



# CEQA YEAR IN REVIEW 2017

## A SUMMARY OF PUBLISHED APPELLATE OPINIONS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The California Supreme Court decided three cases in 2017, two of which involved highly controversial questions of first impression. In the closely-watched *Cleveland National Forest Foundation* case, the court reversed the court of appeal's ruling that the EIR for SANDAG's regional transportation plan was fatally flawed because it had not taken seriously enough the greenhouse gas emissions reduction goal for the year 2050 contained in an executive order issued by the Governor. The court held that SANDAG was not required by CEQA to use the targets in the executive order as a standard for gauging the significance of projected greenhouse gas emissions. In a second decision that has attracted significant attention, the supreme court found an EIR certified by the City of Newport Beach deficient because it did not specifically identify which areas on the project site might qualify as Environmentally Sensitive Habitat Areas under the Coastal Act, even though the Coastal Commission had exclusive authority to decide what areas are ESHA during its permitting process. The court's third decision addressed an issue of more limited interest: whether CEQA is preempted by a federal statute that regulates railroads. The court held CEQA is preempted when the project involves a privately-owned line, but not when the line is owned by a state agency.

The courts of appeal also issued several opinions involving highly controversial issues. In a case involving an EIR on expansion of operations at an oil refinery, the court extended prior case law by endorsing use of operating data from 2007, the last year of full operations at the refinery, as a component of the EIR's environmental baseline, even though the EIR's notice of preparation was not issued until 2013. Addressing a second question, which had not previously been considered in a published decision, the same court upheld the EIR's determination that the project's GHG emissions would be less than significant because the project would comply with CARB's GHG cap-and-trade program.

Another important EIR case involved the often-litigated question whether the project might lead to urban decay, with the court finding the evidence in the record sufficient to support the EIR's conclusion urban decay impacts were unlikely. Two other EIR cases addressed issues relating to project alternatives; one upheld the EIR and the other did not. The two opinions make significant contributions to the continually developing body of law on this somewhat tricky subject.

Two of last year's opinions involved challenges to categorical exemption determinations. Those two opinions provide useful insights into how the courts are likely to interpret and apply the guidance on the standards for court review of challenges to an exemption based on the "unusual circumstances" exception which the California Supreme Court provided two years ago in the *Berkeley Hillside* case.

Finally, several cases considered a court's authority to limit the scope of the remedy it imposes after finding a violation of CEQA. In what is likely good news for public agencies faced with CEQA litigation, these decisions make it clear that a court that determines CEQA has been violated is not required to set aside all of the agency's determinations and approvals, and may tailor the remedy to fit the specific circumstances of the case before it.

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## A. EXCLUSIONS AND EXEMPTIONS FROM CEQA

### 1. College District's Approval of Agreement to Buy Land Did Not Trigger CEQA

#### ***Bridges v. San Jacinto Community College District*** **(4th Dist. 2017) 14 CA5th 104**

A community college district's approval of an agreement to buy land for possible use as a new campus did not trigger CEQA review where the agreement required an EIR before the sale could be consummated and the District had not otherwise committed itself to building a new campus on the site. *Bridges v. San Jacinto Community College District* (4th Dist. 2017) 14 CA5th 104.

At a regularly scheduled meeting, the Board of Trustees of the San Jacinto Community College District approved an agreement to acquire 80 acres of property from a regional park district for possible use as a new college campus. There were no public comments on or objections to the agreement at or before the board meeting.

Plaintiffs subsequently sued, alleging the District violated CEQA by failing to prepare an EIR before approving the agreement. The appellate court concluded (1) plaintiffs did not exhaust administrative remedies or demonstrate they were excused from doing so by lack of notice; and (2) even if plaintiffs had exhausted, their claim foundered on the merits because the District had not committed itself to the new campus project and had expressly agreed to prepare an EIR before completing the purchase.

#### **Plaintiffs Failed to Exhaust Administrative Remedies**

A party alleging violation of CEQA must exhaust administrative remedies or demonstrate either that there was no public hearing or other opportunity to raise objections before the project was approved or that the public agency failed to give the notice required by law (Pub. Res. Code § 21177(e)). Here, the District considered and authorized the purchase agreement at a public meeting of its board of trustees. While this was not a public hearing, it nonetheless triggered CEQA's exhaustion requirement because it constituted an "other opportunity" for members of the public to raise objections prior to the approval of the project.

Plaintiffs contended they were nonetheless exempted from the exhaustion requirement because the District had failed to post the meeting agenda at least 72 hours in advance of the meeting as required by the Brown Act. The record, however, was silent on whether the required notice had been given. Under these circumstances, plaintiffs' exemption claim failed because they bore the burden of proving inadequate notice. Faced with no evidence on the issue, the court concluded that it had to presume that the District's official duty had been regularly performed.

#### **CEQA Review Was Not Required**

The court further held that execution of the purchase agreement did not trigger the duty to conduct CEQA review. When an agency purchases land for a public project that may have a significant impact on the environment, the CEQA Guidelines require the agency to prepare an EIR before acquiring the land. However, the Guidelines allow the agency to designate a preferred site and enter into an acquisition agreement if its future use of the site is conditioned on CEQA compliance. (CEQA Guidelines § 15004 (b)(2)(A).) Here, the court found the District satisfied the latter requirement because the agreement expressly conditioned the opening of escrow on CEQA compliance — specifically, preparation of an EIR.

Plaintiffs argued, however, that the totality of the District's actions indicated it had committed itself to acquiring the land for construction of a new campus. The appellate court disagreed, finding that nothing in the purchase agreement or in any of the District's resolutions committed it to building a new campus on the property, no funds had been allocated for that purpose, the

board had never formally designated the site for a new campus, and no development or construction plans existed. Thus, the court concluded, the District had in no way committed itself to the project or precluded its consideration of alternatives to the site. Accordingly, approval of the purchase agreement did not trigger the duty to conduct CEQA review.

- Geoffrey L. Robinson

## **2. Categorical Exemptions for Telegraph Hill Residential Project Upheld**

### ***Protect Telegraph Hill v. City and County of San Francisco* (1st Dist. 2017) 16 CA5th 261**

In *Protect Telegraph Hill v. City and County of San Francisco* (2017) 16 CA5th 261, the First District Court of Appeal rejected a series of CEQA challenges to San Francisco's approval of a conditional use permit for the renovation of a historic cottage and the construction of a three-unit residential building. In upholding the city's finding the project was categorically exempt, the court rebuffed the routinely-made argument that the city's exemption finding should be overturned based on "unusual circumstances" exception to the categorical exemptions.

#### **Background.**

At the time the city considered the project the property was vacant with the exception of a small cottage built in 1906. During its initial review of the project the city planning Department determined that it qualified for two categorical exemptions from CEQA, CEQA Guidelines section 15301(d) (restoration or rehabilitation of deteriorated structures) and CEQA Guidelines section 15303(b) (multi-family residential structure totaling no more than four units). The Planning Commission subsequently approved a use permit for the project, which included conditions to address disruption caused by construction. After a neighborhood group appealed both the categorical exemption determinations and the use permit, the Board of Supervisors added additional conditions to address construction-related disruption and to preserve landscaping along the front of the property, and voted to approve the exemptions and use permit.

The neighborhood group, calling itself "Protect Telegraph Hill," challenged the approvals, claiming that (1) the conditions of approval on the use permit were actually CEQA mitigation measures that precluded categorical exemption determinations; (2) the project description was inconsistent and inadequate under CEQA; and (3) "exceptional circumstances" prevented the use of categorical exemptions. The court rejected each of these arguments.

#### **Conditions of Approval Not Evidence of Environmental Impact.**

Protect Telegraph Hill argued that conditions relating to pedestrian safety and traffic disruption on Telegraph Hill, including additional, similar conditions added by the Board of Supervisors on appeal, were disguised CEQA mitigation. The court rejected this argument on the basis that the conditions were consistent with the city's authority to approve and condition use permits, and did not constitute environmental mitigation. The record showed that the city adopted findings in support of the categorical exemptions independent of the conditions, with the court noting that nothing in the record showed the conditions were imposed "in order to mitigate the project's significant environmental effects as opposed to taking precautions to address the ordinarily anticipated inconvenience and danger that arises when significant construction activity occurs in a congested urban environment like San Francisco's Telegraph Hill."

#### **Project Description Requirements for EIRs Do Not Apply to Categorical Exemptions.**

Protect Telegraph Hill argued that the city used an inadequate project description when evaluating the categorical exemptions and approving the use permit. The court noted that CEQA does not impose any particular standards for a project description

when a lead agency considers a categorical exemption. The court determined that the project description did comply with the relevant project description requirements, the information required by the local code in order to evaluate an application for an exemption from CEQA.

### **Unusual Circumstances Exception to Categorical Exemptions Inapplicable.**

Lastly, the court rejected Protect Telegraph Hill's argument that the project's location on Telegraph Hill amounts to an unusual circumstance that precludes invocation of categorical exemptions under the exception to the categorical exemptions in CEQA Guidelines Section 15300.2(c). The court noted the project's consistency with the city's general plan, which incorporates a detailed discussion of Telegraph Hill and view preservation, as well as the project's consistency with the site's zoning. Further, the court cited to the fact that the project is located within an infill site in a transit priority area, and pursuant Public Resources Code Section 21099(d), aesthetic impacts of qualifying projects are not considered significant environmental effects. Lastly, the court found that there was substantial evidence to support the city's position that the site's topography and geology did not present unusual circumstances.

- Garrett Colli

### **3. Court Rejects Claim that Clinic Protests Might Cause Significant Environmental Impacts**

#### ***Respect Life South San Francisco v. City of South San Francisco* (1st Dist. 2017) 15 CA5th 449**

A court of appeal has ruled that opponents of a new Planned Parenthood clinic did not establish a fair argument that anti-clinic protests might cause significant environmental effects. Therefore, the City of South San Francisco did not err in finding the clinic project exempt from CEQA. *Respect Life South San Francisco v. City of South San Francisco*, 15 CA5th 449 (2017). Separately, the court's opinion raises questions about how lead agencies should respond when a project opponent raises the unusual-circumstances exception to an agency's reliance on CEQA's categorical exemptions.

#### **Background.**

The city approved a conditional use permit allowing a small downtown office building to be converted into a medical clinic and found the project exempt from CEQA under three separate categorical exemptions.

Project opponents claimed the exemptions were barred by the unusual-circumstances exception because the clinic tenant was a Planned Parenthood affiliate. Under that exception, a project cannot be found exempt if there is a reasonable possibility it will have a significant effect on the environment due to unusual circumstances. The opponents claimed that use of the building for a Planned Parenthood clinic would lead to protests, an unusual circumstance that would cause significant environmental impacts.

#### **A Bifurcated Standard of Review Applies to a Claim that a Categorical Exemption is Barred by the Unusual-Circumstances Exception.**

Under the California Supreme Court's recent *Berkeley Hillside* decision, a party claiming a categorical exemption is barred by the unusual-circumstances exception must prove two things: First, that the project presents unusual circumstances that distinguish it from other projects covered by the exemption; and second, that there is a reasonable possibility a significant effect on the environment will occur because of those unusual circumstances.

To prove the first element, the challenger must surmount a relatively high hurdle; it must persuade the court there is no substantial evidence in the record that would support the agency's determination there are no unusual circumstances. If the

complaining party is able to make that showing, however, it faces a much lower barrier in proving the second element; it need only show there is evidence in the record that would support a fair argument that a significant effect on the environment could occur.

**A Different Standard May Apply When the Agency Does Not Make an Express Determination Whether or not the Project's Circumstances are Unusual.**

Nothing in the statute or CEQA Guidelines requires an agency to make findings explaining why it has concluded a project is exempt under a categorical exemption. The appellate courts have also made it clear that an agency is not required to give its reasons for relying on a categorical exemption when approving a project, or even to put exemption determinations in writing. Here, the city adopted findings showing why it found the project exempt under each of three separate categorical exemptions, but did not make a finding explaining why the exceptions to the categorical exemptions did not apply.

In a surprising take on the standard of review, the *Respect Life* court declared that in the absence of an express finding explaining why the city determined the unusual-circumstances exception was inapplicable, a court's ability to affirm based on the first element—the absence of unusual circumstances—is “constrained.” The court reasoned that without a finding, a court must assume that the agency determined there *were* unusual circumstances, and could only affirm based on that element if the court “concludes that the record does not contain substantial evidence of any such circumstances.” It is not, therefore, sufficient for the court to identify substantial evidence in the record that there are no unusual circumstances. “This is because such an approach fails to address the possibility that the entity thought there were unusual circumstances but concluded, under the second element, that those circumstances did not support a fair argument of a reasonable possibility of a significant environmental effect.” Under this novel approach, to refute the assumption it found unusual circumstances the agency would have to show it could not have done so because the evidence in the record would be insufficient to support such a determination.

Although the court discussed the standard for reviewing the unusual circumstances element of the exception at some length, it nevertheless said it need not consider the issue further because the challengers had, in any event, failed to prove the second element—a reasonable possibility of significant environmental effect due to the project.

**The Challengers Failed to Identify Evidence that the Project Might Result in Significant Environmental Effects.**

The crux of the challengers' argument was that protests against the Planned Parenthood clinic were foreseeable, and that such protests would result in an array of environmental impacts such as sidewalk obstruction, public safety effects, traffic and parking congestion, business disruption and increased noise.

The court first noted that the city and Planned Parenthood had argued that these claimed impacts are not the kind of indirect or secondary effects that are subject to CEQA because if they occur, they will be caused by the protests, not the project. The court concluded, however, that it need not address that argument: Even if it were assumed these asserted impacts could implicate CEQA, there was no evidence in the record sufficient to show a reasonable possibility significant environmental effects would occur.

The court characterized the evidence the challengers relied on of the effects of protests as “minimal, vague and speculative.” Although some project opponents said they would protest, no evidence was presented indicating that protests would be particularly disruptive, or that any of the indirect or secondary effects that might result would be consequential. To the contrary, the relevant evidence in the record supported the opposite conclusion: that there was no reasonable possibility of a significant effect on the environment.

## **A Take-Home Message.**

In the wake of *Respect Life*, where there is any dispute whether a categorical exemption might be precluded based on the unusual-circumstances exception, the safest course for the agency would be to ensure that express findings on this issue are included in the record.

- Julie Jones & Steve Kostka

### **4. A Project Is Not Discretionary if the Agency Lacks Authority to Require Mitigation**

#### ***Sierra Club v. County of Sonoma* (1st Dist. 2017) 11 CA5th 11**

In *Sierra Club v County of Sonoma* (1st Dist. 2017) 11 CA5th 11, the First District Court of Appeal affirmed that a decision to issue a permit will trigger the duty to comply with CEQA only when the agency has the ability and authority to mitigate the project's environmental impacts to some degree.

The Agricultural Commissioner of Sonoma County issued an erosion-control permit that allowed the applicants to establish a vineyard on former rangeland under the county's vineyard and orchard development ordinance. The commissioner reviewed the application and property for conformance with a lengthy list of standards set out in the ordinance and used a form checklist to indicate whether applicable standards were met. The commissioner determined issuance of the permit was ministerial and therefore exempt from CEQA.

#### **CEQA Only Applies When the Agency Has Discretion to Mitigate a Project's Environmental Impacts to a Meaningful Degree**

Environmental groups challenged the commissioner's determination, alleging the permit approval was discretionary because of the broad and vague substantive standards of the ordinance. Those standards provide guidance on proper grading, drainage improvements, and vineyard and orchard site development. The environmental groups argued the ordinance gave the commissioner broad discretion both to interpret and apply those standards and to require measures to mitigate environmental impacts that might occur.

The trial court upheld the commissioner's decision and the court of appeal affirmed. The court's opinion focuses on the functional distinction between discretionary projects which are subject to CEQA, and ministerial activities which are exempt: whether applicable permitting standards give the agency the discretion to deny a permit or impose mitigation measures based on the project's environmental impacts, or instead require the agency to approve the project if it is found to comply with permitting standards, whether or not it might adversely affect the environment.

The court of appeal first acknowledged that some provisions of the ordinance required that the commissioner exercise discretion when applying them to a proposed project. It explained, however, that the discretion-conferring provisions of the ordinance would only be relevant to the analysis if they actually applied to the project. Here, the court held that only three provisions of the ordinance that could be interpreted as involving a discretionary determination applied to the project. But none of those provisions gave the commissioner the authority to exercise judgment or deliberation in deciding whether to approve the application or to mitigate environmental impacts in a meaningful way.

The first provision required either a 50-foot setback from wetlands or a setback as recommended by a wetlands biologist. The court determined that this provision conferred no meaningful discretion – either the project would have a 50-foot setback or a setback as recommended by a wetlands biologist, or it wouldn't. The second provision required diverting storm water to the

nearest practicable disposal location and the third required the applicant to incorporate natural drainage features whenever possible. The court ruled that the environmental groups had failed to demonstrate that the commissioner had discretion under either provision, and also failed to show that the ordinance gave the commissioner authority “to mitigate potential environmental impacts to any meaningful degree.”

### **Voluntary Mitigation Measures Do Not Make an Action Discretionary**

The environmental groups also argued that issuance of the permit was discretionary because the commissioner requested additional mitigation measures and clarifications and corrections to the application before granting the permit. The court disagreed and explained that an action does not become discretionary simply because an agency makes such requests and an applicant voluntarily agrees to them. In this situation, the commissioner had no authority under the ordinance to require mitigation measures as a condition of approval and did not do so. Instead, the applicants voluntarily adopted further mitigation measures and made corrections and clarifications to their application.

### **The Takeaway Message**

The court’s decision reaffirms that an agency decision to approve a project will be treated as a discretionary action that is subject to CEQA only when the provisions of governing law that are claimed to provide discretionary authority over a proposed project directly apply to the project and give the decision-maker the authority to impose measures that will mitigate environmental impacts in a meaningful way.

- *Sunny Tsou*

## B. NEGATIVE DECLARATIONS

### 1. Court of Appeal Rejects CEQA Piecemealing Challenge to County's "Zoning Modernization" Ordinances

#### ***Aptos Council v. County of Santa Cruz*** **(6th Dist. 2017) 10 CA5th 266**

The court in *Aptos Council v. County of Santa Cruz* (6th Dist. 2017) 10 CA5th 266 rejected a lawsuit claiming that three pro-development zoning ordinances the county adopted constituted a single project that that should have been reviewed together in an environmental impact report. The court of appeal found that the zoning ordinances could be implemented separately and operated independently, and were not a reasonably foreseeable "consequence" of one another. The ordinances therefore did not constitute a single project and completion of separate environmental assessments did not amount to improper piecemeal CEQA review.

#### **Background.**

The three zoning ordinances related to minor zoning exceptions, exceptions from sign standards, and height, density and parking requirements for hotels. The county adopted the ordinances as part of a broader effort to reform its land use regulations.

The zoning exception ordinance authorized administrative approval of "minor exceptions" to zoning standards, such as a 5% height increase. The county found no significant impacts and adopted a negative declaration.

The sign ordinance allowed administrative approval of sign exceptions with public notice. The county found the ordinance qualified for various CEQA exemptions.

Finally, the hotel ordinance removed a requirement that hotels have 1,100 square feet of developable area per room, removed a three-story height limit, and reduced required parking from 1.1 spaces per room to 1.0 space per room. The county adopted a negative declaration.

Aptos Council, a community group, filed suit to challenge the county's approval of the ordinances. It asserted that the negative declaration for the minor exceptions ordinance was invalid and the sign ordinance was not exempt. It also claimed that the county improperly engaged in piecemeal CEQA review of the three ordinances and that environmental review of the hotel ordinance should have considered the impacts of potential future hotel projects. The trial court rejected these claims and denied the petition.

On appeal, Aptos Council dropped its CEQA challenges to the minor exceptions ordinance and the sign ordinance. The court's analysis therefore focused on two issues: (1) whether the three ordinances taken together constituted a single project and the county engaged in improper piecemeal environmental review by evaluating them separately and (2) whether the county erred by adopting a negative declaration for the hotel ordinance rather than preparing an EIR.

#### **Pro-Development Zoning Ordinances that Can Be Separately Implemented, Operate Independently, and that Are Not a Reasonably Foreseeable Consequence of One Another, Do Not Constitute a Single Project for Purposes of CEQA.**

On the issue of piecemealing, the court rejected Aptos Council's claim that the three ordinances, adopted as part of a county-wide land use reform effort, constituted a single project and should have been reviewed in a single environmental document. As one court of appeal recently ruled, no improper piecemealing occurs when "projects have different proponents, serve different purposes, or can be implemented independently." On the other hand, under the long-standing rule adopted by the

California Supreme Court, an EIR must include an analysis of the environmental effects of a future action if, at a minimum, the future action is “a reasonably foreseeable consequence of the initial project” being considered for approval.

The court of appeal emphasized that whether different proposed activities must be treated as a single project that must be reviewed in a single environmental document depends on whether a causal relationship among them can be shown— that one or more of the proposed activities is a “reasonably foreseeable *consequence*” of another proposed activity. The county’s decision to change certain zoning regulations—such as changing the number of parking spaces per hotel room—was not a reasonably foreseeable consequence of other regulatory changes such as authorizing administrative approval of minor zoning exceptions. Instead, the court found that the “regulatory reforms operate independently of each other and can be implemented separately.”

Significantly, the court also rejected Aptos Council’s claim that regulatory reform to update county zoning ordinances constituted a single purpose. Although a group of reforms could constitute a single project in some cases, here the court found that “modernizing the County Code is vague” and “was not the type of tangible ‘objective’ that had been found to be the basis of a CEQA project.”

#### **Evidence that the Purpose of an Ordinance Was to Promote Growth Was Insufficient to Show New Development Was Reasonably Foreseeable**

The court rejected the contention that an EIR was required for the hotel ordinance because its stated purpose—to facilitate growth—made future development which would have adverse environmental impacts “reasonably foreseeable.” Aptos Council offered arguments the ordinance would lead to new development, but did not identify any evidence that the ordinance might actually induce growth, or that there were any hotel projects on the horizon. The court found the evidence in the record showed that no hotel developments had been proposed, only a handful of parcels were available for hotels, and the owners of the two most prominent undeveloped parcels did not currently plan to sell or develop the land. While there was evidence that the county was seeking to increase development, including a planning Department letter indicating that regulations were too restrictive, that did not make hotel development “reasonably foreseeable;” it showed only the county’s “hope” for growth. Finally the court explained that it was not possible to forecast the specific environmental impacts that might result from unknown future development. At this point in time “environmental review of potential future developments would be an impossible task, because it is unclear what form future developments will take.”

- *Christopher Parker*

## C. ENVIRONMENTAL IMPACT REPORTS

### 1. California Supreme Court Holds City's EIR Must Identify and Analyze Potential Environmentally Sensitive Habitat Areas under the Coastal Act

#### ***Banning Ranch Conservancy v. City of Newport Beach*** **(Supreme Court 2017) 2 C5th 918**

A local agency's environmental impact report must identify any areas on a project site that might qualify as "Environmentally Sensitive Habitat Areas" under the California Coastal Act, and must account for those areas in the EIR's analysis of project alternatives and mitigation measures. *Banning Ranch Conservancy v. City of Newport Beach* (Supreme Court 2017) 2 C5th 918. Even where the Coastal Commission, and not the local agency, will make the final ESHA identifications, and only the Coastal Commission can issue a coastal development permit, the CEQA lead agency must address ESHA questions and cannot defer those questions to a subsequent Coastal Commission permitting process.

The CEQA statute and Guidelines require lead agencies to integrate, to the maximum extent feasible, their CEQA review with planning and environmental review procedures required by other laws. In addition, CEQA requires lead agencies to consider related environmental regulations and matters of regional significance when weighing project alternatives. Citing these provisions, the court concluded that the City of Newport Beach erred in declining to attempt to identify ESHA on the 400-acre Banning Ranch project site, where some ESHA were already known to exist.

Although the city had no authority to designate ESHA on the property, the court explained that the city was not required to make "legal" ESHA determinations in its EIR. Instead, the city was required to "discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a project site."

The court also rejected the argument that the city's attempt to analyze ESHA impacts would be speculative. Precision was not required, the court said, adding that the city had routinely evaluated ESHA impacts for other locations that, unlike the Banning Ranch site, were covered by the city's coastal land use plan.

The fact that the Coastal Commission would later consider ESHA during its permitting process did not help the city's position because "[t]he City's approach, if generally adopted, would permit lead agencies to perform truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim."

The court noted that an agency's failure to integrate its CEQA review with other environmental review procedures "to the maximum extent feasible" would not always call for reversal of a project approval. Here, however, the court concluded that the city's omission resulted in inadequate evaluation of project alternatives and mitigation measures; suppression of information highly relevant to the Coastal Commission's permitting function; and failure to provide the public with a full understanding of the environmental issues raised by the project proposal. Accordingly, the court determined that reversal was required.

This case may change many CEQA lead agencies' approaches to regulatory topics that are the subject of permitting by other agencies under statutory schemes other than CEQA. EIRs that defer discussion of such topics to other agencies' subsequent processes will be vulnerable to legal challenge.

- Julie Jones

## 2. California Supreme Court Holds Governor's Executive Order Setting 2050 GHG Targets Need Not Be Used as CEQA Significance Threshold

### *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (Supreme Court 2017) 3 C5th 497

The court of appeal issued a controversial decision in this case which overturned the environmental impact report for the San Diego Association of Governments' 2050 Regional Transportation Plan and Sustainable Communities Strategy. The court faulted the EIR for failing to assess the plan's consistency with the 2050 greenhouse gas emissions reduction goal contained in an executive order issued by the Governor in 2005. The court of appeal's decision was reversed by the California Supreme Court, with one justice dissenting. *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, (Supreme Court 2017) 3 C5th 297.

#### **Background of the Plan and SB 375**

In 2005, Governor Schwarzenegger issued an executive order establishing statewide targets to reduce greenhouse gas emissions to 1990 levels by 2020 and to 80 percent below 1990 levels by 2050.

The Legislature adopted several laws to address these targets, including AB 32 and SB 375. SB 375 required metropolitan planning organizations like SANDAG to incorporate "sustainable communities strategies" into their regional transportation plans. The state then set initial targets for the San Diego area: a 7% CO<sub>2</sub>-equivalent reduction by 2020 and a 13% reduction by 2035.

In 2011, the SANDAG Regional Transportation Plan became the first in the state to be adopted with a Sustainable Communities Strategy. SANDAG's EIR found that the plan would reduce greenhouse gas emissions until 2020 but would increase them in later years. Although the EIR discussed the 2050 emissions reduction target in the executive order, it did not treat the order's 2050 emissions reduction target as a standard for assessing the significance of the plan's greenhouse gas impacts.

#### **The Supreme Court's Majority Opinion**

The majority reversed the court of appeal decision, concluding that SANDAG was not required to use the executive order targets as a standard of significance.

The court, however, did not entirely excuse agencies from discussing the executive order in their CEQA analyses of greenhouse gas emissions. According to the court, the goals in executive order express "the pace and magnitude of reduction efforts that the scientific community believes necessary to stabilize the climate" and the information "has important value to policymakers and citizens in considering the emission impacts" of a project. The court found that SANDAG's analysis was adequate in this regard because it "did not obscure the existence or contextual significance" of the executive order, making clear that the executive order's 2050 goals were part of the regulatory setting for the plan. In this case, it was sufficient that the EIR conveyed the "general point" that the upward trajectory of emissions might conflict with the executive order's 2050 emissions reduction goal.

The court also upheld SANDAG's use of three different GHG significance thresholds authorized by CEQA Guidelines section 15064.4(b), stating these three methods "together adequately informed readers of potential greenhouse gas emissions impacts."

The court cautioned, however, against using SANDAG's analysis as a template for future EIRs, observing that GHG analysis under CEQA should reflect improvements in data and methods and should also incorporate new legislation and regulations.

## The Dissent

Dissenting from the majority opinion, Justice Cuellar concluded that the EIR was too “vague and shortsighted” to fulfill SANDAG’s duty to adequately acknowledge the impact of a transportation and land use plan that would increase, rather than reduce, transportation GHG emissions from the region.

- Christopher Chou

### 3. Court Upholds Refinery EIR’s 2007 Baseline and Reliance on Cap-And-Trade for Climate Change Analysis

#### ***Association of Irrigated Residents v. Kern County Board of Supervisors*** **(5th Dist. 2017) 17 CA5th 708**

In a precedent-setting decision, the Fifth District Court of Appeal has upheld two key aspects of the 2014 environmental impact report for a refinery expansion project. *Association of Irrigated Residents v. Kern County Board of Supervisors* (5th Dist. 2017) 17 CA5th 708. First, the court approved the use of 2007 operating data for the refinery as part of the baseline environmental condition, even though the EIR’s notice of preparation was not issued until 2013. Second, the court held, on a matter of first impression, that compliance with California’s cap-and-trade program showed the project’s climate change impact would be less than significant. However, the court also found that the EIR erroneously concluded that federal law preempted CEQA review of certain environmental impacts of off-site rail activities, and thus failed to disclose and analyze these impacts; accordingly, the court overturned the county’s certification of the EIR.

#### **Proposed Refinery Expansion.**

Kern County approved a project to modify an oil refinery in Bakersfield. The refinery began operation in 1932 and was operating under air district permits that allowed processing of 70,000 barrels per day of crude oil and other hydrocarbons. In 2013, the new owner of the refinery proposed modifications to enable the refinery to process a greater variety of crude oils, including Bakken crude oil from North Dakota. The project did not propose an increase in the refinery’s 70,000 barrels per day capacity, but in addition to the refinery modifications, it proposed expanding existing rail transfer and storage facilities to allow offloading an average of 150,000 barrels per day from two unit trains; the balance of unloaded crude would be sent to other refineries.

The project was controversial because it would increase transport of Bakken crude, which is generally more volatile than other crude oils. The EIR described safety concerns with transporting crude by rail, including reference to several high-profile train accidents in recent years. Project opponents sued, alleging the EIR violated CEQA in numerous respects. The published portion of the court of appeal’s opinion addresses three of these challenges.

#### **Substantial Evidence Supported the EIR’s Use of the Last Year of Full Refinery Operations for the Project Baseline.**

The court first addressed the county’s approach to establishing a baseline for review of the proposed project’s environmental impacts. The EIR generally used a baseline of environmental conditions as of 2013, when the Notice of Preparation was issued for the project’s EIR. However, to describe the baseline for refinery operations, the EIR adjusted the existing environmental conditions “to the extent necessary to reflect an operating refinery” and presented throughput data for 2007, which was the refinery’s last full year of operation prior to a bankruptcy, refinery shutdown, and subsequent reduced operations that did not include crude oil processing. Petitioners challenged this deviation from CEQA’s “normal” approach to establishing a project baseline.

The court first upheld the county's finding that existing physical conditions included an operating refinery. Substantial evidence established that refinery operations of up to 70,000 barrels a day had been approved by permits and entitlements still in effect, and that these operations had been the subject of prior CEQA reviews. Furthermore, the refinery was entitled to begin processing crude oil again regardless of the project proposal under consideration.

Second, the court addressed the county's choice of 2007 as the realistic measure of the baseline physical conditions created by the refinery's operations. It noted that the refinery's maximum permitted operation (70,000 barrels per day under existing permits) would have been an inappropriate baseline since that maximum was rarely, if ever, achieved in practice. Instead, 2007 data (60,389 barrels per day) reasonably represented actual refinery operations and was adequately presented by the county as a conservative estimate, given that the average throughput between 2001 and 2008 (when the refinery was fully operational and crude oil was being refined) was slightly higher than the 2007 number.

### **Cap-and-Trade Compliance Shows Project Would Not Cause Significant Climate Change Impact.**

Addressing a question not previously decided by any published decision, the court next addressed the EIR's conclusion that the refinery's compliance with California's cap-and-trade program demonstrated that the project would not cause a significant climate change impact. Petitioners argued that cap-and-trade allowances are merely authorizations to emit GHGs, not reductions in GHG emissions for the purpose of a CEQA significance determination.

The court relied on section 15064.4(b)(3) of the CEQA Guidelines, which provides: "A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment: ... (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions...." The court then ruled that the cap-and-trade program constituted such a regulation, noting: "The idea underlying the cap-and-trade program is not that capped facilities relying on allowances will decrease their greenhouse gas emissions and help the state achieve its target, but that the limited allocation and use of allowances means they are not available for use elsewhere, which affects California's refining industry as a whole. Specifically, the use or expenditure of allowances will diminish the supply of allowances, which will cause their price to rise and incentivize investment in technologies and equipment that reduce greenhouse gas emissions." The court concluded: "Based on this industry-wide perspective, we conclude it is appropriate for a lead agency to conclude a project['s] compliance with the cap-and-trade program provides a sufficient basis for determining the impact of the project's greenhouse gas emissions will be less than significant."

### **An EIR Must Disclose and Analyze the Environmental Impacts of Off-Site Rail Activities Arising from a Refinery Project, Even Though Federal Regulation Might Preempt Mitigation Measures.**

Finally, the court held that the EIR failed to comply with CEQA by erroneously stating that federal law preempted CEQA review of certain environmental impacts of off-site rail activities. Petitioners successfully argued that the Interstate Commerce Commission Termination Act of 1995 (ICCTA), which established the federal Surface Transportation Board in order to administer a regulatory scheme for rail carriers, does not preempt CEQA analysis of the environmental impacts of rail operations that would be caused by a refinery project. Because the disclosure and analysis of environmental impacts stemming from the project's off-site rail activities would not have burdened or interfered with these activities, the court concluded the impacts needed to have been addressed in Kern County's EIR.

Petitioners acknowledged that the ICCTA might preempt Kern County's ability to impose certain mitigation measures, but argued that it would not preempt an agreement requiring the refinery owner to mitigate pollution resulting from off-site rail operations. The court directed that, on remand, Kern County should determine whether the imposition of this or other potential

mitigation measures on the refinery owner (a rail carrier's customer) would indirectly impose an unreasonable burden on or interfere with rail transportation.

The court of appeal's opinion addresses three important issues under CEQA. First, it continues and extends the deference that courts have paid to lead agency's determinations regarding project baseline where modifications to an existing facility are proposed. Here, the court explicitly approved use of a six-year-old baseline year where that year represented the last full year of full facility operations and was consistent with average full facility operations. Second, the decision states that the EIR for a refinery, and presumably for any other facility that is subject to the cap-and-trade program, can rely on compliance with that program to conclude that the project's climate change impacts are less than significant. Third, the decision provides a useful reminder that an EIR must analyze all potentially significant direct and indirect impacts of a proposed project, even if mitigation of those impacts may be legally infeasible for reasons such as federal preemption.

- Julie Jones & Christian Termyn

#### **4. Environmentally Superior Alternative Properly Rejected Based on Inability to Meet Project Objectives**

##### ***Los Angeles Conservancy v City of West Hollywood* (2nd Dist., Dec. 22, 2017) Case No. B270158**

When approving a proposed project, a lead agency may find an environmentally superior alternative infeasible if it conflicts with design-related project objectives that implement general plan policies, according to the court's decision in *Los Angeles Conservancy v City of West Hollywood* (2nd Dist. Dec. 22, 2017) Case No. B270158.

##### **Background.**

Los Angeles Conservancy challenged the City of West Hollywood's approval of "the Melrose Triangle" project, a large mixed-use development proposed on a three-acre site located at a major intersection at the southwestern entrance to the city. The project's most prominent structure, the "Gateway Building," would displace a building constructed in the late 1920's, remodeled a decade later, and now considered an important example of mid-20th century modern architecture. The EIR described demolition of the building as a significant and unavoidable adverse environmental impact.

To address the impact, the EIR explored three alternatives to the project. One of the alternatives would have preserved the building by reconfiguring the project and reducing its size. The lawsuit centered on the EIR's analysis of this preservation alternative and the city's decision to reject it and approve the project as proposed.

##### **The EIR's Analysis of the Preservation Alternative was Legally Adequate.**

The Conservancy first claimed that the EIR's description of the preservation alternative was deficient because it did not include a conceptual design. But, the court ruled, nothing in CEQA requires that an EIR provide design plans for an alternative.

The Conservancy also asserted that the EIR did not adequately explain its determination that preserving the building would prevent construction of the Gateway Building and parts of other buildings planned for the site. The court responded, however, that no explanation was required because it was obvious from the plans and drawings that the existing and proposed buildings could not occupy the same spot at the same time.

Next, the court held that the EIR's use of estimates—rather than precise measurements—to describe the amount of retail, restaurant, and office space that would be lost under the preservation alternative did not make the EIR deficient. The estimates were not confusing and provided sufficient information for a reasonable comparison between the alternative and the project.

### **The City Gave Adequate Responses to the Comments Which Advocated the Preservation Alternative.**

Two comments on the draft EIR asserted that preserving the building through adaptive reuse would be superior to the design of the proposed project, and the Conservancy argued that the EIR did not adequately respond to them. As a rule, a general comment can be met with a general response and a comment that simply objects to the project can be addressed summarily. Here, the two comments did not raise new issues or identify flaws in the EIR's analysis, but instead amounted to little more than objections to the project and expressions of support for the preservation alternative. Accordingly, the court found the city's responses, which referred to the draft EIR's discussion of the alternative and summarized the shortcomings of its design, to be sufficient.

### **The City Properly Found the Preservation Alternative Infeasible on the Ground it was Inconsistent with the Project's Key Design Objectives.**

A public agency may approve a project, and reject environmentally superior alternatives to the project, if it finds the alternatives are infeasible due to economic, legal, social, technological, or other considerations. Several appellate courts have held that a public agency may find an alternative infeasible if it determines the alternative cannot satisfy project objectives or is impractical or undesirable for policy reasons.

Citing this authority, the court upheld the city's determination the preservation alternative was infeasible because it was inconsistent with important design-related project objectives. These objectives, which mirror general plan policies for development of the site, included employing a modern design that complements nearby uses, providing a recognizable architectural gateway to the city, creating a consistent pattern of development and uses, and making the area more pedestrian-friendly and accessible.

Having concluded it was proper for the city to find the alternative infeasible due to its inability to meet project objectives, the court then examined whether the city's findings were supported by substantial evidence in the record. "Substantial evidence," under the CEQA Guidelines, is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."

Applying this definition, the court identified an array of information in the record that would support a fair argument that the preservation alternative was inconsistent with the identified project objectives. Plans and photographs showed that the existing building would be "strikingly dissimilar in appearance" from the other buildings planned for the site and that its architectural style is inconsistent with the overall pattern of development in the area. That information, along with an architect's testimony were enough to support the conclusion that the preservation alternative would not create the desired architectural gateway to the city or a modern, cohesive and consistent design for the site. Statements in the EIR and testimony from a city planner also indicated the preservation alternative would not meet the objectives of making the area pedestrian-friendly or providing internal access within the site.

### **Conclusion.**

There is little disagreement that an agency may reject an environmentally superior alternative that it finds does not implement agency policy as fully as the project. It is less certain, however, that an agency may reject such an alternative based on applicant-defined objectives not anchored in agency policies. For this reason, it can be important for agency findings which reject alternatives due to their inability to achieve project objectives to highlight the linkage between those objectives and the agency's policies.

- *Steve Kostka & Lindsey Quock*

## 5. “Urban Decay” Not a Reasonably Foreseeable Consequence of Relocating Courts from Historic Downtown Courthouse

### ***Placerville Historic Preservation League v. Judicial Council of California*** **(1st Dist. 2017) 16 CA5th 187**

Citing the likelihood of repurposing Placerville’s historic downtown courthouse and evidence nearby businesses were not dependent on it, the First District Court of Appeal held that “urban decay” was not a reasonably foreseeable consequence of moving judicial activities from downtown to a new building in the outskirts of the city. *Placerville Historic Preservation League v. Judicial Council of California* (1st Dist. 2017) 16 CA5th 187.

The defendant, the Judicial Council of California, planned to consolidate all judicial activities in El Dorado County from two buildings—one an historic building on main street in downtown Placerville—to a new building on undeveloped land next to the county jail, two miles from the city center. The Judicial Council prepared an environmental impact report, which identified the Main Street Courthouse as an “historical resource” for purposes of CEQA. This meant that any material impairment of the building as a result of the move would constitute “substantial adverse change” in the environment.

To save the historical resource, the Judicial Council worked with the city and county to establish a committee to explore potential re-use and repurposing of the historic courthouse. And to avoid material impairment, the draft EIR required that any new use of the building retain significant character-defining features of the building compatible with its historic character. The EIR acknowledged that the withdrawal of judicial activities from the downtown area could affect downtown Placerville. However, it concluded that blight or “urban decay” was unlikely to result because of the city and county’s commitment to repurposing the historic courthouse building and because there were numerous office, retail and commercial businesses in the area which did not rely on courthouse operations.

The Placerville Historic Preservation League disagreed, and filed a petition challenging the certification of the EIR. It argued that the EIR’s evaluation of significant environmental effects was deficient because its conclusion that urban decay would not result was not supported by substantial evidence.

The court ruled in favor of the Judicial Council finding that there was substantial evidence supporting its conclusion that urban decay was not reasonably foreseeable. It noted that businesses come and go, and that one commenter told the Judicial Council that 38 downtown businesses had closed in the last three years, indicating the district’s resilience and ability to survive turnover without physical deterioration. The court emphasized that urban decay is a relatively extreme economic condition, and that there was no evidence to suggest it would occur due to the withdrawal of judicial activities from the downtown area.

The court also stated that a “well-grounded probability” that the city and county would follow through on its commitment to repurpose the historic building was sufficient to support the Judicial Council’s conclusion, and that there was no legitimate evidence that nearby businesses were so dependent on the activities of the historic courthouse that urban decay would result from its move. Significantly, the court found that repurposing the building was not a CEQA mitigation measure, but a circumstance informing the project’s foreseeable effects which, in this case, did not necessitate mitigation in part because it was highly likely the building would be reused.

The court also distinguished *Bakersfield Citizens for Local Control*, a key case, decided in 2004, in which the court found the EIR insufficient in addressing the economic impact of locating two new WalMart supercenters in the city. In *Bakersfield*, the court stated, the lead agency disregarded the risk of urban decay altogether, whereas here, the agency addressed the issue and concluded that urban decay was not a reasonably probable result. Furthermore, the court noted that there was ample evidence in *Bakersfield* which supported the concern that the projects would lead to urban decay (e.g., an economic study commissioned by the petitioners, citations to numerous other studies of the adverse effects of supersized retailers in other

communities, and numerous comments submitted related to the risk of urban decay). The Placerville court found no such evidence.

Perhaps most importantly, the court highlighted the difference between the construction of two supercenters which would siphon business from small shops and cause risk of widespread business failures (*Bakersfield*), and the relocation of government functions which might reduce some commercial activity but would be offset by re-purposing the courthouse with other activities (*Placerville*).

- Lindsey Quock

## **6. Court Finds CARB's New Analysis of Biodiesel Low Carbon Fuel Regulations Still Doesn't Comply with CEQA but Leaves Current Regulations in Place Pending Compliance**

### ***POET, LLC v. State Air Resources Board* (5th Dist. 2017) 12 CA5th 52**

In 2013, the fifth district court of appeal ruled that the California Air Resources Board violated CEQA when it adopted its 2009 Low Carbon Fuel Standard regulations, and the court directed issuance of a writ of mandate requiring that CARB take corrective action. The court allowed the LCFS regulations to remain in effect while CARB completed a new CEQA analysis, concluding that leaving the regulations in place would provide more protection for the environment than suspending their operation. CARB then completed a further CEQA analysis and adopted revised regulations. Now, the same court has held that the CARB's new analysis failed to comply with CEQA or its prior decision. *POET, LLC v. State Air Resources Board* (5th Dist. 2017) 12 CA5th 52. This time, the court provided specific suggestions for further CEQA review, but it again allowed the revised regulations to remain in place while CARB takes further action to comply.

### **The Challenge to CARB's Revised CEQA Review**

The challenger, the largest U.S. ethanol producer, again contested CARB's analysis of the environmental effects of the biodiesel portion of CARB's LCFS regulations. Biodiesel combustion emits reduced greenhouse gases compared to other fuels, but increases NO<sub>x</sub> emissions, which have local and regional air quality impacts. The challenge attacked the Board's decisions to: 1) limit its CEQA analysis to the impact of its new biodiesel regulations rather than including the effects of its original 2009 regulations; and 2) use 2014 statewide biodiesel emissions as the baseline for CEQA analysis.

### **The Board Did Not Comply with the Writ of Mandate or CEQA**

First, the court of appeal held that CARB had not complied with the writ of mandate because it still had not analyzed the environmental impacts of its original biodiesel regulations, adopted in 2009. Instead, CARB analyzed only the impacts of the new regulations it adopted in 2015, and compared biodiesel use under those regulations to statewide biodiesel use in 2014. The court held that the original 2009 regulations and its impacts were part of the "project" CARB was required to analyze.

Because the CEQA analysis incorrectly characterized the project to be analyzed as its 2015 regulations, the court found CARB also erred in using 2014 as its baseline year for gauging changes in NO<sub>x</sub> emissions from biodiesel. The court explained: "When this court decided to allow the original LCFS regulations to remain operative pending ARB's compliance with CEQA, we did not intend to deprive the public or decision makers of information about increased NO<sub>x</sub> emissions caused by the original LCFS regulations during that compliance period. A proper baseline would identify the conditions that existed before any impacts of the original LCFS regulations began to accrue and, thus, would provide a solid foundation for identifying those impacts."

## Existing Regulations Stay in Place Pending CEQA Compliance

To decide whether the 2015 diesel LCFS regulations should be suspended until the CARB complied with CEQA, the court focused on CEQA's remedies provision, Public Resources Code section 21168.9(a)(2), and identified two questions. The first was whether keeping the 2015 regulations in effect "will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project." Despite CARB's acknowledged "bureaucratic momentum" in favor of its LCFS biodiesel regulations, the court concluded that once it reconsidered NO<sub>x</sub> impacts and determined whether they were significant, CARB would be able to consider any necessary mitigation measures and alternatives. Second, the court asked whether suspension of the LCFS regulations addressing diesel fuel and its substitutes "could result" in an adverse change to the physical environment. The court concluded that suspending the regulations *would* result in adverse environmental impacts from increased emissions of greenhouse gases, and that this impact outweighed the *potential reduction* in NO<sub>x</sub> emissions that would result from suspension.

Next, while acknowledging this was not a factor identified in the statute, the court considered whether CARB's bad faith should affect the relief granted. The court concluded that CARB had acted in bad faith in its CEQA review of the LCFS regulations on diesel fuel and its substitutes, but that CEQA's goal of protecting the environment "should not be compromised to punish agency bad faith." Accordingly, the court ordered that the LCFS regulations governing diesel fuel and its substitutes be frozen in place as of 2017, pending the CARB's compliance with CEQA.

Finally, CARB requested that the court endorse a 2010 baseline for the further CEQA analysis required by the court's decision. The court declined, noting that the analysis of its first LCFS regulations began in or before 2009; that regulated entities might have begun modifying their behavior by in anticipation of the regulations; and that the hypothetical use of a 2010 baseline on remand was not a question properly before the court.

The court's decision represents a straightforward application of CEQA principles governing the scope of a "project" and the determination of baseline conditions. Because of the impacts at stake - climate change vs. local and regional air quality - the opinion provides an unusually careful analysis of remedies for a CEQA violation, but concludes that the certainty of a greenhouse gas impact resulting from suspension of the LCFS regulations outweighs the potential for localized air quality impacts that may occur pending CARB's CEQA compliance. Accordingly, the case can be seen as part of the judicial trend affording heightened status to climate change impacts under CEQA.

- Julie Jones

## 7. Appellate Court Upholds Approval of Master-Planned Community Against Multiple CEQA Challenges

### ***Residents Against Specific Plan 380 v. County of Riverside*** **(4th Dist. 2017) 9 CA5th 941**

The court of appeal upheld the County of Riverside's decision to approve development of a master-planned community, rejecting claims that the county violated CEQA by (1) filing an inadequate notice of determination; (2) failing to recirculate the final EIR after the project was modified; and (3) failing to consider and adopt feasible air quality mitigation measures. *Residents Against Specific Plan 380 v. County of Riverside* (4th Dist. 2017) 9 CA5th 941.

The project proposed the development of residential, mixed-use, commercial, and open space components on 200 acres of land. The EIR, determined that the project would result in significant air quality and noise impacts. The final EIR responded to comments made by the South Coast Air Quality Management District and the City of Temecula and explained the county's rationale for declining to adopt suggested mitigation measures.

### **The Notice of Determination Was Adequate**

Plaintiff contended the NOD issued upon project approval was inadequate because it described the project as proposed, and failed to reflect changes to the project approved by the Board of Supervisors. The court noted the errors, but found they did not justify unwinding the approval because the notice substantially complied with the informational requirements of CEQA, and the project description was close enough to the project as approved that it “provided the public with the information it needed to weigh the environmental consequences of the county’s determination, seek additional information if necessary, and intelligently decide whether to bring a legal challenge to the approval[.]”

### **Recirculation of the EIR Was Not Necessary**

The court also dismissed plaintiff’s argument that the county was required to recirculate the final EIR after changes were made to the project. The court addressed the project changes and observed that the differences between the plan described in the final EIR and the project as approved had to do with details of the allocation and arrangement of uses within the project site, not the permitted uses themselves or overall extent or density of the proposed development. It noted that “[t]he footprint of the project remains the same...the project as approved permits the same amount of retail development in the same planning areas, the same amount of commercial office development, and the same number of residential units as the version of the plan analyzed in the final EIR.” The court found that concerns raised by the plaintiff regarding the project changes were adequately addressed by the county’s environmental consultant, which provided the county with an adequate factual basis for concluding the changes did not result in new significant impacts requiring recirculation.

### **The EIR Adequately Considered Agency Suggestions for Mitigating Air Quality Impacts**

The court also rejected plaintiff’s contention that the county failed to adequately respond to SCAQMD’s and the City of Temecula’s comments regarding air quality impacts. SCAQMD had recommended a more stringent air quality mitigation measure that would require use of Tier 3 and 4 construction equipment rather than the Tier 2 equipment provided in the final EIR. The City of Temecula had also requested compliance with the 2010 CA Energy Code (rather than the 2008 Code) and the 2010 CA Green Building Code.

In response to SCAQMD’s comment, the county explained that the mitigation measure in the final EIR reflected the construction equipment that was anticipated to be reasonably available at the time of project construction and that it did not anticipate the reasonable availability of equipment meeting the more stringent requirements proposed. The county’s response to the City of Temecula explained the rationale for rejecting the proposed measures, noting that the county’s existing mitigation measures already required compliance with any legally mandated increase in the standard. The court found these responses sufficiently detailed to support the county’s determination that the more stringent standards proposed were not feasible and provided adequate support for the county’s decision not to adopt the recommended mitigation measures.

- Michelle Chan

## **8. Failure to Identify Preferred Alternative Dooms EIR**

### ***Washoe Meadows Community v. Department of Parks and Recreation* (1st Dist. 2017) 17 CA5th 277**

A draft EIR that studies five very different project alternatives without identifying a preferred alternative violates CEQA by failing to provide the public with a stable project to review, the court of appeal held in *Washoe Meadows Community v. Department of Parks and Recreation* (1st Dist. 2017) 17 CA5th 277.

The California Department of Parks and Recreation undertook a project to address erosion of the Upper Truckee River in Washoe Meadows State Park and Lake Valley State Recreation Area, which was a major source of sediment and nutrient runoff in Lake Tahoe. The recreation area contained an 18-hole golf course that had altered the river's original course and flow. The Department issued a scoping notice that identified four alternatives for the project:

Alternative 1: No project.

Alternative 2: River restoration with reconfiguration of the 18-hole golf course.

Alternative 3: River restoration with a nine-hole golf course.

Alternative 4: River stabilization with continuation of the existing 18-hole golf course.

The scoping notice identified Alternative 2 as the preferred alternative.

The Department's draft EIR (which also served as a draft EIS for purposes of NEPA) added a fifth alternative that would include decommissioning of the golf course. The draft EIR did not specify a preferred alternative; rather, it stated that the Department would select a preferred alternative after receiving comments on the draft EIR. The draft EIR analyzed all five alternatives in considerable detail. In the final EIR, the Department identified a slightly modified version of Alternative 2 as the preferred alternative.

Washoe Meadows Community filed a petition for writ of mandate seeking to set aside the Department's certification of the final EIR, alleging, among other claims, that the failure to identify a preferred alternative in the draft EIR violated CEQA. The court of appeal agreed.

The court of appeal relied on *County of Inyo v. City of Los Angeles*, 71 CA3d 185 (1977), in which the court stated that “[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.” Although *County of Inyo* involved an EIR that inconsistently described the scope of the project, the court held that the circumstance in this case—where the draft EIR had not selected a preferred alternative for the project—was “no less problematic.” The court explained: “For a project to be stable, the DEIR, the FEIR, and the final approval must describe substantially the same project. A DEIR that states the eventual proposed project will be somewhere in ‘a reasonable range of alternatives’ is not describing a stable proposed project. A range of alternatives simply cannot be a stable proposed project.”

The court explained that the Department's failure to select a preferred alternative could limit meaningful public participation in the environmental review process. According to the court, it did not matter if the EIR had thoroughly analyzed the preferred alternative; the draft EIR's failure to identify a preferred project “impair[ed] the public's right and ability to participate in the environmental review process.” The court explained that “[a] description of a broad range of possible projects, rather than a preferred or actual project, presents the public with a moving target.”

The court recognized that “there may be situations in which the presentation of a small number of closely related alternatives” would be acceptable, but explained that in this case the five alternatives were vastly different because each alternative “created a different set of impacts, requiring different mitigation measures.” When an agency is considering a diverse range of alternatives, the court held, it must identify a preferred alternative in the draft EIR.

- Jacob Aronson

## 9. Court of Appeal Reissues its Opinion Finding the EIR for SANDAG's Regional Transportation Plan Deficient

### ***Cleveland National Forest Foundation v. San Diego Association of Governments*** **(4th Dist. 2017) 17 CA5th 413**

Three years ago, the court of appeal which reviewed the environmental impact report for the San Diego Association of Governments' 2050 Regional Transportation Plan and Sustainable Communities Strategy found it deficient in a number of respects. The California Supreme Court considered the case, and in 2017 issued its decision reversing the court of appeal's ruling that the EIR's analysis of greenhouse gas emissions did not adequately assess the plan's consistency with the 2050 greenhouse gas emissions reduction goal contained in an executive order that had been issued by Governor Schwarzenegger. (The supreme court's decision is discussed on page 13, above).

After it issued its opinion and decision, the supreme court sent the case back to the court of appeal for further proceedings. The court of appeal then reissued its prior opinion, which it modified to take account of the supreme court's decision. That opinion addresses several particularly important issues:

#### **Mitigation of Greenhouse Gas Emissions Impacts**

The court concluded the EIR did not adequately consider mitigation measures for greenhouse gas emissions that could "both substantially lessen the transportation plan's significant greenhouse gas emissions impacts and feasibly be implemented." The court listed as examples measures that would encourage development of "smart growth areas" through transportation investments, other funding decisions and incentives for transit-oriented developments, coordinating funding of low carbon transportation with "smart growth development," and encouraging parking management that promotes walking and transit use.

#### **Alternatives Analysis**

The court ruled that the seven alternatives examined in the EIR weren't enough. The court faulted the EIR because it had emphasized congestion relief and had not discussed an alternative that could reduce vehicle miles traveled such as public transit projects. In light of the apparent drawbacks of congestion relief as a long-term greenhouse gas reduction measure, the court concluded the alternatives the EIR considered did not comprise a "reasonable range."

#### **Air Quality Impacts**

The court found the plan's air quality impacts analysis deficient because it did not include sufficient detail. The EIR reasoned that SANDAG had not identified sufficient evidence in the record showing it was not feasible for it to provide more definitive information in its description of existing conditions and on the correlation between air pollution and adverse health effects.

The court also found the EIR's measures for mitigating air quality impacts improperly deferred analysis of appropriate mitigation measures and failed to set performance standards. The court rejected SANDAG's contention other mitigation was not feasible at the program EIR level, finding SANDAG had failed to identify any supporting evidence.

#### **Agricultural Resources Impacts**

Finally, the court faulted the EIR's analysis of impacts to agricultural land. Examining the EIR's analysis at particularly close level of detail, the court found the analysis deficient because it had not accounted for farmland on parcels of less than 10 acres that may have been put into agricultural production after the mid-1990s.

## D. SUPPLEMENTAL ENVIRONMENTAL REVIEW

### 1. Fair Argument Test Applies to Agency Determination Whether Subsequent CEQA Review is Required Once a Negative Declaration Has Been Adopted

#### *Friends of College of San Mateo Gardens v San Mateo County Community College District* (1st Dist. 2017) 11 CA5th 596

This court of appeal decision was issued upon remand for further proceedings after a California Supreme Court decision in which the court considered the standard of review that applies when an agency makes significant changes to a project that was originally approved based on a negative declaration and determines that no further environmental review is required. This decision applies the Supreme Court's ruling that the question of whether further environmental review is required for modifications to a project approved based on a negative declaration is not subject to the deferential substantial evidence test but is instead governed by the more searching "fair argument" standard. *Friends of College of San Mateo Gardens v San Mateo County Community College District* (1st Dist. 2017) 11 CA5th 596.

#### **Regulatory Background**

CEQA provides that when changes are proposed to a project for which an EIR has already been prepared, a subsequent or supplemental EIR is required only if the changes are substantial and require major revisions of the previous EIR. The CEQA Guidelines extend this subsequent review framework to projects for which a negative declaration was initially adopted and provide for agencies to determine whether a subsequent EIR, a supplemental EIR, a negative declaration, or an addendum should be used for later project approvals.

#### **Factual Background**

The case before the court involved a master plan approved by a community college district in 2006. The plan contemplated nearly \$1 billion in new construction and building renovations at the District's three campuses. At the College of San Mateo, the District planned to demolish certain buildings and renovate others. The district approved the master plan after adopting a mitigated negative declaration, finding that implementation of the plan would have no significant unmitigated environmental effects.

Five years later, the district decided to demolish one building complex it previously had planned to renovate and to renovate some buildings it previously had planned to demolish. The district prepared an addendum to the prior mitigated negative declaration to document its analysis finding the project changes did not trigger the need for further CEQA review.

The plaintiff challenged the district's approvals and claimed the changes to the master plan amounted to a "new project" that required its own independent review under CEQA, starting with an initial study of the project. Both the trial court and the court of appeal agreed, finding the newly proposed building demolition was a new project, which required restarting the CEQA process.

#### **The Supreme Court's Decision**

The California Supreme Court rejected the "new project" test applied by the trial and appellate courts. It held that whether prior environment review can be relied for later approvals turns on whether the prior document retains relevance—that at least some of the environmental impacts of the new proposal were considered in the original document. In discussing the standard of review that should be applied under CEQA's subsequent review provisions, the court held that the standard differs depending on whether the initial environmental document was an EIR or negative declaration. It concluded that the CEQA Guidelines require agencies to prepare an EIR rather than a negative declaration "whenever there is substantial evidence that

the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered.”

### **The Court of Appeal Decision on Remand**

In implementing the Supreme Court’s decision on remand, the court of appeal used a “two-step” inquiry to determine the validity of the District’s use of an addendum for the modified project.

#### *Step 1: Whether the subsequent review provisions are applicable*

The first step requires a court to determine whether the agency’s resort to CEQA’s subsequent review provisions is appropriate. Under the Supreme Court’s decision, this determination depends on whether the original environmental document “retains some informational value.” As this is a “predominantly factual question,” the agency’s decision on this issue will be upheld if it is supported by substantial evidence.

Here the court had no trouble finding substantial evidence to support the District’s decision. The revised plan did not affect most of the original demolition plans, nor did it remove the measures adopted to mitigate those plans’ environmental effects, so the prior mitigated negative declaration was still relevant.

#### *Step 2: Whether the use of an addendum was consistent with CEQA’s subsequent review provisions*

Once a court determines an agency properly proceeded under CEQA’s subsequent review provisions, the next step is to determine whether the agency has correctly determined how to comply with its obligations under those provisions.

Following the Supreme Court’s guidance, the court of appeal applied a less deferential standard in reviewing the District’s decision to use an addendum because the project was originally approved based upon a negative declaration: an EIR or mitigated negative declaration would be required if substantial evidence supported a fair argument that the proposed changes to the project might have a significant impact not previously considered when the project was originally approved.

The court found substantial evidence in the record that the revised plan would have an impact that was not evaluated in the prior negative declaration: removal of a portion of a garden, which evidence from faculty and students showed might have a significant aesthetic impact. Consequently, the court ruled that the agency’s use of an addendum was inappropriate.

The court, however, refrained from ordering the district to prepare an EIR on remand, noting that the District could adopt a subsequent mitigated negative declaration if it determined that all potentially significant impacts could be adequately mitigated.

- Christopher Chou

## **E. CEQA PROCEDURES**

### **1. CEQA Not Preempted by Federal Rail Transportation Law for Projects Carried Out by State Agencies**

#### ***Friends of Eel River v. North Coast Railroad Authority* (Supreme Court 2017) 3 C5th 677**

The California Supreme Court has issued its decision in *Friends of the Eel River v. North Coast Railroad*, an important case regarding preemption of state environmental law by the Interstate Commerce Commission Termination Act (ICCTA), which contemplates a unified national system of railroad lines subject to federal, not state, regulation.

The court agreed that the preemptive scope of the ICCTA is broad and that the statute preempts the California Environmental Quality Act for private rail owners and operators. But in a 6-1 decision, the majority held that CEQA was not preempted by the ICCTA for projects that are owned by a state agency.

This case concerned a railroad line running from Napa to Humboldt County. The railroad was previously owned and operated by private railroad companies that eventually failed.

The Legislature, concerned about service on this line, created the North Coast Railroad Authority (NCRA), giving the agency the power to acquire property to operate a railroad on the line and to select a public or private entity to operate transportation services. The NCRA obtained ownership rights over the railroad line and received state and federal funding. NCRA contracted with a private operator, Northwestern Pacific Railroad Company (NWPCo) to operate freight service on the line. The Surface Transportation Board (STB) approved NWPCo's application for an exemption from certification to operate the line.

NCRA prepared an environmental impact report under CEQA for the resumption of freight rail service on a portion of the line and for limited repair and construction projects. Several groups challenged the EIR's adequacy and NCRA responded that CEQA did not in fact apply to the project because it was preempted by the ICCTA.

Under the Supremacy Clause of the Constitution, Congress may preempt state law through federal legislation, either expressly or implicitly. The fundamental question regarding the scope of preemption is congressional intent.

The majority and dissent agreed that Congress intended ICCTA's preemption of state regulation to be broad and that the ICCTA preempted CEQA in the regulation of privately owned railroads. The majority held, however, that because the railroad line here was owned by the NCRA, a state subsidiary, CEQA was not preempted by the ICCTA because there was no indication that Congress intended to preempt states' powers of self-governance.

The court's reasoning—particularly that federal preemption of state environmental review requirements is limited where the state has a proprietary interest or is acting as a market participant—may reach beyond the ICCTA. This case may weaken claims of federal preemption of CEQA and similar laws in circumstances where a state agency is involved in carrying out, beyond merely approving, the project.

- Christopher Chou

## **2. Tie Vote Decision Resulting in Upholding Permit Approval was Subject to Challenge Under CEQA**

### ***Grist Creek Aggregates, LLC v. Mendocino County Air Quality Management District* (1st Dist. 2017) 12 CA5th 979**

The court of appeal rejected a claim that a tie vote of the air quality management district's hearing board resulted in "no action" and hence was not subject to judicial challenge. *Grist Creek Aggregates, LLC v. Mendocino County Air Quality Management District* (1st Dist. 2017) 12 CA5th 979.

The Mendocino County Air Quality Management District approved a permit for Grist Creek Aggregates to construct a heating and blending unit for production of rubberized asphalt. Plaintiff appealed issuance of the permit to the District's Hearing Board. After two hearings, the four members of the Hearing Board who participated in the appeal split evenly on their vote. The notice of the tie vote stated that the Hearing Board "was unable to make a decision due to a 2-2 tie vote. The Hearing Board will not hold any further hearings on the appeal."

Plaintiff sought a writ of administrative mandate under Code of Civil Procedure section 1094.5 contending that the District and Hearing Board violated CEQA by approving issuance of the permit without having conducted environmental review. The

Hearing Board argued that the 2-2 vote resulted in no action, and hence there was no “final administrative order or decision” subject to judicial review.

The appellate court disagreed. Acknowledging that tie votes by administrative agencies mean different things in different contexts, the court concluded that in the statutory and procedural context presented, the tie vote gave rise to a claim for abuse of discretion by the Hearing Board. The effect of the Hearing Board’s vote was to deny plaintiff’s appeal, thereby leaving approval of the permit in place. Thus, the Hearing Board’s failure to act was itself a “decision” not to revoke the permit, which the court could review for abuse of discretion under Section 1094.5. While it was true, the court said, that lack of any factual findings by the Hearing Board would make such review more difficult, the tie vote did not render the decision immune from judicial review.

- *Geoffrey L. Robinson*

## F. CERTIFIED REGULATORY PROGRAMS

### 1. Certified Regulatory Programs Must Comply with CEQA's Policies and Substantive Standards

#### ***Pesticide Action Network North America v. California Department of Pesticide Regulation (Valent U.S.A. Corporation)*** **(1st Dist. 2017) 16 CA5th 224**

A certified regulatory program, which is exempt from some of CEQA's requirements, must still comply with CEQA's core policies and standards, which include considering feasible alternatives and cumulative impacts and recirculating environmental review documents in certain circumstances, the court of appeal held in *Pesticide Action Network North America v. California Department of Pesticide Regulation* (1st Dist. 2017) 16 CA5th 224.

#### **Background.**

In 2014, the California Department of Pesticide Regulation approved amended labels for two previously registered pesticides which allowed the products to be used on additional crops. Both pesticides contained a neonicotinoid, a class of pesticides that recent scientific research indicates may be harmful to honey bees. As part of the amended label approval process, the Department prepared a public report for each pesticide that concluded that using the pesticides consistent with the new labels would have no significant adverse environmental impacts. The plaintiff challenged the Department's approval of the two amended labels.

#### **The Court's Analysis.**

The court began its analysis by noting that the Department's registration of pesticides is a certified regulatory program pursuant to Public Resources Code section 20180.5. Certified regulatory programs are exempt from some CEQA requirements, including the obligation to prepare initial studies, negative declarations, and EIRs. The court noted, however, that courts have construed the exemption for certified regulatory programs narrowly and environmental review documents prepared by a certified regulatory program "remain subject to the broad policy goals and substantive standards of CEQA not affected by the limited exemption." The court explained that the Department was still required to comply with CEQA's requirements to consider feasible alternatives and cumulative impacts and to recirculate environmental review documents in certain circumstances.

The court first held that the Department had not adequately considered feasible alternatives that would reduce or avoid significant environmental impacts. The Department had not considered alternatives because it concluded that its action would not have any significant environmental impacts. The court found, however, that the Department's conclusion was not consistent with its ongoing reevaluation of the active ingredient in the two pesticides, as required by a Department regulation. Under that regulation, reevaluation is required if a substance "may have caused, or is likely to cause, a significant adverse impact, or that indicate there is an alternative that may significantly reduce an adverse environmental impact." The Department's decision that reevaluation was required under this regulation should have triggered a significance finding under the Department's certified program regulations, which require that environmental documents discuss "any significant adverse environmental effect that *can reasonably be expected to occur*, directly or indirectly, from implementing the proposal." In addition, the court held that the Department's conclusion was not adequately supported by evidence in the record. Although the public reports referred to a checklist evaluation of whether approving the amended labels would have the potential to cause significant adverse environmental impacts, no checklist or other supporting document was included in the record.

Second, the court agreed with the plaintiff that the Department failed to adequately consider cumulative impacts to honey bees that may result from approving new uses for the two pesticides. Although the Department's certified program regulations do not require analysis of cumulative impacts, the court held that the Department was required to do so because CEQA requires

that all agencies consider cumulative impacts. The court relied on prior cases that held that certified regulatory programs must consider cumulative impacts in environmental reviews that are subject to CEQA, even if the program is exempt from the requirement to prepare an EIR.

Finally, the court held that the Department was required to recirculate the public reports after the close of the public comment period. Under CEQA, an agency must recirculate an EIR if the draft EIR was so inadequate and conclusory that public comment on the draft was in effect meaningless, among other reasons. The court applied this requirement to the Department's environmental review documents. The court explained that the initial public reports were conclusory, with no analysis or explanation of the conclusion that there would be no significant adverse environmental impacts. "Given the Department refrained from explaining its decision until it responded to public comments, recirculation was required to allow meaningful public comment directed at the rationale for its decision."

The court remanded with instructions to the superior court to issue a writ of mandate directing the Department to rescind its approvals of the pesticide label amendments.

- *Jacob Aronson*

## G. CEQA LITIGATION

### 1. CEQA Action Challenging Oil Well Permits Not Barred by Res Judicata

#### ***Association of Irrigated Residents v. California Department of Conservation*** **(5th Dist. 2017) 11 CA5th 1202**

The court of appeal held that the doctrine of res judicata (which precludes relitigation by the same parties of issues previously adjudicated on the merits) does not apply when a prior judgment was based on mootness and ripeness grounds because it is not a judgment on the merits. *Association of Irrigated Residents v. California Department of Conservation* (5th Dist. 2017) 11 CA5th 1202.

In 2012, several environmental organizations sued the California Department of Conservation in Alameda County contending that the Department failed to comply with CEQA because of its “pattern and practice” of issuing permits for oil and gas wells without analyzing the potential environmental impacts of fracking. While the suit was pending, Senate Bill No. 4 (SB 4) was signed into law. SB 4 required the Department to adopt new fracking regulations and to approve projects that met certain conditions before the new law took effect. The court then dismissed the claims as moot due to the passage of SB 4 and not ripe to the extent they targeted future practices of the Department.

In 2014, environmental organizations filed a second suit in Kern County alleging that the Department failed to comply with CEQA before issuing over 200 specific drilling permits. The trial court dismissed the case on the grounds that res judicata applied because the earlier suit had involved essentially the same issues and parties and had been ruled on by the court.

The court of appeal held that res judicata was not applicable because the earlier case had not been decided on the merits but, rather, on the ground that there was no justiciable controversy before the court. The appellate court reasoned that a judgment based on mootness or ripeness is not one “on the merits” because the substance of the claim is not adjudicated. Here, the ruling in the Alameda case had been based solely on mootness and ripeness grounds, and the trial court never addressed the merits of plaintiffs’ CEQA claims.

The court of appeal also rejected the argument that the Alameda court had ruled on the merits of the case because the court order discussed specific ramifications of SB 4. The court of appeal concluded that the Alameda court was simply explaining its mootness ruling, not adjudicating a substantive defense.

The court also held that entry of final judgment in another case in Kern County Superior Court involving similar issues did not warrant dismissal of the appeal based on collateral estoppel. The collateral estoppel doctrine bars relitigation of identical issues that were actually litigated and decided in a prior case by one who was a party in the first suit or in privity with that party (i.e., having essentially the same legal interests). The court reasoned that the ultimate legal issues in the two cases were not identical because the facts in each case were different. Further, although the Sierra Club was a plaintiff in both suits, other plaintiffs in the second Kern County case were not necessarily in privity with the Sierra Club, hence the requirements for collateral estoppel were not met.

- *Rachael Rutkowski*

## 2. Court May Order Partial Decertification and Leave Approvals in Place After Finding EIR Legally Inadequate

### ***Center for Biological Diversity v. California Department of Fish and Wildlife*** **(2nd Dist. 2017) 17 CA5th 1245**

In *Center for Biological Diversity et al. v. California Department of Fish and Wildlife* (2nd Dist. 2017) 17 CA5th 1245, the court of appeal held a court order that requires partial decertification of an Environmental Impact Report and leaves some project approvals in place is a legally permissible remedy when an EIR has been found legally inadequate.

#### **Background.**

This was the second appeal in this case. The petitioners had challenged the EIR and related approvals for two natural resource plans adopted for the proposed Newhall Ranch development in northwest Los Angeles County. The first trial court judgment and corresponding writ of mandate set aside the project approvals, ordered the Department of Fish and Wildlife to set aside its certification of the EIR, and enjoined the Department and the developer from proceeding with any project activity.

The case then worked its way up to the California Supreme Court, which held the EIR's findings on the significance of the project's greenhouse gas emissions were unsupported and its measure for protecting a fish species, the unarmored threespine stickleback, was unlawful. On remand from the supreme court, the court of appeal ruled against the plaintiffs on their other claims, and sent the case back to the trial court for issuance of a revised judgment and writ of mandate.

The trial court entered judgment in favor of the plaintiffs on their claims relating to greenhouse gas emissions and stickleback, and in favor of the Department and the developer on all other issues. The judgment further ordered that a peremptory writ of mandate be issued directing the Department to decertify the portions of the EIR that addressed the significance of the project's greenhouse gas emissions and the validity of the stickleback mitigation measures. Finally, the judgment ordered the Department to "suspend" two project approvals that related directly to these issues, but left four other approvals in place.

On appeal from the post-remand judgment, the plaintiffs' arguments were purely legal—that the judgment and writ were erroneous under CEQA because Public Resources Code section 21168.9 prohibits partial decertification of an EIR and also prohibits leaving project approvals in place when an EIR is decertified

#### **The Court's Analysis.**

The court of appeal first held that the trial court had authority under the statute to partially decertify the EIR. As noted above, the judgment had directed the Department to decertify only the portions of the EIR addressing greenhouse gas emissions and stickleback mitigation measures, rather than the entire EIR. The plaintiffs argued that "CEQA permits no such middle ground between full decertification and no decertification."

The court noted that while an agency must certify an entire EIR before approving a project, a court has other options once it has found an agency has certified a deficient EIR. Public Resources Code section 21168.9(a), the statute that governs court-ordered remedies for a CEQA violation, "clearly allows a court to order partial decertification of an EIR following a trial, hearing, or remand." Specifically, section 21168.9(a)(1) permits a court to void the agency determination "in whole or in part." As a policy matter, the court noted that partial decertification is consistent with the statute's purpose, which is to give courts some flexibility in tailoring a remedy to fit a specific CEQA violation. Thus, the court held that under section 21168.9(a)(1), a court may order partial decertification of an EIR, so long as the severability criteria in subdivision (b) of that section are satisfied, which the court determined them to be in this case.

For similar reasons, the court also held that the trial court was permitted to leave some project approvals in place after partial decertification of the EIR. Since a trial court has authority under section 21168.9 to order an agency's determination to be voided "in whole or in part," the court concluded that this language allowed for the possibility of leaving some project approvals in place when an EIR is partially decertified. In particular, the court pointed to the language in section 21168.9(b), under which a court is required to order "only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division." The court held that a trial court may therefore leave some project approvals in place, if doing so will not obstruct CEQA compliance.

- Anne Beaumont

### **3. Petitioner's Failure to Comply with Discovery Regarding its Standing to Sue Results in Dismissal of CEQA Case**

#### ***Creed-21 v. City of Wildomar* (4th Dist., Dec. 19, 2017) Case No. E066367**

A CEQA case challenging the City of Wildomar's approval of a Wal-Mart retail complex has been dismissed because the petitioner refused to comply with discovery requests regarding its standing to sue. *Creed-21 v. City of Wildomar* No..E066367 (4th Dist. Dec. 19, 2017).

CEQA cases generally are decided on the administrative record before the public agency when it approved a project. Therefore, civil discovery such as depositions, interrogatories and document production requests normally is not a feature of CEQA litigation. Discovery can, however, be allowed regarding threshold questions that are not addressed in the agency's record, such as the petitioner's standing to sue.

In *Creed-21*, the petitioner alleged that it had standing to sue because it was a non-profit, social-advocacy organization, and that at least one of its members resided in or near Wildomar. Wal-Mart contended, however, that Creed-21 existed only as a vehicle for collection of attorneys' fees and lacked standing to bring a CEQA suit. It sought a deposition and documents in order to support its theory that Creed-21 was a shell corporation that consisted of only two members, neither of whom lived in Wildomar.

Over the next six months, Creed-21 responded by:

- objecting to the discovery requests on the theory its membership was irrelevant;
- requiring the respondents to obtain an order from the superior court for the deposition and documents;
- unsuccessfully seeking relief from the superior court to reverse that order;
- unsuccessfully seeking relief from the court of appeal asserting that discovery was not allowed in CEQA cases and would violate the privacy rights of its members; and then
- failing to comply with the court order, citing family emergency.

During this time, the briefing on the merits of the CEQA claims proceeded. Creed-21's opening brief attached a declaration from a witness who stated that she was a member of Creed-21 and that she and other members lived and worked in Wildomar.

The respondents' opposition brief filed without benefit of the court-ordered discovery, argued that Creed-21 had two members, who did not include the declarant; noted that her declaration did not indicate when she had joined Creed-21; and further noted that Creed-21's president had testified in another case that Creed-21 had only two members.

The trial court granted Wal-Mart's motion for an "issue sanction" due to Creed-21's failure to comply with the court's discovery order. The issue sanction precluded Creed-21 from establishing its standing to sue, and thus had the effect of terminating the litigation.

The court of appeal held that the trial court's imposition of the terminating sanction was not arbitrary or capricious.

In *Creed-21*, the courts addressed an abuse of the CEQA process that also happened to constitute an abuse of the discovery process. As is typical in such cases, however, the remedy for abuse does not make the project proponent whole. Wal-Mart obtained dismissal of the case and an award of \$3,000 in discovery sanctions — not enough to compensate an applicant for the attorneys' fees it incurred, much less delay to its project from more than two years of litigation.

- Julie Jones

#### **4. Air District Permit May Be Challenged Under CEQA**

##### ***Friends of Outlet Creek v. Mendocino County AQMD* (1st Dist. 2017) 11 CA5th 1235**

In an unsurprising decision, a court of appeal held that CEQA claims may be asserted against an air quality management district. *Friends of Outlet Creek v. Mendocino County AQMD* (1st Dist. 2017) 11 CA5th 1235.

The Mendocino County Air Quality Management District granted an "Authority to Construct" – a permit issued after the district determines a project will comply with air quality laws – for an asphalt production project. The district determined that no additional CEQA review was required in light of prior environmental review undertaken by the County.

Friends of Outlet Creek sued, claiming the district violated both CEQA and its own regulations in issuing the permit. The district demurred, contending that the only vehicle for bringing claims against an air district is Health & Safety Code section 40864, which states: "Judicial review may be had of a decision of [an air district] hearing board by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure." The district contended this section did not authorize claims under CEQA.

The court sided with Friends. It ruled that claims may be brought directly under CEQA, and that a petitioner need not invoke section 40864 to challenge an air district decision. It noted "there is considerable precedent that air quality management districts can be sued for failing to comply with CEQA," while "no case . . . suggests that only Health and Safety Code section 40864 can be invoked in challenging an action by an air quality management district." Moreover, the district had acknowledged that it has an obligation to comply with CEQA, in both its decision for the asphalt production project and in its regulations.

The court cautioned, however, that Friends could not obtain greater relief under CEQA than it could under section 40864. The remedy would be limited to a writ of mandate under CCP section 1094.5, and the case could be used only to address the validity of the district's permit, not the county's prior decisions related to the project.

- Marie Cooper

**5. An Attorney Fee Award is Not Available to a Project Proponent that Successfully Defends a Challenge to Project Approvals Unless the Lawsuit was Detrimental to the Public Interest**

***Save Our Heritage Organisation v. City of San Diego***  
**(4th Dist. 2017) 11 CA5th 154**

A project sponsor can successfully defend an action brought to challenge a permit for its project, and satisfy the standards in Code of Civil Procedure section 1021.5 for an award of attorneys' fees, but still have its fee claim rejected, if the court concludes the aim of the lawsuit was to protect, rather than curtail, important public rights, according to the decision in *Save Our Heritage Organisation v. City of San Diego* (4th Dist. 2017)11 CA5th 154.

**Background.**

The City of San Diego approved a site development permit for a revitalization project in Balboa Park and Save Our Heritage Organisation filed suit to challenge the permit. The superior court ruled the permit was invalid, and the city did not appeal. The project sponsor, Plaza de Panama Committee, did appeal however, and succeed in having the superior court judgment reversed. After the case was sent back to the superior court, the Committee requested an award of attorney fees against Save Our Heritage for its time spent on the appeal and in bringing the motion for fees. The superior court denied the fee motion and the Committee again appealed.

**A Project Proponent May Be Entitled to a Fee Award If It Successfully Defends a Permit Challenge and Satisfies the Statutory Requirements for an Award.**

Code of Civil Procedure section 1021.5 codifies the so-called private attorney general doctrine, which seeks to promote lawsuits that vindicate public rights but that might not be otherwise brought because of the cost of litigation. On appeal, Save Our Heritage asserted that fees may never be awarded to a project sponsor that successfully defends a challenge to its project, because such an award would have a chilling effect on litigation brought to protect the public interest. The court rejected this argument. The statute allows a court to award attorney fees to "a successful party," and does not draw a distinction between prevailing plaintiffs and prevailing defendants. Accordingly, the court held that *any* successful party in litigation involving public rights that otherwise satisfies the statute's requirements may claim a fee award, not just the party that filed suit.

**The Committee Satisfied the Three-Part Test for Obtaining an Attorney Fee Award Under Section 1021.5.**

A party seeking a fee award under the statute must show that: (1) the litigation resulted in enforcement of an important right that affects the public interest; (2) a significant benefit was conferred on the public or a large class of persons; and (3) an award would be appropriate given the need for private enforcement and the financial burden of enforcement. Save Our Heritage did not dispute the Committee's showing that it had met this three-part test for obtaining a fee award.

**Fees Could Not Be Awarded Against Save Our Heritage Because It Did Nothing to Compromise Public Rights.**

The main issue before the court was whether, under an exception recognized by the California Supreme Court, Save Our Heritage was the "type of party upon whom private attorney general fees were intended to be imposed." Under this exception, "a section 1021.5 fee award may not be imposed on a litigant who did nothing to adversely affect the public interest." A party adversely affects the public interest when it seeks to curtail or compromise important public rights or seeks to exonerate itself from the violation of such rights. The court held that the suit brought by Save Our Heritage did not adversely affect the public interest, but rather sought to correct what it believed to be significant violations of environmental, historic preservation, and land use laws by the city. Although the suit was unsuccessful, it involved the type of public interest claims section 1021.5 was

enacted to encourage and was not detrimental to the public interest. A fee award against Save Our Heritage would, therefore, not be appropriate.

- Brian Daluiso

## **6. Attorney Neglect Not Grounds for Relief from Summary Judgment for Failure to Lodge Administrative Record**

### ***The Urban Wildlands Group, Inc. v. City of Los Angeles* (2nd Dist. 2017) 10 CA5th 993**

A party against whom summary judgment is entered as a result of attorney neglect may not seek relief under a statute that provides relief from a default judgment or dismissal resulting from attorney neglect. *The Urban Wildlands Group, Inc. v. City of Los Angeles* (2nd Dist. 2017) 10 CA5th 993.

The plaintiff challenged the City of Los Angeles's finding that a project was exempt from additional environmental review under CEQA. The parties stipulated that the plaintiff would lodge the administrative record with the court. Because of a mistake on the part of the plaintiff's attorney and his new legal assistant, the plaintiff did not lodge the record before the stipulated deadline. After a hearing, the trial court found that the plaintiff could not support its arguments because it had failed to lodge the administrative record. Accordingly, the trial court denied the plaintiff's petition and complaint and granted summary judgment for the defendant.

The plaintiff then moved to vacate the judgment under Code of Civil Procedure section 473(b), which requires a court to vacate a "default[,] . . . default judgment or dismissal" that results from an attorney's mistake, inadvertence, surprise, or neglect. The plaintiff submitted an affidavit from its attorney attesting to his neglect in failing to lodge the administrative record. The trial court concluded that the attorney's neglect had deprived the plaintiff of its day in court (similar to the effect of a default judgment or dismissal) and vacated the judgment.

The court of appeal reversed and ordered the judgment reinstated, explaining that a summary judgment did not fall within the scope of Section 473(b). The court noted that there are two lines of court of appeal cases interpreting Section 473(b). Under the prevailing view, explained in *English v. IKON Business Solutions, Inc.*, 94 CA4th 130 (2001), relief under Section 473(b) is available only for default, default judgment, or dismissal. The minority view, following *Avila v. Chua*, 57 CA4th 860 (1997), is that Section 473(b) allows relief from judgments that are "directly analogous to a default judgment."

Following the *English* line of cases, and expressly disapproving *Avila*, the court concluded that because the language of Section 473(b) is unambiguous, it should be interpreted according to its plain language. Section 473(b) did not apply to the case because "summary judgments are neither defaults, nor default judgments, nor dismissals."

This is one more case adopting the more narrow interpretation of Section 473(b) that "default judgment or dismissal" means just that and nothing more. Because the California Supreme Court has not yet resolved the split between the *English* and *Avila* lines of cases, trial courts may continue to apply either a strict or expansive interpretation of Section 473(b).

- Jacob Aronson