliance with selected goal
 - State measures plans – mix of federal source-specific limitations and state programs to reduce power plant emissions (e.g. residential energy efficiency, renewable energy standards), with “backstop” of enforceable federal standards on affected plants should state measures fail
- Plans may provide for “trading-ready” electric generating units to facilitate interstate credit or allowance trading
- States must submit final plans, or initial plans with request for extension, by Sept. 2016. All final plans due Sept. 2018. Plans must show progress in interim period until 2030

Clean Power Plan – California compliance

- California has no coal-fired power plants (main target of CPP)
- EPA projects California will over-comply with its target by 2030 under business-as-usual due to AB 32 cap-and-trade
- California likely to select mass-based goal (estimated annual average of 48 million tons CO₂e), in lieu of rate-based goal (est. 828 lb. CO₂e/mH) for GHG emissions, thereby generating credits for maximum interstate/regional trading
- Challenge: harmonizing California pre-existing approach with new CPP nationwide approach
 - State's economy-wide GHG allowances and credits v. CPP's more limited utility-sector approach
 - Restrictions in CPP on interstate trading between states with different compliance approaches

Climate Change – Executive Order B-30-15

- Background:
 - Previous Executive Order S-3-05 established long-term target of 80% reductions from 1990 levels by 2050
 - AB 32 (Nunez) requires reduction in GHG emissions (CO₂e) to 1990 levels by 2020
- Executive Order B-30-15 (4/29/15):
 - Establishes interim target of 40% reductions from 1990 levels by 2030. CARB to update Scoping Plan to reflect CO₂e reductions required to meet this target

Climate Change – SB 32 (Pavley) fails

- SB 32 (Pavley) would extend AB 32 statewide GHG emission reduction targets beyond 2020:
 - 40% below 1990 levels by 2030 (codifying Exec. Order B-30-15)
 - 80% below 1990 levels by 2050 (codifying Exec. Order S-3-05)
- Would not have extended cap-and-trade or other market mechanisms mandated by AB 32 beyond 2020.
- Passed Senate but failed in Assembly in September 2015.
- Consequence: AB 32 still contains sole statutory GHG emission reduction target (1990 levels by 2020).

BAAQMD 2016 Clean Air Plan (CAP) Update – Regional Climate Protection Strategy (RCPS)

- CAP - required by the California Clean Air Act to identify potential rules, control measures, and strategies for the Bay Area to implement in order to meet state standards for ground level ozone.
- CAP update will include RCPS, which will identify potential rules, control measures, and strategies to reduce greenhouse gases in the Bay Area.
- Public workshops in the next few weeks
- Objective is development of strategy to meet BAAQMD goal (based on 2005 Executive Order) of achieving 80% reduction in GHG emissions, from Bay Area sources, relative to 1990 levels, by 2050.

RPS and energy efficiency – SB 350 (de Leon)

- Increases statewide Renewable Portfolio Standard: 33% of electricity sold to retail customers by 2020 must come from renewable sources - to 50% by 2030, with interim targets for 2024 and 2027.
- State Energy Resources Conservation and Development Commission must establish annual targets for statewide energy efficiency savings and demand reduction that will achieve a doubling of statewide energy efficiency savings in electricity and natural gas used by retail customers by 2030.
- CPUC to establish targets consistent with doubling goal for energy companies it regulates, and identify a diverse portfolio of resources to meet the RPS requirements, relying on zero-carbon resources to the maximum extent reasonable.

RPS and energy efficiency – SB 350 (de Leon) (cont.)

- CPUC to oversee applications submitted by investor-owned utilities to accelerate transportation electrification, and to facilitate expansion of charging infrastructure.
- Investor-owned utilities may pass costs of procuring renewables to all customers.
- What SB 350 does not do:
 - Earlier version of bill required 50% reduction in petroleum use in cars by 2030 and imposed increases in building energy efficiency (failed in Assembly and removed from the bill)

Methane monitoring

- AB 1496 (Thurmond)
 - Requires CARB to monitor and measure high-emission methane hot spots using the best available and cost-effective scientific and technical methods to monitor
 - CARB to carry out a life-cycle greenhouse gas emission analysis of natural gas produced and imported into the state
 - Update policies and programs with results of monitoring and analysis

Statewide Transportation GHG Emission Reduction Measures

- Governor's Executive Order B-32-15 (7/7/15)
 - Requires CalTrans, Cal-EPA, CARB, CEC and Natural Resources Agency to adopt integrated plan, by July 2016, establishing targets to:
 - improve freight efficiency
 - transition to zero-emission technologies
 - increase competitiveness of California's freight system
 - Agencies to develop pilot projects on primary trade corridors
- AB 692 (Quirk)
 - Starting January 1, 2017, at least 3% of the aggregate amount of bulk transportation fuel purchased by state government to be procured from very low carbon transportation fuel sources, increasing by 1% each year until 2024

Climate Change Adaptation – October 2015 Legislation

- SB 246 (Wieckowski)
 - Establishes Integrated Climate Adaptation and Resiliency Program, administered by OPR, to coordinate regional and local efforts with statewide climate adaptation strategies
 - Requires OES review and updates of Adaptation Planning Guide
- SB 379 (Jackson)
 - Requires cities and counties to review and update their local hazard mitigation plans or general plan safety elements to address climate adaptation and resiliency strategies
- AB 1482 (Gordon)
 - Requires Natural Resources Agency to update California Climate Adaptation Strategy every three years starting 2017 (codifies Exec. Order B-30-15)

Climate Change Adaptation – Executive Order

- Executive Order B-30-15 (4/29/15):
 - Natural Resources Agency to update climate adaptation strategy every 3 years (codified by AB 1482)
 - Adaptation and consideration of climate change and GHG emission reduction to be considered in all state agencies' planning and investments and in State's 5 Year Infrastructure Plan

Support for Advanced Manufacturing – AB 1269 (Dababneh)

- **Advanced Manufacturing:**
 - Processes that improve existing or create entirely new materials, products, and processes through the use of science, engineering, or information technologies, high-precision tools and methods, a high-performance workforce, and innovative business or organizational models utilizing microelectronics and nanoelectronics (including semiconductors), advanced materials, integrated computational materials engineering, nanotechnology, additive manufacturing, and industrial biotechnology.
 - Systems (“smart” or “intelligent” manufacturing) resulting from substantive advancement beyond the current industry standard, in the production of materials and products.
 - Sustainable manufacturing systems and technologies that minimize the use of resources while maintaining or improving cost and performance.

AB 1269's sales and use tax exclusions

- Expands authority of the California Alternative Energy and Advanced Transportation Financing Authority to grant financial assistance in the form of a sales and use tax exclusion for projects that promote the use of advanced manufacturing and projects using or processing recycled feedstock (not disposal).
- Total tax exclusions limited to \$100,000,000 in any single year, expires 2021
- Bill also extends to 2021 existing program for financial assistance to advanced transportation technologies and alternative energy sources.

SB 9 (Beall) – Funding “transformative capital improvements” in transportation

- 10% of cap-and-trade proceeds received by state go to the Transit and Intercity Rail Capital Program, which funds capital improvements and operational investments.
- SB 9 eliminates Program funding for “operational investments” and provides for funding of “transformative capital improvements,” defined as rail, bus, or ferry transit project that will significantly reduce VMT, congestion, and GHG emissions by creating a new transit system, increasing the capacity of an existing system, or otherwise significantly increasing the ridership of a transit system.
 - Includes high-speed rail, bus rapid transit, integrated systems
- Goal: direction of 25% of fund to disadvantaged communities

Water and Water Quality

Waters of the United States

- Background
- June 29, 2015 – EPA and US Army Corps of Engineers adopt regulatory definition of “waters of the United States” applicable to multiple Clean Water Act programs, including wetlands permitting and the NPDES permit program.
- Defended as effort to simplify jurisdictional analysis and reduce the number of case-by-case jurisdictional determinations.
- Key changes from existing law:
 - “Tributaries” to be jurisdictional (i.e., subject to federal regulation) “by rule” if they have an ordinary high water mark and a “bed and bank” and if those features can be shown to be hydrologically linked to navigable waters or interstate waters.
 - Certain “adjacent wetlands” to be jurisdictional by rule if, for example, they are located in a 100-year floodplain and are within 1,500 feet of a “traditional navigable water” (e.g., a river, lake, or ocean) or of a tributary.
 - Case-by-case determinations of whether an aquatic feature has a “significant nexus” to a navigable water – and hence jurisdictional – will continue to be made for a variety of different waterbody types, including “western vernal pools in California” and any surface water feature within the 100-year floodplain or within 4,000 feet of a navigable water or covered tributary that is not already defined as jurisdictional by the “by rule” standard.
 - “Significant nexus” defined by reference to functional ecosystem values served by wetlands and other water bodies.
- Groundwater and stormwater control features are among excluded water bodies.
- Rule would apply prospectively only, commencing in early August 2015

Waters of the United States, cont.

- August 2015 – federal district court in North Dakota enjoined application of the new rule in 13 states
- October 2015 – federal appeals court (6th Circuit) issued nationwide stay, holding:
 - Challenge likely to succeed on the substantive merits
 - Numerical distance limitations in final rule were not in proposed rule (procedural defect)
- November 2015 - EPA announces that during the stay it will apply law as it existed before the new rule's effective date, which was based on statutes as interpreted by the Supreme Court:
 - Traditional navigable waters, interstate waters, adjacent wetlands, and other waters having a “significant nexus” to downstream traditional navigable waters such that the water is important to protecting the chemical, physical, or biological integrity of the navigable water
- Litigation will ultimately reach the U.S. Supreme Court

Pre-enforcement review of WOTUS jurisdictional determinations

- *Hawkes Co. v. US Army COE* (8th Cir., April 10, 2015)
- Corps of Engineers, made formal determination that Minnesota wetland on which Hawkes Co., a peat-mining concern, had a purchase option, is jurisdictional water subject.
- Jurisdictional determination appealed administratively, set aside and remanded, but reaffirmed by COE in a “final Corps permit decision.”
- *Held*: COE determination is subject to judicial review as a “final agency action.” Option holder need not apply for a permit and sue if permit is denied or improperly conditioned, or disregard the determination and risk penalties should COE enforce.
- U.S. Supreme Court granted review in December 2015.

Oil pipeline spill prevention and response

- Bills adopted October 2015 in the wake of crude oil pipeline failure at Refugio State Beach in May 2015 (~3,400 bbl).
- SB 414 (Jackson)
 - Mandates additional study and improvement in oil spill prevention and response by oil spill response administrator under Lempert-Keene-Seastrand Oil Spill Prevention and Response Act
 - Eliminates credit against per-gallon penalties based on recovery of oil
- AB 864 (Williams)
 - Implementation of best available technologies (e.g., auto shut-off valves) to reduce spill volumes in ecologically sensitive areas of coastal zone by 2018 (new and replacement pipelines) or 2020 (retrofit of existing pipelines)
- SB 295 (Jackson)
 - State Fire Marshall to conduct annual inspections of intrastate pipelines starting 2017 (compare federal 5 year inspection cycle and previous state standard – “at reasonable times”)

AB 815 (Ridley-Thomas) - Oil spill prevention and response fees

- Background: Oil spill prevention and administration fee on crude oil and petroleum products, not to exceed 6.5¢/barrel, funds state's oil spill prevention activities. Fee is charged to the owner of the crude or product, collected by the receiving marine terminal or refinery, and remitted to State Board of Equalization.
- AB 815
 - Establishes that fee is to be collected only once, upon first delivery to a refinery or marine terminal
 - Marine terminals and refineries receiving petroleum products derived from crude oil refined in the state may presume fee has been previously collected
 - Requires operators of refineries, marine terminals and pipelines to register with Board of Equalization

Pipeline safety legislation

- AB 1420 (Salas)
 - Adopted in wake of Arvin gas leak
 - Requires DOGGR to evaluate and, by 1/1/2018, update regulations on gas pipelines that are 4” or less in diameter, 10 years old or more, and located in sensitive areas (near residential areas or anywhere where life, health, property or natural resources may be threatened by a leak)
 - In the event of an active leak,
 - Pipeline owners must notify DOGGR and the local health officer
 - Local officer may require pipeline owners to test surrounding soil, air and groundwater; determine whether risk is serious; and compel owners to notify residents and temporarily relocate them if necessary
 - By 1/1/2018, owners of active gas pipelines must provide DOGGR with up-to-date map with pipeline location and other information; DOGGR may spot-check accuracy of maps and must maintain a list of all active gas pipelines

Sustainable Groundwater Management Act (2014)

- Background:
 - Groundwater Sustainability Agencies (GSA) to be formed by 6/30/2017 for High and Medium priority groundwater basins
 - Deadlines for commencing operation under approved Groundwater Sustainability Plan (GSP) or Alternative
 - High and Medium priority basins subject to critical overdraft – 1/31/2020
 - All other High and Medium priority basins – 1/31/2022
- Alternatives – equivalent groundwater management plan, management under adjudication order, or demonstration of 10 years of sustainable yield. Applications due by 1/1/2017
- Goal: sustainability within 20 years of plan approval (2040 or 2042)
- Low and Very Low priority basins may have GSA's and GSPs, but not required.

Sustainable Groundwater Management Act (2014)

- Groundwater sustainability agencies (GSAs)
 - Can be any governmental agency (or, through MOU or JPA, group of agencies) with responsibility for water supply, water management, or land use within boundaries of designated groundwater basin.
 - If no agency or group of agencies step up to serve as GSA for High and Medium priority basin, then county becomes GSA by default
- Basin boundary modification requests can be submitted to DWR 1/1/2016 - 3/31/2016
- Regulations: By 6/1/2016, DWR must adopt emergency regulations for evaluating groundwater sustainability plans

Sustainable Groundwater Management Act – follow-up bills in 2015

- AB 617 (Perea) - Allows for participation by private parties (e.g., water companies) in GSA implementation by MOA or other contract
- SB 13 (Pavley)
 - Refines process for GSA formation and recognition by DWR
 - Provides extension of time for GSA formation and GSP submission for Low- or Very Low priority basins reprioritized to Medium or High priority
- SB 226 (Pavley) - Requires that judgments in groundwater adjudications be consistent with and minimizes interference with timely implementation of applicable GSP

SGMA in the Bay Area

- San Francisco Bay Area has two, both Medium priority:
 - Livermore Valley
 - Santa Clara Valley/East Bay Plain
- Status: To date, no GSA proposed for Livermore Valley (or any other Bay Area basin)

Streamlined Groundwater Adjudications - AB 1390 (Alejo)

- Comprehensive framework governing groundwater adjudications (court determinations of right to extract groundwater from a basin)
- Superior courts may determine all groundwater rights and priorities for extraction, use and storage
- Authorizes courts to issue injunctions to prohibit or limit extraction from basins in long-term overdraft
- Establishes processes for notice to interested parties; for expedited disclosure by parties of quantities extracted, type of water right claimed, and claims of right to future use or increased use; and for intervention (participation as parties) by affected GSAs and cities and counties overlying the basin under adjudication
- Courts may enter judgment agreed to by only some of the parties if objectors fail to show that agreement substantially violates its rights.

Drought response – Executive Orders

- Executive Order B-29-15 (4/1/2015) – many provisions, including:
 - WRCB to impose restrictions to achieve 25% reduction in potable urban water use, through 2/28/2016, relative to 2013 baseline; request to CPUC to impose same restrictions on investor-owned water utilities (CPUC complied 5/7/2015)
 - Implementation through revised rate structures, surcharges, fees and penalties promoting water conservation
 - WRCB to impose requirements on commercial, industrial and institutional properties to implement water efficiency measures to reduce potable water usage by 25%
 - WRCB to step up enforcement against illegal diversions and wasteful or unreasonable water use
 - Suspension of application of CEQA to projects carrying out this Order
- Executive Order B-36-15 (11/13/15) – extends requirements to October 2016 if drought persists past January 2016.

Drought response – WRCB regulations

- SWRCB Res. 2015-0032 emergency regulations (eff. 5/18/2015)
- Restrictions on residential water uses deemed wasteful
- Water suppliers to reduce potable deliveries in order to achieve statewide 25% reduction relative to 2013 (reduction targets for urban suppliers vary depending on relative per capita usage)
- Industrial users:
 - Self-supplied commercial, industrial and institutional (CII) users must either reduce potable usage by 25 percent or restrict outdoor irrigation to no more than two days per week.
 - CII facilities with an independent source of supply (i.e., not served by a water supplier) not required to submit report, but should be prepared to demonstrate compliance upon request by WRCB.

Drought response – State Water Board, cont.

- 2015 emergency regulations expire late February 2016 unless extended
- Emergency rulemaking to extend, with amendments based on experience in implementing original regs, commenced December 2015. Proposed regulations are posted for public comment at http://www.waterboards.ca.gov/water_issues/programs/conservation_portal/docs/draft_conservation_ex_emerg_reg_011516.pdf.
- Comments due by noon 1/28/2016; WRCB to consider at its meeting 2/2/2016
- No significant changes for industrial users from 2015 regulations

Drought response - Legislation

- SB 88 (Committee on Budget and Fiscal Review) (6/24/2015)
 - Provides mechanism for forced consolidation of water suppliers in disadvantaged areas with larger public water system, where supplier consistently fails to deliver safe drinking water, and forced extension of service by public system to areas formerly served by failing supplier.
 - Authorizes imposition by court or public water supplier of graduated civil penalties, not to exceed \$10,000, for violation of local water conservation programs or WRCB emergency drought regulations
 - CEQA exemption, expiring 1/1/2017, for projects that mitigate drought conditions; projects for construction or expansion of a recycled water pipeline, and any directly related infrastructure; and certain projects for replenishment of groundwater.
 - Measurement, recordkeeping, and reports to WRCB of diversions of 10 acre feet of water or more per year

Hazardous Materials and Waste

HWCL enforcement “three strikes” rule

- AB 1075 (Alejo)
- DTSC must consider 3 or more findings of (or convictions for) violations of Hazardous Waste Control Law at a single facility over a 5 year period as compelling cause to deny, suspend or revoke a permit, registration or certificate.
- Imposes additional civil penalties for such three-strike violators of \$5,000 - \$50,000/day of violation
- Removes requirement for completion of hearings on permit denial, suspension or revocation “without delay” where DTSC determines that conditions may present imminent and substantial threat

TSCA reform

- Toxic Substance Control Act (TSCA) enacted 1976, administered by EPA, never amended. Governs process by which new chemicals may be manufactured, imported or processed in United States. Considered outmoded.
- Two bills in Congress – H.R. 2576 (passed in House June 2015) and S. 697 (passed in Senate December 2015).
- Senate version now denominated H.R. 2576 in reconciliation.
- Main difference is extent to which states may regulate more stringently than EPA.

TSCA reform: key elements of Senate-approved H.R. 2576

- EPA to evaluate both new *and existing* TSCA-listed chemicals to assess whether they present an unreasonable risk of injury “under the conditions of use.”
 - EPA may not consider costs or other non-risk factors
 - EPA must consider impact on vulnerable subpopulations
 - Companies may ask for EPA evaluation at company expense
 - EPA may issue admin orders to require testing of chemicals under evaluation
 - Priority to existing chemicals that are “actively” manufactured or processed and present “significant” exposure risk
- EPA must consider costs and benefits but is no longer restricted to “least burdensome” approach to chemical regulation in decision whether to restrict or ban chemicals
- EPA evaluation has limited pre-emptive effect on parallel state regulation

Pakootas v. Teck Cominco Metals, Ltd. (E.D. Washington 2014)

- Federal district court held that smelter emissions from a mining operation in Canada were “disposed of” at a Washington state cleanup site where they had landed.
- On this basis, the district court held that the Canadian smelter had “arranged for disposal” of hazardous substances at the Washington site, and was therefore liable under CERCLA for costs of cleanup.
- Ninth Circuit Court of Appeals had previously held that “disposal,” as defined in RCRA, does not include emissions into the air. CERCLA is generally held to borrow RCRA’s definition of disposal.
- Ninth Circuit accepted review in April 2015; pending.

Premises liability - *Haver v. BNSF Railway* (Cal. Court of Appeals)

- Defendant employer owed no duty of care based on doctrine of “premises liability” to woman who died due to secondary exposure to asbestos fibers brought home on her husband’s work clothes.
- Premises liability is liability of a landowner for damage or injuries caused by conditions on owned property.
- California Supreme Court granted review in late 2014, decision likely in 2016

CEQA

California Building Industry Association v. BAAQMD (Cal. Supreme Court 2015)

- CBIA challenged BAAQMD's adoption of CEQA thresholds of significance for air pollutants, including "receptor thresholds" for residents and workers who will be brought to the area because of the project.
- Court of Appeal determined receptor thresholds have valid applications and were "not invalid on their face."
- Supreme Court reviewed the question: Does CEQA require analysis of the existing environment's impact on the residents and users of a project?
- Answer: No, but when the project exacerbates existing hazards, must analyze impacts of those hazards on future residents and users.

Berkeley Hillside Preservation v. City of Berkeley (Cal. Supreme Court 2015)

- Berkeley residents challenged City's approval of 6,500 sq ft home under categorical exemption for SFRs, arguing "unusual circumstances" made the exemption inapplicable.
- Supreme Court held City's decision to apply exemption was entitled to deferential "substantial evidence" standard.
 - City just has to show its determination that "unusual circumstances" don't take the project out of the otherwise applicable exemption is supported by "substantial evidence" in the record – even if there is evidence to the contrary
- If City determines "unusual circumstances" exist, whether those circumstances will cause a significant impact requiring an EIR is determined under the less deferential "fair argument standard."
 - If Challenger points to evidence in the record that supports a "fair argument" there will be a significant impact; City must require EIR

Proposed CEQA Guidelines Amendments

- OPR released a “Preliminary Discussion Draft” of proposed updates to CEQA Guidelines (August 11, 2015)
 - Document describes itself as OPR’s “initial thoughts on possible amendments”
 - Proposes revisions to nearly 30 sections, classified in 3 categories:
 1. Efficiency improvements
 2. Substance improvements – require EIRs to analyze water and energy use impacts
 3. Technical improvements – various topics including appropriate baseline conditions, deferral of mitigation details, and lead agency duty to respond to comments

Proposed CEQA Guidelines Amendments (cont'd)

Possible CEQA efficiency improvements in proposed Guidelines amendments:

- a. Codify case law to expressly provide that agencies may use thresholds of significance, and that some regulatory standards may be used as thresholds of significance
- b. Provide guidance regarding whether later activities are within the scope of a program EIR.
- c. Provide guidance on “tiering”
- d. Clarify the statutory transit-oriented exemption
- e. Facilitate infill and multi-mode transportation projects
- f. Update CEQA checklist in Appendix G
- g. Clarify that not every CEQA violation requires a court to set aside project approval; court may allow project to proceed during remand to agency

Proposed CEQA Guidelines Amendments (cont'd)

- If adopted in some form, would be the most comprehensive update to the Guidelines since the late '90s
- Discussion draft describes itself as “a balanced package that is intended to make the process easier and quicker to implement”
- Comment period is over; OPR reviewing input, has not announced what it will do next

Thank you!

David Cooke

Allen Matkins Leck Gamble Mallory & Natsis LLP

Three Embarcadero Center, 12th Floor

San Francisco, California 94111

t: (415) 837-1515

dcooke@allenmatkins.com

www.allenmatkins.com