Bay Planning Coalition Expert Briefing

CEQA Update 2016: Supreme Court Decisions & Hot Topics Review

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California Supreme Court Cases

1) *California Building Industry Ass'n v. BAAQMD*
2) *Friends of the College of San Mateo Gardens v. San Mateo Co. Community College Dist.*
3) *Sierra Club v. County of Fresno* (pending)

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California Building Industry Ass'n v. BAAQMD (2015) 62 Cal.4th 369

- Challenge to BAAQMD adopted significance thresholds for impacts to new receptors from toxic air contaminants.
- Addressed 'reverse CEQA'—whether EIR must evaluate impacts of the surrounding environment on new residents.
- First Appellate District upheld thresholds and held adoption of regulations not a CEQA project.

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California Building Industry Ass'n v. BAAQMD (2015) 62 Cal.4th 369

- Supreme Court held statute addresses project's effects on the environment *and not* the reverse, except:
  - Where required by statute (airport hazards, school siting); and
  - Where project will exacerbate an existing hazard resulting in an impact.
- Expressly invalidated certain provisions of CEQA Guideline § 15126.2(a) (seismic hazard to future residents).
- Strict/literal interpretation of CEQA (*Newhall Ranch*).

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California Building Industry Ass'n v. BAAQMD (2016) 2 Cal.App.5th 485 (on remand)

- Challenge to BAAQMD's significance thresholds for TACs and "reverse-CEQA" analysis;
  - Supreme Court remanded to appeals court question of whether BAAQMD's thresholds must be invalidated.
- First Appellate District held:
  - BAAQMD thresholds invalid to extent they mandate assessment of surrounding environment's impact on future inhabitants;
  - Not required to invalidate thresholds for legitimate uses.

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Friends of the College of San Mateo Gardens v. San Mateo Co. Community College Dist. (2016) __ Cal.4th __

- Challenge to changes to college campus master plan adopted based on an addendum TO MND:
  - Original master plan adopted based on MND;
  - Building/garden originally slated for preservation, would now be demolished instead of demolishing a separate building, which would now be preserved.
- First District followed *Lishman* and ruled that:
  - Courts must first determine whether changes really constitute "new project," which is a legal determination subject to de novo review
  - Demolition was inconsistent with plan and thus a "new project."

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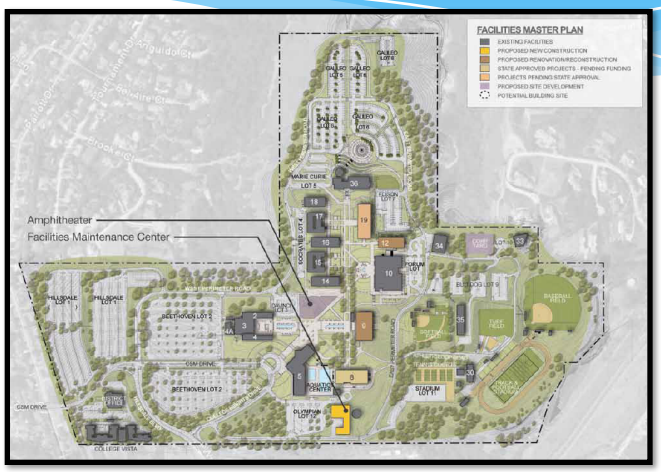
Friends of the College of San Mateo Gardens v. San Mateo Co. Community College Dist. (2016) __ Cal.4th __



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Friends of the College of San Mateo Gardens v. San Mateo Co. Community College Dist. (2016) __ Cal.4th __

- Supreme Court held:
  1) No "new project" test—agency's subsequent review obligations depend on "effect" and not "abstract" characterizations;
  2) Whether project change qualifies under Sections 21166/15162 is conducted under substantial evidence review;
  3) If Sections 21166/15162 apply, subject to "substantial evidence" that "substantial changes . . . require major revisions"—it would be "absurd" to restart entire process;
  4) Guideline 15162 is "valid gap-filling measure" to section 21166 governing changes to projects originally approved by MND.

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Sierra Club v. County of Fresno (Pending)

- Challenge to program/project EIR for large master plan mixed use project (Specific Plan and Community Plan) for active adult community
- Fifth appellate district upheld challenge to sufficiency of evidence supporting the EIR's analysis of air quality impacts finding the EIR should have correlated the extent of air quality impacts with specific health impacts, and this deficiency constituted legal error

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Sierra Club v. County of Fresno (Pending)

- Fifth appellate district held that a statement of overriding considerations which concludes that measures will not mitigate air quality impacts to less than significant must quantify the extent of improvements that will result from the mitigation
- Fifth appellate district held that measures based on further analysis after more detailed project planning and measures that relied on AQMD mitigation program constituted improper deferred mitigation

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Sierra Club v. County of Fresno (Pending)

- **Critical issues presented for decision:** (1) whether sufficiency of evidence in an EIR is evaluated de novo as an issue of law or governed by the substantial evidence test, and (2) whether an agency's abuse of discretion in complying with CEQA is automatically prejudicial

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Climate Change and Energy

1) *Center for Biological Diversity v. Department of Fish and Wildlife*
2) *Bay Area Citizens v. Assn. of Bay Area Governments*
3) *Cleveland National Forest Found. V. San Diego Assn. of Governments*
4) *Ukiah Citizens for Safety First v. City of Ukiah*
5) *Spring Valley Lake Association v. City of Victorville*

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

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

- Challenge to CDFW EIR for 12,000-acre Newhall Ranch Project, Santa Clara River Valley:
  - Application of BAU approach – Climate impacts LTS;
  - Exhaustion as to comments on EIR/EIS; and
  - Mitigation involving three-spined unarmored stickleback, a fully-protected species.
- Trial court invalidated; Second District reversed.

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

- Upheld BAU approach—statewide reduction in GHG emissions to 29% below "business as usual" by 2020 to achieve AB 32 goal.
- But CDFW abused its discretion in applying the BAU approach:.
  - No substantial evidence to show that project's reduction (31%) would help achieve AB 32's statewide goal (29%);
  - "a greater degree of reduction may be needed from new land use projects" to achieve statewide goal;
  - Over time, 2020 goals will become "less definitive guide."*

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

- Court offered pathways to compliance (e.g., local climate action plans or sustainable communities strategies), but:
  - "We do not . . . guarantee that any of these approaches will be found to satisfy CEQA's demands as to a particular project."
- Comments submitted on Final EIR/EIS during federal process but *after* CEQA-mandated comment period served to exhaust administrative remedies under PRC § 21177(a):
  - In providing additional opportunity for public comment, purposes of exhaustion were satisfied.

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

- Fully Protected Species statute (F&GC § 5515) prohibits "take" of listed species (here, stickleback).
  - Take includes to "pursue," "catch," or "capture."
- EIR mitigation mandated relocation—CDFW argued it was consistent with purpose of statute by promoting conservation.
- Court interpreted statute strictly to prohibit "take," whatever the purpose.

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

- Supreme Court ruled against CDFW and remanded to Second Appellate District to address exhaustion, climate change, and other issues left unresolved (e.g., water quality).
- On remand, Second District published only procedural part:
  - Absent specific legislation, appellate districts have no jurisdiction to issue and supervise writs of mandate;
  - That power is reserved to trail courts on remittitur.

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

- Challenge to EIR for Plan Bay Area, a Sustainable Communities Strategy developed by MTC and ABAG under SB 375:
  - SB 375 requires MPOs to adopt plans to meet state and regional GHG-reduction targets.
- First District rejected claims concerning project objectives, baseline, and alternatives that all centered on ability to meet targets without need for "draconian" land-use regime:
  - Regional plans are in addition to statewide mandates;
  - Claims nothing more than attack on wisdom of Plan.

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Cleveland National Forest Found. v. San Diego Assoc. of Governments (Pending)

- Was EIR for 2050 Regional Transportation Plan/Sustainable Communities Strategy required to analyze consistency with Executive Order No. S-3-05, requiring emissions 80% below 1990 levels by 2050?
- Trial court invalidated EIR, 4th Circuit affirmed.
- What does § 15064.4 require?
- Case is fully briefed.

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

- Challenge to EIR for 148,000-sq. ft. retail facility:
  - During pendency of suit, City prepared Addendum to address energy impacts and *Calif. Clean Energy Comm. v. City of Woodland*;
  - Energy impacts analysis required under PRC § 21100(b)(3), Guideline 15126.4, and Appendix F.
- First District invalidated EIR's energy impacts analysis:
  - No separate analysis;
  - No energy use calculations for vehicle trips or construction;
  - Addendum could not cure inadequate EIR.

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

- Overturned EIR for commercial retail development:
  - No substantial evidence that project would meet GP policy incorporating energy efficiency standard (15% over Title 24);
  - No substantial evidence to show consistency with GP requirement for on-site electricity generation to maximum extent feasible; and
  - Revisions to air quality analysis and redesign of stormwater plan required recirculation.
- Violated Subdivision Map Act for failure to make all *affirmative* findings under Section 66474 in approving parcel map.

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Scope of CEQA

1) *Union of Medical Marijuana Patients, Inc. v. City of Upland*

2) *Delaware Tetra Technologies, Inc. v. County of San Bernardino*

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

- City adopted ordinance prohibiting mobile medical marijuana dispensaries, without CEQA review.
- Fourth District held that, as a matter of law, adoption of ordinance not a 'project' subject to CEQA:
  - It restated prohibition imposed by earlier ordinance, and thus did not cause a physical 'change' in the environment;
  - Even so, possible environmental impacts based on "layers of speculation" and thus not reasonably foreseeable.

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

- First of six challenges to public/private Cadiz Project:
  - Install wells and pump groundwater from Mojave Desert
  - 50,000 afy over 50-year term
  - Subject to County's DGMO and later GMP
  - MOU set expectations for providing information for and implementation of final GMP under DGMO if approved
  - MOU challenged as requiring CEQA compliance before approval
- Fourth Appellate District upheld MOU:
  - MOU not "approval of a project" as it did not foreclose alternatives/mitigation or otherwise commit to Project;
  - MOU a framework for completing GMP and not "binding."

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Exemptions

1) *Berkeley Hillside Preservation v. City of Berkeley* (on remand)
2) *Citizens for Environmental Responsibility v. State ex rel. 14th District Agricultural Ass'n*
3) *Walters v. City of Redondo Beach*

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

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

- Remand of 60 Cal.4th 1086 (2015)
- 6,478 square-foot, single-family home approved by City
  - 4,000 sq. ft., 10-car garage on steep slopes in Berkeley hills;
  - Relied on single family home and in-fill development exemptions, CEQA Guidelines §§ 15303(a) and 15332.
- Challengers alleged that exemptions did not apply due to unusual circumstances, Guidelines § 15300.2(c):
  - "unusual size, location, nature and scope"; and
  - Massive grading and retaining walls needed to achieve elevations.

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

- On remand, First District upheld City's use of the exemption:
  - Plaintiffs never challenged and thus conceded that project fit within class of projects that presumptively has no effect; and
  - Sufficient evidence supported City that project was not "unusual."
- Court upheld exemption despite "traffic management plan":
  - Standard conditions are not "mitigation" precluding exemptions (cf., *SPAWN v. Marin County* (2005) 125 Cal. App. 4th 1098);
  - Traffic management plans are "common and typical."

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Citizens for Environmental Responsibility v. State ex rel. 14th District Agricultural Ass'n (2015) 242 Cal.App.4th 555

- Rodeo event approved under Class 23 categorical exemption for "normal operations of existing facilities":
  - Equestrian/livestock events since 1941;
  - Average of 2 to 4 events over past 25 to 30 years;
  - Manure managed under a Manure Management Plan ("MMP").
- Plaintiffs challenged exemption, alleging that:
  - Runoff would pollute stream impaired by fecal coliform;
  - This unusual circumstance and MMP precluded exemption.

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Citizens for Environmental Responsibility v. State ex rel. 14th District Agricultural Ass'n (2015) 242 Cal.App.4th 555

- In line with *Berkeley Hillside*, Sixth District held MMP did not constitute mitigation precluding exemption:
  - MMP prepared in 2010, management in place for decades;
  - MMP a "preexisting measure," thus part of "normal operations."
- Unusual circumstances exception did not apply:
  - Compared to activities at facility, rodeo within normal operations (horses/livestock, facilities/operations, and zoning/land uses);
  - Petitioners never attempted to show creek impacts would occur.

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

- Review of Class 3 categorical exemption (small facilities or structures) applied to car wash and coffee shop:
  - De novo standard for interpretation of exemption, whereas substantial evidence on review of application of exemption;
  - Equipment not substantially different from that associated with commercial uses and thus fit under exemption;
  - Car wash did not present "unusual circumstances" and no significant impacts involving noise or traffic.

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Negative Declarations

1) *Preserve Poway v. City of Poway*
2) *Joshua Tree Downtown Business Alliance v. County of San Bernardino*
3) *Coastal Hills Rural Preservation v. County of Sonoma*
4) *Friends of the Willow Glen Trestle v. City of San Jose*

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

- City approved MND for subdivision and grading of property occupied by equestrian boarding/training facility.
  - Future homes subject to later environmental review.
- Trial court granted writ on single ground—substantial evidence of fair argument of adverse impact on "community character."

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

- Fourth District held that "community character" is not an impact under CEQA:
  - "subjective psychological feelings or social impacts" are not aesthetic or cognizable physical impacts.
  - Change in use was consistent with surrounding community.
- Trial court erred in requiring MND to analyze impacts of adjacent rodeo/polo grounds on subdivision (*CBIA v. BAAQMD*).
  - Petitioner failed to cross appeal on other grounds.

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

- Review of MND for 9,100 sq. ft. retail store, Dollar General:
  - Local business alliance filed suit, raising urban decay;
  - Trial court granted writ, relying on layperson testimony.
- Fourth District upheld MND:
  - Urban decay a matter of special expertise—lay testimony with no factual basis insufficient;
  - General plan consistency claim rejected; those claims subject to "abuse of discretion" standard (not fair argument).

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

- Challenge to Subsequent MND for expansion of Buddhist retreat center, affirming storage uses and raising occupancy:
  - Original entitlements and changes approved with MNDs;
  - Petitioner argued "new project" subject to "fair argument."
- Upheld changes as falling within scope of original project:
  - Determination subject to substantial evidence review;
  - No improper deferral of analysis in condition of approval requiring applicant to install infrastructure to be recommended by Fire Marshall.

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

- Challenge to City's demolition of Railroad Trestle on MND;
  - Petitioner clamed and trail court found that because Trestle might be historical, an EIR was required under fair argument standard.
- Sixth District reversed:
  - Consistent with Guideline 15064.5(a)(3) and *Valley Advocates*, fair argument standard does not govern historicity determination;
  - Historicity subject to "preponderance of the evidence" standard (PRC § 21084.1).

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Environmental Impact Reports

1) *North County Advocates v. City of Carlsbad*
2) *SF Baykeeper v. California State Lands Commission*
3) *North Coast Rivers Alliance v. Kawamura*
4) *Center for Biological Diversity v. County of San Bernardino*

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

- EIR for renovation of partially vacant shopping center:
  - City approved Site Development Plan and Specific Plan;
  - Baseline for traffic presumed full occupancy, and traffic analysis applied SANDAG trip generation rates (not actual traffic counts).
- Baseline normally existing conditions, historical baseline proper:
  - Existing entitlements allowed immediate occupancy of full space;
  - Baseline reflected "actual historical operation[s]" and accounted for "temporary lull[s] and spike[s]."

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

- City properly rejected alternative mitigation for traffic impacts (widening of a bridge) as record supported finding of no impact on bridge.
- Court denied City recovery of some costs for staff time to review, correct, and certify the record ($5,802):
  - Petitioners had elected to prepare the record;
  - Court awarded some costs where petitioners displayed "total disregard for cost containment" (additional consultant files).*

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San Francisco Baykeeper, Inc. v. Calif. State Lands Comm. (2015) 242 Cal.App.4th 202

- Challenge to EIR and lease renewals granted by State Lands Commission for sand mining on San Francisco Bay floor:
  - CEQA claims focused on sediment supplies to outer coast;
  - Public trust doctrine claim alleged procedural violation – failure to "consider" public trust in granting leases.
- First District denied all CEQA claims, but granted writ on public trust doctrine claim.

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San Francisco Baykeeper, Inc. v. Calif. State Lands Comm. (2015) 242 Cal.App.4th 202

- Court upheld historical average baseline (2002—2007) despite decline in volumes during recession (*North Co. Advocates*).
- Rejected claim that EIR dismissed cumulative impacts by relying on 'ratio approach' (*Kings Co. Farm Bureau v. Hanford*).
- New scientific articles and supplemental study did not constitute "significant new information" (*Beverly Hills Unified*):
  - While "relevant," analysis did not alter substantive conclusions.

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San Francisco Baykeeper, Inc. v. Calif. State Lands Comm. (2015) 242 Cal.App.4th 202

- State properly exercised discretion in applying non-mandatory Appendix G threshold for mineral resources:
  - Project would not result in "loss of availability" of mineral resource;
  - Instead, project provides citizens "access to that very resource."
- While State failed to notice and consult with trustee agencies (Coastal Commission and City/County), error not prejudicial:
  - Trustee agencies had some opportunity to comment but declined;
  - Plaintiff failed to identify any information improperly "omitted."

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San Francisco Baykeeper, Inc. v. Calif. State Lands Comm. (2015) 242 Cal.App.4th 202

- Private use of trust property triggers "affirmative duty" of trustee agency to take trust into account and protect trust uses whenever feasible (see *National Audubon*).
- While compliance with CEQA can fulfill agency's separate trust obligation, the EIR process here did not:
  - While EIR addressed impacts to navigation, recreation, fisheries, habitat, etc., it did not include a separate trust analysis or findings;
  - Cf., *East Shore Parks, CBD v. FPL, SWRCB Cases, EPIC.*

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

- CDFA PEIR for 7-year plan to eradicate light brown apple moth:
  - DEIR declined to analyze any alternative to eradication, citing project objective of eradication (and not control/management);
  - After publication of FEIR, USDA determined eradication infeasible;
  - CDFA certified FEIR and adopted 7-year "control" plan.
- CDFA violated CEQA by adopting alternative not analyzed in EIR – the narrow project objective (eradication) "infected" entire EIR and thus did not consider reasonable range of alternatives.

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

- Challenge to Cadiz Groundwater Project EIR and lead agency designation for public/private partnership;
- Water District was proper lead agency under Guideline 15051:
  - As part of partnership, district was carrying out project;
  - District had greatest responsibility for project as a whole;
  - MOU property designated district, which had a "substantial claim," as lead

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

- Created new rule for public/private partnerships: the lead agency for a project carried out as a public/private partnership may be the public agency that is part of the public/private partnership or the agency with the greatest responsibility for supervising or approving the project as a whole.
- EIR's project description was not inaccurate, misleading, or unstable about duration or conservation purpose of project.

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

- Review of amended Reclamation Plan and EIR for 3,510-acre limestone and aggregate mine – CEQA and SMARA claims.
- Sixth District upheld EIR and amended Reclamation Plan:
  - No "piecemealing" where proposal for future pit was withdrawn and would not change nature or scope of amended Plan;
  - Need not adopt overriding considerations where impact to red-legged frog deemed less than significant;
  - Biologist's email clarifying frog's absence deemed part of record.

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Questions?

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