Lottiefox

From: "Lottiefox" <lottiefox@verizon.net>
To: "pamela05n" <pamela05n@peoplepc.com>; "ROBERT WHEELER" <robertdwheeler@verizon.net>; <bikemanterry@verizon.net>; "Vicki Long" <VickiGLong@AOL.com>; "Del Ross" <delross@verizon.net>; "Edward Stanton" <stantoned11@mchsi.com>; "danishelen" <danishelen@earthlink.net>
Cc: "Hewitt, Robert - San Jacinto, CA" <Robert.Hewitt@ca.usda.gov>
Sent: Sunday, February 04, 2007 1:17 PM
Attach: EMARCD - Board Minutes - Jan 11, 2007.doc
Subject: revised EMARCD minutes

All:

A couple of corrections were submitted for the January minutes....both were minor and have been incorporated in the attached version.

Dan and Ellen have volunteered to take minutes for the meeting this week, as I will be out of town. And Bob Wheeler will swear in the new director.

TWO REMINDERS:

1) Form 700s are needed from every director and associate director. They can be filled in on line at www.fppc.ca.gov. Instructions on completing the forms are included. Before you leave the website, **print two copies of your form**(s). Keep one copy for your records and make sure that I get a file copy for our records. The request is not idle; it's required by law.

2) The deadline has slipped for the Annual Report because no reports have come to me yet. ***Please*** send. The earliest possible publish date for an Annual Report has now slipped into March.

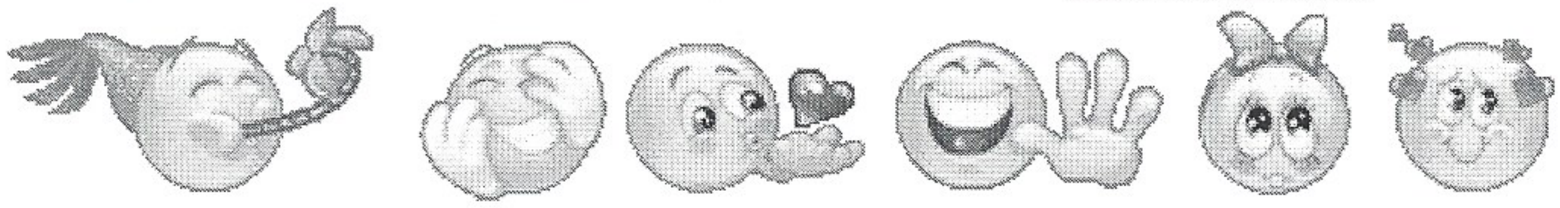
Thanks!

Charolette Fox
32800 Hupa Drive
Temecula, CA 92592
(951) 302-0180
(951) 302-0171 Fax
lottiefox@verizon.net

Lottiefox

From: "ROBERT WHEELER" <robertdwheeler@verizon.net>
To: "Vicki Long" <VickiGLong@AOL.com>; "Robert D. Wheeler" <robertdwheeler@verizon.net>; "Pam Nelson" <pamela05n@peoplepc.com>; "Gary Watts" <gwatts@parks.ca.gov>; "Ed Stanton" <estanton@cnlm.org>; "Del Ross" <delross@verizon.net>; "Dan Matrisciano" <danishelen@earthlink.net>; "Charolette Fox" <lottiefox@verizon.net>; "Bob Hewitt" <Robert.Hewitt@ca.usda.gov>; "Terry Whittington" <bikemanterry@verizon.net>
Sent: Thursday, January 25, 2007 8:46 PM
Subject: Workshop with Sandra Baca to develop accounting system for RCD

We were scheduled to meet in Riverside on January 30. However, because of illness, the MEETING IS CANCELLED and will be re-scheduled later.
Bob



Lottiefox

From: "pamela05n" <pamela05n@peoplepc.com>
To: "vicki" <vickiglong@aol.com>; "bob" <robertdwheeler@verizon.net>; "lottie" <lottiefox@verizon.net>; <bikemanterry@verizon.net>; "del" <delross@verizon.net>; "dan" <danishelen@earthlink.net>
Sent: Monday, February 05, 2007 3:36 PM
Subject: action items

I will be sending out an agenda soon. Any additions?
Action items:
1) Organizational structure:
Standing comm.: composed of 2 directors, meet monthly or more
- mitigation, new chair—Vicki
- watershed, new chair ---Pam
- regulatory oversight---Bob

ad hoc comm.: composed of associate directors, directors and community members
- events: Pam, Charolette
- office search: Pam
- others ?

2) Hire Sandra Baca for an accounting workshop, if the RC&D won't pay for her.
3) Mitigation funds acceptance policy
4) We will host the CARCD regional meeting March 28. It will be held in Anza and the main topic will be the Anza Water Study. Other ideas?
5) Annual plan workshop:
-prioritize tasks
- set date
- get in suggestions to Charolette---now
6) agenda format change

I will swear in new directors and discuss assigning associate directors.
Presenter from CDF Forestry, Guy Anderson, on seed banks and seedlings available

Director's Report: Pam Nelson

1) Jan. 16, 2007:
   -Watermaster meeting
   -Bur. of Reclamation Executive Management meeting. Discussion of how stakeholders can participate in affecting impacts on the SMR watershed. Afterwards, met with Scott Thomas and Bill Steele to describe our district's mitigation and restoration focus.
2) Jan. 17:
   - Bur. of Reclam. Water Quality meeting: Discussion of what kind of monitoring would be appropriate for this group and how it would relate to the new monitoring requested by the EPA.
3) Jan. 18: Bob Wheeler and I
   - met with Wells Fargo Business specialist, Natalie Martinez. She set up a system for us so that each account will have a descriptor for easy tracking. We still have our General Fund and Special Fund. Our mitigation funds are in CDs with separate numbers and descriptors. Bob suggested different time frames for the CDs so that some will mature sooner than others in case of need.
4) Jan. 25:
   - met with Sup. Buster to tell him about the mitigation and restoration direction our RCD has taken. Vicki came along and we thanked him for supporting the new appointees. He gave us several suggestions for our proposed projects and is enthusiastic about our ideas. He will try to help get our auditing done and agreed with our suggestion to leave our boundary as it stands.
   - Lafco Commission Meeting: Vicki and I presented our district's request of keeping our current boundary even though we thought the watershed line adjustment would be more practical. The commission agreed with us.
   - SAWA meeting: lots of good ideas for restoration, help on projects and partnering were discussed. We need a letter reinstating our district to the association.
5) Jan. 26:
   - Aguanga Town Hall meeting: a very intense and to-the-point meeting with Sup. Stone, Planners, Joe Tronti and Keith Gardner and Brian Black from Code Enf. Specific land use and OHV problems were brought up by residents from Sage, Aguanga and Wine Country. The Sup. made a long list for a follow-up meeting. He requested to attend the "agency" meeting scheduled for Feb. 8th that I organized as a way to solve one of the problems brought to us by Ida Martin. I also presented the Agua Tibia problem brought to us by Larry Ulvestad.
6) Jan. 29:
   - RC & D:
     Budget discussions and reporting were the main topic. I reported about the Yosemite Conference (Pac Rim). They are looking for new ways to get more members to participate and have some new staff helping.
7) Feb. 7:
   - RMC meeting: discussion of our use of Alamos Schoolhouse grounds for our Earth Day event on May 20.
7) Feb. 8:
   -"Agency" meeting at site (Canyonlands/ Superior batch plant)

DIRECTOR'S REPORT
for Thursday, February 8, 2007
Charolette Fox

Activities

This was another very full month of activities. In addition to my usual schedule of meetings that relate to water and habitat conservation, I attended the third annual conference on managed growth sponsored by UCR.

I participated in:

-- webcasts of the Air Resources Board
-- conference calls of the environmental legislative collaboration
-- CA ISO (California Independent System Operators) regarding the LEAPS project in Lake Elsinore

Assigned Board Tasks

Displays/Exhibits

I am in the process of gathering materials and developing a display for EMARCD use at nature and earth day type events. Since displays are static and tend to have passive appeal for youngsters, I've ordered some games and activities that can be used to teach about nature in a fun way.

Annual Report

Write ups are requested from Directors and Assistant Directors so that the Annual Report can be compiled.

Form 700's

One copy of Form 700 needs to be maintained for the record and must be available upon request of any individual or organization. Please forward one copy of your Form 700 as soon as possible.

Other

The City of Temecula may begin an annexation to the area where the proposed Liberty Quarry would be built. As a resident and as a city Commissioner, I will attend meetings.

Lottiefox

From: "pamela05n" <pamela05n@peoplepc.com>
To: "Lottiefox" <lottiefox@verizon.net>
Sent: Monday, January 22, 2007 7:41 PM
Subject: Re: Form 700 - state report required

I sent the email to Rick (rhopkins@loainc.com) . I spoke with Tacy curry (CARCD) about our regional meeting. She would like us to do it on March 28th. I've spoken to Mary at the cahuilla tribal office to see if we could work something out. She'll tell me this week.
pam

-----Original Message-----
From: Lottiefox
Sent: Jan 21, 2007 11:40 AM
To: pamela05n , bikemanterry@verizon.net, Vicki Long , ROBERT WHEELER
Cc: Del Ross , danishelen
Subject: Form 700 - state report required

The Political Reform Act of 1994 requires that officials, employees, consultants, and members of certain enumerated committees, commissions and boards submit an annual Statement of Economic Interests **(Form 700)**. These forms are public records and are to be made available for inspection to any requesting party.

An interactive version of Form 700 is available at www.fppc.ca.gov. Please contact me if you need a hardcopy.

As Secretary, I maintain the records for EMARCD. Please complete the form as soon as possible, no later than April 1, 2007.

Make a copy for yourself then mail or bring the original to me. The forms will be filed in a notebook maintained for this purpose.

PS Pam or Vicki: I do not have Dr. Hopkins email address. As our Consultant, he (Live Oak Associates, Inc) is required to comply with the Form 700 filing. The information is not released until or unless requested by a member of the press, the public, or another agency.

Could one of you please inform Dr. Hopkins so that he can provide the information? I rather imagine he is aware of this requirement to file and may already be prepared to respond.

Thank you.

Charolette Fox, Secretary
Elsinore-Murrieta-Anza RCD
32800 Hupa Drive
Temecula, CA 92592
(951) 302-0180
(951) 302-0171 Fax
lottiefox@verizon.net

A- DEL ROSS - ASSOCIATE DIRECTOR'S REPORT- January – February 2007

I- Summary.

EMARCD again was well represented at a number of meetings as many activities are moving from concept to action in the Santa Margarita Watershed. The US Bureau of Reclamation (BuRec) is proceeding a program for water quality by bringing together the many diverse groups such as SD State and Camp Pendleton that have measurement data regarding the Santa Margarita.

No action yet on our interests in the Integrated Regional Watershed Plan. Made some contacts with San Diego Public Works that may lead to our acceptance in the program.

II- Events

Webcasts- Del has "captured" a several webcasts from Izaac Walton League and EPA as reported on last time. Not yet ready to "publish" them. These can be used for "outreach" and for our own education. Most are 2 hours long and consist of "streaming" audio and slide presentations. Here is the list to date:

- IDDE (Illicit Discharges) Sept. 12
- Brownfields Funding Sept 19
- TMDL 3rd Party Review Sept 21
- Volunteer Monitoring Oct 11
- Pharmaceuticals in stormwater Oct 24
- Stormwater- construction BMPs Jan 10
- Stormwater- Transportation- on archives

Meetings / Events:

1. 1/16/07 BuRec executive meeting
2. 1/17/07 BuRec Water Quality Meeting
3. 1/17/07 Attended NPDES meeting- San Bernardino to review WQMP as compared to Riverside
4. 1/18/07 Attended Rainbow Creek Stakeholder's meeting.
5. 1/25/07 Attended Riverside NPDES
6. 1/18/07 Toured potential revegetation sites in Murrieta

Press Enterprise
1-30-07

– CARL LOVE

A GREENER VIEW

Their very name, Elsinore-Murrieta-Anza Resource Conservation District board of directors, implies these folks are into saving land from development.

Given the way things have gone in recent years — in case you haven't noticed, just a little building has gone on in Southwest Riverside County — you could argue they haven't been real successful. Not that it's their fault, given the avalanche of growth that has slammed into us.

Like Chicken Little running around about the sky falling, the group continues to sound the alarm about trying to protect the environment. Unlike the storybook character, these guys aren't naive about what's happening.

"They (developers) want to put cookie-cutter houses down, take their money and run as fast as they can," said **Bob Wheeler**, who's served on the board since about 1990, longer than anybody else.

The five-member board — which also includes President **Pam Nelson**, **Charolette Fox**, **Terry Whittington** and newcomer **Vickie Long** — is appointed by Riverside County supervisors to work with builders and other public officials to make sure the environment is at least a passing thought before the earth movers are fired up.

They have no office and no paid staff. Passion: that's one thing they're loaded with.

The conservationists might ensure that wildlife corridors are kept open or that development isn't going to affect waterways. They work to restore riparian habitat that has been overwhelmed by growth. They feel they've been successful in protecting Warm Springs Creek as it meanders through eastern Murrieta.

Wheeler proudly notes that Supervisor **Jeff Stone** thinks so much of their work that he gave them $5,000 to keep it up.

"We effectively do a lot of work for the county," he said.

As a Temecula city councilman and now as a county supervisor, Stone said he's long respected Wheeler's expertise.

"He gives me the environmental perspective and I need to hear that. I'm not always going to agree with it."

Stone said the district is a good balance to the developer interests he hears plenty from.

They meet the second Thursday of every month at the visitors center at the Santa Rosa Plateau Ecological Reserve near Murrieta. They also crank out newsletters on topics such as global warming and waste-to-energy proposals. Not exactly hot-button topics in a southwest county dominated by rabidly conservative — not conservation — politics.

It's a panel with local, state and federal ties. Such districts were created after the devastating Dust Bowl of the 1930s that ravaged much of the Great Plains. The idea was to prevent such disasters in the future.

Farmers formed the local panel in 1949 and their original 13 goals all related to agriculture. The population then was about 3,000. Today it's about 300,000. Just a little change.

The district includes a whopping 505,000 acres, sweeping south from Scott Road to the San Diego County line, and east of Anza to the Orange County line. The mission statement says the district "promotes conservation practices of natural resources, opportunities for public education and participation, and a sustainable quality of life within the district."

It sounds great. Making it happen is their job, as difficult as it seems.

Reach Carl Love at carllove4@yahoo.com

Lottiefox

From: "Kevin Olson" <olsonke@cox.net>
To: <Recipient List Suppressed:>
Sent: Wednesday, January 31, 2007 8:02 PM
Subject: Oppose the 1st ever attempt to *DE-DESIGNATE* a protected wilderness area in California!

Dear SAMTF members and friends,

Please read the following message and consider attending a public meeting on Feb 8 and/or writing a letter to the California State Park and Recreation Commission opposing San Diego Gas and Electric's outrageous proposal to put a large transmission line (the "Sunrise Powerlink") through Anza Borrego State Park and to de-list a Wilderness area in the park so that the line can run through it.

Ulrike Luderer, Wilderness Chair, Santa Ana Mountains Task Force

PLEASE FORWARD THIS ALERT FAR AND WIDE! Sorry about cross-postings

Dear lovers of California's wild places:

San Diego Gas and Electric Company (SDGE) has proposed to erect a gargantuan powerline called the "Sunrise Powerlink" in Anza-Borrego Desert State Park and, even more shockingly, to PLUNGE THE LINE THROUGH A DESIGNATED WILDERNESS AREA!

When either the federal or state government protects fragile wild lands as wilderness the protection is supposed to last forever, or at least as close to forever as something can get under our nation's laws. Sadly, a loophole exists that allows wilderness or portions of wilderness to be de-designated under some circumstances. SDGE is trying to exploit this loophole by de-designating wilderness for THE FIRST TIME IN CALIFORNIA'S HISTORY. If SDGE is successful at Anza-Borrego, then no designated wilderness is safe anywhere!

The California State Park and Recreation Commission has been given the utterly unenviable task of voting on this heinous proposal because under state law they have the authority to de-designate state park wilderness. Commission members absolutely MUST hear from you before they vote on the issue on 2/8/07!

There are two ways you can contact the Commission and stand up for California's wilderness:

1) ATTEND THE NEXT MEETING OF THE CALIFORNIA STATE PARK AND RECREATION
COMMISSION on Thursday, February 8, 2007 at 7:00 p.m. in the De Anza Ballroom of the Borrego Springs Resort, 1112 Tilting T Drive, in Borrego Springs, California. Come prepared to speak, even if it's just to express in a few simple words your opposition to wilderness de-designation and the idea of building massive powerlines through state parks.

2) IF YOU ABSOLUTELY CAN'T ATTEND THE MEETING, THEN WRITE A

LETTER TO THE
COMMISSION IN TIME FOR THEM TO GET YOUR COMMENTS BY 2/7/07! Please address
your letters to:

The Honorable Bobby Shriver, Chair
California State Park and Recreation Commission C/O Louis Nastro, Assistant to the Commission P.O. Box 942896 Sacramento, CA 94296-0001
LNastro@parks.ca.gov

Please provide your full name and address in your letter, even if you send your comments by e-mail.

SAMPLE LETTER:

The Honorable Bobby Shriver, Chair
California State Park and Recreation Commission C/O Louis Nastro, Assistant to the Commission P.O. Box 942896 Sacramento, CA 94296-0001

Dear Mr. Shriver and other members of the Commission:

I strongly oppose the construction of the Sunrise Powerlink through Anza-Borrego Desert State Park. I also oppose the shocking proposal to de-designate wilderness inside the park. If the Commission approves the de-designation, it will establish an extremely harmful precedent that will threaten wilderness areas not only in California, but across the nation.

The Commission has shown itself to be a friend of our parks and wilderness areas over the years. Please continue to stand up for our wild places by voting against Sunrise Powerlink.

Thank you.

Sincerely,

****
Ryan Henson
Policy Director
California Wilderness Coalition
P.O. Box 993323
Redding, CA 96099
(P) 530-246-3087
(M) 530-902-1648
(F) 574-966-2324
E-mail: rhenson@calwild.org
Website: www.calwild.org

The CWC: The Voice for Wild California

****

2/5/2007

Lottiefox

From: <Barbrosey@aol.com>
To: <JillCaseE@aol.com>
Cc: <blimberg@fea.net>; <dsexelby@cox.net>; <dthomas949@cox.net>; <edandMaryBrooks@cox.net>; <genelah@fea.net>; <gloriasall@yahoo.com>; <jca1934@aol.net>; <Jenhumphrey6@cs.com>; <JRoss231@cox.net>; <lnrhudd@cox.net>; <lynharrishicks@cox.net>; <marilynjobrien@earthlink.net>; <peggyedwards4@yahoo.com>; <srholdt@cox.net>; <Barbrosey@aol.com>; <ealabahn@att.net>; <grtnhs@pacbell.net>; <jack_sullivan@pitzer.edu>; <Joanriddle@yahoo.com>; <Liz1allen@aol.com>; <margoreeg@yahoo.com>; <saseven@juno.com>; <skyhawk172@socal.rr.com>; <Tnmengland@sbcglobal.net>; <wendyrose@adelphia.net>; <Yetta@aol.com>; <lottiefox@verizon.net>; <angela@chenlindstrom.com>; <barbj@sbcglobalnet>; <carolk@kiscomm.com>; <dpirch@socal.rr.com>; <Dthomas949@cox.net>; <eileeno@sbcglobal.net>; <hakehome@sbcglobal.net>; <maryevelynbryden@yahoo.com>; <mathewsfran@sbcglobal.net>; <shirleybloom@dslextreme.com>; <tagielow@ca.rr.com>
Sent: Monday, February 05, 2007 6:05 PM
Attach: Oppose the 1st ever attempt to _DE-DESIGNATE_ a protected wilderness area in California!.eml
Subject: Fwd: Oppose the 1st ever attempt to *DE-DESIGNATE* a protected wilderness area in California!

Lottiefox

From: "Lottiefox" <lottiefox@verizon.net>
To: <bob.johnson@cityoftemecula.org>; <mlanier@murrieta.org>
Cc: <rsudman@watereducation.org>; "Margo Reeg" <margoreeg@yahoo.com>
Sent: Friday, February 02, 2007 2:47 PM
Subject: Marine Corps Conservation Expo

All:

FYI. The Santa Margarita Watershed includes Camp Pendleton, and I'm sure you are aware that the Murrieta and Temecula Rivers converge to provide the Marine Base with it's ONLY source of fresh water. I've had the privilege of touring the biodiversity there and seen the water storage/waste treatment facilities. Legal cases of *many years duration* have been settled and the Base is moving forward to address the water resources needed for the ever-growing "military city" they serve. There are no environmental "exemptions;" the Base must comply with all local, state and federal health and environmental laws.

I'm forwarding the information below because you may be interested in the upcoming workshops and/or securing a booth space for displays.

Charolette Fox
Director, Elsinore-Murrieta-Anza Resource Conservation District (EMARCD)
Director, Water Education Foundation (WEF)
32800 Hupa Drive
Temecula, CA 92592
(951) 302-0180
(951) 302-0171 Fax
lottiefox@verizon.net

~~~~~~~~~~~~~~~~~~~~~~~~~~

FROM: "Quigley GS12 Kenneth W" <kenneth.quigley@usmc.mil>
TO:
DATE: Thu, 1 Feb 2007 16:48:36 -0800

RE: MARINE CORPS CONSERVATION EXPO

MGen Michael Lehnert, USMC, the Commanding General, Marine Corps Installations WEST (MCIWEST), is sponsoring a Conservation EXPO at MCB Camp Pendleton, on 8 March 2007.

Through this forum, the Commanding General seeks to bring together environmental planners, programmers, contract managers and contractors, stakeholders, non-governmental organizations (NGOs), and other interested parties to exchange and leverage ideas, experiences, requirements, and best management practices that will:

(a) Identify and increase efficiencies through contracting processes that provide maximum return on limited available Marine Corps environmental funds and resources;

(b) Promote resource management program approaches and practices that maximize the conservation potential for MCIWEST lands, within its mission context, and

(c) Strengthen partnerships that can conserve regional landscapes and biodiversity, relieve encroachment related restrictions and restore tactical flexibility and mission capability for MCIWEST installations and ranges.
~~~~~~~~~~~~~~~~~~~~~~~~~~

* Please see the following Web link for additional information and registration: www.mciwestconservationexpo2007.com

* Space is somewhat limited for the workshops, so register soon; the Web page will inform you when registration is full/closed.

* Please feel free to forward this announcement to others that may be interested.

We look forward to seeing you there.

Ken Quigley
Planning Branch
AC/S Environmental Security
Box 555008
Building 22165
Marine Corps Base
Camp Pendleton, CA 92028-5008
Kenneth.Quigley@USMC.mil
(760) 725-9733
fax (760) 725-9722
DSN 365

Lottiefox

From: "Ed Stanton" <estanton@cnlm.org>
To: "Pam Nelson" <pamela05n@peoplepc.com>; "Charolette Fox" <lottiefox@verizon.net>
Sent: Friday, February 02, 2007 1:42 PM
Subject: FW: MARINE CORPS CONSERVATION EXPO

FYI

Edward Stanton
Center for Natural Lands Management
425 E. Alvarado St., Suite H
Fallbrook, CA 92028
760-731-7790 (p)
760-731-7791 (f)

-----Original Message-----

---------- Forwarded Message ----------

FROM: "Quigley GS12 Kenneth W" <kenneth.quigley@usmc.mil>
TO:
DATE: Thu, 1 Feb 2007 16:48:36 -0800

RE: MARINE CORPS CONSERVATION EXPO

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* Space is somewhat limited for the workshops, so register soon; the Web page will inform you when registration is full/closed.

* Please feel free to forward this announcement to others that may be

interested.

We look forward to seeing you there.

Ken Quigley
Planning Branch
AC/S Environmental Security
Box 555008
Building 22165
Marine Corps Base
Camp Pendleton, CA 92028-5008
Kenneth.Quigley@USMC.mil
(760) 725-9733
fax (760) 725-9722
DSN 365

MCI WEST
CONSERVATION EXPO 2007

The Commanding General, Marine Corps Installations WEST (MCIWEST), MGen Michael Lehnert, is sponsoring MCIWEST Conservation Expo '07 at MCB Camp Pendleton's Staff NCO Club, on Thursday, March 08, 2007.

Through this EXPO, MCIWEST seeks to engage environmental planners, program managers, contract managers and contractors, non-governmental organizations (NGO's), and other interested parties in an exchange of ideas, experiences, and best management practices that can strengthen relationships and yield high-quality environmental products and services.

A distinguished panel of speakers will join General Lehnert for the plenary session to provide a brief overview of their organizational conservation mission(s), objectives and challenges. The plenary panelists are:

The Honorable Mr. Donald Schregardus,
Deputy Assistant Secretary of the Navy (Environment)

Ms. Felicia Marcus,
Executive Director and Chief Operating Officer for the Trust for Public Lands

Mr. Stew Bornhoft,
President of San Diego SAME & VP (PM) for Shaw Environmental & Infrastructure

In addition, attendees will have the opportunity to hear Congressman (Retired) Paul "Pete" McCloskey, a framer of the Endangered Species Act, provide his views on the national conservation agenda and posture.

Three workshops will be conducted to promote open dialogue and to explore the best means to:
(a) assure that environmental contracts deliver maximum return on limited available Marine Corps environmental funds and resources,
(b) promote conservation management approaches and practices that maximize the conservation potential for MCIWEST lands, within its mission context, and
(c) strengthen partnerships that can conserve regional landscapes and biodiversity, relieve environmental encroachment restrictions and restore tactical flexibility and mission capability for MCIWEST installations and ranges.

- Space is limited to approximately 100 per workshop and is available on a first-come basis, so register promptly to reserve your seat. Registration is not required for those who are serving as a presenter or panelist.

- Space for organizational displays will be available, although also limited. Those desiring to reserve booth space for their company or organization can do so through the registration process. Space will be provided on a first-come, first-reserved basis.

- There will be a no-host luncheon during the lunch hour and a no-host reception in the evening.

- Please visit this site frequently for any new updates and pass to others in your organization that may be interested in attending this event.

Lottiefox

From: "DEL ROSS" <delross@verizon.net>
To: "Robert Wheeler" <robertdwheeler@verizon.net>; "Pam Nelson" <pamela05n@peoplepc.com>
Sent: Friday, February 02, 2007 10:10 AM
Subject: Fw: Time extension for comments on Draft CA NNE Case Study for theSanta Margarita River

Pam- Bob re SMR TAC re NNE comments
The NNE TAC has accepted a delay in member's responses until April 2. I would like to make a meaningful response, after reviewing many of the other response. I will forward the pertinent emails to both of you. I will need your comments after I prepare a draft response - target date March 1.

Del

----- Original Message -----
From: "Cynthia Gorham-Test" <ctest@waterboards.ca.gov>
To: <aldo.licitra@cityoftemecula.org>; <lcgarcia@co.riverside.ca.us>; <juhley@co.riverside.ca.us>; <jyahnke@do.usbr.gov>; <ivan_karnezis@dot.ca.gov>; <emkimura@earthlink.net>; <joyj@emwd.org>; <joe@fpud.com>; <DMCPHERSON@lc.usbr.gov>; <wsteele@lc.usbr.gov>; <FNaceem@murrieta.org>; <chuck.katz@navy.mil>; <ken.richter@navy.mil>; <pamela05n@peoplepc.com>; <rwatson@rwaplanning.com>; <mrahn@sciences.sdsu.edu>; <JoAnn.Weber@sdcounty.ca.gov>; <jeremy.jungreis@usmc.mil>; <khalique.khan@usmc.mil>; <delross@verizon.net>
Cc: <steve.carter@tetratech-ffx.com>; <Clayton.Creager@tetratech.com>; "Julie Chan" <JChan@waterboards.ca.gov>; "Wayne Chiu" <wchiu@waterboards.ca.gov>
Sent: Thursday, February 01, 2007 5:17 PM
Subject: Time extension for comments on Draft CA NNE Case Study for the Santa Margarita River

Dear Santa Margarita River NNE Technical Advisory Group Members,

The San Diego Water Board is extending the due date for comments on the Draft Report for the "CA Nutrient Numeric Endpoint Approach Case Study for the Santa Margarita River". The San Diego Water Board and Tetra Tech have made this decision after receiving requests from some of the TAG members for additional review time. Major Jungreis from Camp Pendleton has requested April 2, 2007 as a due date for comments.

Please provide me your technical comments by April 2, 2007. I will forward these comments to Tetra Tech.

In order to accomodate the time extension, we will need to delay the meeting with the TAG and Tetra Tech until at least two weeks after the new comment period.

Please let me know if you have any questions. Thank you for your time and interest in this matter.

Sincerely,

Cynthia

Cynthia Gorham-Test
Environmental Scientist III
Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
phone: 858-467-2957
fax: 858-571-6972
e-mail: ctest@waterboards.ca.gov

Lottiefox

From: "Lottiefox" <lottiefox@verizon.net>
To: "pamela05n" <pamela05n@peoplepc.com>; "Del Ross" <delross@verizon.net>
Sent: Sunday, February 04, 2007 7:58 AM
Subject: Re: Q and A- Stormwater in EMARCD

You'll be dismayed to learn that I received NO year-end reports by January 31.

I received a couple of minor corrections for the minutes that I sent out, so today I will send out the lastest version...and remind everyone that they need to get a report to me ASAP. Because I have a back-breaking schedule this month, the Annual Report could be delayed til March.

Sorry I will miss the EMARCD meeting this month, but Dan and Ellen offered to take minutes. Bob Wheeler offered to do the swearing in of new director (Vicki).

By the way, a letter of thanks should be sent to Gary Watts for his service on the board. And perhaps he would be willing to continue to participate as an Associate or Agency representative (for State Parks). He has a very good grasp of many issues that the rest of us lack.

Charolette Fox
32800 Hupa Drive
Temecula, CA 92592
(951) 302-0180
(951) 302-0171 Fax
lottiefox@verizon.net

> ----- Original Message -----
> **From:** pamela05n
> **To:** DEL ROSS
> **Cc:** lottie
> **Sent:** Saturday, February 03, 2007 6:08 PM
> **Subject:** Re: Q and A- Stormwater in EMARCD
>
> Del, I think we have to go over our annual plan as a board and prioritize what we should work on. I don't know if Charolette has gotten input for the annual plan yet, but we need to do this as a workshop or discuss what to do at our next meeting.
> pam
>
> -----Original Message-----
> From: DEL ROSS
> Sent: Jan 31, 2007 4:49 PM
> To: Charolette Fox
> Cc: Pam Nelson
> Subject: Q and A- Stormwater in EMARCD
>
> Charlotte; Pam- One of my goals for 2007 is to get some meaningful outreach programs going. Here is a starter: a stormwater Q and A. I am repeating page 5 that I added below. Any suggestions on a stormwater outreach program?
> Dan- here are some acronyms and a good overview of the stormwater permitting process.

Del Ross

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(800) 506-2555 for illegal discharge reporting. More definitive information on stormwater permitting may be found at http://www.floodcontrol.co.riverside.ca.us.
The stormwater BMP Manual is available at CASQA; E-mail: info@casqa.org

If I can be of assistance, please call or email:
Del Ross, P.E.
Associate Director Water Quality- EMARCD
Tel: (800) 222-9686 email: delross@verizon.net

Lottiefox

From: "pamela05n" <pamela05n@peoplepc.com>
To: "Lottiefox" <lottiefox@verizon.net>
Sent: Monday, January 29, 2007 8:58 PM
Subject: Re: possible speaker for EMARCD

This is what Del has been talking about. The San Diego watersheds are covered by the efforts going on that Del and I have been watching, but the plan only goes up to the county line leaving the upper Santa Marg. out. The Riverside area has a different one for the Santa Ana Watershed. So we ARE the hole. The Bur. of Reclam. was informed of this and are trying to figure out what to do.
Pam

> -----Original Message-----
> From: Lottiefox
> Sent: Jan 29, 2007 1:48 PM
> To: pamela05n
> Subject: Re: possible speaker for EMARCD
>
> **Pam: Here's a part of Daniel's latest email to me. When he says "you all" I think he means the four RCDs--RCRCD, SJBRCD, Mission RCD and EMARCD.**
>
> Charlotte:
>
> You all are right in the area that I was describing as a hole in the IRWMP planning groups for the San Diego watersheds.
>
> You all would certainly want to stay up on this process and to be a participant, maybe even provide funding to help get something started. There are significant grant funds for capital efforts, but they must go through a fairly involved process. There is also flood/stormwater funding in Prop 1E that is accessed through the IRWM process.
>
> *Daniel Cozad*
>
> Charolette Fox
> 32800 Hupa Drive
> Temecula, CA 92592
> (951) 302-0180
> (951) 302-0171 Fax
> lottiefox@verizon.net
>
> ----- Original Message -----
> **From:** pamela05n
> **To:** Lottiefox
> **Sent:** Sunday, January 28, 2007 8:28 PM
> **Subject:** Re: possible speaker for EMARCD
>
> Wow, he sounds interesting! I have a quick 15-minute speaker planned, so if he can come on the 8th (next meeting) ,I think it would be fine. I'm going out of town until about the 4th and then will send out the agenda so I'll put him on if he can come after I return.

Thanks!

-----Original Message-----
From: Lottiefox
Sent: Jan 28, 2007 11:35 AM
To: pamela05n
Subject: possible speaker for EMARCD

Pam:

A few years back, I met Daniel Cozad in a "social" way because we have mutual friends. Until recently, Dan worked in an executive position with SAWPA. He has now started a water consulting firm of his own.

He is working with various groups and agencies to help them with grant funding from Regional Water Quality Control Boards. One project involves the Santa Margarita Watershed.

I asked if he'd be willing to attend an EMARCD meeting and explain who he's working with and what he's doing within our watershed. He lives in Redlands, so if our next meeting of EMARCD is at the Santa Rosa Plateau, he might be willing to come.

Let me know if there's an interest in hearing from him and whether I should invite him to the meeting. In the meantime, I will send him the minutes of our last couple of meetings so that he gets to know who we are and what we're focusing on as stewards for Santa Margarita Watershed.

Charolette Fox
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Temecula, CA 92592
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lottiefox@verizon.net

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A better way to Internet
http://www.peoplepc.com

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Dan- here are some acronyms and a good overview of the stormwater permitting process.
Del Ross

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If I can be of assistance, please call or email:
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Tel: (800) 222-9686 email: delross@verizon.net

1/31/2007

Stormwater: Questions and Answers

Courtesy of Ben Meadows
Originally published 2007

The whole subject of Stormwater is complicated. Here`s a chance for you to check out some of the most frequently asked questions about stormwater . . . and their answers.

What is an NPDES (National Pollutant Discharge Elimination System) permit?

The Clean Water Act prohibits anybody from discharging `pollutants` through a `point source` into a `water of the United States` unless they have an NPDES permit. The permit will contain limits on what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people`s health. In essence, the permit translates general requirements of the Clean Water Act into specific provisions tailored to the operations of each person discharging pollutants.

What is a point source?

The term point source is very broadly defined in the Clean Water Act because it has been through 25 years of litigation. It means any discernable, confined and discrete conveyance, such as a pipe, ditch, channel, tunnel, conduit, discrete fissure, or container. It also includes vessels or other floating craft from which pollutants are or may be discharged. By law, the term `point source` also includes concentrated animal feeding operations, which are places where animals are confined and fed. By law, agricultural storm water discharges and return flows from irrigated agriculture are not `point sources`.

What is a water of the United States?

The term `water of the United States` is also defined very broadly in the Clean Water Act and after 25 years of litigation. It means navigable waters, tributaries to navigable waters, interstate waters, the oceans out to 200 miles, and intrastate waters which are used: by interstate travelers for recreation or other purposes, as a source of fish or shellfish sold in interstate commerce, or for industrial purposes by industries engaged in interstate commerce.

What is a pollutant?

The term pollutant is defined very broadly in the Clean Water Act because it has been through 25 years of litigation. It includes any type of industrial, municipal, and agricultural waste discharged into water. Some examples are dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat,

wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste. By law, a pollutant is not sewage or discharges incidental to the normal operations of an Armed Forces vessel, or water, gas, or other material injected into an oil and gas production well.

Do I need an NPDES permit?

It depends on where you discharge pollutants. If you discharge from a point source into waters of the United States, you need an NPDES permit. If you discharge pollutants into a municipal sanitary sewer system, you do not need an NPDES permit, but you should ask the municipality about their permit requirements. If you discharge pollutants into a municipal storm sewer system, you may need a permit depending on what you discharge. You should ask the NPDES permitting authority.

Where do I apply for an NPDES permit?

NPDES permits are issued by states that have obtained EPA approval to issue permits or by EPA Regions in states without such approval. The following map illustrates the states with full, partial, and no NPDES Authority. This file in PDF format provides the status of states NPDES Programs.

How are the conditions in NPDES permits enforced by EPA and the States?

There are various methods used to monitor NPDES permit conditions. The permit will require the facility to sample its discharge and notify EPA and the state regulatory agency of these results. In addition, the permit will require the facility to notify EPA and the state regulatory agency when the facility determines it is not in compliance with the requirements of a permit. EPA and state regulatory agencies also will send inspectors to companies in order to determine if they are in compliance with the conditions imposed under their permits.

Federal laws provide EPA and authorized state regulatory agencies with various methods of taking enforcement actions against violators of permit requirements. For Example, EPA and state regulatory agencies may issue administrative orders which require facilities to correct violations and that assess monetary penalties. The laws also allow EPA and state agencies to pursue civil and criminal actions that may include mandatory injunctions or penalties, as well as jail sentences for persons found willfully violating requirements and endangering the health and welfare of the public or environment. Equally important is how the general public can enforce permit conditions. The facility monitoring reports are public documents, and the general public can review them. If any member of the general public finds that a facility is violating its NPDES permit, that member can independently start a legal action, unless EPA or the state regulatory agency has taken an enforcement action.

Typically, how long are NPDEES permits effective?

The Clean Water Act limits the length of NPDES permits to five years. NPDES permits can be renewed (reissued) at any time after the permit holder applies. In addition, NPDES permits can be administratively extended if the facility reapplies more than 180 days before the permit expires, and EPA or the state regulatory agency, which ever issued the original permit, agrees to extend the permit.

What is the National Pollutant Discharge Elimination System (NPDES) Storm Water Program?

Polluted storm water runoff is a leading cause of impairment to the nearly 40 percent of surveyed U.S. water bodies which do not meet water quality standards. Over land or via storm sewer systems, polluted runoff is discharged, often untreated, directly into local water bodies. When left uncontrolled, this water pollution can result in the destruction of fish, wildlife, and aquatic life habitats: a loss in aesthetic value; and threats to public health due to contaminated food, drinking water supplies, and recreational waterways.

Mandated by Congress under the Clean Water Act, the NPDES Storm Water Program is a comprehensive two-phased national program for addressing the non-agricultural sources of storm water discharges which adversely affect the quality of our nation`s waters. The Program uses the National Pollutant Discharge Elimination System (NPDES) permitting mechanism to require the implementation of controls designed to prevent harmful pollutants from being washed by storm water runoff into local water bodies.

What is a Municipal Separate Storm Sewer System (MS4)?

The regulatory definition of an MS4 (40 CFR 122.26(b)(8)) is ` a conveyance of system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created to or pursuant to state law)…including special districts under state law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Clean Water Act that discharges into waters of the United States. (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.`

In practical terms, operators of MS4s can include municipalities and local sewer districts, state and federal departments of transportation, universities, hospitals, military bases, and correctional facilities. The Storm Water Phase II Rule added federal systems, such as military bases and correctional facilities by including them in the definition of small MS4s.

Who is regulated under the Storm Water Phase II Final Rule?

The rule automatically regulates two classes of storm water dischargers on a nationwide basis: Operators of small MS4s located in `urbanized areas` as defined by the Bureau of Census and operators of construction activities that disturb equal to or greater than 1 and less than 5 acres of land. Additional small MS4s (outside urbanized areas) and construction sites (disturbing less than one acre of land), along with other sources which are a significant contributor of pollutants to waters of the U.S., may be brought into the NPDES Storm Water Program by the NPDES permitting authority.

The rule also exclude from the NPDES program storm water discharges from industrial facilities that have `no exposure` of industrial activities or materials to storm water. This exclusion does require facilities to complete, sign, and submit a no exposure certification to the permitting authority once every five years.

When will I need to get a permit under the Storm Water Phase II regulations?

Operators of Phase II regulated small MS4s and small construction activity are required to apply for NPDES permit coverage by March 10, 2003. The agency which issues your NPDES permit could set an earlier deadline for permit coverage.

Is a permit required for regulated MS4s?

Yes. A National Pollutant Discharge Elimination System (NPDES) permit must be obtained by the operator of an MS4 covered by the NPDES Storm Water Program.

Which MS4s are regulated by the NPDES Storm Water Program?

For regulatory purposes, EPA`s NPDES Storm Water Program regulates `medium,` `large,` and `regulated small MS4s.`

A medium MS4 is a system that is located in an incorporated place or country with a population between 100,000-249,999.

A large MS4 is a system that is located in an incorporated place or country with a population of 250,000 or more.

In addition, some MS4s that serve a population below 100,000 gave been brought into the Phase I program by an NPDES permitting authority and are treated as medium or large MS4s, independent of the size of the population served.

A small MS4 is any MS4 that is not covered by Phase I of the NPDES Storm Water Program as a medium or large MS4, i.e., any MS4 that does not currently have an NPDES storm water permit. (There is no population threshold associated with this definition).

A regulated small MS4 is any small MS4 located in an `urbanized area` (UA), as defined by the Bureau of Census, or located outside of a UA and brought into the program by the NPDES permitting authority.

What is required of the regulated entities under the NPDES Storm Water Program?

The regulated entities must obtain coverage under an NPDES storm water permit and implement storm water pollution prevention plans (SWPPPs) or storm water management programs (both using best management practices (BMPs)) that effectively reduce or prevent the discharge of pollutants into receiving waters.

Source: Environmental Expert February 2007
Saved as: envte546-Stormwater: Questions and Answers- International Water Association 3-31-07

See following pages for regulatory Issues.

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Lottiefox

From: "DEL ROSS" <delross@verizon.net>
To: "Bob Hewitt" <Robert.Hewitt@ca.usda.gov>; "Jeff Brandt" <JBrandt@dfg.ca.gov>; "Vicki Long" <VickiGLong@AOL.com>; "Terry Whittington" <bikemanterry@verizon.net>; "Robert Wheeler" <robertdwheeler@verizon.net>; "Gary Watts" <gwatts@parks.ca.gov>; "Ed Stanton" <stantoned11@mchsi.com>; "Dan Matrisciano" <danishelen@earthlink.net>; "Charolette Fox" <lottiefox@verizon.net>; "Pam Nelson" <pamela05n@peoplepc.com>
Sent: Sunday, January 21, 2007 10:37 AM
Attach: envl2950- The Dirt - Land Use Environmental Natural Resources and Consumer Products Law and Regulation Fall 2006- Morrison & Foerster.doc
Subject: (1) New Climate Change Law -(2) Courts Uphold Habitat Conservation Program- (3) wind turbines & Birds

Ed and rest of mitigation committee and Jeff Brandt- see entire text

Excerpts from The Dirt - Land Use, Environmental, Natural Resources and Consumer Products Law and Regulation, Fall 2006

1. **New Climate Change Law - Kyoto in California? re AB 32, the California Global Warming Solutions Act of 2006**

- inclusion of a market-based compliance mechanism in AB 32 -- The new law only provides that the Board "may adopt" such a program
- one could expect that Europe's up-and-running market would be a likely model. but- data that underpins each country's National Allocation Plan for the Kyoto Protocol has built into it a level of uncertainty. Indeed, the guidelines expressly recognize that emission measurements-particularly historic measurements-can be imprecise

2. Courts Uphold The Natomas Basin Habitat Conservation Program, Providing Important Guidance for Future Planning In California

- More than a decade's worth of habitat conservation planning in the Natomas Basin (Sacramento) was recently put under the judicial microscope in both state and federal courts in California. At issue in the two cases (Environmental Council of Sacramento v. City of Sacramento and National Wildlife Federation v. Norton) was whether the Natomas Basin Habitat Conservation Plan ("NBHCP")-a multi-species, long-term, regional conservation program developed by the City of Sacramento and Sutter County, in consultation with the California Department of Fish & Game and the United States Fish & Wildlife Service ("FWS")-complied with the Federal Endangered Species Act ("ESA"), the California ESA ("CESA"), and the California Environmental Quality Act ("CEQA").
- Cumulative Impacts: Clarification on "Reasonably Certain" and "Probable Future"Projects - Court's review shed light on -- clarification of what courts will consider "reasonably certain" or "probable future" projects, which is particularly valuable to proponents of regional habitat conservation plans.
- The "Mitigation Ratio": How Much Is Enough? the NBHCP established a 0.5- to-1 ratio (0.5 acre set aside for each acre of development). The petitioners challenged this ratio as inadequate, arguing that the NBHCP should have employed at least a 1:1 mitigation ratio. The courts disagreed with the petitioners and upheld the NBHCP's mitigation ratio. In so doing, they established at least two noteworthy principles of general application. --).

  First- Both courts found that the entire conservation plan, of which the mitigation ratio was just a part, supported the NBHCP's use of a 0.5-to-1 mitigation ratio. These decisions strengthen public agencies' and project proponents' ability to "fully mitigate" impacts (CESA) and/or mitigate impacts to the "maximum extent

  Second, for the first time, the state court's opinion extended CEQA's "substantial evidence" standard to mitigation ratios. It thus confirmed to lead agencies and project proponents that, like other determinations under CEQA, their determination of the mitigation ratio will be evaluated under well-developed "substantial evidence" principles

- Habitat Loss Does Not Result in "Take" Under CESA (delnote- CESA is California equivalent of ESA - the endangered species act) The courts' rulings thus promised to affect, for better or worse, regional conservation planning throughout the state

- Cumulative Impacts- Clarification on "Reasonably Certain" and "Probable Future"Projects
- Re the MOU between the parties. Court stated-- MOU need not be included in the cumulative impact analysis. In similar fashion, the state court concluded that the MOU was not a "project" within the meaning of CEQA and CESA and that given the "amorphous nature of possible development" under the MOU, it was not "amenable to meaningful environmental review."
- further-- These opinions provide helpful clarification of what courts will consider "reasonably certain" or "probable future" projects, which is particularly valuable to proponents of regional habitat conservation plans.

- The "Mitigation Ratio": How Much Is Enough? established at least two noteworthy principles of general application.

first- the courts agreed that mitigation ratios are not properly evaluated in a vacuum. The petitioners' attack on the NBHCP's 0.5-to-1 mitigation ratio improperly attempted to focus on the mitigation ratio in isolation from the numerous other components of the NBHCP's conservation plan (e.g., preconstruction surveys, monitoring, and specific management of the reserves in perpetuity, among others). Both courts found that the entire conservation plan, of which the mitigation ratio was just a part, supported the NBHCP's use of a 0.5-to-1 mitigation ratio. These decisions strengthen public agencies' and project proponents' ability to "fully mitigate" impacts (CESA) and/or mitigate impacts to the "maximum extent practicable" (federal ESA) by combining an array of conservation features that, considered together, may support the use of a particular mitigation ratio.

second- , for the first time, the state court's opinion extended CEQA's "substantial evidence" standard to mitigation ratios. It thus confirmed to lead agencies and project proponents that, like other determinations under CEQA, their determination of the mitigation ratio will be evaluated under well-developed "substantial evidence" principles

- Habitat Loss Does Not Result in "Take" Under CESA
  In dicta analyzing whether the NBHCP's mitigation ratio complied with CESA, the state court held that the definition of "take," as codified at Fish and Game Code section 2081(b)(2), does not include "the taking of habitat alone or the impacts of the taking." Rather, the court stated, "proscribed taking involves mortality." This provides important guidance for public agencies and project proponents in evaluating the potential impacts where the project is expected to adversely impact species' habitat, but is not anticipated to take any protected species.
- Conclusion
  Both the state and the federal court opinions represent an important affirmation of the regional habitat conservation planning concept, and provide much-needed guidance and clarification that should help lead agencies and project proponents fashion their habitat conservation plans to withstand attacks under state and federal environmental laws. Note: Morrison & Foerster LLP represented the City of Sacramento and Sutter County in both court cases.

3. Trade Group's Declaratory Relief Action Against Private Enforcer Found Not to be a "Slapp" Suit

- The classic SLAPP suit is brought "not to vindicate a legal right, but rather to interfere with the defendant's ability to pursue his or her interests." Thus-- While the anti-SLAPP law serves an important purpose by discouraging lawsuits brought to "chill" constitutional rights, the law has had the unintended effect of deterring valid lawsuits aimed at "gray area" conduct

- Applicability of Voting Rights Act to Initiatives and Referenda Remains Uncertain Following Ninth Circuit Decision - California's First District Court of Appeal recently provided clarification regarding the life of tentative subdivision maps under California's Subdivision Map Act.

4. Court Dismisses "Altamont" Case, Rejecting Claims Based on Public's "Ownership" of Birds

- A closely watched and controversial lawsuit involving several wind operators in California's Altamont Pass ended with dismissal of the case last month.
  The plaintiffs in Center for Biological Diversity v. FPL Group, Inc. sued a group of wind operators in 2004 under two novel theories - that the wind companies are illegally profiting from killing birds in violation of California's Unfair Competition Law ("UCL"), and that, in killing them, the companies are also violating an alleged "public trust interest" in birds. These legal claims were troubling for the wind industry

And More .....

Del Ross

EMARCD
Excerpted from article appearing in Mondaq.com

MORRISON | FOERSTER

United States: The Dirt - Land Use, Environmental, Natural Resources and Consumer Products Law and Regulation, Fall 2006

19 December 2006

Editor's Letter

While Morrison & Foerster LLP has long been at the forefront of cutting-edge environmental issues, it is the firm's ability to identify and analyze problems and possibilities for its clients and friends that sets it apart. Rather than merely provide dry legal analysis without real world context and application, we strive to give a practical assessment of how a new law or case or rule will affect your day-to-day operations. An example is a recent seminar on AB 32, the California Global Warming Solutions Act of 2006, held by the Land Use and Environmental Law Group. Presented by the firm's own Michèle Corash, with Andrea Russell of Rio Tinto Minerals and Joel Levin of the California Climate Action Registry, the seminar provided three different and complementary perspectives on the opportunities and obstacles for the regulated community in responding to the emergence of the new legal regime. If you are interested in receiving a copy of the seminar materials or being on the mailing list for future events, please contact Judy Burgin at JBurgin@mofo.com.

This issue of *The Dirt* continues the dialogue on this rapidly evolving area with an article on how (and if) a European-style emissions market could be applied in California. We also provide articles on two important recent victories for our clients, one decision upholding the habitat conservation plan in California's Natamos Basin and another decision dismissing an "anti-SLAPP" motion by a private environmental enforcer. Another article addresses the ongoing debate over whether citizen-sponsored referendum and initiative petitions need to comply with the Voting Rights Act. Next, we offer an analysis of a new case that may affect the relationship between development moratoria and vested subdivision maps. We also provide a discussion of the recent dismissal of an Unfair Competition Law action against several windpower operators based on the public's "ownership" of birds. Finally, the California Department of Fish and Game provides a response to our article in the last issue on consistency determinations under the California Endangered Species Act—to which we respond as well.

Thank you for the many compliments on the inaugural issue of *The Dirt*. We hope this issue continues to meet your high expectations for up-to-date and practical information you can use. Please feel free to contact us with any comments or suggestions for future issues or articles.

New Climate Change Law – Kyoto in California?

By Bill Sloan

The signing ceremony for California's new climate change law—the Global Warming Solutions Act of 2006 (AB 32)—included a satellite feed of British Prime Minister Tony Blair heralding the achievement. The European interest in California's new law, however, runs deeper than just a shared environmental vision. For approximately two years now, Europe has been experimenting with carbon emission trading. This market-based mechanism at the core of the Kyoto Protocol is intended to help countries achieve their respective greenhouse gas emission targets. With passage of AB 32, California, the world's fifth-largest economy, is now contemplating whether to develop its own carbon trading market in the state. If that happens, the primary question on almost everyone's mind will be whether California should link its market with the existing European program. While the enthusiasm for such a link is strong, a number of problems should be addressed before California and Europe consummate such an arrangement.

The inclusion of a market-based compliance mechanism in AB 32 was negotiated up to the end. A large portion of the regulated community wants a trading program, while a significant environmental faction is opposed. This debate has pitted the Governor's office against the leaders of the California Legislature in a remarkably open tug-of-war that is now moving to the administrative rulemaking arena before the California Air Resources Board. The new law only provides that the Board "may adopt" such a program. All eyes are on the Board and on whether it will, or will not, include emission trading as part of the implementation of this new law. Already the Board is soliciting information and advice, trying to gain a better understanding of the benefits and pitfalls involved with emission trading.

Large-scale carbon-emitting industries have commonly stated a preference for one global integrated emission trading market, as opposed to a patchwork of different regulatory markets that operate on different standards and principles. In seeking to normalize one approach to fit all regulatory efforts, one could expect that Europe's up-and-running market would be a likely model. However, some of the nuances in how that market is set up, and the international legal principles underlying that market, are unique and do not easily translate into a model for California.

Two primary problems exist with the European trading market: (1) it is designed to be one market but is premised on different individual nations that have committed to meet their own different individual targets—presenting different challenges and pressures that may or may not be feasible under any circumstances; and (2) it depends upon a uniform data approach that is not easily assured across the participating countries. As for the first problem of individual national targets, the Kyoto Protocol (like California's law) uses 1990 emissions as a benchmark—countries under the Kyoto Protocol have committed to achieving 5% below their 1990 greenhouse gas emission levels by 2012. While this appears to be a uniform standard, it does not represent an entirely level playing field. Since 1990, some European countries have seen their actual national emission levels increase significantly while others have barely increased at all. Moreover, within Europe, there have been adjustments made in favor of more-developing economies—adjustments that in effect act as a subsidy to reallocate the burden of meeting reduction targets. As a result, some countries participating in the European market will be more capable of reaching their targets and thus generating credits quicker. Integrating California into this program—one where a form of economic subsidization has been built in—may or may not be in the interest of California's economy.

As for the second problem, the data that underpins each country's National Allocation Plan for the Kyoto Protocol has built into it a level of uncertainty. Indeed, the guidelines expressly recognize that emission measurements—particularly historic measurements—can be imprecise and, at least in the early stages of implementation, have not been collected uniformly country by country. This data uncertainty played out in dramatic fashion this April when the price of carbon on the European exchange dropped by nearly two-thirds due to the unexpected discovery that many countries were going to handily meet their targets. That plummet in price represented a $36 billion drop in the value of the overall market. Unless and until uncertainties related to poor data understanding and collection have been minimized, the European market will remain a relatively risky carbon emission trading partner for California.

Any approach to a carbon emission trading market under AB 32 would do well to consider carefully these problems with the European model. For now, California should focus on creating its own market within the state before aspiring to go international. Until the Kyoto kinks have been worked out, the vision of a global emission trading market should probably be shelved.

Citations

California Global Warming Solutions Act of 2006, 2006 Cal. Stat. 488 (AB 32)

Courts Uphold The Natomas Basin Habitat Conservation Program, Providing Important Guidance for Future Planning In California
By Andrew Sabey and Chad Hales

More than a decade's worth of habitat conservation planning in the Natomas Basin (Sacramento) was recently put under the judicial microscope in both state and federal courts in California. At issue in the two cases (*Environmental Council of Sacramento v. City of Sacramento* and *National Wildlife Federation v. Norton*) was whether the Natomas Basin Habitat Conservation Plan ("NBHCP")—a multi-species, long-term, regional conservation program developed by the City of Sacramento and Sutter County, in consultation with the California Department of Fish & Game and the United States Fish & Wildlife Service ("FWS")—complied with the Federal Endangered Species Act ("ESA"), the California ESA ("CESA"), and the California Environmental Quality Act ("CEQA").

But much more than just the NBHCP was at stake. The petitioners' challenges exploited practical limitations faced by all public agencies and project proponents striving to balance development with regional conservation planning. The courts' rulings thus promised to affect, for better or worse, regional conservation planning throughout the state. Fortunately, in significant victories that affirmed core strategies underlying regional habitat conservation planning, both the state and federal courts concluded that the NBHCP fully complied with state and federal environmental laws. The courts' opinions provide important guidance and clarification for public agencies and project proponents throughout California.

Cumulative Impacts: Clarification on "Reasonably Certain" and "Probable Future"Projects

Regional conservation planning often is a lengthy process involving multiple jurisdictions. One of the challenges caused by the time and breadth of such an undertaking is that the surrounding landscape can be in a state of flux with different land use proposals surfacing and actions being considered by various local agencies, some of which may not be parties to the regional conservation planning process. The problem is that the environmental analysis for the regional plan cannot be amended to include a new cumulative impact analysis each time a local agency is asked to consider some future project, no matter how speculative. If this were required, the plan might never be finalized.

The petitioners challenged the NBHCP on those grounds, focusing on a memorandum of understanding ("MOU") between the City of Sacramento and the County of Sacramento. The MOU concerned certain revenue-sharing and division-of-responsibility aspects of *possible* future development in the Natomas Basin, beyond that development contemplated by the NBHCP. The petitioners theorized that development under the MOU was "reasonably certain to occur" and that the MOU was a "probable future project" that required the lead agencies to conduct a comprehensive cumulative impact analysis. Both the state and the federal courts rejected this argument. The federal court noted that the MOU was "by no means a concrete plan for development" and that its "tentative, general nature" and the "considerable number of . . . approvals" that remained before any development could occur supported FWS's determination that the MOU need not be included in the cumulative impact analysis. In similar fashion, the state court concluded that the MOU was not a "project" within the meaning of CEQA and CESA and that given the "amorphous nature of possible development" under the MOU, it was not "amenable to meaningful environmental review." These opinions provide helpful clarification of what courts will consider "reasonably certain" or "probable future" projects, which is particularly valuable to proponents of regional habitat conservation plans.

The "Mitigation Ratio": How Much Is Enough?

The courts' opinions also provide insight into habitat mitigation ratios. Every habitat conservation plan has a mitigation ratio—the number of acres that must be set aside and protected from development for every acre of development. Neither statutory nor case law prescribes a specific ratio, which leaves public agencies and project proponents with the task of identifying the proper ratio—one that adequately compensates for the impacts of "take" of protected species but that does not require so much land as to effectuate a taking requiring just compensation. As just one component of its comprehensive plan, the NBHCP established a 0.5– to–1 ratio (0.5 acre set aside for each acre of development). The petitioners challenged this ratio as inadequate, arguing that the NBHCP should have employed at least a 1:1 mitigation ratio. The courts disagreed with the petitioners and upheld the NBHCP's mitigation ratio. In so doing, they established at least two noteworthy principles of general application.

First, the courts agreed that mitigation ratios are not properly evaluated in a vacuum. The petitioners' attack on the NBHCP's 0.5–to–1 mitigation ratio improperly attempted to focus on the mitigation ratio in isolation from the numerous other components of the NBHCP's conservation plan (*e.g.*, preconstruction surveys, monitoring, and specific management of the reserves in perpetuity, among others). Both courts found that the *entire* conservation plan, of which the mitigation ratio was just a part, supported the NBHCP's use of a 0.5–to–1 mitigation ratio. These decisions strengthen public agencies' and project proponents' ability to "fully mitigate" impacts (CESA) and/or mitigate impacts to the "maximum extent

practicable" (federal ESA) by combining an array of conservation features that, considered together, may support the use of a particular mitigation ratio.

Second, for the first time, the state court's opinion extended CEQA's "substantial evidence" standard to mitigation ratios. It thus confirmed to lead agencies and project proponents that, like other determinations under CEQA, their determination of the mitigation ratio will be evaluated under well-developed "substantial evidence" principles.

Habitat Loss Does Not Result in "Take" Under CESA

Finally, the state court opinion provided important guidance concerning CESA, which prior to the state court's decision, had received little judicial construction. The lack of judicial gloss on CESA created ambiguities for public agencies and project proponents attempting to fashion conservation measures that would meet CESA's requirement that the impacts of "take" be "minimized and fully mitigated."

In dicta analyzing whether the NBHCP's mitigation ratio complied with CESA, the state court held that the definition of "take," as codified at Fish and Game Code section 2081(b)(2), does *not* include "the taking of habitat alone or the impacts of the taking." Rather, the court stated, "proscribed taking involves mortality." This provides important guidance for public agencies and project proponents in evaluating the potential impacts where the project is expected to adversely impact species' habitat, but is not anticipated to take any protected species.

Conclusion

Both the state and the federal court opinions represent an important affirmation of the regional habitat conservation planning concept, and provide much-needed guidance and clarification that should help lead agencies and project proponents fashion their habitat conservation plans to withstand attacks under state and federal environmental laws.

Note: Morrison & Foerster LLP represented the City of Sacramento and Sutter County in both court cases.

Citations:

Envtl. Council of Sacramento v. City of Sacramento, 142 Cal. App. 4th 1018 (2006)

Nat'l Wildlife Fed'n v. Norton, 2005 WL 2175874 (E.D. Cal. Sept. 7, 2005)

Cal. Fish & Game Code § 2081(b)(2)

Trade Group's Declaratory Relief Action Against Private Enforcer Found Not to be a "Slapp" Suit
By Bill Tarantino

California's anti-Strategic Lawsuit Against Public Participation ("SLAPP") law was designed to protect citizens from being harassed for exercising their rights to petition the government. Under the law, if a cause of action against him or her "arises out of" constitutionally protected conduct, that suit will be considered a SLAPP and subject to a

special motion to strike, unless the party bringing the lawsuit can show a probability of prevailing. The classic SLAPP suit is brought "not to vindicate a legal right, but rather to interfere with the defendant's ability to pursue his or her interests."

While the anti-SLAPP law serves an important purpose by discouraging lawsuits brought to "chill" constitutional rights, the law has had the unintended effect of deterring valid lawsuits aimed at "gray area" conduct. Legitimate plaintiffs have been fearful to sue for conduct that is not clearly protected speech. This issue was recently put to the test by the Fourth Appellate District's decision in *American Meat Institute v. Leeman*, in which the court upheld a trial court's ruling that a trade association's declaratory relief action against a potential Proposition 65 private enforcer was not a SLAPP.

Background: Environmental SLAPP Suits

In the land use and environmental areas, the SLAPP is often found in one of two scenarios: (1) a project proponent/land developer either sues a project opponent for objecting to the project publicly or brings an action against a permitting authority for appealing a decision favorable to the developer, or (2) a regulated company brings an action against a "private attorney general" or other citizen who attempts to draw attention to violation of the law.

A classic example of a SLAPP is *Ramona Unified School District v. Tsiknas*. Ramona Unified ("RUSD") sought to construct a school and issued a mitigated negative declaration pursuant to the California Environmental Quality Act. When plaintiff RUSD proposed an alteration to the project, defendant Neighborhood Alliance for Safe Ramona Schools ("NASRS") filed a writ petition alleging that the proposal violated CEQA. RUSD prevailed at trial, and the court dismissed the action. Not satisfied with mere victory, RUSD sued NASRS and its attorneys, including Tsiknas, for abuse of process and barratry. Finding that RUSD's suit was lacking merit, the trial court refused to impose liability on NASRS for exercising its right to challenge government action and granted NASRS's anti-SLAPP motion to strike.

A contrary suit in the land use context was *Visher v. Malibu*, in which the City of Malibu refused to process the plaintiffs' application for a coastal development permit ("CDP") to build a home on their vacant lot. Malibu was engaged in litigation over whether it was obligated to issue such a permit. Because Malibu was appealing the trial court's order that it was compelled to issue a CDP, Malibu refused the plaintiffs' request. The plaintiffs filed a petition for writ of mandate to compel Malibu to act, which Malibu sought to dismiss as a SLAPP, claiming that the petition arose from Malibu's decision to exercise its right to appeal its trial court loss. The court of appeal found this unpersuasive, concluding that while appealing an order is a protected activity, the plaintiffs' lawsuit did not "arise from" that activity, but from the plaintiffs' "desire to get a CDP to build their home."

***American Meat Institute*: The "Gray Area" Gets Clearer**

Both cases above illustrate the long-standing difficulty under the anti-SLAPP statute in discerning between protected activity and legitimate bases for filing suit. The decision in *American Meat Institute v. Leeman* provides some clarity on the issue.

In *American Meat Institute*, the meat industry sought a declaratory judgment finding that Proposition 65 was preempted by the Federal Meat Inspection Act ("FMIA"), and that the California warning requirement could not be applied to meat products that comply with the FMIA. The trade groups sued after private attorney general Whitney R. Leeman had issued 60-day intent-to-sue notices and threatened the industry with legal action. The trial court found that, while Dr. Leeman certainly had engaged in protected conduct, the trade association's action was based on the conflict between state and federal law, not Dr. Leeman's freedom of speech.

On appeal, Dr. Leeman (joined by the California Attorney General as amicus) argued that the trial court's ruling would allow private citizens to be sued at random by trade associations if the citizens questioned the industry's legal compliance. Rejecting this broad reading of the trial court's opinion, the court of appeal affirmed the ruling and emphasized that the *nature* of the declaratory relief action controlled the analysis. The court concluded that the trade association's claim did not "arise from" Dr. Leeman's conduct, but instead from a legitimate desire to clarify an issue of conflicting state and federal laws.

Conclusion

This case highlights the importance of a careful reading of the anti-SLAPP statute and related case law. It is not enough for the allegedly SLAPP-ed defendant to show that she engaged in protected conduct. The defendant must establish that the claim *arises from* that conduct — the fact that the conduct merely "triggers" legal action is not enough. In other words, the defendant must show that the plaintiff is seeking to impose liability for the conduct or that the conduct is an essential element of the plaintiff's cause of action. In cases involving declaratory relief, plaintiffs do not seek to impose any liability, as they are only seeking clarity from the courts regarding their respective rights and obligations.

Note: Morrison & Foerster LLP represented the American Meat Institute and the National Meat Association in the case.

Citations:

Cal. Civ. Proc. Code §§ 425.16-425.18

Am. Meat Institute v. Leeman, Case No. D047115 (Ct. App. 4th Dist. Aug. 31, 2006)

Ramona Unified Sch. Dist. v. Tsiknas, 135 Cal. App. 4th 510 (2005)

Visher v. Malibu, 126 Cal. App. 4th 363 (2005)

Applicability of Voting Rights Act to Initiatives and Referenda Remains Uncertain Following Ninth Circuit Decision
By John Doorlay

A eagerly anticipated recent decision by the Ninth Circuit Court of Appeals failed to clear up uncertainty over whether the minority language requirements of the federal Voting Rights Act apply to citizen-sponsored initiatives and referenda in California. The court's en banc decision in *Padilla v. Lever* held that the Act's minority language provisions do not apply to recall petitions, but did not address initiative and referendum petitions. It remains

uncertain, therefore, whether the Act requires initiative and referendum proponents in jurisdictions subject to it to translate their petitions into minority languages.

Voting Rights Act

In jurisdictions with substantial voting-age populations not proficient in English, the Voting Rights Act requires certain election materials to be provided in minority languages as well as English. Specifically, section 203 of the Act states that whenever a state or political subdivision with a specified voting-age population not proficient in English "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." 42 U.S.C. § 1973aa-1a(c).

The list of jurisdictions designated by the Director of the Census as subject to the Voting Rights Act and, therefore, requiring election material to be provided in a language or languages other than English, is available in the Federal Register. In California, statewide election materials must be provided in English and Spanish, and 25 counties must provide election materials in one or more languages other than English. Whenever a particular county is subject to section 203, all cities within that county are similarly subject to section 203.

There is no question the Voting Rights Act requires covered jurisdictions such as a county holding an election to provide ballots in English as well as minority languages. However, it is less clear whether this provision applies to citizen-sponsored petitions to qualify a measure for the ballot. For example, in order for a referendum, citizen-sponsored initiative, or public official recall to qualify for an election, the proponents must prepare a petition and gather signatures from the requisite number of registered voters. The Act does not explicitly address whether such petitions must be prepared and circulated in both English and minority languages.

Padilla v. Lever

In *Padilla v. Lever*, a group of citizens initiated a recall of a member of the Santa Ana Unified School District Board by drafting a recall petition. The Orange County Elections Department reviewed the petition and concluded that it complied with the requirements of the California Elections Code. The recall proponents then circulated the recall petition and gathered the required number of signatures to hold a recall election. Although Orange County is required by section 203 to provide election materials in multiple languages, the recall petition was circulated only in English.

A group of plaintiffs challenged the validity of the recall petition since it was not made available in Spanish. Reversing an earlier decision of a three-judge panel, the full 11-judge panel of the Ninth Circuit rejected the challenge and held that the Voting Rights Act did not apply to recall petitions since the petitions were prepared and circulated by private citizens and, therefore, were not "provided by" a state or political subdivision. This holding affirmed the original ruling of the federal district court.

The plaintiffs in *Padilla* argued that as a result of California's extensive regulation of the form of recall petitions and because the Orange County Elections Department had

reviewed and approved the form of petition, the "provided by" requirement was satisfied. In rejecting this argument, the Ninth Circuit concluded that although the California Elections Code provides the format for a recall petition, that does not mean the State itself provides the petition. The court noted that the California Elections Code does not specify the actual wording to be used in a recall petition and that the role of the County Elections Department was simply to ensure that the petition complied with the form required by law. As a result, it could not be said that the County "provided" the recall petition to the public. The court also expressed concern about the "chilling effect" of translating petitions into multiple languages, as the costs of translation and reprinting are borne by the recall proponents. The expense and trouble of complying with the translation requirements, reasoned the court, may deter proponents from launching petitions in the first place.

Conclusion

While the *Padilla* ruling clearly holds that recall petitions are not subject to the Voting Rights Act's requirement to provide election materials in English as well as minority languages, it remains uncertain whether referendum and citizen-sponsored initiative petitions are similarly exempt from the Voting Rights Act. The *Padilla* court chose not to address either of these situations. There are procedural and substantive differences between recall petitions, on the one hand, and initiative and referendum petitions, on the other hand, that may make the court's analysis in *Padilla* inapplicable to other petitions. Until courts resolve this issue, participants and stakeholders in land use and other electoral issues throughout California must be aware of the potential consequences of failing to follow the Voting Rights Act when they propose a referendum or initiative, as well as the possibility of challenging a referendum or initiative based on failure to comply with the Act.

Citations:

Padilla v. Lever, 463 F.3d 1046 (9th Cir. 2006) (en banc)

Voting Rights Act, 42 U.S.C. § 1973aa-1a(c)

When Does a Moratorium Become a Mortuary? The Death of a Vesting Tentative Map Under *Ailanto Properties, Inc. v. City of Half Moon Bay*
By Rob Hodil

California's First District Court of Appeal recently provided clarification regarding the life of tentative subdivision maps under California's Subdivision Map Act.

The case, *Ailanto Properties, Inc. v. City of Half Moon Bay*, involved a vesting tentative map for a residential project in the City of Half Moon Bay that was subjected to significant delays as a result of the City's water and sewer moratoria. The court refused to extend the life of the vesting tentative map to account for the total actual time of the moratoria. In reaching its decision, the court addressed two issues: (1) how long the life of a tentative map may be extended when a city or county has a development moratorium in effect; and (2) when filing a final map prevents a tentative map from expiring.

Effect of Moratorium

The first issue hinged upon the interpretation of a provision of the Map Act, California Government Code section 66452.6(b)(1), which tolls the expiration of a tentative map while a development moratorium is in effect, but provides that "the length of the moratorium shall not exceed five years." The project site at issue was subject to a water service moratorium at the time the vesting tentative map was approved. The site subsequently became subject to a separate sewer moratorium that the City of Half Moon Bay extended several times so that it remained in effect for some eight years.

The developer, who had obtained approval of the vesting tentative map in 1990, argued that the five-year limit applied to the length of the development moratorium itself, rather than the length of the extension of the life of the map. Under the developer's theory, a tentative map would continue to be extended as long as the development moratorium remained in place. The court rejected this theory, holding that section 66452.6(b)(1) was intended to limit to five years the total length of time that a tentative map could be extended by a development moratorium, rather than limiting the length of a development moratorium itself.

The developer also argued that even if the five-year limit applies to the length of time the life of the map can be extended, a separate five-year limit applies to each development moratorium (and its extension) that delays approval of the final map, so that the expiration of the map had been tolled for multiple five-year periods and the map was still alive. The court also rejected this argument, holding that the five-year limit applied to the total of *all* development moratoria that could be applied to a project to extend a map.

Satisfaction of Conditions for Filing Final Map

The second issue in *Ailanto* was whether "filing" of a final map was sufficient to extend the life of the tentative map, regardless of the development moratorium. Government Code section 66452.6(a)(1) provides that if a subdivider has expended $178,000 or more on off-site improvements, the filing of a final map will extend the life of a tentative map by 36 months. One of the conditions of approval attached by the City to the vesting tentative map required the developer to obtain a coastal development permit, and the developer filed a final map with the city engineer before obtaining it.

The developer argued that the expiration of the tentative map nevertheless was tolled by this submittal, because Government Code section 66452.6(d) provides that delivery of a final map to the city engineer is deemed a timely filing, and does not specify that the delivered final map must meet all conditions of tentative map approval at that time. The court rejected this argument, holding that the filing of a final map that did not conform to the vesting tentative map did not extend the life of the tentative map. The court explained that in this case, there was a "significant deficiency" in the final map, since a coastal development permit was required both by the California Coastal Act of 1976 and by the conditions attached to the vesting tentative map.

The court also rejected the developer's theory that equitable estoppel prevented the City from claiming that the vesting tentative map had expired. The developer had expended millions of dollars in a good-faith attempt to fulfill the conditions attached to the vesting tentative map, and alleged that the City had a "practice" of tolling the expiration of a vesting tentative map while a coastal development permit application was pending. Given that practice, the developer argued that its expenditures estopped the City from asserting

any five-year limit on the extension of the life of the tentative map due to development moratoria. The court explained that the City did not have the power to indefinitely waive the limitations imposed by state law on the life of vesting tentative maps. Although the court's rejection of the equitable estoppel argument is dictum (the court found that the developer waived its estoppel claims, but nonetheless discussed the merits of the argument), it could be an obstacle for other defendants attempting estoppel arguments under the Map Act.

Conclusion

This case should serve as a cautionary note to property owners and developers who have obtained approval of either tentative maps or vesting tentative maps (the statutory provisions at issue in the case apply to both types of maps). The *Ailanto* decision makes it clear that there is a five-year limit on the extension of tentative maps due to development moratoria even if the moratoria extend longer than five years. Potential purchasers of entitled property should also be aware of this rule when conducting due diligence. It is important to note, however, that the *Ailanto* opinion suggests that there may be an exception to this rule if a city and a property owner agree to waive the time limits on the life of the tentative map.

Additionally, the *Ailanto* decision clarifies that "filing" a final map that does not conform to the tentative map due to a "significant deficiency" in meeting conditions of approval will not extend the life of the tentative map. On the other hand, the decision leaves some room to argue that a final map that may not strictly satisfy all of the conditions attached to a tentative map nevertheless could extend the life of a final map, if the unfulfilled conditions are not as significant or as clearly unfulfilled as the requirement for a coastal development permit was in this particular case. Subsequent court decisions may provide additional clarity as to what else might constitute a "significant deficiency" in a final map that would similarly result in failure to extend the life of the map.

Citations:

Ailanto Prop., Inc. v. City of Half Moon Bay, 142 Cal. App. 4th 572 (2006)

Cal. Gov't Code § 66452.6

Court Dismisses "Altamont" Case, Rejecting Claims Based on Public's "Ownership" of Birds
By Anne Mudge and Shaye Diveley

A closely watched and controversial lawsuit involving several wind operators in California's Altamont Pass ended with dismissal of the case last month.

The plaintiffs in *Center for Biological Diversity v. FPL Group, Inc.* sued a group of wind operators in 2004 under two novel theories – that the wind companies are illegally profiting from killing birds in violation of California's Unfair Competition Law ("UCL"), and that, in killing them, the companies are also violating an alleged "public trust interest" in birds. These legal claims were troubling for the wind industry. To date, wind companies have had only limited legal exposure under wildlife protection laws such as the Migratory Bird Treaty Act ("MBTA") and the Bald and Golden Eagle Protection Act ("BGEPA") because they do

not authorize citizen suits—meaning they can only be enforced by the federal government. For the most part, the Justice Department has declined to prosecute wind companies under the Acts.

The plaintiffs in *Center for Biological Diversity* tried going around this obstacle by using the UCL, which until recently had provided private citizens a right to enforce violations of the MBTA and BGEPA by calling such violations "unfair business practices" under California law. However, shortly after the suit was filed in November 2004, California voters enacted Proposition ("Prop") 64, which amended the UCL to prohibit private suits brought on behalf of the public and not based on loss of money or property suffered by the plaintiff. The wind company defendants quickly brought a motion to dismiss the suit based on the new law, but it was rejected by the court last year, which concluded, among other things, that the plaintiffs sufficiently alleged an injury to property – i.e., birds held in trust by the public.

In the meantime, California courts issued new decisions in 2006 interpreting Prop 64. Armed with this new case law, the defendants moved to dismiss the suit, again based on two arguments—that the plaintiffs lacked standing to sue under the UCL, as amended, and that there is no private right of action for destruction of public trust resources. This time, the court agreed on both counts and dismissed the suit.

First, the court concluded that the loss of "money or property" required for standing under Prop 64 did not include injury to birds. The court looked at the text of the new law, which referred to a loss of money or property in two places. The law limited the standing, or the right to sue, under the UCL to those who "lost money or property as a result of such unfair competition." The law also limited monetary recovery to restitution "necessary to restore any person in interest any money or property" taken as a result of unfair or unlawful business practices. The 2005 decision had concluded that the "money or property" required for standing was broader than that for monetary relief, so that the plaintiffs could maintain their suit based on the alleged injury to birds even if they could not receive monetary relief. In its new decision, the court rejected this argument based on the California Supreme Court's decision in *California for Disability Rights v. Mervyn's*, which held Prop 64 prohibited lawsuits based on "abstract interests." The trial court concluded that because the plaintiffs' interest in birds was, at most, an abstract interest held in common by the public, the plaintiffs could not show standing or a right to restitution. In other words, if the plaintiffs could not get money for the loss of birds, they could not sue based on harm to the birds either.

Second, the court rejected a cause of action based on the alleged destruction of wild animals held in the public trust. The court found no statutory or common law basis for such a private cause of action, holding that cases have limited such suits to those involving navigable and tidal waters. The court rejected the argument that provisions of the California Fish and Game Code describing wildlife as the "property of the People" create a private right to sue, as the Code also states that any claims for the destruction of such wildlife must be brought by the State, not private individuals.

It is unclear at press time whether the plaintiffs will appeal the court's ruling, although it is likely because the door has been slammed on private environmental suits based on state law. Even if the defendants are ultimately successful in defeating the suit, the high-profile litigation has propelled bird mortality into the spotlight and has made permitting of new

wind projects more difficult and more costly. This may continue to be the case regardless of the ultimate outcome of this particular suit.

Citations:

Ctr. for Biological Diversity v. FPL Group, Inc. (Alameda Superior Court No. RG04-183113)

Cal. for Disability Rights v. Mervyn's, 39 Cal. 4th 223 (2006)

Pfizer v. Superior Court, 141 Cal. App. 4th 290 (2006)

Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210

Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712

Bald & Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d

Cal. Fish & Game Code § 1600

Letters to *The Dirt*

DFG Responds Regarding Consistency Determinations

The Dirt received a letter dated August 7, 2006, from Ann Malcolm, General Counsel of the California Department of Fish and Game ("DFG"), responding to our article in the Summer 2006 issue about consistency determinations under the California Endangered Species Act. We reproduce below, for the benefit of *The Dirt* readers, Ms. Malcolm's letter. Our response follows.

Dear *The Dirt*:

I am writing in regard to your July 2006 legal update entitled "Consistency Determinations Under the California Endangered Species Act Streamline Permitting Process," available at *http://www.mofo.com/news/updates/files/update02225.html"* . The article states that a person submitting a notice pursuant to section 2080.1 of the Fish and Game Code "is allowed to commence activities immediately after submitting these documents" to the Department of Fish and Game (DFG). This view is repeated a second time towards the end of the article. After the article was brought to our attention, we found the same legal interpretation in an earlier article, "Court Decides 'Consistency Determinations' Under the California Endangered Species Act Are Not Subject to CEQA Review," dated November 2005 and available at *http://www.mofo.com/news/updates/files/update02091.html.*

These statements conflict with other provisions in CESA and could, I fear, encourage activities that would amount to a criminal violation of the California Endangered Species Act (CESA). The interpretation would appear to be based on the language in subdivision (a) of section 2080.1 that says no further authorization or approval for take of listed species is required under CESA if a person notifies DFG that a federal authorization has been obtained and provides a copy of the federal document to DFG. But subdivision (a)

cannot be read in isolation. Subdivision (c) clearly modifies the language in subdivision (a) by requiring that the taking of a listed species "may only be authorized pursuant to this chapter" – i.e. through one of CESA's permitting mechanisms – if DFG determines that the federal permit or federal incidental take statement is not consistent with CESA. In other words, more is required under section 2080.1 to take listed species than merely submitting a notice and copy of the federal authorization: the law also requires a determination from DFG's director that the federal authorization is consistent with CESA before take can lawfully occur.

It is true that a bill analysis prepared for the Assembly Appropriations Committee took a view similar to your own, stating that Assembly Bill 21 (1997), which added section 2080.1, would allow a person to incidentally take species listed under both the state and federal endangered species acts immediately after providing the specified notice to DFG. To the degree legislative history might be relevant to this issue, the Assembly Appropriations Committee analysis is not persuasive, especially since none of the other four legislative analyses prepared for AB 21, including the analyses prepared for the full Assembly and Senate, describe the statute as allowing take prior to a finding of consistency by DFG. Indeed, the other bill analyses, among them those prepared by the policy committees most familiar with CESA, contain language to the opposite effect. Bill reports prepared in advance of Assembly and Senate floor votes both describe the bill as allowing "the director to apply CESA regulations if it is determined that the federal take permit is not consistent with the California law." This, of course, is only possible if the incidental take has not already occurred under sanction of the statute. The Assembly report also states that "an individual need only obtain a federal take permit so long as the director of the Department of Fish and Game (DFG) determines that the federal permit is consistent with California law," and the Senate Rules Committee's one-sentence digest about the bill said it would authorize "the Director of the Department of Fish and Game under specified circumstances to waive requirements for state incidental take permits for plant and animal species that have been jointly-listed by the state and federal government. . .". These all indicate that the exemption from CESA's permitting requirement is dependent on DFG determining that the project qualifies for the exemption, and not merely on a person submitting information to DFG.

Finally, I would point out that to interpret the statute in a way that gives all persons holding a federal take permit or biological opinion the right to take species for several weeks while DFG considers the federal document's consistency with CESA would create a gaping hole in CESA's protections without any clear evidence that the Legislature intended such a result. Many properties on which development projects are planned could be stripped of all habitat and wildlife within a few weeks, obviating the need for a consistency determination *or* a state incidental take permit and frustrating the Legislature's clear intent that projects proceeding under the exemption in section 2080.1 still meet CESA's permitting standard of take minimization and full mitigation.

The longer the article goes uncorrected, the more likely a client of your firm or another member of the public might prematurely launch activities that could expose the person to a CESA enforcement action. I therefore request you promptly revise the two on-line articles and take appropriate action to inform any readers who received the articles by mail or email about DFG's interpretation of this section.

I appreciate your attention to this important matter. If you have questions, please contact Deputy General Counsel Stephen Adams at (916) 654-5295 or sadams@dfg.ca.gov.

Sincerely,
Ann S. Malcolm
General Counsel, California Department of Fish and Game

The Dirt:

Because the Department of Fish and Game administers the California Endangered Species Act and is responsible for consistency determinations, we bring Ms. Malcolm's letter to the attention of the readers of *The Dirt*.

In "Consistency Determinations Under the California Endangered Species Act Streamline Permitting Process" (*The Dirt*, Summer 2006), we explained that "[u]nder California Fish and Game Code section 2080.1, the applicant is allowed to commence activities immediately after submitting" certain documents required by the statute. Section 2080.1(a) provides:

> Notwithstanding any other provision of this chapter, or Chapter 10 (commencing with Section 1900) or Chapter 11 (commencing with Section 1925) of Division 2, but subject to subdivision (c), if any person obtains from the Secretary of the Interior or the Secretary of Commerce an incidental take statement pursuant to Section 1536 of Title 16 of the United States Code or an incidental take permit pursuant to Section 1539 of Title 16 of the United States Code that authorizes the taking of an endangered species or a threatened species that is listed pursuant to Section 1533 of Title 16 of the United States Code and that is an endangered species, threatened species, or a candidate species pursuant to this chapter, no further authorization or approval is necessary under this chapter for that person to take that endangered species, threatened species, or candidate species identified in, and in accordance with, the incidental take statement or incidental take permit, if that person does both of the following:
>
> (1) Notifies the director in writing that the person has received an incidental take statement or an incidental take permit issued pursuant to the federal Endangered Species Act of 1973 (16 U.S.C.A. Sec. 1531 et seq.).
>
> (2) Includes in the notice to the director a copy of the incidental take statement or incidental take permit.

Cal. Fish & Game Code § 2080.1(a).

As explained by an analysis prepared by the Assembly Committee on Appropriations, the statute provides that "[i]mmediately after providing this information to the director, the individual is allowed to start incidentally taking the species." Cal. Assembly Comm. on Appropriations, Analysis of A.B. 21 at 1 (May 13, 1997). The analysis recognized that this could mean a permittee may start operations that the agency may later find inconsistent with the California Endangered Species Act:

> Since the "incidental take" can begin immediately upon providing the director with the required information, takes can occur before the director has a chance to review the information and determine whether or not it is consistent with CESA policy. If, in a particular case, the director eventually decides the federal permit is not consistent with CESA policy, a "stop order" could be issued after members of the species have already been taken. *Id.* at 2. The analysis recommended that the bill be amended so that no take can "take place until the director has made a determination that the information provided is consistent with CESA policy." *Id.* However, no such amendment was made before the bill was chaptered and became section 2080.1.

This interpretation is also consistent with the non-discretionary nature of consistency determinations. As explained by the Sacramento County Superior Court in *Center for Biological Diversity v. California Department of Fish & Game* (Sacramento Superior Court Case No. 05CS01166), "the issuance of a consistency determination is not a discretionary project" for the purposes of CEQA, but instead a ministerial act. As a result, so long as the informational requirements of section 2080.1 are satisfied, a consistency determination must issue. This strongly supports the interpretation that operations may commence once these conditions are fulfilled.

All this being said, Ms. Malcolm's interpretation of the statute should be given appropriate consideration. As it appears to reflect DFG's considered opinion regarding the requirements of section 2080.1, it presumably would inform DFG's evaluation of whether a party is in compliance with those requirements. We believe those instances will be rare in which it will be important to an applicant to commence activities prior to the expiration of the 30-day period section 2080.1(c) provides DFG to make a consistency determination. Moreover, we are confident, in light of the issues raised by our exchange with Ms. Malcolm, that in such instances DFG will be especially cognizant of the timing needs of applicants and work diligently to accommodate them. We are pleased to note that Ms. Malcolm does not take issue with the primary focus and conclusion of our article—that consistency determinations are a valuable regulatory tool for streamlining the permitting process.

We welcome further commentary on this issue, as well as on any other topic discussed (or topics that you believe should be discussed) in *The Dirt*.

Thank you,
Chris Carr and Shaye Diveley

The Dirt on Upcoming Events

Sacramento
January 4, 2007
404 Permitting Issues – Identifying the LEDPA, CLE 13th Annual Conference on California Wetlands – Rapanos, Carabell and Beyond
Clark Morrison, Presenter

Los Angeles
January 19, 2007

CEQA Update, UCLA Extensions Annual Land Use & Policy Conference
Michael Zischke, Presenter

San Francisco
March 29-30, 2007
Third Annual NEPA Conference
Alicia Guerra, Presenter

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.