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Bay Planning Coalition Expert Briefing: CEQA Litigation Update

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CEQA LITIGATION UPDATE[1]

I. PUBLISHED CEQA DECISION

A. Scope of CEQA

1. *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369

- Agencies conducting CEQA review are not required to analyze the impact of existing environmental conditions on the project's future users or residents, absent a specific statutory mandate.

- When a proposed project risks exacerbating hazards that are already present, an agency must evaluate those hazards in light of the project's impacts.

In 2010, the Bay Area Air Quality Management District (BAAQMD) adopted thresholds of significance for determining when increases in air pollutants from proposed projects are significant in the context of CEQA review, including thresholds for "new receptors"—i.e., workers and residents who will be brought into the project area as a result of the proposed projects. The California Building Industry Association (CBIA) successfully challenged the thresholds in Superior Court by arguing that adoption of the thresholds itself constituted a "project" subject to CEQA review, which had not been performed by BAAQMD. The Court of Appeal reversed on this point and rejected CBIA's other arguments, including its claim that the "new receptor" thresholds were invalid because CEQA does not require analysis of the impacts that existing hazardous conditions—here, levels of toxic air contaminants and particulate matter in the project area—will have on a new project's occupants. The Supreme Court granted CBIA's petition for review, but limited the scope of review to whether CEQA requires an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project.

The Court focused its analysis on the interpretation of Public Resources Code section 21083, which states that a proposed project may have a "significant effect on the environment," and therefore require preparation of an environmental impact report (EIR) under CEQA if the "environmental effects of the project will cause substantial adverse effects on human beings, either directly or indirectly." The CEQA Guidelines had interpreted this provision to require an EIR to identify "any significant environmental effects the project might cause by bringing development and people to into the area affected," and to "evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas . . . ." (Guidelines § 15126.2(a).)

The Court held that requiring analysis of the existing environment's effects on a project, as a general matter, would "impermissibly expand the scope of CEQA," even if one assumes that CEQA's definition of "environment" includes the people associated with the project in question:

[1] Authored by Downey Brand attorneys Arielle Harris, Christian Marsh, Pejman Moshfegh, Kathryn Oehlschlager, and Donald Sobelman.

"Despite the statute's evident concern with protecting the environment and human health, its relevant provisions are best read to focus almost entirely on how projects affect the environment." In support of its finding, the Court pointed out several exceptions to this rule that are specified in the statute. For example:

- Existing airport-related hazards must be addressed for projects proposed to be located in the surrounding area (Pub. Res. Code § 21096);

- Review of proposed schools must consider certain health and safety risks posed by hazardous emissions from existing hazardous waste sites, freeways, and other potential sources of hazardous emissions (Pub. Res. Code § 21151.8); and

- Use of CEQA exemptions is limited where future residents or users of certain housing development projects may be harmed by existing conditions (e.g., Pub. Res. Code §§ 21159.21, 21159.22, 21159.23, 21159.24, 21155.1).

The Court reasoned that if the legislature intended for all CEQA review to include the effects of the existing environment on future project users, it would not have included these limited and specific requirements.

Finally, the Court confirmed that—regardless of the rule discussed above—CEQA does require analysis of "existing conditions in order to assess whether a project could exacerbate hazards that are already present," and upheld the provisions of Guidelines section 15126.2(a) as consistent with that rule. However, while giving due deference to the Natural Resources Agency's interpretation of CEQA, the Court invalidated another portion of Section 15126.2(a) as "clearly erroneous and unauthorized" by the Court's interpretation of CEQA: "An EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there."

2. *Union of Medical Marijuana Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265

- City ordinance restating existing law prohibiting mobile marijuana dispensaries is not a "project" subject to CEQA.

- Even if the ordinance does not restate existing law, it still is not a "project" because the claimed environmental impacts of the ordinance are "based on layers of speculation."

In 2007, the City of Upland adopted a municipal ordinance stating that "[n]o medical marijuana dispensary . . . shall be permitted in any zone within the city," and defining a dispensary as including any "fixed or mobile" facility or location. The City prepared and adopted a negative declaration for this ordinance, which went unchallenged. In 2013, the City adopted another ordinance, which added a new chapter to the municipal code expressly stating that mobile dispensaries "are prohibited" in the City. The 2013 ordinance contained recitals asserting that

such facilities were associated with criminal activity and highly likely to "flourish in the City without the adoption of this Ordinance."

Prior to the adoption of the 2013 ordinance, the Union of Medical Marijuana Patients, Inc. (UMMP) submitted comments opposing the ordinance and arguing that CEQA review was required. UMMP asserted that the ordinance was a "project" for purposes of CEQA because it would have foreseeable effects on the environment, resulting from increased travel by residents outside the City to obtain marijuana, as well as increased cultivation within the City. However, the City did not conduct CEQA review of the ordinance before adopting it, and UMMP filed a petition for writ of mandate. The trial court denied the petition.

The Fourth Appellate District affirmed, holding that, as a matter of law, the ordinance is not a project subject to CEQA. The Court determined that the 2013 ordinance "merely restates the prohibition on mobile dispensaries that was first imposed by the 2007 ordinance" and therefore will not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. In doing so, it rejected UMMP's argument that the 2007 ordinance was solely a land use regulation that did not "regulate activities carried out through vehicular means," noting that (1) the language of the 2007 ordinance does not support this interpretation, (2) the fact that the 2007 ordinance is codified in the zoning title of the municipal code is not dispositive, (3) the City has the authority to regulate both land uses and other conduct and activities through its police power, and (4) the City could enforce a violation of the 2007 ordinance by a mobile dispensary, through an action for public nuisance.

The Court also held that, even if it were to conclude that the 2013 ordinance is not just a restatement of existing law, the ordinance is still not a "project" subject to CEQA review: the environmental impacts cited by UMMP are "based on layers of speculation"—e.g., concerning the existence and number of patients within the City, their usage rates of marijuana and of mobile dispensaries, and the likelihood of their beginning to cultivate marijuana in response to the ordinance—and therefore are too speculative to be deemed reasonably foreseeable.

3. *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (2016) 247 Cal.App.4th 352

- Memorandum of understanding governing groundwater pumping project did not constitute a "project" under CEQA as it did not foreclose alternatives or mitigation measures, it did not commit the agency to a particular course of action, and it ensured the agency retained full discretion to approve, deny, or condition the project.

This case is one of six[2] related actions before the Fourth District Court of Appeal challenging the Cadiz Valley Water Conservation, Recovery and Storage Project (Project), which proposes to pump groundwater from an underground aquifer located in eastern San Bernardino County through pumps located private property owned by Cadiz Inc. (Cadiz). The Project is a

[2] The Fourth District Court of Appeal published two of the six cases, this one and *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, summarized later in this report. Downey Brand attorneys represented the County of San Bernardino in all six cases.

public/private partnership between Cadiz and the Santa Margarita Water District (SMWD) that would deliver the water for municipal and industrial uses in Southern California. This case involved the challenge by Delaware Tetra Technologies (Tetra) to the County of San Bernardino's (County's) 2012 resolution approving a Memorandum of Understanding (MOU) among the County, Cadiz, SMWD, and the Fenner Valley Mutual Water Company (Fenner). The County determined that the MOU was not a "project" subject to CEQA. Tetra challenged that determination claiming that the County should have conducted full environmental review prior to approving the MOU.

The Project involves the construction of approximately 34 new wells on Cadiz's land to extract an average of 50,000 acre-feet of groundwater from the aquifer every year (afy) for 50 years. The Project will be managed and operated by Fenner, a private, nonprofit entity formed by Cadiz. Tetra operates brine mining facilities at dry lakes overlying the aquifer from which the Project will pump water. Those dry lakes produce calcium chloride brine and sodium chloride salt that Tetra then mines. Tetra's concern is that the Project's pumping of groundwater will negatively affect Tetra's business.

Because the Project is located within San Bernardino County, it is subject to the County's Desert Groundwater Management Ordinance (Ordinance), which requires operators of groundwater wells to either secure a permit from the County or qualify for an "exclusion" under the Ordinance. In the case of the Cadiz Project, SMWD and Cadiz proceeded under the exclusion process based on a comprehensive Groundwater Monitoring, Management, and Mitigation Plan (GMMMP). In May of 2012, the County approved a MOU for the Project in which the parties agreed that a GMMMP would be developed, that the GMMMP would govern the operation and management of the Project, with an anticipated project term of 50 years, and that the Project could not proceed without the County's approval of a GMMMP. At the time of the County's approval of the MOU, SMWD was in the process of undertaking environmental review as lead agency for the Project and had released the Draft Environmental Impact Report (DEIR), but had not yet certified a Final EIR.

Relying on the California Supreme Court's opinion in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, Tetra argued that the MOU was a "project" requiring environmental review prior to approval. Tetra claimed that the MOU was one of four governmental approvals necessary for the Project to proceed, and, therefore, environmental review before the execution of the MOU was required. The Court disagreed, finding that MOU merely establishes a process for completing the GMMMP, and provides that after the GMMMP is completed and approved, the County retains *full discretion* to consider the final EIR and then to approve the Project, disapprove it, or require additional mitigation measures or alternatives.

The Court distinguished the facts from those in *Save Tara* (where the City of West Hollywood contractually bound itself to sell land) and *RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186 (where the water district contractually bound itself to deliver water for 60 years). The Court held that, unlike those cases, here the MOU would "not foreclose alternatives or mitigation measures," or "commit the County to a particular course of action that will cause an environmental impact," and that the County "retained full discretion over the Project." The Court analogized the MOU to the facts presented in *Cedar Fair, L.P. v. City of Santa Clara*

(2011) 194 Cal.App.4th 1150 (*Cedar Fair*), where the appellate court concluded that a highly detailed term sheet setting forth the terms of a transaction to develop a football stadium was not a project as it only bound the parties to negotiate in good faith, and did not make any of its terms binding on the parties.

The Court affirmed the trial court's denial of Tetra's petition for writ of mandate, finding that the MOU did not constitute a project under CEQA.

4. *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2016) 2 Cal.App.5th 485

- Air District's CEQA thresholds for toxic air contaminants and sensitive receptors held invalid to the extent they sought to mandate that lead agencies apply the thresholds to assess the effects of existing environmental conditions on future users or occupants of a project.

- The thresholds need not be invalidated in their entirety because there are legitimate circumstances where the thresholds could be used consistent with CEQA—e.g., voluntarily for informational purposes or to measure the extent a project might exacerbate existing conditions.

On remand from the California Supreme Court, the First Appellate District issued its second ruling in *California Building Industry Association v. Bay Area Air Quality Management District*. In this case, the California Building Industry Association (CBIA) challenged the Bay Area Air Quality Management District's (BAAQMD's) 2010 "CEQA Air Quality Guidelines"—specifically, the Guidelines' thresholds and methods for assessing the effects of siting new sensitive receptors (residences) near existing sources of toxic air contaminants and other harmful air emissions, such as freeways. In December 2013, the California Supreme Court held that CEQA "does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents" (so-called 'CEQA-in-Reverse'). Requiring analysis of the existing environment's effects on a project, the Supreme Court emphasized, would "impermissibly expand the scope of CEQA." The Supreme Court remanded the case to the First Appellate District to apply its general ruling to the specific aspects of the BAAQMD Guidelines still in dispute.

BAAQMD argued on remand that despite the Supreme Court's ruling, the receptor thresholds adopted by BAAQMD did not need to be set aside "because there are legitimate circumstances in which they could be utilized during the CEQA process." The appeals court agreed, holding that:

- While the Supreme Court's ruling forecloses an agency from requiring private applicants or other agencies to apply the thresholds, "an agency may do so voluntarily on its own project and may use the Receptor Thresholds for guidance";

- Agencies can rely on the receptor thresholds to address the degree to which a project might worsen (or "exacerbate") environmental conditions;

- Agencies can rely on the receptor thresholds to "assess the health risks to students and employees at a proposed school site," a circumstance in which the CEQA statute specifically requires consideration of the environmental effects of locating new receptors at a proposed project site; and

- The thresholds may be used to "evaluate whether a housing project [is] exempt from CEQA review."

BAAQMD further argued that the threshold could be used to "determine whether a particular project is consistent with a general plan." The court declined to rely on this reasoning, as it was too speculative.

Ultimately, the court ruled that, "[b]ecause the Receptor Thresholds themselves may be used under certain circumstances consistent with CEQA, they . . . need not be set aside in their entirety." Nevertheless, because BAAQMD's Guidelines remained "misleading" in scope, the court instructed the trial court to partially grant the writ and invalidate those portions of the Guidelines "suggesting that lead agencies should apply the Receptor Thresholds to routinely assess the effect of existing environmental conditions on future users or occupants of a project."

Finally, with respect to an award of attorneys' fees, the court noted that CBIA had now "prevailed in part on one of the issues it raised in this proceeding" and that "[p]artially successful plaintiffs may recover attorney fees under Code of Civil Procedure section 1021.5." Therefore, on remand, the trial court would need to "determine CBIA's entitlement to attorney fees on appeal and the amount of any such fees (including fees for proceedings in the Supreme Court), in addition to the fees it awards, if any, for the litigation in the trial court."

B. Exemptions

1. *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694

- An agency must demonstrate with substantial evidence that the claimed categorical exemption applies.

- Class 7 and 8 Exemptions do not apply to actions that diminish existing environmental protections even if the actions increase environmental protection in other ways.

In 1976, the City of Santa Cruz adopted an ordinance that protected "heritage trees," determined by the tree's size and historical or horticultural significance. In 2013, the City adopted amendments to the ordinance, including changes that:

(i) Removed heritage shrubs from protection;

(ii) Made listing heritage trees more difficult and removal from listing easier (particularly for non-native invasive trees); and

(iii) Added new methods to protect heritage trees, including increased penalties.

The City concluded that CEQA's Class 7 and Class 8 categorical exemptions, which exempt actions that "assure the maintenance, restoration, or enhancement" of natural resources or the environment, applied to the amendments. The plaintiff, Save Our Big Trees, argued that the amendments were not exempt from CEQA because they weakened the existing heritage tree ordinance, and would likely result in more heritage tree removals.

The Court of Appeals made two key findings. First, the Court explained that the City bore the burden of demonstrating with substantial evidence that the claimed exemption applied to the City's amendments. While the City argued that there was insignificant environmental impact from the amendments, it failed to provide substantial evidence that the amendments assured environmental or natural resource protection, i.e. that the CEQA exemptions actually applied. Second, the Court explained that Class 7 and 8 exemptions only apply to actions that "combat environmental harm" and do not apply to actions that diminish existing environmental protections. Since the City's amendments would protect "fewer heritage trees more effectively," the amendments would probably lead to the removal of more heritage trees and would not fall within the claimed exemptions.

The Court refused to resolve one important issue pertaining to the Class 7 and 8 exemptions. The City argued that when evaluating whether the new amendments strengthened or weakened environmental protection, the Court should look at the amendments "on the whole"; if overall the amendments resulted in more environmental protection, then the exemptions should apply. In the plaintiff's view, if the amendments included any "unfavorable" impacts, then the exemptions should not apply. As noted, the Court sidestepped this issue because even taking the City's view, the City failed to carry its burden so deciding the issue was not necessary to resolve the case.

2. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943

- Petitioner admonished for not addressing evidence in support of City's finding that circumstances were not "unusual" under the exception to categorical exemptions.

- A standard condition requiring a traffic plan did not constitute mitigation; normally mitigation cannot be relied upon to ensure consistency with a categorical exemption.

On remand from the California Supreme Court, the First Appellate District once again had occasion to consider the City of Berkeley's approval of a 6,478 square-foot, single-family home and attached 10-car garage in the hills overlooking the City. The City originally found the project exempt from CEQA under the categorical exemptions for single-family homes and infill developments (Guidelines sections 15303(a) and 15332, respectively). Several residents sued claiming that CEQA's categorical exemptions did not apply due to "unusual circumstances"—namely, the project's "unusual size, location, nature and scope." In addition to the building's size, the challengers argued that to achieve the home's proposed elevations, massive grading and retaining walls would be necessary. The Supreme Court ultimately ruled in the City's favor and resolved a number of key issues surrounding the application of categorical exemptions, including the evidence and standards governing review of the "unusual circumstances" exception for

otherwise exempted projects. In the decision, the Court remanded the matter to the First Appellate District for further proceedings.

On October 28, 2015, the Court of Appeal published its decision on remand. The Court's opinion applies the framework announced by the Supreme Court, affirms the trial court's ruling that the "unusual circumstances" exception did not apply to the project, and holds that the project was categorically exempt from CEQA review. The Court of Appeal's conclusion was a departure from its original ruling. Throughout the proceedings petitioners had conceded that the project fit within the two categorical exemptions. Petitioners instead sought to challenge the project solely on an interpretation of the "unusual circumstances" exception that was ultimately rejected by the Supreme Court. On remand, the Court of Appeal held that petitioners' concession had the effect of placing "the proposed project within a class [of projects] that presumptively does not have an effect on the environment," thereby conceding "in effect, that there is no feature distinguishing it from the exempt class"—and therefore no "unusual circumstances" prohibiting use of the exemptions. Of note, the Court ultimately found that there was sufficient evidence supporting the City's position that the house was not unusual from a size, setting, or geotechnical standpoint.

The Court of Appeal also ruled for the City on a separate issue that the Supreme Court did not address, but left for the lower court to resolve: petitioners' contention that the City's imposition of traffic mitigation measures on the project precluded the use of categorical exemptions. When the City approved the project, it included a condition requiring that the applicant obtain approval of a construction traffic management plan from the City's traffic engineer, in part to address the need for removal of 940 cubic yards of soil from the project site in large trucks. The staff report to the City Council noted that this condition, along with all other conditions (except for one) were "standard conditions imposed on residential development in the [project area] which are not intended to address any specific environmental impacts resulting from construction of this project." The only non-standard condition imposed on the project required circulation of the draft version of the traffic management plan to local residents.

The Court of Appeal recognized that prior decisions have held that a project's eligibility for a categorical exemption from CEQA review should be determined without any reliance on mitigation measures, because only projects that have no significant effect on the environment are eligible for such exemptions. In this instance, the Court found that the traffic management plan was not a measure that was implemented to mitigate a significant project effect: "Managing traffic during the construction of a home is a common and typical concern in any urban area, and especially here given the narrow roads in the area and the volume of dirt to be removed. We reject appellants' argument that implementing a traffic plan amounted to a mitigation measure that precluded the application of two categorical exemptions."

3. *Citizens for Environmental Responsibility v. State ex rel. 14th District Agricultural Association* (2015) 242 Cal.App.4th 555

- Categorical exemption does not impermissibly rely on mitigation where the alleged mitigation (a manure management plan) was an ongoing practice and obligation.

- Petitioners failed to present substantial evidence that the project would have a significant effect, and thus could not establish that unusual circumstances existed under the test articulated by the Supreme Court in *Berkeley Hillside*.

On November 23, 2015, the Third District Court of Appeal issued its final decision in *Citizens for Environmental Responsibility v. State of California*, on remand from the California Supreme Court for reconsideration in light of the Court's decision last year in *Berkeley Hillside Preservation v. City of Berkeley*. In *Citizens*, the Third District analyzes the same two issues concerning the use of categorical exemptions that were recently evaluated by the First District Court of Appeal on remand in *Berkeley Hillside*, above, and upholds the lead agency's use of a categorical exemption for a rodeo held at the Santa Cruz County Fairground in 2011.

The Court of Appeal affirmed a lower court ruling that the rodeo was exempt from CEQA review, pursuant to the Class 23 categorical exemption for "normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose." The notice of exemption (NOE) discussed the Fairground's routine hosting of equestrian/livestock events since 1941, with an average of two to four such events taking place each month for the past 25 to 30 years, and about two dozen such events being held annually in each of the prior three years. The NOE also stated that horse and livestock manure would be strictly managed in accordance with the Fairground's Manure Management Plan (MMP), to prevent further pollution of a nearby creek that was already impaired by animal fecal coliform. Although the MMP was not written until 2010, it formalized manure management practices that had been implemented for decades at the Fairground.

The Court rejected petitioners' contentions that (1) the MMP constituted a project mitigation measure that precluded use of the Class 23 exemption, because categorical exemptions must be determined without reliance on any such measures; and (2) the unusual circumstances exception to categorical exemptions was applicable, because storm water runoff would transport manure from the rodeo into the impaired creek.

On the first point, petitioners claimed that the MMP fell within the definition of "mitigation" in the CEQA Guidelines, because it reduced or eliminated the impact of manure generated by the rodeo on the impaired creek, and the NOE relied on the MMP to prevent those impacts. The Court disagreed, finding that the MMP was not a new measure proposed for the rodeo project, but instead was a "preexisting measure previously implemented to address a preexisting concern" and therefore was part of the "normal operations" of the Fairground. As such, use of the MMP did not preclude application of the Class 23 exemption.

On the second point, petitioners asserted that the exception applies where there is a "reasonable possibility" that the project will have a significant effect on the environment due to "unusual circumstances." Applying the two-part framework laid out by the Supreme Court in the *Berkeley Hillside* case, the Court of Appeal found that no such unusual circumstances existed here, because substantial evidence supported the lead agency's decision that there were no unusual circumstances based on the features of the project. The Court rejected petitioners' argument that the rodeo project should be compared to activities held at other facilities that would be exempt under Class 23, holding instead that the appropriate comparison is with other activities at the

same facility. The Court then found that the rodeo project had no unusual circumstances to distinguish it from the other "normal operations" of the Fairground: it did not involve more horses or livestock than were used for other routine events held there, no changes to the facility or operations were required, and the nature and scope of the rodeo was no different from other Fairground events. The Court also noted that the rodeo was consistent with the surrounding zoning and land uses.

Conversely, petitioners had failed to present substantial evidence that the project would have a significant effect, and thus could not establish that unusual circumstances existed. The Court noted that petitioners had not attempted to prove that the rodeo project *would* actually have a significant effect on the environment (as is required under the test announced by the Supreme Court in *Berkeley Hillside*), but instead only asserted that there was a reasonable possibility that the rodeo *might* result in significant adverse pollution effects on the creek. The Court evaluated the evidence relied upon by petitioners and found that it fell "well short" of what is required under *Berkeley Hillside*.

4. *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809

- The Class 3 categorical exemption for "construction and location of limited numbers of new, small facilities or structures" can be applied to commercial projects that are similar to stores, motels, offices, and restaurants.

- General effects of an operating business, such as noise, parking and traffic, cannot serve as unusual circumstances in and of themselves.

Respondents and real parties in interest Redondo Auto Spa and Chris McKenna (collectively Auto Spa) filed an application with the City of Redondo Beach to build a 4,080 square-foot, full-service car wash and small coffee shop on a property that was zoned for commercial uses. The City issued Auto Spa a conditional use permit (CUP), found that the project was categorically exempt under CEQA Guidelines section 15303(c), and imposed several conditions concerning noise, operating hours, and a vehicle limit of 10,000 cars per month.

Appellants, five homeowners of the parcels adjacent to the proposed car wash and coffee shop, filed a petition for writ of mandate challenging the City's CEQA determination and issuance of the CUP. The trial court denied the writ petition, upholding the City's use of an exemption for the Project and the issuance of the CUP.

The Second District Court of Appeal began its analysis by clarifying the standard of review. The Court explained that where the argument turns only on the interpretation of language within the CEQA Guidelines, the issue is a question of law. Where the agency makes factual determinations as to whether the project fits within an exemption, the Court instead determines whether the record contains substantial evidence to support that decision.

The core dispute over application of the Class 3 exemption involved three issues: (1) whether the project generally fits within the definition of "commercial buildings" as it is used in Guidelines section 15303; (2) whether the exemption can be applied to a single commercial building in

excess of 2,500 square feet; and (3) whether the car wash and coffee shop would be utilizing "hazardous chemicals."

As to the first issue, the appellants characterized the car wash operation as requiring the installation of industrial equipment such as blowers, vacuums, air nozzles, and waste treatment, which appellants contended removed the project from outside the purview of the exemption. Appellants also argued that the car wash use was not comparable to the example uses listed in Section 15303(c), which include stores, motels, offices, restaurants, or similar structures. The Court rejected appellants' arguments, finding that the car wash and coffee shop combination qualified as a commercial use. The Court also held that the equipment needed for the car wash was not substantially different from the types of equipment associated with other commercial uses.

As to the issue of square footage limitations, appellants argued that Section 15303(c) could not be applied to a single commercial building that exceeds 2,500 square feet. Citing previous case law, the Court rejected that claim, stating that the exemption covers projects involving the construction of one to four buildings in an urbanized area where the total floor area does not exceed 10,000 square feet.

Finally, on the issue of the use of hazardous substances, appellants argued that the car wash would use hazardous chemicals that would disqualify it from coverage under the exemption, which only covers projects "not involving the use of significant amounts of hazardous substances." The Court pointed out that appellants had presented no evidence suggesting that the soaps and detergents used by the car wash are hazardous or that any significant amount of hazardous substances would otherwise be used. Instead, the evidence showed that the soaps were biodegradable and verified as nonhazardous. For these reasons, the Court held that the project fit within the Class 3 categorical exemption.

Appellants also claimed that, even if the Class 3 categorical exemption otherwise applied to the project, the presence of "unusual circumstances" described in Guidelines section 15300.2(c) disallowed the use of that exemption. In assessing the application of this exception, the Court applied the two-part test described by the California Supreme Court in the Berkeley Hillside decision (discussed in a prior Downey Brand Legal Alert). In applying the first part of the test — i.e., determining whether any unusual circumstances are present—the Court found that "there is nothing particularly unusual about the proposed car wash and coffee shop," that the evidence in the record established that there are many other car washes in the surrounding area, and that the site itself had been a car wash and snack bar for nearly 40 years. The Court also rejected appellants' claim that the "large air blowers and other outdoor activities" made the car wash qualitatively different from the other uses provided in the Class 3 exemption. Finally, the Court stated that the "general effects of an operating business, such as noise, parking and traffic, cannot serve as unusual circumstances in and of themselves."

Next, the Court looked at appellants' arguments under the second prong of the test in Berkeley Hillside, to see whether there was "substantial evidence indicating (1) the project will actually have an effect on the environment and (2) that effect will be significant." Appellants raised concerns regarding noise and traffic, claiming that the operation of the car wash would violate

the City's interior and exterior noise limits at the abutting property line and that the car wash would adversely impact local traffic and pose public safety concerns. The Court rejected both claims. On the issue of noise, the Court noted that the finding of environmental impacts must be based on the project as approved, and that here the condition of approval imposed by the City mandated that the project not exceed the City's noise ordinance decibel levels. As to traffic, appellants argued that the car wash and coffee shop was "inefficient" and would cause backups "within the project property." The Court summarily rejected this argument, finding that the claim was speculative and contradicted by facts in the record, and that there was no legal authority holding that parking or traffic issues occurring wholly within the project property qualify as transportation/traffic impacts under CEQA.

C. Negative Declarations

1. *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560

- "Community character"—apart from aesthetic impacts—is not a cognizable impact area under CEQA.

- In line with *CBIA v. BAAQMD*, CEQA does not require environmental documents to analyze impacts of existing environmental conditions (nearby operations) on a proposed project's future residents.

In this case, the Fourth District Court of Appeal upheld the use of a mitigated negative declaration for a project to subdivide a property currently occupied by an equestrian boarding and training facility. The Court held that evidence of the project's social and psychological impacts to the community does not require preparation of an EIR, as CEQA does not address such impacts.

The property, located in the City of Poway (which calls itself the "City in the Country"), was being used as a boarding facility for approximately 100 horses across the street from a 12-acre rodeo and polo grounds operated by the Poway Valley Riders Association (PVRA). The project involved the subdivision of the property into twelve residential lots, grading of the property, extension of an existing sewer line, undergrounding of existing utilities, installation of new curb, gutters, and fire hydrants, and flood channel improvements. No home construction was included in the project—any such construction would be subject to further environmental review and City approval. PVRA and a number of community residents opposed the project on the grounds that replacing the Stock Farm with a residential subdivision would negatively impact the "country character" and "equestrian lifestyle" of the community. The City Council approved the tentative tract map and adopted the MND.

In the trial court, petitioner presented ten arguments, but the trial court rejected all except one: that there was substantial evidence creating a fair argument that the project would have a significant effect on the community character of the City. The trial court granted the petition on this ground. The Fourth District reversed the trial court's ruling, holding that "community character"—separate and apart from aesthetic impacts—is not cognizable under CEQA. Prior precedent establishes that CEQA addresses physical changes to the environment, and therefore

economic and social changes need not be studied, avoided, or mitigated. The Court noted that published decisions that have discussed "community character" have been limited to aesthetic impacts, which must be evaluated under CEQA. Here, the trial court did not invalidate the MND due to aesthetic impacts: the project was fully consistent with existing zoning and all other land use regulations, and there was "no substantial evidence creating a fair argument that the Project is visually out of character with the surrounding community," which includes single-family homes to the immediate north, east, and northwest.

The Court found that the impacts described by project opponents were not aesthetic, "rather, they are impacts to the collective psyche of Poway's residents related to living in the 'City in the Country' and *social* impacts caused by the loss of the Stock Farm." However, "CEQA does not require an analysis of subjective psychological feelings or social impacts," as these are not environmental impacts. As such, the trial court erred in determining that an EIR was required to study these impacts of the project.

The Fourth District also ruled that (1) given the California Supreme Court's recent decision in *California Building Industry Assn. v. BAAQMD*, addressed above, the trial court erred in requiring the MND to analyze the impact of existing environmental conditions (associated with PVRA's operations) on the Project's future residents, and (2) Petitioner forfeited its right to challenge on appeal other portions of the trial court's ruling, as it did not file a cross-appeal.

2. *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677

- A layperson's opinion that a project would lead to urban decay does not qualify as "substantial evidence."
- A project's inconsistencies with economic development policies and goals in a general plan do not implicate CEQA; as such, the abuse of discretion standard of review applies when reviewing a project's consistency with such policies and goals.

In this case, the County of San Bernardino approved a 9,100 square foot general retail store in the rural community of Joshua Tree, which was intended for occupancy by national chain Dollar General. In approving the project and granting the applicant a conditional use permit, the County prepared and adopted a mitigated negative declaration. The Joshua Tree Downtown Business Alliance, an association of local business owners and residents ("Alliance"), filed a petition for writ of mandate, challenging the County's decision on several grounds: (1) the County failed to adequately consider the Project's potential to cause urban decay; (2) an EIR was required because substantial evidence supported a fair argument that the Project would cause urban decay; (3) the project was inconsistent with the various policies and goals contained in the Joshua Tree Community Plan ("Community Plan"), which was a part of the County's general plan; and (4) the County improperly attempted to conceal the intended occupant's identity.

The lower court held that the County had adequately considered urban decay, but had erred in failing to find the existence of substantial evidence to support a fair argument that the Project could cause significant urban decay. As such, the lower court issued a writ of mandate directing the County to set aside its approval until it prepared an EIR. The court rejected the Alliance's

other two claims. On appeal, the Fourth District Court of Appeal reversed the judgment, holding that the Alliance failed to establish any grounds for issuance of a writ of mandate.

The Fourth District affirmed the lower court's ruling that the County had adequately considered whether the project had the potential to cause urban decay. At various stages of the CEQA process, the County had considered and responded to public comments regarding urban decay, and had concluded that there was no evidence that the project would have negative economic impacts – and therefore no evidence that it would cause urban decay.

However, the appellate court disagreed with the lower court's holding that lay opinion evidence in the record regarding urban decay impacts required preparation of an EIR. One commenter—a local business owner who was a former assistant attorney general in the Oregon Department of Justice—had commented extensively on the project's potential to cause urban decay. The lower court relied on this commenter's opinions in finding substantial evidence of potential urban decay impacts requiring preparation of an EIR. The Fourth District reversed, holding that, although members of the public may provide opinion evidence where special expertise is not required, analysis of urban decay requires relevant expert opinion, such as from an economist. Because the commenter – as a business owner and lawyer – lacked expertise in any relevant area, she was not qualified to opine on urban decay, and her comments did not constitute substantial evidence. Moreover, the commenter "did not offer any particular factual basis" for her opinions – she did not claim that any business in Joshua Tree had suffered due to competition from a national chain, and she had not undertaken any surveys or studies. As such, "whether viewed as lay or expert opinions, her conclusions were speculative."

The Fourth District also denied the Alliance's claim that the Project was inconsistent with various policies and goals in the Community Plan. Applying the "abuse of discretion" standard of review that normally applies to general plan consistency claims – and rejecting the Alliance's argument that CEQA's "fair argument" standard was instead applicable – the court found that the County could reasonably have concluded that the Project was not inconsistent with the Community Plan's policies and goals.

3. *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457

- Where trial court grants petition for writ of mandate and requires lead agency to vacate MND/project approvals and prepare EIR, appeal is not rendered moot just because an EIR for the project was certified, if the lead agency has neither vacated the prior approvals nor evaluated the project in light of the EIR.

- Where a resource is neither deemed nor presumed to be a historical resource for purposes of CEQA, a lead agency's determination as to whether the resource is a historical resource not subject to "fair argument" standard of review: determination must be supported by substantial evidence.

In 2013, the City of San Jose proposed to demolish the Willow Glen Railroad Trestle – a wooden railroad bridge built in 1922 to service industry – and replace it with a pedestrian bridge that

would be part of the City's trail system. The City issued an initial study and mitigated negative declaration for the project that found no impact on historical resources. This finding relied on two documents obtained by the City in 2004, when it proposed a trail project that did not threaten the Trestle's existence: (1) a one-page letter from a State Historic Preservation Officer stating that the proposed project would not affect any "historic properties"; and (2) a one-page evaluation by a consulting architectural historian who opined that the Trestle's design was based on standard plans for wood trestle bridges, the trestles and superstructure were likely replaced during the previous 30 to 40 years, and the Trestle was "a typical example of a common type and has no known association with important events or persons in local history."

During the comment period on the MND, the City received numerous comments, including from a local historian, a historical architect, and an environmental architect. These comments described the uniqueness and historic importance of the Trestle, stated that the Trestle qualified for listing in the state Register of Historical Resources, and asserted that the 2004 documentation was outdated and contradicted by more recent reports and documents. In January 2014, the City Council adopted the MND, finding that "the existing wood railroad trestle bridge is not a historic resource" because "the design is based on standard plans for wood trestle bridges and has no known association with important persons; the bridge materials were likely replace[d] during the last 30 or 40 years; the trestle is not unique and is unlikely to yield new, historically important information; and the trestle did not contribute to broad patterns of California's history and cultural heritage."

In February 2014, petitioner Friends of the Willow Glen Trestle filed a petition for writ of mandate in Santa Clara County Superior Court, asserting that there was substantial evidence to support a fair argument that the Trestle was a historical resource, and therefore an EIR was required. In August 2014, the trial court determined that the fair argument standard applied and that the evidence presented by petitioner met that standard. As a result, the court granted the petition and ordered the City to set aside the approvals for the project and MND and to prepare an EIR. The City appealed.

On appeal, the City first argued that the case was moot because the City had already certified an EIR for the project. The appellate court disagreed: even though an EIR had been certified, the City had neither vacated the original project approvals nor reconsidered the project in light of the EIR's analysis. Because the City would not be required to take those actions if it succeeded on appeal, the appeal was not moot.

The appellate court then addressed the issue of whether the fair argument or substantial evidence standard applies to a lead agency's determination that a resource is a "historical resource" under CEQA section 21084.1. The court first rejected the City's claim that it was bound to adopt the Fifth District Court of Appeal's holding in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 – which held that the substantial evidence standard applies to this determination – because the California Supreme Court "allegedly approved of the holding on this issue" in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. Although *Berkeley Hillside* referenced *Valley Advocates* as support for the Supreme Court's interpretation of the CEQA provision in question (the "unusual circumstances" exception to a categorical exclusion), it did not consider *Valley Advocates'* holding. As such, the Sixth District was required to resolve the issue itself in this case.

The court began by examining the language of section 21084.1, which provides that (1) a resource listed in (or determined to be eligible for listing in) the California Register of Historical Resources is deemed to be a historical resource, and (2) a resource included in a local register of historical resources, or deemed significant pursuant to statutory criteria, is presumed to be historically or culturally significant, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. The final sentence of section 21084.1 provides that the fact that a resource is neither deemed nor presumed to be a historical resource under these criteria – as was the case with the Trestle at issue – "shall not preclude a lead agency from determining whether the resource may be an historical resource" for CEQA purposes, yet does not specify whether the fair argument or substantial evidence standard applies to such a determination.

The court found the treatment of "presumed" historical resources in section 21084.1 to be instructive. The fact that a lead agency may find such a "presumed" historical resource not to be a historical resource if the preponderance of the evidence supports the lead agency's finding "necessarily establishes that such a finding would not be reviewed under the fair argument standard. The inclusion of a resource in a local historical register will by itself generally create a fair argument that the resource is historical, yet the statute plainly permits the lead agency to conclude that it is not. It would make no sense for the statute to permit the lead agency to make a finding based on a preponderance of the evidence that a resource is not a historical resource if the fair argument review standard would generally result in the invalidation of that finding. . . . If the lead agency's standard for its decision is 'preponderance of the evidence,' the standard of judicial review logically must be whether substantial evidence supports the lead agency's decision, not whether a fair argument can be made to the contrary." As such, "it cannot be that the Legislature intended for the standard of judicial review for a lead agency's decision under the final sentence of section 21084.1 to be fair argument rather than substantial evidence. The final sentence of section 21084.1 imposes no presumption and sets no standard for the lead agency's decision. The Legislature intended for the lead agency to have more, not less, discretion under the final sentence, and it is inconceivable that the lead agency's decision under that sentence would be subject to less deferential review than its decision regarding a resource that is presumed to be a historical resource."

The Sixth District concluded by finding that this interpretation of the statute was consistent with both CEQA Guidelines section 15064.5(a)(3) – which requires the lead agency's determination regarding a historical resource to be "supported by substantial evidence in light of the whole record" – and with the Fifth District's decision in *Valley Advocates* and other appellate decisions. On remand, the trial court was ordered to (1) vacate its judgment granting the petition, and (2) determine whether the City's adoption of the MND was supported by substantial evidence that the Trestle is not a historical resource.

D. Environmental Impact Reports

1. *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94

- Recent historical use may serve as CEQA baseline for replacement of vacant building where applicant has right to fully occupy vacant space without additional discretionary approvals.

- City may not recover costs for reviewing administrative record for completeness and accuracy, performing routine "chores" in making project files available, or for time spent in responding to a petitioner's reasonable motion to augment the record.

Real parties in interest Camino Real, LP and CMF PCR, LLC (collectively Westfield), proposed to renovate a portion of a former shopping center (Project) originally built in the City of Carlsbad over 40 years ago. The Project site was developed as a two- and three-story indoor shopping center with five main anchor department store buildings (four occupied and one vacant), and numerous smaller retail specialty shops. The site contained over 6,400 surface parking spaces as well as several outbuildings. Westfield owned the developed parcels within the shopping center; the City owned the surface parking lots. Under a "Precise Plan," Westfield was entitled to renovate the interior of the vacant department store building and fully occupy it without obtaining any further discretionary approvals from the City. The Project was reduced from its original size during the environmental review process, and ultimately would result in a net loss of 636 square feet of total gross leasable space. The City certified an EIR for the Project and issued two entitlements, a "Specific Plan" to facilitate future development at the shopping center area beyond the Project and a "Site Development Plan" allowing the immediate project.

Petitioners North County Advocates challenged the City's approval under CEQA, claiming the EIR used an improper baseline for traffic trips, that the City failed to consider as a mitigation measure a requirement that Westfield make a fair share contribution to the future widening of the El Camino Real bridge over State Route 78, and that the City failed to respond adequately to public comments concerning that mitigation measure. The trial court rejected petitioners' challenge, and subsequently awarded costs to the City and Westfield. Petitioners appealed the judgment and the award of costs to the City, but not to Westfield.

In determining the baseline traffic conditions for the Project, the EIR assumed 5,000 daily trips to the existing shopping center, which was based on the vacant department store being fully occupied, even though it was vacated in 2006. For the vacant space, the EIR used the San Diego Council of Government's (SANDAG) 2002 *Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region*, for a "Super Regional Shopping Center" land use. Based on SANDAG's guide, the EIR assumed the building would generate 5,186 daily trips on a typical weekday. Those trips were then added into the actual traffic counts for the existing shopping center. Petitioners argued that the baseline used was "incorrect and misleading" because it did not follow normal rule of measuring conditions as they actually existed when environmental review begins—i.e., a vacant building. The Fourth District Court of Appeal disagreed. It held that "selection of a traffic baseline that assumed full occupancy of the [vacant] space was not merely hypothetical because it was not based solely on Westfield's entitlement to reoccupy the []

building 'at any time without discretionary action,' but was also based on the *actual historical operation* of the space at full occupancy for more than 30 years up until 2006." The court emphasized lead agency discretion to "consider conditions over a range of time periods" so that the baseline may account for a "temporary lull or spike in operations." (Quoting *Communities for a Better Environment v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 327-28 [internal quotations omitted].) Thus, the Court upheld the City's selection of a traffic baseline.

On the issue of traffic impacts, the EIR disclosed that the Project would have indirect cumulative impacts on three street segments in the neighboring City of Oceanside. The City's traffic consultant concluded that these impacts could be mitigated to less than significant by requiring Westfield to contribute its fair share (approximately $6,000) toward "adaptive-response signals" that adjust to address real-time traffic conditions. The City adopted that mitigation measure. Petitioners argued that the City should also have considered mitigation requiring Westfield to contribute its fair share ($85,000) toward widening of the bridge, a measure that was suggested by Oceanside. The Court concluded that the record contained substantial evidence supporting the City's rejection of that measure, as the EIR demonstrated that the Project would not have direct or indirect impacts on the bridge. Finally, the Court rejected petitioners' claims that the City did not adequately respond to public comments on the issue of traffic impacts.

As to the trial court's award of costs to the City, petitioners claimed that because they elected to prepare the administrative record, the trial court erred by awarding the City $5,802 for staff time to review, correct, and certify the record. The City responded stating that the City's work on the record "went far beyond simply reviewing the record for completeness," and instead included: (1) paralegal time reviewing and correcting the draft record; (2) locating attachments that were missing from the documents originally made available by the City; (3) obtaining additional files from the City's consultant; and (4) responding to petitioners' motion to augment the record with the missing attachments. The Court concluded that the trial court erred with respect to all but one subcategory (the third) in its award of costs.

For the first category, the trial court should have determined to what extent the petitioners' errors and omissions in the record were severe enough that the paralegal's work was tantamount to preparing a supplemental record, or that petitioners' errors revealed a total disregard for cost containment. In the second category, the trial court should not have awarded anything to the City for what was essentially the "expected chore" of making all City project files available to petitioners. The Court upheld the award of costs for obtaining additional consultant files, as the trial court found petitioners displayed "a total disregard for cost containment" for this category of costs. For the fourth category, the court held that awarding expenses incurred in the motion practice "'blur[s]' the line between record preparation and litigation strategy," and given that the trial court granted the motion to augment, the costs did not result from any disregard for cost containment on the part of petitioners.

2. *Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority* **(2015) 241 Cal.App.4th 627**

- Where the addition of new information to a final EIR does not change the environmental impacts of a project, recirculation is not required.

In May 2012, the Los Angeles County Metropolitan Transportation Authority (Metro) approved the Westside Subway Extension Project and that project's associated EIR/EIS. The project proposed to add seven new stations to the subway line. The Draft EIR/EIS presented two possible subway line alignments for a Century City station, one of which required tunneling under Beverly Hills High School (Constellation Boulevard) and one that did not (Santa Monica Boulevard). The Draft EIS/EIR examined, among other things, air quality impacts from the construction and operation of each alternative, noise and vibration impacts, and geologic hazards along each of the alternative subway line alignments and at each station location option. The Draft EIS/EIR then evaluated each of the alignment and station options against various environmental factors and the goals and objectives of the Project. The DEIR concluded that the Santa Monica Boulevard alignment for the Century City station might not be a viable option due to seismic risk, although further studies were being conducted to determine that option's viability.

The Beverly Hills Unified School District and the City of Beverly Hills filed comments objecting to the proposed subway tunnel under the high school. Those comments centered around concerns for student and staff safety during the subway's operation and construction, decreases in surrounding property values, and interference with plans to modernize the school's buildings. After the comment period closed, the Metro Board directed that during preparation of the Final EIR/EIS, "staff fully explore the risks associated with tunneling under the high school," and that the staff continue to work with the community to provide information from the staff's analyses as it became available. Metro's further study expanded on the draft EIR/EIS analysis on tunneling and seismic risk, and supported the conclusion that the Constellation Boulevard alignment was the preferable alternative. The City and School District hired their own experts to evaluate the studies performed by Metro. Although the Final EIR/EIS responded to the comments submitted by the City and School District, it did not address the reports prepared by those entities' experts. Metro then certified the Final EIR/EIS without recirculating it for public comment, and approved the project.

The District and the City challenged Metro's approval, on the grounds that the EIR/EIS contained significant new information and analysis triggering recirculation of the EIR/EIS. The trial court upheld the agency's approval and the Second Appellate District affirmed. The Appeals Court concluded that substantial evidence supported Metro's decision not to recirculate the EIS/EIR, and that the EIS/EIR adequately discussed air pollution and public health impacts. Citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, the Court observed "that the addition of new information to an EIR after the close of the public comment period is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project." But "recirculation is not required where the new information added to the EIR 'merely clarifies or amplifies or makes insignificant modifications in an adequate EIR." Here,

the Court found that the new information in the EIR/EIS merely confirmed and expanded upon the analysis in the Draft EIR/EIS. Moreover, although that new information supported Metro's decision to eliminate the Santa Monica station, "elimination of the Santa Monica station as an option did nothing to change the potential environmental impacts of the Project, other than to eliminate a potential source of seismic hazard." As to the air quality analysis, the court reasoned that the Final EIR/EIS did not increase the size of the Project or work required to construct it. And, since the Draft EIR/EIS based its significance conclusions regarding air quality on the intensity of the impacts rather than their duration, those conclusions did not change. Therefore, substantial evidence supported Metro's decision not to recirculate the EIR/EIS. Accordingly, Metro had not abused its discretion in determining that recirculation was not required.

3. *San Francisco Baykeeper, Inc. v. California State Lands Commission* (2015) 242 Cal.App.4th 202[3]

- A cumulative effects analysis that dismisses the impact as less than cumulatively considerable based on an analysis of the controversy and a small percentage contribution to the problem does not run afoul of the "ratio" approach invalidated in *Kings County Farm Bureau*.

- Failure to properly notice and consult with trustee agencies does not amount to prejudicial error where the trustee agencies are provided some opportunity to comment and petitioner neglects to show that there was information omitted from the environmental review process that would have been provided by the trustee agencies.

- Private use of public trust property triggers affirmative duty to take the public trust into account and protect public trust uses whenever feasible, a duty that is separate and not necessarily fulfilled by complying with CEQA or other environmental statutes.

The California State Lands Commission (SLC) in 2012 certified an Environmental Impact Report (EIR) and renewed several leases of submerged lands for the mining of construction-grade sand from specific areas within San Francisco Bay. The lease parcels were sovereign lands, administered by the SLC and subject to the public trust. The SLC renewed the leases for a new 10–year term and a maximum mining rate of 2.04 million cubic yards per year, an amount less than previously permitted but more than the historical average from 2002 to 2007, the baseline period. San Francisco Baykeeper, Inc. (Baykeeper) challenged the lease renewals under CEQA and the common law public trust doctrine.

On review, the First Appellate District upheld the EIR and rejected all of Baykeeper's claims under CEQA. First, Baykeeper had argued that the baseline period (2002 to 2007), although it coincided with the date of the notice of preparation (2007), no longer represented existing conditions because, since that time, sand mining volumes had fallen substantially. The Court recognized, however, that environmental conditions can vary from year to year, and that the rules governing the environmental baseline are not "inflexible." The SLC's finding that the five-year average was a better indicator of existing mining conditions was supported by substantial

[3] Downey Brand attorneys represented real parties in interest the sand mining operators.

evidence, including evidence that the more recent slowdown in mining emanated from the financial crisis that began in 2007.

Second, the EIR had addressed in some detail the possible environmental impacts of sand mining on sediment losses at coastal beaches, and ultimately concluded that the proposed project did not contribute cumulatively to coastal erosion based on studies of Bay bathymetry and numeric modeling prepared by SLC's geologists at Coast & Harbor Engineering (CHE Study), which quantified the Project's contribution to sediment losses amounted to less than 0.2 to 0.3 percent of observed sediment losses on the outer coast. Baykeeper argued that the EIR improperly used the "ratio" approach first articulated in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, to dismiss the cumulative impacts analysis as insignificant. The Court disagreed, finding that a "more comprehensive analysis of the cumulative impact . . . was not required." Further, the Court found that the EIR's attempt to produce a numeric ratio was a "supplemental component" added to "reinforce the impact conclusions" in the EIR, and thus bore "little resemblance to the cursory analysis of the cumulative ozone impacts that was found lacking in *Kings County*."

Third, Baykeeper had argued that the Final EIR added "significant new information" and required recirculation. The new information encompassed the numeric modeling prepared for the EIR referenced above (the CHE Study), as well as two articles prepared by a coastal geologist at the U.S. Geological Survey that added to the scientific knowledge about the causal link between sediment transport and coastal erosion. While the CHE Study and new scientific articles were "relevant to the scientific controversy," the Court nevertheless found that the controversy had been "fully disclosed and considered" in the Draft EIR and the new information "did not alter any of the substantive conclusions" in the Final EIR. Consequently, the new information was not significant and did not trigger recirculation.

Fourth, Baykeeper challenged the EIR's application of the Appendix G threshold to the assessment of mineral resources impacts. To assess mineral resource impacts, Appendix G asks whether the project would "[r]esult in the loss of availability of a known mineral resource." The EIR concluded that, while sand mining would "reduce the amount of sand that would be available for future mining," there was no adverse impact under the Appendix G threshold because the project did not propose to limit the availability of mineral resource. Reciting Appendix G as encompassing only "suggested" thresholds, the Court found that the impact conclusion was supported by substantial evidence that "the project will not lead to the loss of the availability of a mineral resource, but instead will provide the citizens of this state with access to that very resource."

Fifth, in one of the more significant rulings in the case, the Court concluded that while the SLC had failed to properly notice and consult with two trustee agencies—the Coastal Commission and City of San Francisco—that error was not prejudicial. Despite the failure to properly notice and consult with trustee agencies, the Court emphasized that error is only prejudicial "where failure to comply with the law results in 'a subversion of the purposes of CEQA by omitting information from the environmental review process. . . .'" (Quoting *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 959; *see also* Pub. Res. Code § 21005(a).) In this case, San Francisco and the Coastal Commission had the opportunity to comment on the Project but

elected not to do so. And because Baykeeper could not identify "any information that was omitted from the environmental review process that would have been provided by these other agencies," the Court could not find that the error was "prejudicial."

Baykeeper asserted a second cause of action under the common law public trust doctrine arguing that the SLC violated the public trust in approving the lease renewals by failing undertake a separate trust analysis and adopt public trust findings. The SLC had conducted an environmental analysis of many public trust uses and resources in the EIR (e.g., navigation, recreation, fisheries, Bay habitats, land uses, and consistency with plans and policies), and the SLC contended on appeal that it fulfilled its duty to consider the public trust in the CEQA process. The Court rejected this view. Private uses of trust property trigger affirmative obligations under the trust doctrine, including the "affirmative duty to take the public trust into account . . . and to protect public trust uses whenever feasible." (Quoting *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446.) While compliance with environmental statutes such as CEQA can serve to fulfill an agency's trust obligations, the Court held that the record of the CEQA review process in this instance did not address the SLC's obligation to conduct such analysis.

4. *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204

- Reliance on the "business as usual" approach to climate analysis is not invalid, but the EIR must show how individual projects will help achieve statewide goals for emissions reductions.

- Project opponents may exhaust administrative remedies by raising concerns during the CEQA-mandated public comment period or when alternative opportunities for public comment are provided (e.g., through a federal public comment period for a joint EIR/EIS).

- Courts will interpret the Fully Protected Species statutes literally, and CDFW may not authorize the capturing and relocation of state Fully Protected Species even if it serves to promote overall conservation of the species.

This case involves a challenge to the California Department of Fish & Wildlife's (CDFW's) certification of an EIR and related approvals for a resource management and conservation plan, streambed alteration agreement, and incidental take permits for the Newhall Ranch Specific Plan Project, a 12,000-acre development project proposed in the Santa Clara River Valley. The EIR adopted by CDFW determined that: (1) taking into account the project's design and the existing regulatory standards, the project's greenhouse gas emissions would have a less than significant impact on the global climate; and (2) the project could significantly impact the unarmored threespine stickleback, a fish that is fully protected under the state Fish and Game Code, but mitigation measures adopted by CDFW would avoid or reduce that impact below a level of significance. CDFW certified the EIR and approved the project in December 2010. Petitioners challenged the EIR, and the trial court ruled for petitioners on several grounds. The Second Appellate District upheld the EIR and other approvals under CEQA and the California Fish and Game Code.

On the greenhouse gas (GHG) emissions issue, the Supreme Court affirmed that CDFW did not abuse its discretion in adopting consistency with AB 32's goal—a statewide reduction in GHG emissions to 29 percent below "business as usual" levels" in 2020—as the criterion for determining the significance of the project's GHG emissions. The Court, however, ultimately held that CDFW abused its discretion in finding that the project's GHG emissions would have no cumulatively significant impact on the environment, because there was no substantial evidence in the administrative record showing that the project's project-level reduction (31 percent below "business as usual" levels) was consistent with achieving AB 32's statewide goal of a 29 percent reduction below those levels. The Court held that this "analytical gap" deprived the EIR of its sufficiency as an informative document, in violation of CEQA, and noted that "a greater degree of reduction may be needed from new land use projects" in order to achieve the statewide goal of 29 percent. And in a harbinger of its future opinion in *Cleveland National Forest v. San Diego Assoc. of Governments* (see list of pending cases below), the Court further undermined the use of the AB 32 significance criterion in future EIRs:

> [O]ver time consistency with year 2020 goals will become a less definitive guide, especially for longterm projects that will not begin operations for several years. An EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project's effects on meeting longer term emissions reduction targets.

The Court did not provide a clear pathway by which CDFW—or any other lead agency preparing an EIR—might cure the defect in the agency's GHG analysis identified by the Court. The opinion does state that, "[w]hile the burden of CEQA's mandate in this context can be substantial, methods for complying with CEQA do exist" (e.g., consistency with regional climate action plans or sustainable communities strategies). Yet before describing these options, the Court set forth a serious disclaimer: "We do not, of course, guarantee that any of these approaches will be found to satisfy CEQA's demands as to any particular project; what follows is merely a description of potential pathways to compliance, depending on the circumstances of a given project."

On exhaustion, the Court held that petitioners had, under Public Resources Code section 21177(a), adequately preserved two other challenges to the EIR by raising the disputed issues in letters submitted during a public comment period on the Final EIR/EIS noticed by the United States Army Corps of Engineers pursuant to NEPA. The Court acknowledged that the comments were not made during the earlier CEQA-mandated period for comments on the Draft EIR/EIS, and that CEQA does not require a comment period for a Final EIR. However, the record demonstrated that CDFW effectively treated the federal comment period as an opportunity to receive additional comments on CEQA issues, by independently reviewing the comments, helping to draft responses and related EIR/EIS revisions, and including those responses and revisions in the final version of the EIR/EIS that the agency certified. The Court held that, in these circumstances, the purpose of CEQA's requirement for exhaustion of administrative remedies had been served.

On the species issue, the Court strictly interpreted the state's Fully Protected Species statutes and held that the mitigation measures in the EIR providing for collection and relocation of the three-spined unarmored stickleback during project construction were invalid, because Fish and Game Code section 5515(a)(2) specifically prohibits the "take" of fully protected fish. Under the Fully Protected Species statutes, which are separate from the California Endangered Species Act, the definition of "take" includes to "pursue," "catch," or "capture" fully protected species—here, the stickleback. The EIR's mitigation called on the agencies to pursue and capture stickleback that might be harmed by construction activities and move them to a location more conducive to their recovery. CDFW argued that such mitigation did not run afoul of the Fully Protected Species statutes because it promotes "conservation" of the species. The Court disagreed, providing a literal interpretation of the Code: to "pursue," "catch," or "capture" really means to pursue, catch, or capture, whatever the purpose.

5. *City of Hayward v. Board of Trustees of the California State University* (2015) 242 Cal.App.4th 833

- Lead agency directed to reconsider feasibility of funding fair-share contributions to off-site traffic mitigation; lack of appropriations by Legislature does not render mitigation infeasible.

- Increased fire and emergency vehicle response times are not environmental impacts that require mitigation under CEQA; the City is responsible for providing adequate emergency services and cannot shift that financial burden to project proponents.

- Transportation Demand Management (TDM) plans do not constitute improper deferral of mitigation for traffic and parking impacts, provided that they contain appropriate standards and measurable objectives.

- Program-level EIR for university expansion master plan violated CEQA by analyzing impacts of increased student population on parks system, generally, without looking at impacts on particular parks.

In November 2015, the First Appellate District issued a modified opinion in *City of Hayward v. Board of Trustees of California State University* (*City of Hayward*), updating the opinion to address the test for "feasibility" as applied to fair share mitigation payments an agency intends to fund via legislative appropriations. In *City of Hayward*, the City challenged the adequacy of an EIR certified by the Board of Trustees of the California State University (the "Trustees") for a university expansion master plan to accommodate forecasted increases in the student population on the Hayward campus over 20-30 years. The EIR concluded that buildout under the master plan would result in significant impacts as to aesthetics, air quality, cultural resources, and traffic. The Trustees certified the EIR, adopted a statement of overriding considerations, and approved the plan.

The City of Hayward and local community groups filed petitions for writ of mandate challenging the certification of the EIR and approval of the master plan, and the cases were coordinated for trial. In October 2010, the trial court issued an order granting petition for writ of mandate,

holding that the EIR failed to adequately analyze impacts on fire protection and public safety, traffic and parking, air quality, and parklands.

In May 2012, the First Appellate District issued an opinion reversing the trial court on all grounds except one: the court of appeal agreed that the EIR failed to adequately analyze potential effects on two regional parks adjacent to the campus. The California Supreme Court granted review, but then transferred the case back to the appellate court with directions to reconsider the case in light of the Supreme Court's decision in *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945 (City of San Diego). The 2015 decision was modified only as to mitigation for off-site traffic impacts. The remainder of the opinion was left unchanged.

The modifications to the opinion concerned the test for "feasibility" as applied to fair share mitigation payments an agency intends to fund via legislative appropriations. The EIR committed the Trustees to request appropriations from the legislature to support fair share mitigation costs for off-site traffic impacts. However, because the Trustees could not require the legislature to approve those appropriations, they concluded that the fair share mitigation was potentially infeasible and issued a statement of overriding considerations. The trial court found that the Trustees had violated CEQA in concluding that they were "not obligated to mitigate a significant effect consequent to a CEQA project simply because the Legislature declined to fund mitigation while otherwise funding the project."

In its original opinion, the First Appellate District found in favor of the Trustees, rejecting the trial Court's rationale as to off-site traffic impacts based, in part, on principles articulated in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 359-360. The Court upheld the Trustees' determination that the fair share payments were potentially infeasible, stating that "[n]othing in CEQA requires the Trustees to commit to a mitigation measure that is not feasible." The Court went on to find that the City had failed to exhaust administrative remedies as to its argument that reliance on legislative appropriation to determine the feasibility of paying for the mitigation measures "ignores the fact that it has alternative funding available to it." However, in *City of San Diego*, the Supreme Court rejected the Trustees' argument that a state agency may contribute funds for off-site environmental mitigation only through earmarked appropriations, to the exclusion of other available sources of funding. Reexamining dicta in *City of Marina*, the court found that this "erroneous assumption" invalidated the finding that mitigation was infeasible and the statement of overriding considerations. The Court emphasized that an agency's duty to mitigate for the environmental impacts of its project is not conditioned upon its ability to obtain funding through appropriations.

In response to the Supreme Court's decision in *City of San Diego*, the First District modified section 3(c) of its *City of Hayward* opinion to affirm the trial court's decision, which required reconsideration of the feasibility of funding the University's fair-share contribution as a mitigation measure. Regarding exhaustion, the court stated that "[a]lthough the issue was not fully presented when the adequacy of the EIR was before the Trustees, in view of the clarification provided by *City of San Diego* and the scope and public importance of the project in question, it is appropriate for the Trustees to heed the Supreme Court's guidance with respect to this project . . ."

The Court of Appeal reversed the trial court's finding that the EIR's analysis of impacts associated with expanded fire and emergency medical services required by the project was inadequate. The EIR had acknowledged that the project would give rise to a need for additional firefighters and new fire facilities, and that CEQA review would be required for those additions. However, the EIR concluded that the impacts of addition a new fire station would be less than significant "due to the limited area that is typically required to build a fire station (between 0.5 and 1 acre) and its urban location." The trial court found this analysis inadequate, but the court of appeal disagreed, finding that it was "reasonable and sufficient" for the EIR to conclude that the fire station would likely be approved via an exemption or a negative declaration, and that the impacts would therefore be less than significant.

The appellate court also rejected the trial court's conclusion that the Trustees were required to provide mitigation for increases in emergency vehicle response times. The court found that these were social impacts, stating that "[t]he need for additional fire protection services is not an environmental impact that CEQA requires a project proponent to mitigate." The Court focused on the fact that "the obligation to provide adequate fire and emergency medical services is the responsibility of the city" (citing Cal. Const., art. XIII, § 35(a)(2)), and went on to state that there is no authority upholding the city's view that CEQA shifts financial responsibility for the provision of adequate fire and emergency response services to the project sponsor." The Court relied, in part, on *Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, which held that increased school enrollment is not, in and of itself, an environmental impact.

The trial court found that the EIR's analysis was inadequate as to the traffic and parking impacts associated with proposed faculty housing. The appellate court disagreed, however, finding that the limited analysis of impacts of a potential site for faculty housing – which looked only at impacts on major area intersections – was sufficient because no site had yet been selected. The court found that the level of analysis was appropriate for a program EIR, and that the future impacts of the housing project were appropriately deferred to a future proceeding. To mitigate general parking and traffic impacts associated with the increased student population, the EIR relied upon a Transportation Demand Management (TDM) plan, which aimed to reduce student and faculty reliance on single-occupancy vehicles for commuting to campus. The court of appeal disagreed with the trial court's conclusion that the TDM plan constituted improper deferral of mitigation. The court pointed out that, although the TDM had not yet been finalized, the EIR contained specific policy goals, quantitative criteria, and specific deadlines for completion of the parking and traffic studies, as well as a monitoring program to ensure the program's effectiveness. The court found that the TDM did not constitute improper deferral of mitigation, and that the plan was sufficiently concrete as to pass muster under CEQA.

The court of appeal also rejected the trial court's holding that the air quality analysis in the EIR was inadequate because it relied upon the TDM plan to reduce emissions. The trial court had determined that there was no substantial evidence to support the determination that the TDM plan would be effective. The court of appeal rejected this contention, finding the TDM plan adequate, and thus reversed the trial court's finding on air quality.

Finally, the court of appeal affirmed the trial court's determination that the EIR was inadequate in its analysis of the project's impacts on area parklands. The EIR analyzed east bay parks on a system-wide basis, rather than evaluating impacts on individual parks, and concluded that, based on "long-standing use patterns" and ample on-campus recreation options, impacts on area parks would be less than significant. The court found that the EIR lacked substantial evidence to show that students would make the same "nominal" use of the parks, and that none of the parks would be significantly impacted by the project.

6. *North Coast Rivers Alliance v. Kawamura* (2016) 243 Cal.App.4th 647

- Agency adopted an alternative pest management program (multi-year control) that was not evaluated in original EIR and conflicted with original project and objectives (complete eradication), leading to incomplete alternatives and cumulative impacts analysis.

In this opinion, the Third Appellate District reversed the Sacramento Superior Court and held that a programmatic EIR for a seven-year plan to control an invasive pest—the light brown apple moth—violated CEQA. In 2009, the California Department of Food and Agriculture (CDFA) issued a draft program EIR for a seven-year plan to eradicate the moth in the State of California, relying primarily on biological control methods. The Draft EIR's alternatives analysis did not analyze any alternatives to the eradication program—such as a program to control the moth population—but instead evaluated seven tools (five of which were approved) as "alternative" means for achieving the goal of eradication.

Shortly after the Final EIR was published in 2010, CDFA received notice that the United States Department of Agriculture had determined that eradication of the moth was no longer feasible, due to its continued spreading throughout the state, and the federal agency would be shifting to a "control and suppression strategy." Ten days after receiving this notice, CDFA certified the final program EIR for the eradication program, but approved a seven-year control program, finding that the new project objectives only "differ[ed] somewhat" from the objectives studied in the EIR (despite the fact that the Draft EIR had stated that eradication was "fundamentally different" from control). Several petitioners sought writs of administrative mandate to invalidate the EIR, but the lower court denied their petitions.

The Third Appellate District reversed, holding that the EIR violated CEQA because it failed to analyze a control program as an alternative to the eradication program. The Court found that the Draft EIR applied an "artificially narrow" definition of the program's actual objective: "eradication" of the moth, rather than "protect[ion of] California's native plants and agricultural crops from damage." This mistake "infected the entire EIR" by causing CDFA to reject consideration of any alternative that would not result in the complete eradication of the moth, despite the fact that "the goal of eradication was always known to be tenuous, because [the moths] kept spreading" during the EIR process. CDFA's last-minute selection of an alternative that was not analyzed in the EIR—a control program—rendered the EIR inadequate, as the document failed to include relevant information and precluded informed decisionmaking and

public participation. As such, the Court concluded that the EIR was "fatally defective" in failing to study a range of reasonable alternatives.

The Court rejected two of petitioners' other contentions: that substantial evidence did not support CDFA's assumptions about the "no project alternative" and that CDFA failed to adequately analyze certain program impacts. Lastly, the court found it unnecessary to review petitioners' claim that the EIR's cumulative impacts analysis violated CEQA, because the statute does not require a court to "address additional alleged defects that may be addressed in a completely different and more comprehensive manner upon further CEQA review following remand." (Citing *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 101-102.)

7. *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326

- The public agency that is part of a public/private partnership that will be carrying out a project may serve as lead agency for the purposes of environmental review for that project.

This case is one of six[4] related actions before the Fourth District Court of Appeal challenging the Cadiz Valley Water Conservation, Recovery and Storage Project (Project), which proposes to pump groundwater from an underground aquifer located in eastern San Bernardino County through pumps located on private property owned by Cadiz Inc. (Cadiz). The Project is a public/private partnership between Cadiz and the Santa Margarita Water District (SMWD) that would deliver the water for municipal and industrial uses in Southern California. This case involves a challenge by the Center for Biological Diversity, San Bernardino Valley Audubon Society, and Sierra Club, San Gorgonio Chapter, and the National Parks Conservation Association (collectively Petitioners) against SMWD, the SMWD Board of Directors, the County of San Bernardino its Board of Supervisors (County). The Petitioners challenged SMWD's certification of the final EIR and approval of the Project.

The Project involves the construction of approximately 34 new wells on Cadiz's land in San Bernardino County to extract an average of 50,000 acre-feet[5] of groundwater from the Cadiz Valley and Fenner Valley aquifer system every year (afy) for 50 years. The aquifer is estimated to hold 17 to 34 million acre-feet of fresh groundwater. The Project will be managed and operated by Fenner Valley Mutual Water District (Fenner), a private, nonprofit entity formed by Cadiz. The Project would be subject to the County's Desert Groundwater Management Ordinance (Ordinance), and would be required to obtain either a permit or an exclusion from the County. In June 2011, the County and SMWD executed a memorandum of understanding that provided that SMWD would act as the lead agency, and the County would act as a responsible

[4] The Fourth District Court of Appeal published two of the six cases, this one and *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (2016) 247 Cal.App.4th 352, summarized earlier in this report. Downey Brand attorneys represented the County of San Bernardino in all six cases.

[5] One acre-foot equals about 326,000 gallons, or enough water to cover an acre of land, about the size of a football field, one foot deep.

agency (the 2011 Memorandum). In December 2011, SMWD released the draft EIR for public review and comment, and on July 31, 2012, SMWD certified the final EIR. Prior to certification of the EIR, the County, SMWD, Cadiz, and Fenner entered into a separate memorandum of understanding (2012 MOU) setting forth the terms of the parties' agreement concerning the application of the County's Ordinance to the Project, and the use of the exclusion process under that Ordinance. Under the terms of the 2012 MOU, the Project was required to obtain approval by the County of a Groundwater Monitoring, Management, and Mitigation Plan to satisfy the terms of the Ordinance. The County would consider whether to approve GMMMP after SMWD's certification of the FEIR and approval of the Project. At the time that Petitioners initiated this lawsuit, that approval had not yet been granted.

Petitioners' core contention was that the County—and not SMWD—should have acted as the lead agency for the Project, and that the improper designation of SMWD as lead agency "so tainted the entire environmental review process" that a new EIR had to be prepared by the County. The trial court had agreed that the County should have acted as the lead agency, but ultimately found that no prejudice resulted from the designation of SMWD as lead agency. The Court of Appeal, however, concluded that there was no error in designating SMWD as lead agency, and thus no need to evaluate whether prejudice occurred.

Public Resources Code section 21067 defines the lead agency as "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." Section 15051 of the CEQA Guidelines further elaborates this requirement by setting forth the criteria for determining what agency should act as the lead agency; it provides in relevant part:

> Where two or more public agencies will be involved with a project, the determination of which agency will be the lead agency shall be governed by the following criteria:
>
> (a) If the project will be carried out by a public agency, that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency.
>
> (b) If the project is to be carried out by a nongovernmental person or entity, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.
>
> > (1) The lead agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project. [¶] ..
>
> (c) Where more than one public agency equally meet the criteria in subdivision (b), the agency which will act first on the project in question shall be the lead agency.

> (d) Where the provisions of subdivisions (a), (b), and (c) leave two or more public agencies with a substantial claim to be the lead agency, the public agencies may by agreement designate an agency as the lead agency. An agreement may also provide for cooperative efforts by two or more agencies by contract, joint exercise of powers, or similar devices.

Thus, Petitioners claimed that under subdivision (b)(1) of section 15051, the County should have acted as the lead agency since it was the agency with "general governmental powers," over the Project. SMWD and the County argued that SMWD was properly the lead agency, because it satisfied subsections (a) and (b), and because subsection (d) authorized the 2011 MOU between SMWD and the County designating lead agency status.

The Court concluded that SMWD was correctly designated as the lead agency under Section 15051(a), (b), or (d). The Court's holding clarified for the first time that where a project will be carried out jointly between a public agency and a nongovernmental person or entity, the agency that will serve as the lead agency for purposes of the environmental review for the project may be: (1) the public agency that is a part of the public/private partnership, or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole. The Court went on to hold that SMWD was correctly designated as the lead agency under either prong of this test. The Court listed in considerable detail all of SMWD's responsibilities over the Project, noting that whereas the County has primary authority over the pumping of groundwater under the County's Ordinance, that SMWD has far more authority over the project as a whole, which encompasses much more than pumping water. Finally, the Court clarified that subdivision (d) of Section 15051, which authorizes two or more agencies to enter into an agreement designating one as the lead agency so long as each agency has a "substantial claim", *does not* require that each agency have an "equal claim" to lead agency status.

Petitioners' second argument was that the EIR's project description was inaccurate and misleading because it stated that the "fundamental purpose of the Project is to save substantial quantities of groundwater that are presently wasted and lost to evaporation by natural processes." Petitioners argued that the Project could not satisfy this purpose because it would not save from evaporation an amount of water equal to the amount of water being pumped from the aquifer. The Court disagreed, concluding that the Project is consistent with the EIR's purpose and objectives because it will conserve water that would otherwise be lost to evaporation and brine production, that the EIR provide substantial evidence for calculating the loss of water to evaporation over a 100-year (as opposed to 50-year) period, and that the Project will improve water supplies throughout many areas of the State of California.

Petitioners' third argument was that the EIR's description regarding the total duration of the Project was unstable, not finite, and misleading, because as Petitioners contended the Project could exceed the initial 50-year term. The Court rejected Petitioners' argument, finding that the EIR sets a definite length of time during which pumping may occur, and that any additional time permitted for pumping *would not* alter the total amount of water that may be withdrawn from the aquifer. Further, the EIR provided that any extensions of the Project term would require further, separate environmental review. Finally, the Court held that "the possibility of an extension of the term of the Project" is "far too speculative to require environmental analysis at this point." The EIR provided a definite period of time for the Project, and explains what will happen after

pumping stops in terms of well field closure, decommissioning, and post-pumping monitoring of the aquifer.

Finally, Petitioners claimed that the Project would pump more water from the aquifer than is contemplated by and evaluated in the EIR. The Court also rejected this argument, finding that the EIR and its supporting documents do not permit withdrawal of water in excess of the amounts specified in the EIR.

The Court of Appeal affirmed the judgment, denying the petition for writ of mandate in full.

8. *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91

- Where a GHG impacts analysis asserts that those impacts are below the threshold of significance due to the project's exceeding of California's Title 24 Building Energy Efficiency Standards, record must include substantial evidence demonstrating the project's exceedance of those standards.

- Where a general plan requires that all new commercial development generate electricity on-site to the maximum extent feasible, a bald claim that on-site electricity generation is infeasible due only to cost considerations does not constitute substantial evidence supporting a finding of general plan consistency.

- Revisions to EIR's analysis of air quality and hydrology/water quality impacts constituted "significant new information" requiring recirculation to allow the public a meaningful opportunity to comment.

A local association challenged the construction of an approximately 215,000 square foot commercial retail development in the City of Victorville, which included an approximately 185,000 square foot Wal-Mart store. The challenge included claims under CEQA, state Planning and Zoning Law provisions concerning general plan consistency, and the Subdivision Map Act.

The San Bernardino County Superior Court granted the petition in part, holding that (1) the EIR failed to adequately analyze both the project's impacts on GHG emissions and the project's consistency with the general plan's on-site electricity generation requirement, and (2) there was insufficient evidence to support a finding that the project's parcel map and zone change were consistent with the general plan's on-site electricity generation requirement. The lower court rejected the project opponent's other claims: that the City violated CEQA by failing to recirculate the EIR after revising the EIR's analysis of numerous project impacts; and that the City violated the Subdivision Map Act by not making all of the findings specified in Government Code section 66474. Both the project opponent and Wal-Mart Stores, Inc. ("Wal-Mart," the real party in interest) appealed.

Wal-Mart sought reversal of the lower court judgment that found the EIR's GHG emissions impacts analysis inadequate, claiming there was substantial evidence in the record to demonstrate compliance with a general plan policy incorporating state energy efficiency standards. The EIR's GHG impacts analysis had relied on compliance with this policy to

demonstrate that the project's GHG impacts were below the threshold of significance. However, the court rejected Wal-Mart's argument, finding several inconsistencies in the record regarding the project's actual capacity to meet the energy efficiency standards.

The EIR's air quality impacts analysis discussed the project's GHG emissions impacts, consistent with CEQA Guidelines section 15064.5(b), and concluded that the project (1) did not substantially increase GHG emissions over baseline, (2) would support and not hinder the state's GHG reduction goals, and (3) that although there were no local or regional GHG reduction mitigation or reduction plans, the project's design features would likely comply with any future adopted plans. Notably, each of the City's conclusions was partially dependent on the project's compliance with a general plan policy that requires all new commercial construction in the City to attain a 15 percent efficiency increase over 2008 Title 24 (Cal. Code Regs.) Building Energy Efficiency Standards. The Court found that the City's conclusions in this regard were not supported by the record. In two separate places, the EIR stated that the project would achieve only a minimum of 10 percent increased efficiency over the Title 24 Standards. In another, it stated the project would achieve a minimum of 14 percent increased efficiency. Finally, in response to a comment, the City acknowledged that the project was "currently not in conformity" with the general plan policy, and asserted only that "several of the Project's current energy efficient measures likely meet the 15% requirement" (emphasis added). The court held that, at most, the record showed that the project may comply with the policy, not that it will comply, and therefore the City's determination that the project will have no significant GHG emissions impacts was not supported by substantial evidence.

The appellate court also affirmed the trial court's ruling that there was no substantial evidence to support the City's finding of consistency with another general plan requirement: that all new commercial or industrial development generate electricity on-site to the maximum extent feasible. The EIR explained that the project was being developed as "solar ready," but concluded that it was infeasible for the City to require rooftop solar panel installation due to uncertainties concerning the availability of tax credits and other financial incentives. The court of appeal held this was insufficient, noting that the EIR also stated that "there are many factors to be considered in determining the feasibility of solar power generation," but failed to state what those factors might be or to discuss their application to this project. The EIR also did not include any discussion of the feasibility of other types of on-site electricity generation, such as wind power. For these reasons, the City could not demonstrate general plan consistency with substantial evidence, and the City therefore failed to comply with both CEQA and the Planning and Zoning Law requirements concerning such consistency (CEQA Guidelines section 15125(d); Govt. Code sections 65860(a), 66473.5).

Lastly, the appellate court partially reversed the trial court's ruling on recirculation of the EIR, holding that certain revisions to the EIR constituted "significant new information" within the meaning of section 21092.1 of CEQA. The court held that revisions to the air quality impacts analysis added analysis of the project's consistency with several general plan policies and implementation measures and – without recirculation – deprived the public of a meaningful opportunity to comment on the information. Similarly, recirculation was required for revisions to the hydrology and water quality impacts analysis that included a "complete redesign" of the

project's stormwater management plan and essentially replaced 26 pages of the EIR's text with 350 pages of technical reports.

9. *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256

- Adoption of an addendum to address an approved EIR's inadequate analysis of energy impacts fails to comply with CEQA.

In 2011, Costco applied for a use permit and site rezone to allow construction of a 148,000-square-foot retail facility – including a warehouse store, over 600 parking stalls, and a 16-pump gas station – in the City of Ukiah. In December 2013 and January 2014, the City adopted the necessary rezoning legislation, certified the EIR, and adopted a statement of overriding considerations. Ukiah Citizens for Safety First, a local citizens group, filed suit to challenge the EIR in the Mendocino County Superior Court. Shortly after the suit was filed, the Third Appellate District issued its opinion in *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173 ("CCEC"). The City concluded that the *CCEC* decision required "a more detailed discussion of energy use than was previously understood at the time the EIR was certified," and thereafter prepared an addendum and lodged the addendum with the trial court, in an effort to satisfy the more exacting standard articulated in *CCEC*.

Petitioner argued at trial that the EIR did not properly identify and analyze the project's potentially significant energy impacts, and that the addendum prepared by the City – following certification of the EIR and approval of the project – was not properly a part of the administrative record concerning the EIR's adequacy. However, the trial court took the addendum into consideration, found the energy impacts analysis to be adequate, and denied the petition in its entirety. Petitioner appealed.

The First District reversed, holding that the EIR did not adequately analyze the potential energy impacts of the project. The Court noted the requirements contained in Public Resources Code section 21100(b)(3) (an EIR must include a statement concerning mitigation measures "to reduce the wasteful, inefficient, and unnecessary consumption of energy") and in section 15126.4 and Appendix F of the CEQA Guidelines (requiring EIR to consider "potentially significant energy implications of a project"). Here, the EIR did not contain a separate section analyzing energy impacts, but instead mentioned them throughout the EIR. Notably, the EIR did not include a calculation of the energy use attributable to vehicle trips generated by the project, or of the operational and construction energy use of the project, which the *CCEC* opinion found necessary to an adequate energy impacts analysis. The court concluded that the EIR held deficient in *CCEC* was "in all material respects the same" as the EIR for the Costco project.

The addendum prepared by the City to address the *CCEC* decision did not solve the problem. First, the addendum was prepared after the EIR was certified by the City. As such, the addendum was not a part of the administrative record concerning that certification and could not be considered by the court in evaluating the adequacy of the EIR. Second, subsequent approval of the addendum – even if it contained the necessary analysis of energy impacts – "does not cure the prior approval of an inadequate EIR." Guidelines section 15164, which authorizes preparation of an addendum in certain circumstances, "assumes that the EIR previously certified

was properly certified. The section does not authorize the retroactive correction of an inadequate EIR based upon the consideration of which the project was approved, by providing the additional necessary information about the environmental effects of the project after the project has been approved."

10. *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966

- Establishes the authority of CARB and MPOs to mandate GHG reduction measures at the regional level, independent of any statewide GHG reduction mandates.

In this case, the court of appeal rejected a challenge to the regional GHG reduction mandates of "Plan Bay Area," the sustainable communities strategy developed by the Metropolitan Transportation Commission (MTC) and Association of Bay Area Governments (ABAG) to comply with the requirements of SB 375. In particular, the court rejected petitioner's argument that the EIR for the Plan should have taken into account reductions in GHGs that will occur under statewide GHG reduction mandates.

Prior to SB 375 becoming effective in 2009, California promulgated a number of mandates for the reduction of GHG emissions, including regulations issued pursuant to AB 1493, aka the "Pavley" legislation (setting statewide emissions reduction targets for passenger vehicles and light-duty trucks), AB 32 (requiring reduction of GHG emissions to 1990 levels by 2020), and Executive Order S-01-07 (the Low Carbon Fuel Standard, requiring reduction of the carbon density of transportation fuel by at least 10 percent by 2020).

SB 375 requires that each metropolitan planning organization (MPO) adopt, as part of its regional transportation plan, a "sustainable communities strategy" that sets forth plans to meet regional GHG reduction targets set by the California Air Resources Board (CARB). In 2010, CARB established the requisite GHG reduction targets for the Bay Area region. MTC and ABAG, acting collectively as the MPO for the Bay Area, then developed a sustainable communities strategy for the region called "Plan Bay Area." In 2013, following CEQA review, MTC and ABAG adopted the Plan. In 2014, CARB accepted the determination by MTC and ABAG that the Plan would meet the GHG reduction targets set by CARB under SB 375.

Petitioner Bay Area Citizens, a group represented by the Pacific Legal Foundation, filed a CEQA challenge to the adoption of Plan Bay Area in Alameda County Superior Court, arguing that the EIR failed to comply with CEQA in five ways: (1) not adequately identifying the Plan's basic objectives; (2) not adequately assessing a "no project" alternative; (3) relying on an outdated baseline; (4) not including a reasonable, feasible alternative; and (5) not responding to petitioner's alternative proposed plan. All five claims relied on the same premise: that the EIR should have taken into account existing statewide GHG reduction mandates that would result in CARB's GHG reduction targets under SB 375 being met without the need for the Plan's "draconian, high-density land-use regime." Petitioner argued that this alleged omission resulted in the EIR failing to satisfy CEQA's "core purpose of informed public decision-making." The Superior Court rejected this argument and upheld the EIR.

The First Appellate District affirmed, holding that "[t]he only legally tenable interpretation of SB 375 is that it requires [CARB] to set targets for, and [MTC and ABAG] to strive to meet these targets by, emissions reductions resulting from regionally developed land use and transportation strategies, and that it requires these reductions be in addition to those expected from the statewide mandates" (emphasis added). The Court based this holding on the language of SB 375, the accompanying legislative declarations and findings, and the interpretation of SB 375 by CARB, which is the administrative agency charged with implementing the statute.

The appeals court also rejected Petitioner's arguments on two independent grounds. First, even if – for the sake of argument – the Legislature did not intend for MPOs to develop regional GHG reduction goals that are in addition to existing statewide mandates, CARB – as the agency charged with implementing and meeting the goals of SB 375 – had the discretion to require MTC and ABAG to do so. Second, because the lawsuit essentially argued that MTC and ABAG violated CEQA by "adopting a plan that did more than the minimum necessary to meet their SB 375 targets," it amounted to a "substantive attack on the wisdom of Plan Bay Area itself." However, "an objection to the substantive choice a lead agency makes in approving a project is not a legitimate basis for a CEQA lawsuit."

11. *Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) ___ Cal.App.5th ___

- County did not engage in improper "segmentation" by not analyzing impacts of potential future mining project, where application for that project had been withdrawn and current project was not the first phase in a "larger development."

- Conclusion by Department of Conservation that a reclamation plan complies with SMARA constitutes substantial evidence supporting County's conclusion that project complies with SMARA.

- Neither certification findings nor statement of overriding considerations need address impacts determined to be less than significant.

In *Bay Area Clean Environment, Inc. v. Santa Clara County*, the Sixth Appellate District rejected a challenge to the County's 2012 approval of an amendment to a Reclamation Plan ("Plan") for a century-old 3,510-acre limestone and aggregate surface mine. The County prepared an EIR for the Plan, which was designed to reclaim all of the property impacted by the mining operation over a 20-year period. In its challenge, Petitioner Bay Area Clean Environment, Inc. ("Bay Area") claimed that that the County had failed to comply with both the Surface Mining and Reclamation Act ("SMARA") and CEQA. The trial court upheld the County's approvals and the Sixth Appellate District affirmed.

As to CEQA, Bay Area argued that the EIR was inadequate because it failed to address the cumulative impact of a new South Quarry pit that had previously been proposed to replace the reclaimed pit. According to Bay Area, the project proponent had intentionally omitted the new pit from the environmental document in order to achieve quick approval of the Plan. Bay Area said this was improper "segmentation" or "piecemeailing" of environmental review. The court

rejected this argument, finding that the application for the new pit, previously submitted by the project proponent, had been withdrawn before the EIR process began. Further, the new pit—if subsequently built—"would not change the scope of the nature of the reclamation of the North Quarry pit or the reclamation's environmental effects." Consequently, the court emphasized, the Plan was a "stand-alone project and does not require approval of a future project, such as the South Quarry pit for reclamation for the North Quarry to occur." Distinguishing *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325—an early case holding that separate treatment of phased development was improper piecemealing—the court here emphasized that the Plan was not a "first phase in a larger development."

Bay Area also claimed that the County's certification findings and statement of overriding consideration were insufficient to support approval of the Plan and EIR in that they did not adequately address impacts on the California red-legged frog. The EIR, however, had concluded that direct impacts to the frog were less than significant because no frogs had been identified in the project area. Because the impact was found to be less than significant, the court concluded that no additional findings were required. Further, the EIR concluded that indirect impacts to aquatic life—not necessary the frog—were significant and unavoidable. According to Bay Area, the statement of overriding considerations should have expressly addressed the red-legged frog. The court rejected this argument. In upholding long-standing CEQA precedent, the court held that because direct impacts to the frog were determined to be less than significant, the statement of overriding considerations was not required to discuss it.

Finally with regard to CEQA, Bay Area argued that the trial court erred in augmenting the record to include an email exchange between an expert biologist and the California Department of Fish & Wildlife. In a 2007 report, the consultant had documented a frog in a pond at the site, but in the 2009 email the consultant clarified that the earlier entry was a mistake. The court found that the document was properly part of the administrative record under Public Resources Code section 21167.6(e)(10), which includes "any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits . . ." The court noted that the email was sent before the EIR was certified by the same firm that prepared the biological assessment for the Plan EIR. The EIR, in turn, relied on the biological assessment for its conclusion that no protected frogs were present in the project area. Consequently, the consultant's email was properly part of the administrative record of the proceedings.

Separately, the court addressed Bay Area's several challenges to the Plan under SMARA. First, the court rejected a claim by Bay Area that the Plan failed to satisfy SMARA water quality standards because placement of overburden during reclamation would increases selenium in a nearby creek. Under the plain language of the SMARA regulations, 14 C.C.R. § 3706(b), it was within the County's discretion to allow temporary water quality impacts if necessary to implement the Plan. Second, the court rejected a claim by Bay Area that the Plan violated SMARA's provisions governing wildlife habitat by failing to specifically mention and provide for the red-legged frog. While SMARA requires that a reclamation plan return the disturbed area to prior (or better) habitat conditions except under certain conditions, the biological assessment attached to the Plan analyzed the frog and its habitat and provided measures for avoiding and minimizing impacts. Third, Bay Area had argued that statements by the Office of Mining Reclamation that the Plan complied with SMARA did not constitute substantial evidence to

support the County's determination of SMARA compliance. The court rejected this claim as well, finding that the County properly relied on the Department of Conservation's determination of compliance, which was based in part on the statements of the Office of Mining Reclamation

E. Subsequent Review

1. *Coastal Hills Rural Preservation v. County of Sonoma* (2016) __ Cal.App.5th ___

- Even though project originally proceeded under an MND, subsequent project changes are properly reviewed under CEQA section 21166 and Guidelines section 15162 and the substantial evidence standard of review (rather than fair argument).

- The updated project changes fell within the scope of the earlier-approved project and did not have significant impacts with respect to fire or wildlife hazards, and thus did not require a subsequent EIR.

- Undisputed evidence established that the facility operated as a nonprofit, and therefore qualified for the County's general plan and zoning ordinance designations for rural development and noncommercial clubs and lodges.

This case centered on the applicable standards and appropriateness of proceeding on a Subsequent Mitigated Negative Declaration (SMND), rather than an EIR, where changes had been incorporated in a religious facility approved earlier based on an MND. In 2004, the Tibetan Nyingma Meditation Center (TNMC) purchased a resort located in an area of Sonoma County designated as Resources and Rural Development in the County's general plan. TNMC renamed the resort the Ratna Ling Retreat Center and submitted an application for a master use permit (MUP) to construct 19 additional cabins, a library, a healing center, a therapeutic pool, and a new 18,750 square foot printing press facility for the printing of sacred Buddhist texts in the Tibetan language. The application also proposed expansion of the existing lodge into a meditation hall with a kitchen and dining facilities, and a maximum occupancy of 60 persons. The County adopted an MND (2004 MND) and approved the MUP, subject to 58 conditions of approval. Those conditions designated the printing press operation a noncommercial "ancillary use" and set the maximum occupancy for that operation at 27 persons, with hours of operation 7:00 a.m. to 10:00 p.m., seven days a week. The accompanying staff report indicated that the printing press operation was intended to be based on the use of one printing press.

In 2006, TNMC installed five additional printing presses at the Ratna Ling facility. Then, in 2008, Ratna Ling received a temporary zoning permit for four steel-frame storage tents to house a "Sacred Text Treasury." Combined, the four tents covered 39,270 square feet—over twice the size of the 18,750 square foot printing press facility. Also in 2008, the County adopted an MND (2008 MND) and approved a use permit allowing construction of a reservoir for Ratna Ling's water system and to modify the size and location of the healing center.

In 2010, a citizens group filed a complaint with the County (2010 Complaint), alleging that Ratna Ling was operating in violation of the conditions of the 2004 MUP—in particular, that the printing press operation was no longer an ancillary function, given that (1) the combined square

footage of the printing press operation and the four temporary storage tents was equal to the square footage of Ratna Ling's retreat-related facilities, (2) the six printing presses were operating around-the-clock, with up to 40 workers present each day, and (3) truck traffic related to the operation had increased by 12 to 16 times over Ratna Ling's 2004 estimate. TNMC responded that the sacred text production was "a central religious practice and provides essential support to the primary purpose" of Ratna Ling as a Buddhist retreat.

In 2011, Ratna Ling submitted an application for an MUP that would (among other things) secure permanent status for the four temporary storage tents, allow for a storage use not to exceed the combined square footage of those tents, and raise the occupancy limit to 98 persons (2011 Project). In 2012, the County Board of Zoning Adjustments approved the permit and adopted an MND for the project (2012 MND). These approvals were appealed to the County Board of Supervisors by a project opponent. In 2013, Ratna Ling submitted an updated proposal for the 2011 Project, and Coastal Hills Rural Preservation (CHRP) subsequently refiled its 2010 Complaint. In 2014, the County released a 46-page subsequent MND (SMND) to the 2004 and 2008 MNDs, which superseded the 2012 MND.

The County Board adopted the SMND, denied the project's opponent's appeal, and approved the 2011 Project subject to 96 conditions of approval. CHRP then filed a petition for writ of mandate and complaint in Sonoma County Superior Court, challenging the actions of the Board. In April 2015, the trial court denied the writ, and CHRP appealed. The court of appeal affirmed, rejecting CHRP's claims.

First, CHRP argued that the 2011 Project was a new project under CEQA, as opposed to a modification of Ratna Ling's prior MUPs, and therefore the fair argument test should apply regarding the County's decision to proceed with the SMND rather than an EIR. The court rejected this claim, holding that the County appropriately viewed the 2011 Project as falling within the scope of CEQA section 21166 and Guidelines section 15162, as (1) the printing press operation was evaluated in the 2004 MND and authorized by the MUP issued at that time, and (2) although the storage tents were not evaluated in the 2004 or 2008 MNDs, it was "undisputed that these structures are integral to Ratna Ling's existing printing press operation." As such, the 2011 Project was not a new project for CEQA purposes, and the County's decision not to require an EIR would be reviewed under the substantial evidence standard. The appeals court then rejected CHRP's claim that the record did not include substantial evidence demonstrating that the 2011 Project would not have a significant impact with respect to wildland fires or wildlife hazards. The court also ruled against CHRP with respect to the County's inclusion of the storage tents as part of the baseline conditions for the impacts analysis, finding that the tents were, in fact, part of the existing physical conditions at the site, and, in any event, the County fully evaluated the impacts of the tents. Finally, the court held that the County did not improperly defer study of fire impacts until after the adoption of the SMND by incorporating a condition requiring that the applicant coordinate with the Fire Marshal to review existing fire-fighting infrastructure and install any additional onsite infrastructure that the Fire Marshal deemed appropriate.

Second, CHRP argued that the 2011 Project involved "rampant commercial activity" associated with the production, storage, and sale of printed materials, and therefore was inconsistent with

the General Plan's Resources and Rural Development (RRD) designation covering the Ratna Ling property, which permits "visitor serving uses," and the related zoning ordinance, which includes "noncommercial clubs and lodges" as an allowable use, along with "accessory" buildings and uses that are appurtenant to the operation of allowable uses. The appeals court rejected this claim, finding no evidence in the record that Ratna Ling's printing activities were undertaken for profit. Rather, the undisputed evidence showed that 98 percent of its total printing output was given away for free, only 11 percent of its total revenue came from printing operations, and proceeds from those operations were used to support the production of more religious texts. The court held that these operations were not inconsistent with Ratna Ling's primary function as a religious retreat "merely because some of its output enters the stream of commerce." The court also rejected CHRP's claim that the printing operations should be deemed "industrial" uses inconsistent with the RRD designation. Though the printing operations intensified over time, the County did not abuse its discretion in categorizing those operations as ancillary to the retreat center use. Finally, the court found that the Board "fully considered the County's land use policies and the extent to which the 2011 Project conforms to those policies" and, given the deferential standard of review, the court would not reweigh conflicting evidence or substitute its judgment for that of the Board.

Third, the court found that (1) CHRP failed to exhaust its administrative remedies with respect to its argument that adoption of the SMND violated California Constitution provisions relating to the establishment of religion, and (2) CHRP failed to exhaust its administrative remedies with respect to its claim that the County engaged in impermissible spot zoning when it approved the 2011 Project. Even if it had exhausted this claim, nothing in the record or the relevant zoning regulations suggested that the County had violated Government Code section 65852 by authorizing a use at Ratna Ling that was prohibited at all other parcels in the same zone.

2. *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) __ Cal.4th ___

This highly anticipated Supreme Court case resolves a split among the Circuits regarding the proper procedures for addressing changes to a project that have already been subject to CEQA review. The Court clarified that such changes are not subject to an independent, "new project" threshold test, and that an agency's decision that no EIR is required as a result of proposed modifications to a previously approved project is subject to review for substantial evidence. The decision also affirmed the validity of CEQA Guidelines section 15162 and its application of the principles of finality and subsequent review to projects originally approved with a negative declaration.

In this case, the San Mateo Community College District (District) had approved a plan to improve its campus at the College of San Mateo by renovating ten buildings and demolishing sixteen others. The District prepared and adopted a mitigated negative declaration (MND) to address the impacts of its improvement plans. Later, the District revised its plans for the College by deciding to demolish one building that had been set for renovation and to renovate two buildings that had been set for demolition. The District evaluated the possible environmental consequences of altering its plans for the three buildings under CEQA's provisions governing subsequent review of previously approved projects (Pub. Res. Code § 21166 and CEQA Guidelines § 15162), and ultimately concluded that the changes were not so extensive as to

require preparation of a subsequent EIR The District instead prepared an Addendum to address the proposed revisions. Petitioners challenged the District's decision, claiming that the changes constituted a "new" project and therefore the District could not rely on the prior MND.

It is well-established that the deferential substantial evidence standard applies to a lead agency's decision to not require a subsequent EIR under Public Resources Code section 21166 when changes are proposed to a previously approved project approved with an EIR. (*See Santa Teresa Citizens Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1397-1401.) The CEQA Guidelines apply these same principles and procedures to projects approved based on a negative declaration. (Guidelines § 15162(a); *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 668-671, 675.) However, an earlier appellate decision, *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, created a separate "new project" test to first determine, without any deference to the agency, whether project changes even qualify for subsequent review analysis under Section 21166.

In an unpublished opinion, the First Appellate District in *San Mateo Gardens* expressly followed *Lishman* and held that the question of whether a project is a "new" project is a question of law reviewed de novo by the courts without any deference to the lead agency's review of the factual circumstances of the particular project. It went on to find, without expressing any standards to guide the inquiry, that it was "clear" that the changes proposed by the District here constituted a "new project altogether." The decision posed noteworthy problems for public agencies: the court declined to defer to the District's factual determination that the changes were adequately covered by the prior MND and then failed to set standards to guide application of the "new project" test in the future. Despite the fact that the lower court's ruling was unpublished, the Supreme Court accepted review and ultimately reversed the First Appellate District's ruling. Importantly, the Court made several welcome clarifications in the law. First, the Supreme Court rejected the notion in *Lishman* and the opinion below that there is any separate "new project" test. The threshold question should focus on the "effect" of the change and not "abstract" characterizations of the project by the courts. An agency's determination of this threshold issue—of whether a project change qualifies for analysis under Section 21166 and Guidelines section 15162—is entitled to substantial deference by the courts.

The Court's opinion repudiates *Lishman*, which had seriously undermined the ability of lead agencies to rely on the deferential standards and process for subsequent review under Section 21166 (and Guidelines section 15162) based on aspects of the changed project unrelated to environmental impacts (e.g., the identity of the project proponent and the preparer of project design plans). The Court noted as well its expectation that the "occasions when a court finds no substantial evidence to support an agency's decision to proceed under CEQA's subsequent review provisions will be rare, and rightly so; 'a court should tread with extraordinary care' before reversing an agency's determination . . . that its initial environmental document retains some relevance to the decisionmaking process."

Second, the Court addressed the standards for reviewing project changes once it is determined that those changes properly fall within the rubric of Section 21166. Petitioner had argued that because the initial project in this case was approved under a negative declaration, the "fair

argument" standard should apply. In response, the Court recited the standards for subsequent review under Guidelines section 15162—"substantial evidence" that "substantial changes . . . require major revisions"—and emphasized that negative declarations "are entitled to a presumption of finality" once adopted and it would be "absurd" to restart the entire process each time a change is proposed in a project.

Third, while the issue did not feature prominently in the briefing, petitioner's counsel and the Court at oral argument expressed interest in whether Guidelines section 15162 validly applied the principles governing subsequent environmental review under Section 21166 to projects initially approved based on a negative declaration. The Court clarified that Guidelines section 15162 is a "valid gap-filling measure" adopted by the California Natural Resources Agency. On the whole, the decision in *San Mateo Gardens* clarifies the standard of review of changes to previously approved projects and preserves Guidelines section 15162 as a useful tool to avoid successive and unnecessary rounds of CEQA review.

F. Litigation Procedures

1. *Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267

- A related corporate entity can, under certain circumstances, be considered an alter ego of a single purpose entity (SPE) and be liable for attorney's fees and costs if the SPE dissolves.

- Development company was not prejudiced by plaintiffs' delay in filing a motion to amend the judgment to add it as a debtor acting as the alter ego of real party SPE that was dissolved during the litigation.

In 2006, defendant and respondent City of Banning certified an EIR for a 1,500–acre real estate development project known as the Black Bench project. Plaintiffs Highland Springs Conference and Training Center (Highland Springs), Banning Bench Community of Interest Association (Banning Bench), and three additional parties (not parties in this appeal) filed a total of four separate CEQA actions challenging the approval in November 2006, which were later consolidated. The actions named "SCC/Black Bench, LLC, dba SunCal Companies" (SCC/BB), as the only real party in interest. Judgment was entered in favor of plaintiffs, and thereafter plaintiffs moved to recover attorney's fees and costs incurred in the CEQA proceeding. At that time, it was apparent that SCC/BB was having financial difficulties. SCC/BB did not oppose the motion and the trial court ultimately awarded the plaintiffs over $1 million in attorney's fees and costs.

Four years later, the four plaintiffs jointly moved to amend the judgment to add SCC Acquisitions, Inc. (SCCA) as an additional judgment debtor under Code of Civil Procedure section 187 and make SCCA liable for paying the fees and costs, on the grounds that it was the alter ego of SCC/BB. Plaintiffs claimed they did not discover until 2012 that SCC/BB had been dissolved in 2010. After several rounds of briefing, three hearings, and several evidentiary submissions, the trial court denied the motion on the sole basis that plaintiffs failed to act with due diligence in bringing the motion. The court reasoned plaintiffs knew, or reasonably should

have known, of SCCA's alleged alter ego relationship to SCC/BB long before plaintiffs moved to amend the judgments in October 2012. Highland Springs and Banning Bench appealed the trial court's order.

The Fourth Appellate District reversed, finding that SCCA made an insufficient evidentiary showing that it was prejudiced by the delay and did not meet its burden of proving the motion was barred by laches. The court noted that SCCA could not "simply assert, without specifics or supporting evidence, that it no longer had the same resources it had before the real estate market 'collapsed' in 2008 and that other unspecified 'circumstances [had] materially changed.'" The Court also clarified that "[n]o statute of limitations applies to a section 187 motion to amend a judgment to add a judgment debtor." The court remanded the case to the trial court to determine whether plaintiffs met their burden of demonstrating that: (i) SCCA effectively controlled the CEQA litigation; (ii) there was such a unity of interest and ownership in SCCA and SCC/BB; and (iii) an inequitable result will follow unless SCCA is held liable. The decision in *Highland Springs*, establishes that a related corporate entity can be considered an alter ego of an SPE and be liable for attorney's fees and costs if the SPE dissolves, even though the purpose of creating the SPE was to limit liability.

2. *Center for Biological Diversity v. California Department of Fish & Wildlife* (2016) 1 Cal.App.5th 452

- Court of Appeal lacked authority on direct appeal in CEQA action to issue a writ of mandate and then supervise compliance.

As reported above, the California Supreme Court in *Center for Biological Diversity v. California Department of Fish and Wildlife* invalidated the greenhouse gas analysis and mitigation for the fully-protected unarmored stickleback on review of an environmental impact report ("EIR") prepared for the Newhall Ranch development in northern Los Angeles County. In its ruling, the Supreme Court remanded the case to the lower appeals court to determine two issues left undecided—the project's impacts on tribal cultural resources and the endangered steelhead trout.

On July 11, 2016, the Second Appellate District finally issued its ruling after remand from the Supreme Court. In unpublished sections of its opinion, the court provided further direction to the trial court and lead agency on the greenhouse gas analysis and species issues and reiterated its earlier ruling—that the EIR's evaluation of tribal cultural resources and steelhead trout was supported by substantial evidence. In the only published portion of the opinion, the court grappled with a procedural issue that only a CEQA aficionado could love—whether the appeals court itself can retain jurisdiction to supervise directly the agency's compliance with its ruling. Appeals court jurisdiction in CEQA cases has witnessed some interesting turns in recent years, as the Legislature has added targeted streamlining provisions and original jurisdiction in the court of appeals in some instances. (*See, e.g.*, Pub. Resources Code, §§ 21168.6 [CPUC challenges], 21185 [environmental leadership projects].) The court here, however, found that it did not have the authority to step into the shoes of the trial court.

After remand from the Supreme Court—and to avoid facing delays in further proceedings before the trial court—the developer and Department urged that the Supreme Court's opinion and certain remedy and timing provisions under CEQA together permitted the appeals court to retain

jurisdiction to "supervise the completion of the environmental review process." The Petitioner Center for Biological Diversity ("CBD") protested, arguing that appeals courts have no jurisdiction to retain supervision, and that the only available procedure is to remit the case to the trial court for further proceedings. The appeals court agreed with CBD, finding that unlike specific provisions that grant original jurisdiction to the appeals courts—e.g., Section 21168.6 for actions against the Public Utilities Commission—nowhere does CEQA or the Code of Civil Procedure offer such a procedural device.

While appeals courts may not have the power to issue and supervise writs of mandate directly, the court's opinion did recite the significant flexibility that trial courts have to fashion alternative remedies in CEQA cases. This discussion may be the most important element of the opinion, as the scope of available remedies is a common issue in any case where a writ of mandate has been granted.

3. *Communities for a Better Environment v. Bay Area Air Quality Management District* (2016) 1 Cal.App.5th 715

- The discovery rule could not be used to delay the triggering of the limitations period where petitioner has constructive notice of potential CEQA violation.

In this case, Communities for a Better Environment and a host of other environmental groups sought to challenge a rail-to-truck facility for the transloading of crude oil permitted by the Bay Area Air Quality Management District (BAAQMD). The trial and appeals courts held that CBE's petition was time barred under Section 21167(d) of the Public Resources Code for failure to bring the claim within 180 days of BAAQMD's approval of an Authority to Construct (ATC) that authorized the transloading of Bakken Crude. In doing so, the courts rejected the argument by CBE that the "discovery rule" should apply in CEQA cases where, as here, there is no public notice of the approval.

The rail-to-truck facility had been transloading ethanol through Richmond since 2009. In February 2013, however, the operator (Kinder Morgan) applied to BAAQMD for approval to alter the facility and begin transloading Bakken crude oil, a form of crude that CBE alleged was "highly volatile and explosive" (among other environmental risks). Without any public notice, BAAQMD in July 2013 found the approval "ministerial" (not subject to CEQA) and issued an ATC for transloading Bakken crude. The facility began transloading Bakken crude in September 2013 and BAAQMD later modified two conditions of the ATC in October and December 2013. BAAQMD in February 2014 finally issued Kinder Morgan a Permit to Operate ("PTO")—a follow-on permit to the ATC's that incorporated the modified conditions. BAAQMD exercised its discretion and declined to file a Notice of Exemption, which it could have done under Section 15062 of the CEQA Guidelines.

CBE filed suit in March 2014 to challenge the transloading of Bakken Crude, which was within 180 days of the PTO but long after BAAQMD's approval of the original ATC authorizing the switch to Bakken crude. CBE argued that its petition was timely because its first discovery (i.e., "notice") of the approval of Bakken crude did not occur until January 2014, "when one of CBE's staff members received an email disclosing that the Richmond facility had begun transloading

crude oil." Citing *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, CBE argued that:

> [I]t could not with reasonable diligence have learned, of the project any earlier, because BAAQMD 'gave the public no notice of Kinder Morgan's switch to ... Bakken crude oil' and 'Kinder Morgan's transloading operation is entirely enclosed, making the transported commodity, and any change to it, invisible.'

In *Costa Mesa*, the Supreme Court had held that when the project under construction differs from the project originally approved by the agency, "an action challenging the agency's noncompliance with CEQA may be filed within 180 days of the time the plaintiff *knew or reasonably should have known* that the project under way differs substantially from the one described in the EIR." (*Id.*, at 939–940.) But in that case, there was no formal "approval" and the project opponents were not aware of substantial changes in an amphitheater project until the venue held its first concert. The Court reasoned that this interpretation of the statute of limitations was appropriate because the opponents "could not with reasonable diligence have discovered" the changes earlier.

The First Appellate District declined to apply *Costa Mesa*, citing an important distinction—here, BAAQMD had issued its approval of the switch to Bakken crude in July 2013, which served as one of three alternative dates specified in Section 21167(d) that starts the limitations period (from "notice," "approval," or "commencement" of the project). At that point—and despite no public notice of the approval—the public is deemed to have "constructive notice" of the project under CEQA.

The court further emphasized that the "discovery rule" has never been applied in CEQA cases to postpone accrual of the statute of limitations. The discovery rule, which has been applied in non-CEQA cases, "postpones the accrual of an action . . . until the date the plaintiff has actual or constructive notice of the facts constituting the injury." The Supreme Court in *Concerned Citizens*, however, "specifically rejected 'as contrary to the Legislature's intent' the plaintiffs' position 'that their action was timely because it was filed a few days before the expiration of 180 days after the first concert was held at the theater." Rather, the Supreme Court held that "an action accrues on the date a plaintiff *knew or reasonably should have known* of the project *only if no statutory triggering date has occurred*." In *Costa Mesa*, there was no "notice" and no formal "approval" of the changed amphitheater project, and thus no earlier "triggering date" for accrual of the limitations period.

In the end, the First District acknowledged that while public participation plays an important role in CEQA, "arguments about the proper balance between the interests of public participation and of timely litigation are better directed at the Legislature."

4. *Citizens for Ceres v. City of Ceres* (2016) __Cal.App.5th__

- Real-party-in-interest may recover costs associated with record preparation as long as record was prepared in one of the three ways specified under Public Resources Code section 21167.6.

Petitioners challenged the EIR for a new shopping center anchored by a Wal-Mart on a variety of grounds, including that the project did not adequately mitigate for urban decay impacts and that the EIR failed to set forth an adequate long-term plan for solid waste disposal. The trial court upheld the EIR on all grounds but rejected real-party-in-interest Wal-Mart's motion to recover costs associated with preparing the record, based on Public Resources Code section 21167.6 and the principles elucidated in *Hayward Area Planning Assn. v. City of Hayward* (2005) 128 Cal.App.4th 176.

In the unpublished portion of the opinion, the Fifth District affirmed the trial court's decision on the merits, rejecting each of the petitioner's claims in turn. However, in the published portion of the opinion, the Court reversed the trial court on the issue of Wal-Mart's request for costs, disagreeing with the *Hayward* court to the extent that that case proscribed a real-party-in-interest's recovery of record costs under any circumstances.

Section 21167.6 provides only three options for preparation of the record: (1) the agency can prepare it; (2) the petitioner can prepare it; or (3) the agency and petitioner can agree to some other procedure. In *Hayward*, the agency did not prepare the record itself; rather, without consulting with the petitioner, the agency requested that counsel for the developer prepare the record. The court found that the developer's costs were not recoverable because the record had not been prepared in a manner permissible under the statute. The *Hayward* court averred that requiring the agency to appear in court to recover its own costs would incentivize public agencies to minimize costs associated with the record. The *Ceres* court rejected this argument, stating that it "might or might not be good public policy, but we do not see how section 21167.6 implies it."

The Fifth District distinguished *Hayward* on the basis that here, the agency did prepare the record, but was subsequently reimbursed by Wal-Mart. The Court found that because the record was prepared in a manner allowed under the statute, there was no limitation on who could recover the costs of preparation.

II. PENDING CALIFORNIA SUPREME COURT CASES

A. *Sierra Club v. County of Fresno* (Review granted October 1, 2014)

This case presents issues concerning the standard and scope of judicial review of an EIR under CEQA for the Friant Ranch Project, an active adult community in Fresno County. After an adverse ruling in the appellate district below, the County petitioned for review to address the applicable standard of judicial review when evaluating claims that an EIR provides insufficient information on an issue and to clarify when mitigation measures are adopted to reduce but not eliminate an unavoidable impact. Without providing any deference to the County's

methodology, the Fifth Appellate District had concluded that, as a matter of law, the EIR had failed to include sufficient information regarding air quality impacts. The case was fully briefed in March 2015.

B. *Friends of the Eel River v. North Coast Railroad Authority* **(Review granted December 10, 2014)**

This case includes the following issues: (1) Does the Interstate Commerce Commission Termination Act (ICCTA) preempt the application of CEQA to a state agency's proprietary acts with respect to a state-owned and funded rail line, or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)? (2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property? The appellate court held that CEQA's requirement to prepare an EIR was preempted and that a petition for writ of mandate was not an appropriate method to enforce an agency's voluntary agreement to prepare an EIR. The case was fully briefed in April 2015.

C. *Cleveland National Forest Found. v. San Diego Assoc. of Governments* **(Review granted March 11, 2015)**

The Court limited review to a single issue—whether an EIR for a regional transportation plan must include an analysis of the plan's consistency with the GHG emission reduction goals reflected in Executive Order No. S–3–05 (80% below 1990 levels by the year 2050) in order to comply with CEQA. The appellate court held that the EIR failed to adequately disclose, analyze, and mitigate GHG emissions and air quality impacts by, among other things, failing to analyze the plan's consistency with the targets set forth in Executive Order S-3-05. The case was fully briefed in August 2015.

D. *Banning Ranch Conservancy v. City of Newport Beach* **(Review granted August 19, 2015)**

This appeal pertains to a challenge brought to review an EIR for a residential and commercial development in the coastal zone. The Fourth Appellate District upheld the EIR, finding that the City complied with its general plan policy requiring it to coordinate with appropriate state and federal agencies in connection with the approval, and that the City could defer the identification of environmentally sensitive habitat areas to the California Coastal Commission so long as the EIR evaluated the project's potential inconsistencies with the Coastal Act. The Supreme Court granted review on the following issues: (1) Did the City's approval comport with the directives in its general plan to "coordinate with" and "work with" the California Coastal Commission to identify habitats for preservation, restoration, or development prior to project approval? (2) What standard of review should apply to a city's interpretation of its general plan? (3) Was the City required to identify environmentally sensitive habitat areas—a legal determination under the Coastal Act—in the EIR? The case was fully briefed in April 2016.