



In case you missed it...

AEP's Legal and Legislative Update

OPR releases and seeks input on Guidelines updates in response to SB 743

On January 20, 2016, the Governor's Office of Planning and Research (OPR) released its [Revised Proposal on Updates to the CEQA Guidelines on Evaluating Transportation Impacts in CEQA](#) pursuant to Senate Bill (SB) 743. Among other things, the revised proposal contains a revised proposed new CEQA Guidelines Section 15064.3, a draft technical advisory containing recommendations related to methodology, thresholds of significance, safety, and mitigation, and case studies illustrating how the proposed analysis would apply to sample projects. Written comments on the revised proposal should be submitted to CEQA.Guidelines@resources.ca.gov by 5:00pm on February 29, 2016.

California Supreme Court issues anticipated CBIA v. BAAQMD decision

On December 17, 2015, the California Supreme Court issued its decision in the [California Building Industry Association v. Bay Area Air Quality Management District, Sup. Ct. Case No. S213478](#). Therein, the California Supreme Court responds to the question of what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users of a proposed project. The California Supreme Court held that CEQA generally does *not* require an agency to consider the impact of existing conditions on future project users.

However, the Court went on to note exceptions to this general rule, such as “when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users. ... Moreover, special CEQA requirements apply to certain airport,

school, and housing construction projects [and, in] such situations, CEQA requires agencies to evaluate a project site's environmental conditions regardless of whether the project risks exacerbating existing conditions. The environmental review must take into account...how existing environmental risks such as noise, hazardous waste, or wildland fire hazard will impact future residents or users of a project." The full decision may be read [here](#).

U.S. Supreme Court to resolve split regarding Clean Water Act jurisdictional determinations

In December 2015, the U.S. Supreme Court decided to review [Hawkes Co. Inc. v. U.S. Army Corps of Engineers, 782 F.3d 994 \(8th Cir. 2015\)](#) which found that "jurisdictional determinations," *i.e.*, determinations by U.S. Army Corps of Engineers regarding the presence/absence of "waters of the United States" regulated under the Clean Water Act, are final agency actions subject to judicial review. The Eighth's Circuit's ruling directly conflicts with the ruling of the Fifth Circuit in *Belle Co., LLC v. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), which found that jurisdictional determinations are not subject to judicial review. If the U.S. Supreme Court sides with the Eighth Circuit, finding jurisdictional determinations are subject to judicial review, this may increase uncertainties and legal expense for projects requiring Clean Water Act permitting.

For additional commentary and analysis, we note the following articles:

- Perkins Coie, LLP, [Supreme Court to Resolve Split on Court Review of Clean Water Act Jurisdictional Determinations](#) (December 15, 2015)

California Fish & Game Commission advances Tricolored Blackbird as CESA candidate species

On December 10, 2015, the [California Fish and Game Commission](#) voted to advance the Tricolored Blackbird to candidacy under the California Endangered Species Act (CESA). This decision triggers a 12-month period during which the California Department of Fish and Wildlife will conduct a review to inform the California Fish and Game Commission's subsequent decision on whether to list the species as threatened or endangered. In the interim, per California Fish & Game Code § 2085, as a candidate species the Tricolored Blackbird receives the same legal protection afforded to an endangered or threatened species.

President Obama orders federal agencies to mitigate environmental harm

In November 2015, President Barack Obama issued a [Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment](#) asserting that it shall be the policy of federal departments and agencies “to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities.” This order may, in effect, further align the requirements of the National Environmental Policy Act (NEPA) with CEQA’s existing mitigation requirements.

We strive to keep our members with up-to-date information on matters important to environmental professionals. The latest information from the Legal and Legislative Review Committee can always be viewed on AEP's [CEQA and Public Policy Program webpage](#).



[Like us on Facebook](#)



califaep.org



[Follow us on LinkedIn](#)