

AT A GLANCE

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PREFACE

THIS BOOK IS INTENDED FOR ANYONE SEEKING AN UNDERSTANDING of the complexities of state and federal wetlands and endangered species permitting in California. Although written primarily from a legal perspective, this book is not just for lawyers. It should be useful also to students, teachers, planners, biologists, resource managers, local government officials, consultants, and members of the public. We hope it serves as a practical guide offering both a broad perspective for our readers and detailed information on the agencies, laws, regulations, and policies that govern the permitting process.

Part I of this book covers the full panoply of state and federal species-related laws that govern development in California. In addition to the federal Endangered Species Act (Chapter 1) and the California Endangered Species Act (Chapter 2), Part I covers avian protections (e.g., the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and California Fish and Game Code protections for avian species) (Chapter 3); statutory protections for plant species (including the California Native Plant Protection Act and the California Desert Native Plants Act) (Chapter 4), and fish species (e.g., Magnuson-Stevens) (Chapter 5); and various other categories of protected wildlife including California's fully protected and other special-status species (Chapter 6).

Part II covers wetlands and other waters of the United States and the State of California, which are governed by Section 404 of the federal Clean Water Act (Chapter 7) and California's Porter-Cologne Water Quality Control Act (Chapter 8), respectively. Part II also covers California's regulatory structure for rivers, streams, and lakes under Section 1600 of the California Fish and Game Code (Chapter 9) which, in many cases, governs resources that are also covered by the Clean Water Act or Porter-Cologne.

Part III addresses a number of subjects that do not fit neatly within the species- and wetlands-related themes of Parts I and II. In particular, Chapter 10 describes the means by which mitigation is accomplished in California through conservation-related transactional structures such as conservation easements, permittee-responsible projects, mitigation, and conservation banks. Chapter 11 explains the structure and use of regional conservation plans including habitat conservation plans, natural community conservation plans, and regional conservation investment strategies. Finally, Part III covers certain other discrete

categories of natural resources that are often implicated during species- or wetlands-related permitting. These include discussions of cultural resource protections under the National Historic Preservation Act and California's AB 52 (Chapter 12); bay and coastal resource protections administered by the Bay Conservation and Development Commission, and the California Coastal Commission (Chapter 13); and the role of the public trust doctrine in shaping environmental policy in the State of California (Chapter 14).

Because the authors had to stop somewhere, certain specialized subjects were excluded from coverage in this book. For example, this book does not cover California water law. Nor does it cover laws or regulations relating to specific industry sectors such as energy, mining, forestry, or agriculture. Moreover, although this book covers the discharge of dredged or fill material into state and federal waters, it does not otherwise include broader discussions of surface or groundwater pollution or storm water regulation except where needed for context. Finally, although from time to time this book touches on requirements of the California Environmental Quality Act and National Environmental Policy Act—and these statutes are of paramount importance in resource agency permitting in California—this book is not a treatise on either statute.

The reader should not rely on this guide as an authoritative source of legal advice. First, although intended to provide a broad overview for the practitioner, this book does not cite to every case, regulation, guidance document, or other source of authority relevant to the subjects covered. This is particularly true with respect to federal law, where we have concentrated on Ninth Circuit and U.S. Supreme Court opinions as examples of how different subjects are treated. Moreover, where we do discuss cases or other sources of authority, we cite to them only for specific illustrative purposes; in many instances the information we provide here may be incomplete or lacking in context.

Second, the regulatory environment in California, and nationwide, is changing at a break-neck pace. It is certain that aspects of this book will be outdated on the date of its publication. While we intend to update the book from time to time, it will be the reader's responsibility to track changes in the law in the meantime.

As this is our first edition, we encourage our readers to let us know of any errors requiring correction (of which we expect many); disagreements they may have with our expressed positions or occasional biases arising out of our experience as counsel to private and public permittees (of which we expect more than a few); or additional subjects that might be helpful to include in future editions (all of which we will gladly consider).

ACKNOWLEDGMENTS

We were supported in this endeavor by a number of our colleagues. Our contributors included Christian Cebrian (Bay Conservation and Development Commission), Tim Paone (Coastal Commission), Linda Klein (cultural resources), Stephanie Straka (plant protections), Jimmy Purvis (fish and avian protections), Ashley Weinstein-Carnes (conservation planning), and Julia Stein, who now serves as Supervising Attorney at UCLA's Frank G. Wells Environmental Law Clinic and Project Director of the Emmett Institute on Climate Change and the Environment (waters of the State). Each of these contributors devoted considerable personal time to this project, and we are grateful for their sacrifices. Christian and Tim deserve special mention as the primary authors of Chapter 13 (Bay and Coastal Resources), and Linda as the primary author of Chapter 12 (Cultural Resources). We are greatly appreciative of the administrative and technical support provided by our able assistants, Susan Berger Law and Sandy E'Bell, law librarian Justine Morgan, and word processor Howard Moore. We are in debt to our partners, particularly our chair Mario Camara and team leaders Michael Zischke and Annie Mudge, for encouraging this project and supporting generously the participation of all of these contributors.

We thank also the professionals who provided extraordinarily helpful comments on various chapters of this book. Our peer reviewers included Chris Beale at Resources Law Group (California Endangered Species Act); Travis Hemmen at Westervelt Ecological Services (conservation transactions); Jim Monroe, U.S. Fish and Wildlife Service Office of the Solicitor (ret.) (federal Endangered Species Act); Brian Plant at Remy, Moose & Manley (waters of the United States); Lisa Westwood at ECORP Consulting (cultural resources); David Zippin at ICF International (conservation planning); and Steve Foreman at LSA (fully protected species). Also, many of our friends in the consulting community were generous in providing the photos of flora and fauna contained in this book.

Thanks to Ling-Yen Jones and Natalie Macris, who brought us into the Solano Press fold, and our editor/designer Catherine Courtenaye, who guided us through countless revisions and painstaking discussions about Bluebook citations, the

presentation of “bulleted” lists, and how to deal with the ubiquitous acronyms of environmental law.

We wish to acknowledge the many hard-working and dedicated public servants we have worked with over the last 30 years. Our friends at the agencies have incredibly difficult jobs and deserve far more credit and thanks than they may receive from those of us in the regulated community.

It goes without saying that the greatest contributors to this book were our ever-patient spouses, Rebecca Galler and Rachel Birkey, and Clark’s daughters, Islay and Margo. To our families, this book is as much your accomplishment as it is ours. Thank you so much for your enthusiasm and support. We dedicate this book to you, and to our parents who raised us in the outdoors and showed us how to appreciate all things natural and wild.

ABOUT THE AUTHORS

Clark Morrison and Scott Birkey practice land use and natural resource law in San Francisco with the law firm Cox, Castle & Nicholson. Together, they have over 50 years of combined experience. Their practice focuses on the permitting of complex private and public projects under Section 404 of the Clean Water Act, Porter-Cologne, the state and federal Endangered Species Acts, and the other state and federal laws covered in this treatise. Their experience includes environmental permitting and defense, environmental review under CEQA and NEPA, habitat conservation planning, mitigation and conservation banking, conservation easements and other transactional structures, and legislative and regulatory advocacy.

Clark and Scott are alumni of and have taught at U.C. Berkeley School of Law, which is home to one of the finest environmental law programs in the United States. During his time at Berkeley Law, Scott served as Editor-in-Chief of *Ecology Law Quarterly*. Scott and Clark speak and write regularly on natural resource matters. In addition to their traditional law practices, Scott and Clark devote much of their time assisting The Nature Conservancy in its efforts to conserve natural resources throughout the western United States.

The authors' interest in natural resource law is both personal and professional.

Clark spent his childhood in Anchorage, Alaska, as the son of a land man for the Standard Oil Company of California. Clark's father spent much of his time on the North Slope negotiating land deals with the State of Alaska, the federal government and the Alaska Native Corporations, bringing home caribou sausage for the family to eat and drafts of oil leases that served as drawing paper for the kids. Clark learned to fish and camp in the Chugach Mountains and the Kenai Peninsula, and he remains an avid outdoorsman today.

Scott is a third-generation natural resource legacy. His father was a surveyor for NOAA, spending his time on ships mapping out coastlines. His grandfather worked for the U.S. Bureau of Reclamation (Department of the Interior) and then the Soil Conservation Service (USDA) helping ranchers and farmers in Wyoming and Montana to establish irrigation systems. Scott was born and raised in Wyoming where he learned to love the outdoors, and most summers Scott can be located only with a good GPS as he wanders throughout the Sierra Nevada.