

Legal Updates & News

Bulletins

The Dirt – Winter 2007: *Land Use, Environmental, Natural Resources and Consumer Products Law and Regulation*

March 2007

The Dirt -- Winter 2007



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Editor's Letter

Five years have passed since the California Legislature adopted Senate Bills 610 and 221, yet the changes wrought by those landmark pieces of legislation continue to be worked out. By requiring project proponents to "prove up" water supply for the lifetime of a development, this legislation solidified the relationship between development and water supply, although often with less than consistent results across the state.

In this issue of *The Dirt*, we highlight this increasingly complex problem in two articles that reinforce the old saying that "whiskey is for drinking and water is for fighting." The first focuses on the California Supreme Court's recent decision in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, which rejected the water supply analysis in an environmental impact report for a large-scale development in the Central Valley on grounds that it failed to adequately analyze whether there would be sufficient long-term supply for the project and the environmental impacts of providing such supply. The Court's decision has potentially raised the bar as to scope and content of water supply analyses. This issue's first article provides some clarity regarding the impact of the Court's decision and gives the "dirt" on practical steps on how to comply with it. A second article focuses on attempts to use SB 610 to challenge project approvals, providing an interesting lesson that although SB 610 may have changed the way some things are done, the California Environmental Quality Act (CEQA) still reigns supreme when it comes to review of land use approvals.

In addition, this issue of *The Dirt* features several other articles that span the Land Use and Environmental Law

Group's practice areas. To wit, these articles focus on such wide-ranging issues as private plaintiffs' attempts to commandeer the Attorney General's prosecutorial discretion under Proposition 65; California's new electronic waste regulations and how they compare to the European Union's standards; a new proposed federal rule requiring conservation easements when land is set aside as mitigation for wetlands removal; the growing focus by companies and governments on "green" building standards; a new federal storm water decision reinforcing the burden on citizen groups to prove up violations of the Clean Water Act; and the United States Supreme Court's surprisingly large docket of environmental cases this term.

We hope you find that *The Dirt* once again provides practical and up-to-date information affecting companies in California and beyond. As always, please let us know if you have any questions or comments regarding articles and topics. Enjoy!

Leading Water to the Horse: Practical Guidance for CEQA Water Supply Analysis in the Wake Of Vineyard Area Citizens

By [Rob Hodil](#)

Gone are the days when nothing more than a divining rod was needed to locate water supplies for new development. The recent landmark decision in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (*Vineyard Area Citizens*), one of the California Supreme Court's rare forays into the realm of CEQA jurisprudence, potentially raises the bar regarding the requirements for analyzing water supplies. Although the decision clarifies many of the rules for preparing a water supply analysis under CEQA, it also creates a great deal of uncertainty for project proponents and agency planners as to whether a particular water supply analysis will meet the standards articulated by the Court. Future litigation is inevitable and will result in additional clarification regarding the application of these standards. Meanwhile, to minimize vulnerabilities to legal challenge, the water supply analysis in an EIR (or other CEQA document) should be carefully drafted keeping in mind the principles announced in *Vineyard Area Citizens*.

The full text of this article is available at:
<http://www.mofo.com/news/updates/files/9040.html>

Court Rejects Direct Challenge to SB 610 Water Supply Assessment

By [Miles Imwalle](#)

While the *Vineyard Area Citizens* case may have made headlines and caused commotion among water supply planners and project proponents, the Los Angeles Superior Court recently faced an important question about the way in which a Water Supply Assessment (WSA) prepared under Senate Bill 610 (SB 610) may be challenged. In *California Water Impact Network v. Newhall County Water District* (*CWIN v. Newhall*), the court considered a challenge to the legal adequacy of a WSA prepared by the Newhall County Water District. The issue before the court was whether project opponents can directly challenge a WSA, in addition to challenging the CEQA document that relies upon the WSA, which would effectively give opponents two bites at the apple. In a blow to the project opponents, the court agreed with the District's argument that the challenge, brought by the California Water Impact Network (C-WIN), was inappropriate because a WSA is prepared as a part of the CEQA process and, thus, must be challenged within the CEQA framework.

The full text of this article is available at:
<http://www.mofo.com/news/updates/files/9041.html>

Private Plaintiffs Attempt to Usurp Attorney General's Role under Proposition 65

By [Robin Stafford](#)

For many years, companies whose consumer products are sold in California have complained about Proposition 65 lawsuits being brought against retailers on the basis of allegations concerning chemicals in those products. Now, for the first time, a state court is poised to consider whether such suits may be barred under certain circumstances.

The full text of this article is available at:

<http://www.mofo.com/news/updates/files/9116.html>

California Adopts Significant Electronic Recycling and Waste Control Regulations

By [Peter Hsiao](#), [Andrea Tozer](#) and [Robert Reinhard](#)

The new year has apparently only strengthened California's resolve to set the pace on environmental initiatives in the United States. Following on the heels of the state's much-publicized greenhouse gas initiatives, California recently promulgated new regulations designed to address potential environmental threats from discarded or improperly recycled electronic products. The new regulations set limits for lead, chromium, mercury, and cadmium content of certain categories of electronic equipment sold in California. Starting in 2007, the sale of some electronic devices containing these substances will be banned in California.

The full text of this article is available at:

<http://www.mofo.com/news/updates/files/9152.html>

New Proposed Rule Expands Use of Conservation Easements to Protect Mitigation Areas under Clean Water Act

By [Marc Campopiano](#) and [Mylene Evered](#)

The Army Corps of Engineers (Army Corps) and Environmental Protection Agency (EPA) recently proposed a new joint rule under the Clean Water Act (CWA) that clarifies and expands requirements associated with compensatory mitigation for losses to aquatic resources allowed by Army Corps permits.

The CWA requires that a proposed discharge of dredged or fill material into a wetland or waterbody take all appropriate and practicable steps to avoid and minimize impacts to aquatic resources. However, in some situation, certain impacts may be unavoidable. In such circumstances, the proposed discharger is required to replace the loss of wetland, stream, or other aquatic resource; this is known as compensatory mitigation. The proposed rule would require that land set aside for such compensatory mitigation be subject to long-term protection through an "appropriate real estate instrument," such as a conservation easement. The real estate instrument must restrict or prohibit incompatible uses that would jeopardize the mitigation project while allowing for the long-term management of the site.

The full text of this article is available at:

<http://www.mofo.com/news/updates/files/9168.html>

Green Construction Standards Continue to “Build” Momentum

By [Sarah Schindler](#) and [Robert Falk](#)

Green. Lately, the word seems to denote more than just a color. In the last few months alone, the *New York Times* ran an article about green weddings and another about dirt floors; the *Wall Street Journal's* Marketplace section ran a front-page article entitled “While Housing Withers, ‘Green’ Materials Bloom,” and a recent Pacific Gas & Electric slogan asked, “What does green mean to you?” More and more local governments are requiring new buildings, both public and private, to meet certain energy-related building standards. Therefore, it is not surprising that developers are increasingly looking to include “green building” practices in their projects.

The full text of this article is available at:

<http://www.mofo.com/news/updates/files/9182.html>

Environmental Plaintiff Dealt a Blow in Storm Water Case

By [Chris Carr](#) and [Shaye Diveley](#)

A recent decision from the U.S. District Court for the Northern District of California clarifies the plaintiff's burden of proof in citizen suits brought under the Clean Water Act (CWA). In the long-running *Environmental Protection Information Center v. Pacific Lumber Company (EPIC)* case, Judge Marilyn Hall Patel's recent decision denying the plaintiff's motion for summary judgment illuminates precisely what a citizen plaintiff must show to carry its burden of proving that alleged discharges are from a “point source” and go to “navigable waters.”

The full text of this article is available at:

<http://www.mofo.com/news/updates/files/9202.html>

Supreme Court Round-up: Environmental Cases Figure Big on this Year's Docket

By [Priscillia de Muizon](#)

Four environmental law cases are currently pending before the United States Supreme Court. The outcome of these closely watched cases will have far-reaching implications for various interested parties, including the energy and building industries, regulators, and environmentalists.

Massachusetts v. Environmental Protection Agency

In *Massachusetts v. Environmental Protection Agency*, twelve states, three cities, and several environmental organizations sued in the D.C. Circuit Court of Appeals, seeking an injunction requiring the United States Environmental Protection Agency (EPA) to regulate carbon dioxide emissions from new motor vehicles. At issue in the case is section 202(a)(1) of the Clean Air Act (CAA), which directs the EPA to regulate air pollutants from new motor vehicles “which in [the administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” The plaintiffs argue that greenhouse gases such as carbon dioxide constitute such pollutants covered by the Act. In response, the EPA has argued that it does not have the statutory authority to regulate greenhouse gases, and that it would not do so even if it did.

The full text of this article is available at:

<http://www.mofo.com/news/updates/files/9217.html>

The Dirt on Upcoming Events

San Francisco, CA

March 23

Michèle Corash, *Proposition 65: Why Food Has Become Such a Hot Issue*, Proposition 65 Clearinghouse Conference

San Francisco, CA

March 23

Robert Falk, *Proposition 65: How to Make a Better Prop 65 Warning For Your Product: What Will Work and What Won't*, Proposition 65 Clearinghouse Conference

Napa, CA

March 23

Chris Carr, *Northern California River Watch v. City of Healdsburg: Implications for Water Quality Regulation of Mining in California*, California Construction and Industrial Materials Association Annual Meeting

Barcelona, Spain

April 2-3

Zane O. Gresham, *Beyond the Public/Private Debate: Promoting Water Sector Reform*, Global Water Intelligence 2007: Where Do Water & Money Meet?

Monterey, CA

May 3

Robert Falk, *Stormwater Permitting*, California League of Cities

Boulder, CO

June 28-30

Peter Hsiao, *Expert Witness Testimony*, ALI-ABA Advanced Litigation Course

Washington, D.C.

November 8-9

Peter Hsiao, Co-Chair, ALI-ABA Clean Air Act Course