2014 Developments in Environmental Law

Industrial Association of Contra Costa County

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CHALLENGE. OPPORTUNITY. SUCCESS.

Topics

- Air Quality
  - Conventional emissions regulation
  - Greenhouse gas regulation
- Water and Water Quality
  - Waters of the United States
  - Industrial Stormwater General Permit
  - Sustainable Groundwater Management
- Hazardous Wastes and Cleanup
  - CERCLA and RCRA developments
  - Vapor intrusion
- Green Chemistry
- CEQA

AIR QUALITY:
NATIONWIDE DEVELOPMENTS

Proposed new 8-hour ozone standard

- Current 8-hour standard is 75 ppb
- November 2014 proposal – 65-70 ppb, with comments solicited on health standard as low as 60 ppb
- Rule to be finalized by October 2015, with nonattainment designations late 2017 and attainment deadlines stretching from 2020-2037

Coming up this term

Michigan v. EPA (US Supreme Court)

- Challenge by 23 states, UARG and National Mining Association to EPA's stringent mercury and air toxics emissions standards for coal- and oil-fired power plants
- Issue on review: whether EPA unreasonably refused to consider costs – in addition to environmental harms - as part of its threshold determination that regulation of power plant emissions was "appropriate and necessary."
  - EPA deferred cost considerations to later step of setting numeric standard.

Cost-effectiveness of NESHAPs

NRDC v. EPA (US Court of Appeals, DC Circuit, 2014)

- Upholds EPA's Portland cement plant MACT standards
  - Held: EPA permissibly determined that "beyond-the-floor" standards would not be cost-effective ($268K/ton removed)

Startup, Shutdown and Malfunction – EPA does away with CAA penalty defenses for unavoidable malfunctions

NRDC v. EPA (US Court of Appeals, DC Circuit, 2014)

- Rejects EPA's inclusion in MACT rule of affirmative defense in citizen suits of "unavoidable malfunctions."
- Held: EPA lacks the authority to adopt such a rule affecting cases before the federal courts.
- EPA response: September 17, 2014 – following *NRDC v. EPA*, EPA proposed to revise its SSM policy to reject *all* SIP provisions (not just MACT rules) for penalty relief for malfunctions as well as startup and shutdown.
- Not yet final.

Title V – Court mandates nationwide consistency on policy for aggregation of emissions units to establish major source

National Environmental Development Association v. EPA (DC Cir., 2014)

- Background: In general, multiple emissions units may be aggregated to constitute Title V major source if they are "adjacent"
- Former EPA policy: "adjacency" determined by functional interrelationships, not just physical proximity
- 2012: 6th Circuit rejects EPA aggregation of natural gas plant and its remote associated wells as "adjacent" units.
- EPA issues internal "directive" to confine narrower "adjacency" definition to 6th Circuit states (MI, OH, KY, TN), apply "functional interrelationship" test elsewhere.
- DC Circuit rejects EPA directive, setting it aside.
  - Puts non-6th Circuit states at competitive disadvantage
  - CAA regulations require nationwide uniformity

Limitations in effect at time permits are issued must be enforced, despite permit processing delay

Sierra Club v. EPA (US Court of Appeals, 9th Circuit, 2014)

- PSD permit application to EPA 2008.
- Application deemed complete 2 months later.
- Per PSD regs, EPA had 1 year to act on application; failed to act timely.
- While application pending, EPA new standards for NO_2 (2010) and CO_2 BACT for new power plants (2011).
- Plant could not meet these standards.
- EPA issued permit based on standards in effect when application was submitted.
- Held: Permit approval set aside.
  - Even though delay was unreasonable, standards in effect at time of permit issuance apply.
- Compare BAAQMD existing (and proposed) rule: limits that apply are limits in effect when application deemed complete. Inconsistent with ruling?

AIR QUALITY:
REGIONAL DEVELOPMENTS

Proposed BAAQMD Rule 12-15 – Petroleum Refinery Emissions Tracking

- Rule in development would require:
  - Annual emissions inventories and crude slate reports (starting September 2016)
  - Emissions Profile Reports revised as necessary (July 2018)
  - HRA based on 2014 emissions data and district-approved model (March 2016)
  - Fence-line and community air monitoring plan (December 2015)
- Draft rule last revised July 2014

BAAQMD's petroleum refinery emissions reductions initiative

- December 17, 2014 – BAAQMD Board unanimously adopts staff proposed strategy to achieve a goal of 20% reduction in Bay Area refineries' criteria pollutant, toxics and GHG emissions by 2020.

Petroleum refineries emissions reduction initiative – adopted strategy

1. Emission reductions focus on criteria pollutants
   - Rulemaking proceedings already underway:
     - SO_2 from *coke calciners*
     - PM from *fluid catalytic cracking units*
   - Draft measures planned for 2015 CAP
     - ROG (and TACs) from *equipment leaks*
     - SO_2 from reductions in sulfur content of *refinery fuel gas*
     - General reductions from reductions of *flaring*
   - Future study to identify possible additional reductions – SO_2 and NO_x

Petroleum refineries emissions reduction initiative – adopted strategy, cont.

2. Health risk reduction
   - Review and, as appropriate, adopt or borrow federal MACT rules.
   - Proposed Rule 12-15 sitewide HRA's, identify possible reduction strategies based on findings

Petroleum refineries emissions reduction initiative – adopted strategy, cont.

3. GHG emissions
   - Track reductions from other emission reduction programs
   - Evaluate against objective/third party standards
   - Try to identify additional reduction opportunities
4. Periodic evaluations by refineries of key source units to determine level of control and identify need for additional controls.

NSR, PSD and Title V rules

- December 2012 – BAAQMD adopted restated rules implementing CAA permitting programs:
  - Rule 2-1 – General requirements
  - Rule 2-2 – NSR and PSD
  - Rule 2-6 – Title V
- Rules include $PM_{2.5}$
- Not effective until EPA approves into SIP
- Approval said to be expected early 2015

AIR QUALITY – GREENHOUSE GAS REGULATION – NATIONWIDE

The Supremes speak.

Utility Air Regulatory Group v. EPA (US Supreme Court, 2014)

- Court holds: BACT requirements on GHG emissions may be imposed on "anyway" sources – sources already subject to regulation under Title V or PSD on account of emissions of other pollutants.
- Court rejects:
  - "Triggering Rule" – EPA argument that it is required to regulate stationary source GHG emissions.
  - "Tailoring Rule" – EPA effort to right-size PSD program, as it applies to GHG emissions, to the scale of GHG emissions.
- Result – EPA lacks authority under CAA to regulate GHG emissions from sources not otherwise subject to PSD or Title V.
- But note: 83% of GHG emissions from stationary sources nationwide come from "anyway" sources.

Regulation of existing power plants

- New greenhouse gas emission regulations for existing power plants under CAA 111(d).
- Comment period closed December 1, 2014.
- Pre-emptive challenge already filed in DC Circuit.

AIR QUALITY – GREENHOUSE GAS REGULATION – STATE LEVEL

Cap and Trade now includes transportation fuels

- January 1, 2015 – transportation fuels (gasoline and diesel) go under cap and trade
  - 38% of carbon emissions in California from transportation sources.
  - Unsuccessful effort to delay 3 years.
- At current allowance auction price of $12/ton CO2E, estimated retail pump price increase of $0.10-$0.12/gallon plus sales taxes.
- Other commentators have projected pump price increase resulting from inclusion of transportation fuels in C&T as high as $0.76/gallon.
- Any immediate increase since 1/1/15 is currently hidden in falling prices due to overall declining crude prices.

AIR QUALITY – GREENHOUSE GAS REGULATION – REGIONAL LEVEL

BAAQMD Thresholds of Significance

California Building Industry Association v. BAAQMD (Cal. Supreme Court – pending case)

- Primary issue in original litigation: BAAQMD compliance with CEQA in approval of new CEQA thresholds of significance for GHG, $PM_{2.5}$, and toxic air contaminant (TAC) emissions.
  - Court of Appeal held that approval was not a "project," hence CEQA didn't apply. Supreme Court is not reviewing this ruling.
- Secondary issue in original litigation: Were specific thresholds proper under CEQA?
- Supreme Court review: limited to question whether CEQA requires analysis of how existing environmental conditions will impact future receptors at a proposed project.
- This question affects only TAC and $PM_{2.5}$ thresholds
- BAAQMD position: GHG thresholds no longer in litigation, can be reinstated. TAC and $PM_{2.5}$ thresholds only in doubt with respect to narrow issue under review.

WATER QUALITY

Redefining “waters of the United States”

- April 21, 2014 – EPA and U.S. Army Corps of Engineers proposed revisions to regulatory definition of “waters of the United States.”
- Proposal retains traditional categories of jurisdictional waters by rule:
  - Traditional navigable waters;
  - Interstate waters, including interstate wetlands;
  - The territorial seas; and
  - Impoundments of the foregoing.
- Proposal would expand categories of waterbodies for determination of federal jurisdiction by rule. List would now include:
  - *“Tributaries”* of traditional jurisdictional waters
  - Wetlands “*adjacen*t” to traditional jurisdictional waters and tributaries; and
  - Waters other than wetlands that are "adjacent" to other jurisdictional waters.
- Proposal adds the following category to be determined on a case-by-case basis:
  - “*Other waters*, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a *significant nexus* to" traditional navigable waters, interstate waters, and the territorial seas.
- Extremely controversial; well-publicized.
- Comment period ended in November 2014, EPA working on final rule.

NPDES Permit Shield

Alaska Community Action on Toxics v. Aurora Energy Services LLC (US Court of Appeals, 9th Circuit)

- Company with stormwater general permit discharged coal and slurry into Alaska's Resurrection Bay at its overwater coal loading facility.
- Held: not a stormwater discharge and not allowed by general permit; hence company cannot assert a permit shield from penalty liability.
- Court specifically leaves open the question whether general permit sets up a permit shield.

WATER QUALITY – STATE ISSUES

Industrial Stormwater General Permit

- Adopted by SWRCB April 1, 2014
- Requirements go into effect July 1, 2015
- Replaces 1997 version
- Challenged in court by California Coastkeeper Alliance.
- Hearing scheduled for March 27 in Alameda County Superior Court

Industrial Stormwater General Permit Applicability and Coverage

- Applicable to listed categories and to facilities designated by RWQCB, unless facility:
  - Has another permit (individual NPDES or other general permit) addresses stormwater, or
  - Files ***Notice of Non-Applicability (NONA)***, supported by a No Discharge Technical Report, both prepared by a PE.
    - Certification that facility is designed to have no discharge (including to groundwater) and/or is not hydrologically connected with waters of the US.
- Facilities with no exposure of industrial activity and materials to stormwater may file ***No Exposure Certification (NEC)***, providing conditional exclusion from key permit requirements such as SWPPP, sampling and monitoring.
  - Replaces former “light industry” facility exemption.
  - Annual inspections and annual NEC refiling required.
  - Still subject to RWQCB inspections and payment of fees.

Industrial Stormwater General Permit – Impending deadlines

- All covered facilities, including existing dischargers operating under current general permit, must file:
  - NOI by July 1, 2015, or
  - NEC by October 1, 2015
- All existing dischargers must implement updated SWPPP by July 1, 2015

Industrial Stormwater General Permit
Electronic Reporting

- All enrollment documents (NOI, NEC), exclusion claims (NONA and technical reports), SWPPPs, monitoring reports and other required documents must be submitted electronically in publicly-accessible SWCRB Storm Water Multi Application and Report Tracking System (“SMARTS”)

Industrial Stormwater General Permit SWPPP requirements - Mandatory BMPs

- Formerly, facilities had to consider which BMPs were best suited
- New permit specifies mandatory “minimum BMPs”
  - Good housekeeping
  - Preventative maintenance
  - Spill and leak prevention and response
  - Materials handling and waste management
  - Erosion and sediment controls
  - Employee training
  - QA and recordkeeping
- “Advanced BMPs” required “to extent feasible” to reduce or prevent discharges in a manner reflecting “best industry practice considering technological availability and economic practicability and achievability.” Possible categories:
  - Minimize exposure of chemicals to stormwater
  - Containment and discharge reduction
  - Treatment

Industrial General Stormwater Permit
SWPPP requirements – contents and revisions

- New SWPPP contents:
  - Expanded list of “Industrial Materials,” including typical quantities and locations – even locations not exposed to stormwater
- SWPPP revisions:
  - “Significant” revisions to SWPPPs must be certified and submitted via SMARTS within 30 days of revision
  - Less than “significant” revisions every three months
  - “Significant” not defined

Industrial General Stormwater Permit Sampling and Monitoring

- Sample collection required after Qualifying Storm Events (QSE), redefined to be precipitation event that produces a discharge from any drainage area that is preceded by 48 consecutive hours without a discharge. (1997 rule: 72 hours)
- Samples must be collected from each drainage location within 4 hours of a QSE. (1997 rule: within the first hour)
  - Samples of equal volume from up to four discharge locations can be combined if locations are substantially similar.
- Samples must be collected following 2 QSEs during first and second six month periods of calendar year. (1997 rule: 2 samples during the wet season)
- Minimum lab analyses: O&G, TSS, pH. (1997 rule: included specific conductance; no longer required)
- Other lab analyses: ELG pollutants (if any); pollutants typical for dischargers within SIC code; pollutants causing Clean Water Act Section 303(d) impairment listing (if TMDL has been adopted)
- New discharger certification when discharging to Section 303(d) impaired waterbody: discharger is not a source of the pollutant driving the listing, or that there is no stormwater exposure to sources of this pollutant, or that discharge could not result in exceedance of a water quality standard.

Industrial General Stormwater Permit
Action Levels and Exceedances

- Numeric Action Level (NAL) exceedance:
  - Annual NAL exceedance – average of all sampling results within reporting year for single parameter (except pH) exceeds applicable annual NAL
  - Instantaneous maximum NAL exceedance – two or more results from samples for any single parameter within reporting year exceed applicable instantaneous maximum NAL.
    - TSS and O&G only

Industrial General Stormwater Permit Exceedance Response Actions (ERAs)

- Before any exceedance: Discharger has "baseline" status.
- "Level 1" status: First exceedance of an annual or instantaneous maximum NAL during a reporting year:
  - Triggers Level 1 ERA report (evaluate, revise BMPs)
- "Level 2" status: Second exceedance (same parameter, subsequent reporting year):
  - SWRCB-approved "Level 2 Action Plan" & "Level 2 ERA Technical Report" with mandated BMPs
- No further ERAs for parameters in question if Discharger demonstrates in Technical Report that:
  - additional BMPs not *technologically available* or *economically practical or achievable*; or
  - exceedances caused solely by non-industrial or background sources.

Industrial General Stormwater Permit - QISPs

- "Qualified Industrial Storm Water Practitioner" ("QISP"):
  - Level 1 ERA Reports and Level 2 Action Plans and Technical Reports
  - (Where new discharge is to 303(d) impaired water body): Demonstration that new discharger will not discharge pollutant driving the listing or that discharge will not cause or contribute to an exceedance of a water quality standard.
- Designation available to those who undergo specific course of training sponsored or approved by SWRCB, pass examination, and register on SMARTS.

Industrial General Stormwater Permit
Group compliance

- Dischargers in same industry type (same types of industrial activities, pollutant source and pollutant characteristics) may form Compliance Group
- Group must have SWRCB-trained and registered Compliance Group Leader.
- Compliance Groups can submit consolidated Level 1 and Level 2 ERA reports

Industrial General Stormwater Permit Reporting

- “Legally Responsible Person” (“LRP”) must certify all enrollment documents (NOI or NEC)
- LRP or Duly Authorized Representative must certify all other submissions
- Remember additional QISP and PE certifications
- Annual compliance evaluations still required.
- Annual Report due by 7/15 following end of compliance year on June 30.

GROUNDWATER

Sustainable Groundwater Management Act (SGMA)

- SB 1319 (Pavley) signed into law September 16, 2014
- First statewide regulation of groundwater usage in California history
- Focus on depleted and “medium” and “high” priority aquifers
  - Bay Area has none of the state’s 43 high priority basins and only 7 of the state’s 84 medium priority basins
  - Only 1 of the 7 medium priority basins – Livermore Valley basin – is in Contra Costa County
  - Does not apply to adjudicated aquifers.
- Requirements:
  - Formation of groundwater sustainability agencies (“GSA’s”)
  - Creation of groundwater sustainability plans by 2020-2022, with 50-year planning horizons
  - Sustainability by 2040
  - Enforceable limits on groundwater use

SGMA – Implementation Steps Beginning January 1, 2015

- Begin forming or identifying GSA's
  - Some mandated by statute
  - Others to be formed from existing local agencies with water supply or management responsibilities
  - Counties, then the state, are GSA's of last resort
  - Reportedly, Contra Costa County GSA will likely be special district or combination of agencies organized under a Memorandum of Understanding or Joint Powers Agreement.
- GSA's may:
  - Require well registration, metering and usage reporting
  - Establish system of fees for program administration and fines for violations of use restrictions
- Department of Water Resources (DWR) must:
  - Confirm or redefine groundwater basin and sub-basin boundaries
  - By 1/31/15, update 2014 effort assigning priority level (low/medium/high) to all 515 groundwater basins statewide.

SGMA – Future Implementation Steps

- By 2017
  - GSA's will be created for high and medium priority (i.e., most active) groundwater basins statewide
  - GSA's will develop plans for basin management, including plans for management and restoration of depleted supplies. Plans must be reviewed and approved by DWR.
- Deadlines for DWR-approved sustainability plans:
  - 2020 (depleted high and medium priority basins)
  - 2022 (all other high and medium priority basins)
- 2040 – all high and medium priority basins must have achieved sustainability

CONTAMINATED SITES AND CLEANUP

Avoiding joint and several liability under Superfund

U.S. v. P.H. Glatfelter et al. (US Court of Appeals, 7th Circuit 2014)

- Default rule: CERCLA cleanup liability to the government is joint and several (each liable party responsible for 100% of cleanup costs) unless the harm is "divisible."
- Relatively simple numeric data quantifying a party's individual contribution to cleanup costs – such as volumetric contributions – may be enough to avoid joint and several liability.
- Follows *Burlington Northern & Santa Fe Railway v. US* (US Supreme Court 2009): "reasonable basis for apportioning liability" will suffice.

CERCLA liability for pumping water supply well?

Coppola v. Smith (US District Court, ED Cal.)

- Water Company pumped supply well, thereby drawing groundwater contaminants (PCE) to it. Another potentially responsible party sued water company as a CERCLA liable party.
- Held, Water Company is not liable.
  - No "disposal" at the well because pumped water entered distribution system, not the environment.

Airborne deposition is not “disposal”

Center for Community Action and Environmental Justice v. BNSF Railway Company DC (US Court of Appeals, 9th Circuit 2014)

- Rail yard operators did not dispose of solid waste when they let diesel particulate matter blow away and be inhaled.
- “Disposal” requires placement into land or water.
- Note: CERCLA lacks “disposal” definition, cases borrow RCRA definition. Could have implications for CERCLA cases.

Vapor Intrusion – Regulatory Focus in 2014

- Primarily TCE
- Carcinogenic industrial solvent
- Recent controversial studies – non-cancer risk
  - 1st trimester pregnant women – fetal heart abnormalities
- Started at South Bay Superfund Sites late 2013
- Middlefield/Ellis/Whisman (MEW) Site in Mountain View - IAQ testing mandated within area of 5 ug/l or higher concentration of TCE in groundwater
- EPA Region 9 Guidance (July 2014)

EPA TCE VI Indoor Air Response Action Levels

- Commercial indoor air action levels
  - Accelerated response: 8 ug/m^3 (8-hour days); 7 ug/m^3 (10-hour days)
  - Urgent response : 24 ug/m^3 (8-hour days); 21 ug/m^3 (10-hour days)
  - Residential action levels are more stringent.
- "Accelerated" means prompt action with results confirmed *within a few weeks*
- "Urgent" means immediate action with results confirmed *within a few days*.
- Possible response actions:
  - increasing building pressurization or ventilation;
  - sealing conduits;
  - treating indoor air;
  - retrofit buildings (e.g., installed SSD);
  - temporary relocation/evacuation.

RWQCB "Interim Framework" (October 2014)

- Same indoor air screening/action levels as EPA
- Mandates graduated investigation approach from source to receptor before jumping to IAQ testing
  - Sets trigger levels for groundwater and soil gas TCE
  - Evaluates sites based on multiple lines of evidence.
- If action levels exceeded in commercial buildings:
  - Increase HVAC operation
  - Seal conduits
  - Treat indoor air
- Contains evaluation of VI mitigation approaches based on setting, use and age of building.

Crude by rail

- In the news due to incidents and Keystone pipeline controversy
- Primary regulator is Federal Railroad Administration
- State legislative efforts:
  - SB 1319 (Pavley) would have established Regional Railroad Accident Preparedness and Immediate Response Force, and created system for fees for hazardous materials transport.
  - SB 1319 abandoned, bill number became SGMA
  - AB 2678 (Ridley-Thomas), not yet passed, has fee component
- BAAQMD Resolution December 2014 – urges federal and state agencies with responsibility for regulation of rail safety to adopt regulations regarding transport of crude and other hazardous materials by rail.

HAZARDOUS WASTE

Amendments to Definition of Solid Waste (DSW) Rule under Resource Conservation and Recovery Act (RCRA)

- Finalized by EPA December 2014.
- Withdraws RCRA exclusion for materials transferred by the generator to an independent off-site recycler.
- Creates exclusion for transfer to “verified recycler,” who must either have RCRA permits or variances to operate under the exclusion for specified materials.
- In California requires adoption by Department of Toxic Substances Control (DTSC) before it can become effective.

DSW Rule Amendments, cont.

- Requirements for generators:
  - Notification to state or EPA
  - Ensure that hazardous secondary materials are contained
  - Maintain shipment records
  - Comply with emergency preparedness requirements
  - No sham recycling.
  - Termination of requirement to audit recyclers.

DSW Rule Amendments, cont.

- Verified recyclers under variance from permit requirements:
  - Demonstrate legitimate (non-sham) recycling
  - Financial assurances
  - No formal enforcement actions for 3 years; not a significant non-complier with Subtitle C
  - Emergency preparedness plans; minimum equipment and personnel training standards
  - Proper management of residuals
  - Address risk to communities of releases of hazardous secondary material

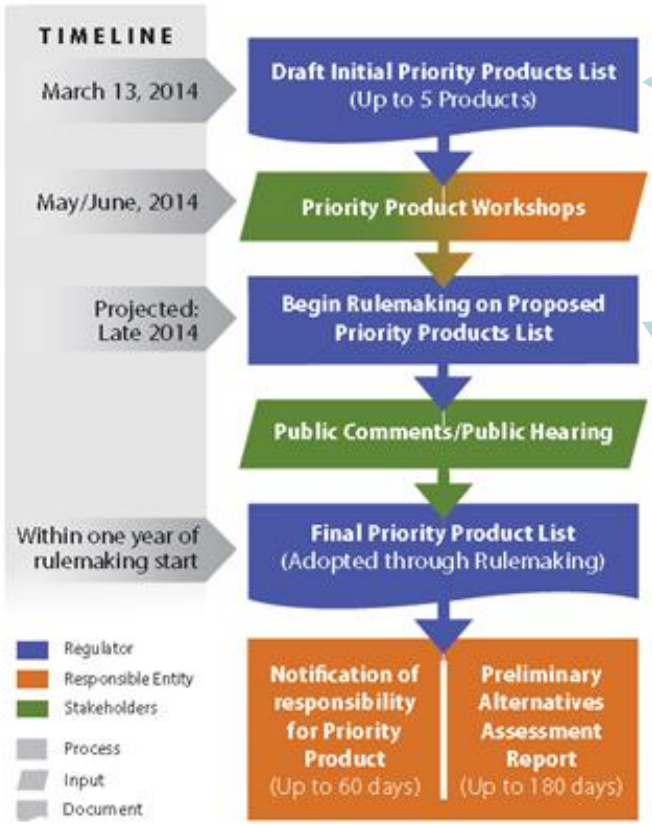
DSW Rule Amendments, cont.

- Other key elements:
  - Establishes standard for legitimate recycling
  - Reaffirms legitimacy of in-process recycling and desirability of commodity-grade recycled products:
    - Restores certain categorical exclusions (e.g., scrap metal).
    - Retains exclusion for recycling under the control of the generator, including onsite recycling, within the same company or through specified agreements.
    - Includes exclusions for high-value spent solvents that are remanufactured into commercial grade products.

GREEN CHEMISTRY

Green Chemistry

- 2008 – Legislature passed Green Chemistry Law (AB 1879 and SB 509)
- October 2013 – Safer Consumer Products Regulations went into effect



Initial Priority Products (not finalized)

- Spray Polyurethane Foam (SPF) Systems containing unreacted diisocyanates;
- Children's Foam Padded Sleeping Products containing Tris(1,3-dichloro-2-propyl) phosphate or TDCPP;
- Paint and Varnish Strippers, and Surface Cleaners with methylene chloride

Not yet initiated

After Priority Products list is finalized through formal rulemaking and "Alternatives Analysis" is complete, DTSC will implement "Regulatory Responses" for Priority Products (could include requirements to reformulate, product bans, etc.)

CEQA

Proposed new CEQA Guideline regarding transportation impacts

- Proposed 14 CCR 15064.3 – mandated by SB 743 (Steinberg 2013)
- OPR issued discussion draft guidelines August 6, 2014
  - Abandons longstanding Level-of-Service (LOS) metric
  - Categories of projects do not have significant adverse transportation impacts
    - Within ½ mile of major transit stops, or
    - Reduce vehicle miles traveled (VMT)
  - Projects that increase VMT may have significant adverse impact
  - Evaluation and mitigation (as necessary) of emissions or noise impacts required in any event.
- Comment period closed; awaiting publication of new guidelines, likely in 2015.

Office of Planning and Research (OPR) comprehensive review/amendment of Guidelines

- Planned for 2014
- Spilling over to 2015

Possible categories of Guideline amendments

- GHG emissions (initial set adopted 2010)
  - May be affected by outcome of CBIA litigation in state Supreme Court
- Lead agency designation
- Lead agency sharing of draft documents with proponent
- Significance of environmental effects
- Responses to comments
- Project definition and description
- Definition of environmental setting and baseline
- Mitigation and alternatives
- Water supply

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

- BAAQMD's revised CEQA thresholds of significance for $PM_{2.5}$ and TAC emissions require new developments to evaluate (and, potentially, mitigate) exposure of new residents and users to pre-existing air pollutants from existing sources.
- Supreme Court review limited to question whether CEQA requires analysis of how existing environmental conditions will impact future receptors at a proposed project.
  - Note that similar question has appeared for years on Initial Study checklist (air quality impacts)

Center for Biological Diversity v. California Dept. of Fish & Wildlife (Cal. Supreme Court – pending)

- Major open space mixed use development near Santa Clarita.
- "Business As Usual" Baseline: EIR compares actual project GHG emissions projections to "business as usual" ("BAU") projections assuming absence of statewide measures to implement AB 32.
- AB 32 significance threshold: Lead agency used AB 32 scoping plan's 29% reduction in emissions.
- EIR significance determination: Projected actual emissions are 31% below BAU projected emissions – better than 29% - thus GHG emissions impact deemed less than significant.
- Court of Appeal: Upheld EIR.
- Issue (one of several) before Supreme Court: May an agency deviate from the Act's existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher "business as usual" baseline?
- Compare BAAQMD thresholds.

Save the Plastic Bag Coalition v. City and County of San Francisco (Cal. Ct. of Appeal 2014)

- SF Board of Supervisors relied on categorical exemption for measures to maintain, restore, enhance or protect environment in adoption of ban on use of plastic checkout bags in retail stores.
- Challenge cited increase in paper use and environmental impacts of paper manufacturing and paper waste.
- Ordinance upheld.

Picayune Rancheria v. Brown (Cal Ct. of Appeal 2014)

- The Governor is not a "public agency," and hence his or her decisions made in that capacity are not subject to CEQA.
- Case arose when Governor concurred, without going through CEQA, in US Department of Interior decision to authorize Indian gaming casino for one tribe over objection of competing tribe.

Saltonstall v. City of Sacramento (Cal Ct. of Appeal 2014)

- Challenge to specific legislation relating to Sacramento Kings (NBA) stadium project. Bill shortens deadlines for CEQA compliance and CEQA challenges.
- Validity of legislation upheld: not an unconstitutional intrusion on the power of the courts and does not implicate a constitutional right.

Ventura Foothill Neighbors v. County of Ventura (Cal Ct. of Appeal 2014)

- In EIR "addendum," County, project proponent, failed to disclose increase in height of health clinic it planned to build.
- Held:
  - Change was substantial, requiring supplemental EIR
  - Failure to provide public notice excused late filing of lawsuit.
  - Project approval set aside.
- Court opined: "Men must turn square corners when they deal with the Government… It is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens."

ONE MORE IMPORTANT SUPREME COURT CASE TO WATCH

Interpretative Rules

Perez v. Mortgage Bankers Association (US Supreme Court)

- Challenge to 2010 interpretive rule by U.S. Department of Labor stating that mortgage brokers are no longer exempt from minimum wage and overtime pay requirements.
- Court will decide:
  - Whether agencies should be required to engage in formal notice-and-comment rulemaking in lieu of informal agency guidance and "interpretive rules"
  - The extent to which agencies should still receive deference from courts in interpreting their own regulations when regulations are vague.

Questions or comments?

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Presentation: