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CEQA YEAR IN REVIEW 2014

A SUMMARY OF PUBLISHED APPELLATE OPINIONS AND LEGISLATION UNDER CEQA

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In 2014, courts, regulators and public agencies continued to struggle with the relationship between CEQA and California's efforts to reduce greenhouse gas emissions. Courts of appeal held that San Diego County's regional transportation plan, sustainable communities strategy and climate action plan all violated CEQA, concluding that public decisionmakers had not done enough to analyze and mitigate GHG impacts from vehicles. Another court held that EIRs must provide detailed discussion of a proposed project's energy use. And under the mandate of Senate Bill 743, the Office of Planning and Research proposed sweeping CEQA Guidelines changes that would shift the focus of CEQA transportation analysis from traffic congestion to reduction of vehicle GHG emissions.

The year also saw a surprising conflict in decisions regarding the analysis of impacts to agricultural resources, with one court reaffirming a lead agency's ability to identify its own significance thresholds and another court taking a much more hands-on approach. Turning to mitigation for impacts to agricultural land, a third court confirmed earlier cases holding that CEQA does not require agricultural conservation easements as mitigation.

Court decisions tackling the nuts-and-bolts operation of CEQA were equally interesting.

During the year four appellate courts discussed the functions and uses of program EIRs versus project EIRs; these cases may help lay to rest persistent misconceptions about program EIRs. One court addressed the circumstances under which a city commission can approve a CEQA document. Another delved, with uncertain results, into the distinction between a proposed project element and a mitigation measure.

The California Supreme Court issued only one CEQA decision in 2014. The court held that CEQA compliance is not required where a city council is presented with an initiative measure and a short Elections Code deadline to either adopt or reject it.

Finally, the Legislature's key contribution in 2014 was Assembly Bill 52, which adds tribal cultural resources to the categories of cultural resources in CEQA, provides for tribal consultation, and requires lead agencies to consider mitigation measures for impacts to tribal cultural resources.

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A. WHEN DOES CEQA APPLY?

1. CEQA Compliance Not Required For Council-Adopted Land Use Initiative Measure

***Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal.4th 1029 (2014)**

Developers, project opponents, agencies and courts often lose the forest for the trees when considering CEQA issues. A prime example is the conflicting appellate authority and public debate on the question whether a city council's adoption of a voter-sponsored initiative measure is subject to CEQA.

In *Tuolumne Jobs & Small Business Alliance* the California Supreme Court answered "no" to this question, in a decision that brings some welcome common sense to the CEQA world. Rather than focusing on the question whether a council decision to adopt an initiative measure is ministerial, as lower courts have done, the court simply ruled that the language and intent of the Elections Code preclude application of CEQA.

At issue in the case was the "Wal-Mart Initiative," an initiative petition that proposed a specific plan for a Wal-Mart Supercenter. The city council adopted the initiative measure instead of placing it on the ballot. The council did not take any steps to comply with CEQA. Opponents sued, claiming the city should have. The trial court ruled for the city, the court of appeal ruled for the opponents, disagreeing with an earlier appellate decision that had reached the contrary result, and the California Supreme Court then took the case. Focusing on the fundamentals, the court upheld the city's action.

The court first examined the language of the Elections Code, which requires city councils and boards of supervisors to act quickly upon receipt of a qualified voter-signed initiative petition, and allows them to adopt the measure without alteration as an alternative to putting it on the ballot.

The court noted that the delay that would be required for CEQA review meant that CEQA compliance would essentially nullify these Election Code provisions. Further, even if time constraints permitted CEQA review, that review would be pointless, as the Elections Code does not give cities authority to reject a qualified measure or require alterations to lessen its environmental impacts.

The court also explored legislative history. It noted that the Legislature had failed to pass a handful of bills that would have required environmental review of voter-signed initiative measures, while adopting a law that allows preparation of a report to be completed within 30 days. The court found this evidence telling, and concluded that adoption of that law represented a legislative compromise, balancing the right of initiative with the goal of informing voters and local officials about potential consequences of an initiative's enactment: "Thus, when faced with competing bills, the Legislature enacted the bill that gave local governments the option of obtaining *abbreviated* review to be completed with the short time frame required for action on initiatives."

The court also addressed policy issues. The opponents argued that developers could use the initiative process to avoid CEQA review. The court responded by noting that the initiative power can also be used to thwart development. It concluded that: "these concerns are appropriately addressed to the Legislature. The process itself is neutral. The possibility that interested parties may attempt to use initiatives to advance their own aims is part of the democratic process.

2. Actions By The Governor Are Not Subject To CEQA

***Picayune Rancheria of Chukchansi Indians v. Brown*, 229 Cal. App. 4th 1416 (3rd Dist. 2014)**

The Picayune Tribe, the operator of a casino in Madera County, brought an action against the Governor challenging the Governor's concurrence in the approval of a competing casino by the Secretary of the Interior under the Indian Gaming Regulatory Act. The Tribe claimed that the Governor's concurrence constituted an approval of a "project" subject to CEQA and that the Governor was required to comply with CEQA before issuing a concurrence. The lower court dismissed the case, finding that CEQA does not apply to actions taken by the Governor, and the court of appeal upheld that ruling.

The court of appeal described the case as presenting a single question: whether the Governor is a "public agency" for purposes of CEQA. By statute, CEQA applies "to discretionary projects proposed to be carried out or approved by public agencies." CEQA § 21080(a). Public agencies are defined as including "any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." CEQA § 21063.

The court held that despite the inclusive language of the statute, nothing in its "explicit language" suggests the Legislature intended to encompass the Governor within the term "public agency" for purposes of CEQA. Because the Governor is not a "public agency" within the meaning of CEQA, there was no legal support for the suit, and the trial court properly dismissed it.

B. EXEMPTIONS FROM CEQA

1. Is The Possibility Of A Significant Effect Enough To Disqualify Projects From Qualifying For A Categorical Exemption?

***San Francisco Beautiful v. City and County of San Francisco*, 226 Cal. App. 4th 1012 (1st Dist. 2014)**

In *San Francisco Beautiful* the First District Court of Appeal found that the installation of 726 metal cabinets on city sidewalks as part of AT&T's fiber optic network expansion falls within a CEQA categorical exemption.

It first found that the project falls within the CEQA Class 3 exemption for the "installation of small new equipment and facilities in small structures." It then dispensed with petitioner's argument that the an exemption was precluded by the "unusual circumstances" exception to the categorical exemptions as well as the argument that the city had improperly relied on mitigation measures in finding the project exempt.

City properly used a categorical exemption for the installation of new small cable boxes on urban city sidewalks.

The court explained that the Class 3 exemption in CEQA Guidelines section 15303 establishes exemptions for "installation of small new equipment and facilities in small structures." Petitioner argued that the project did not fall under this exemption because the project did not involve installation of equipment in previously constructed structures. The court quickly dispensed with this argument, holding that the terms of that provision do not limit installation of small new equipment and facilities to existing small structures. The court reasoned that if such a limitation had been intended, it could have easily been included in the exemption but was not, and that the project was properly an "installation" for the purposes of the Class 3 exemption.

Petitioner failed to meet its burden to show that the project will have significant environmental impacts due to unusual circumstances.

Petitioner argued that even if the project fell within the Class 3 exemption, environmental review was necessary due to evidence that the project fell within the "unusual circumstance" exception. Once an agency determines that a project falls

within a categorical exemption, the burden shifts to the challenging party to produce evidence showing that one of the exceptions which bars a categorical exemption applies. The court recognized that there is a split of authority regarding the standard of proof and the standard of review that applies to an agency's determination of whether a project falls within an exception to the categorical exemptions. However, the court held that under either of the standards, petitioners failed to meet their burden.

The court began by considering whether the project presented unusual circumstances. It found the plaintiffs failed to identify "any way in which the utility boxes would create impacts that [differed] from the general circumstances of the projects covered by the exemption." In considering this issue, the court took account of the context of the city's urban environment and all existing utilities on the public right of way. Noting that San Francisco is already replete with facilities located on the public right of way, the court found that the addition of 726 additional utility cabinets would not be "unusual."

Petitioner argued that because the project had a potential significant impacts on aesthetics and pedestrian safety, the potential for these impacts itself constituted an unusual circumstance requiring preparation of an EIR. The court noted that while this issue was currently being considered by the California Supreme Court in Berkeley Hillside Preservation v. City of Berkeley, the outcome of Berkeley Hillside Preservation would not be relevant to this case because the petitioner failed to even demonstrate a fair argument of significant impacts. In concluding that petitioner failed to produce evidence to support the exception, the court noted that the significance of an environmental impact is measured in light of the context in which it occurs and that the city is an urban environment with tens of thousands of buildings along the rights of way. Recognizing the petitioner's concern that the new cabinets might become targets for graffiti or public urination, the court nonetheless concluded that there was no basis to find that people are more likely to engage in those behaviors in the presence of the utility cabinets and thus there was no fair argument that the cabinets would create a significant environmental impact.

The court also noted that petitioner failed to provide "fact-based" evidence to support its argument that the project would have a significant environmental effect. Neither the residents' concerns nor the concerns raised by the government officials rose to the level of "fact-based evidence" that the cabinets would substantially degrade the existing visual character of the urban environment in which they would be placed.

The categorical exemption did not rely on mitigation measures.

The court also dispensed with petitioner's argument that the city improperly relied on mitigation measures, specifically review by the Department of Public Works, in concluding the project was categorically exempt from CEQA. The court explained that application review is required under the City's Public Works Order, and an agency may rely on generally applicable regulations to conclude that an environmental impact will not be significant under CEQA. Additionally, the memorandum of understanding submitted by AT&T was not a basis for the city's decision that the project qualified for a categorical exemption from CEQA, nor was it a mitigation measure for a significant effect on the environment. Thus, compliance with the city ordinance and the memorandum of understanding did not constitute mitigation measures, and the city did not improperly rely on them in declaring the project exempt.

2. Plastic Bag Industry Loses Another CEQA Challenge To Local Ordinance

***Save the Plastic Bag Coalition v. City and County of San Francisco*, 222 Cal. App. 4th 863 (1st Dist. 2014)**

In the third such case to result in a published opinion, the plastic bag industry has lost its challenge to San Francisco's "single-use checkout bag" ordinance. As it did in an earlier challenge to Marin County's bag ordinance, the court of appeal held the city properly relied on CEQA categorical exemptions in enacting the ordinance and did not need to prepare an environmental impact report.

San Francisco's ordinance applies to all retail stores, including retail food establishments; imposes a new 10-cent charge for a single-use compostable plastic or recycled paper bag; and establishes an outreach and education program.

The Coalition made four arguments that the city improperly invoked CEQA categorical exemptions (Classes 7 and 8) that apply to regulatory actions to protect natural resources and the environment. First, it argued that the California Supreme Court, in *Save the Plastic Bag Coalition v. City of Manhattan Beach*, had precluded any city larger than Manhattan Beach from relying on a categorical exemption to avoid preparing an EIR before enacting an ordinance restricting the use of plastic bags. Describing this argument as "perplexing," the court found nothing in the Supreme Court's opinion to support it.

Second, the court rejected, as it had in the Marin County case, the Coalition's argument that ordinances are not regulatory actions, and therefore that CEQA's categorical exemptions for "regulatory actions" could not apply.

Third, the Coalition argued that even if categorical exemptions would otherwise apply, "unusual circumstances" precluded the city's use of those exemptions. The court ruled that, even assuming a challenger-friendly "fair argument" standard applied to this question—an issue that the California Supreme Court is currently considering in another case—the Coalition had established no fair argument that unusual circumstances showed the plastic bag ordinance would harm the environment. Discerning two claims of unusual circumstances, the court began by rejecting as "unsupported theory" the assertion that tourists and commuters would not use, or would throw away, reusable bags. The court then rejected the Coalition's reliance on studies indicating that paper bags are more damaging to the environment than plastic bags, noting that the San Francisco ordinance is not a plastic bag ordinance, but rather is intended to reduce all single-use bags.

Finally, the court rejected the Coalition's argument that the ordinance's 10-cent charge was a "mitigation measure," and therefore could not be taken into account in determining whether categorical exemptions applied. The court concluded that the fee was integral to the ordinance and not a mitigation measure.

The San Francisco case, like the Manhattan Beach and Marin County cases before it, indicates that CEQA challenges are unlikely to derail carefully crafted single-use bag ordinances.

3. Renewal of Interim Contracts For Delivery Of Central Valley Project Water To Districts An Ongoing Project Exempt From CEQA

North Coast Rivers Alliance v. Westlands Water District,
227 Cal. App. 4th 832 (5th Dist. 2014)

A court of appeal has held that water districts' renewals of water distribution contracts for Central Valley Project water were exempt from CEQA under the statute's "ongoing projects" exemption as well as the categorical exemption for continued use of existing facilities.

Westlands Water District serves over 600,000 acres of farmland with CVP water. The CVP is a federal reclamation project built within the major watersheds of the Sacramento and San Joaquin river systems and the Delta.

The original contract between the Bureau of Reclamation and Westlands was entered into in 1963 and was to remain in effect for 40 years. The Improvement Act of 1992 provides that the Bureau "shall," upon request, renew existing long-term water service contracts for a period of up to 25 years—but only after the Bureau prepares a federal Environmental Impact Statement that examines the effects of implementing the Act on the environment. Delays in the completion of the EIS led the Bureau to enter into a series of interim two-year contracts with Westlands and other Districts. In December 2011, the Districts approved the two-year interim renewal contracts that were challenged in this case, finding that the renewals were exempt form CEQA on several grounds.

The appellate court concluded that CEQA's statutory exemption for ongoing projects approved before CEQA took effect applied. The court held that the applicability of the ongoing project exemption depends upon whether the challenged action is a normal, intrinsic part of the ongoing operation of a project approved prior to CEQA or is instead an expansion or modification of a pre-CEQA project. It concluded the exemption applied because the evidence in the record was sufficient to support a finding that the amount of water Westlands was entitled to receive through its existing facilities each year could be traced back to contractual commitments that were made before CEQA's effective date, November 23, 1970.

The court also held that the categorical exemption for continued use of existing facilities applied and that there was no basis for finding that an exemption was precluded by one of the exceptions to the categorical exemptions. The court first found the exception based on a reasonable probability of significant effects due to unusual circumstances did not apply. The petitioners argued significant effects would result because the diversion of more than 1 million acre-feet of water from the Delta each year could adversely affect threatened fish populations and fragile habitat in the Delta and that use of the water for irrigation could add to the salt and selenium buildup in the soil, and groundwater in the Westlands area. The court rejected this claim, determining that application of the correct environmental baseline to assess the project's impacts made it clear that petitioners had failed to show a reasonable possibility of a significant effect on the environment: The large volume of water distributed to the water districts and used for irrigation was clearly part of the existing environmental baseline for the district's ongoing operations and a potential for adverse change in the environment from these existing conditions was not shown. Further, even if were assumed some change from the existing environmental baseline might occur, the record evidence was insufficient to show that the brief period involved in the interim renewal contracts—only two years—would potentially have a significant environmental effect.

The court also rejected the argument that the interim renewal contracts triggered the exception for "successive projects of the same type" which may result in significant cumulative impacts. Petitioners claimed the successive contract renewals would create significant cumulative environmental damage over time, including salt and selenium buildup in the soil and groundwater, as well as harm to salmon, smelt and other endangered fish populations and their habitat in the Delta. The court concluded, however, that under the "unique statutory context" of the case, the short-term, interim renewal contracts did not amount to "successive projects of the same type."

C. NEGATIVE DECLARATIONS

1. Court Reaffirms City's Discretion To Identify Local Historic Resources

Citizens for the Restoration of L Street v. City of Fresno
229 Cal. App. 4th 340 (5th Dist. 2014)

In *Citizens for the Restoration of L Street* an appellate court ruled that the substantial evidence test, not the fair argument test, governs review of an agency's discretionary determination whether buildings or districts should be treated as historical resources under CEQA.

BACKGROUND

The case concerned a proposed residential infill development project in the City of Fresno that would demolish the Crichton Home, a site which was designated as a heritage property by the city's preservation commission in 2007. Under the city's code, heritage properties are not designated as historical resources in the local register, but are nonetheless worthy of preservation. The Crichton Home, however, had fallen into disrepair and most of its historic integrity had been lost.

The city's initial study found the project would not result in any significant environmental impacts and that the Crichton Home was not a historical resource. The preservation commission then considered and approved a mitigated negative declaration and issuance of a demolition permit.

Petitioners appealed the preservation commission's approvals, asserting that the commission did not have authority under the city code to make CEQA determinations. The city council denied the appeal, finding that the commission had the requisite authority to make a determination on the mitigated negative declaration, and upheld the commission's decision to approved it. Project opponents filed suit, alleging that the city had failed to comply with CEQA.

THE SUBSTANTIAL EVIDENCE STANDARD, NOT THE FAIR ARGUMENT STANDARD, APPLIES TO A PUBLIC AGENCY'S DETERMINATION OF HISTORICITY.

Petitioners argued that the fair argument standard applies to review of the threshold question whether a building or site is a historical resource under CEQA. In petitioners' view, whether a project site contains a building that is a historical resource should be reviewed under the same fair argument standard that applies to an agency's determination whether an environmental impact is significant.

The court rejected this argument, finding that the substantial evidence standard applied to the commission's determination of historicity. Relying on legislative history, the court concluded that CEQA's provisions concerning historical resources were intended to allow a lead agency to make a discretionary decision about the historic significance of certain resources. The position that only a fair argument is needed to demonstrate historic significance is inconsistent with that discretion. The court found that the preservation commission's determinations were supported by substantial evidence and consequently upheld the determinations.

CEQA PERMITS DELEGATING A LEAD AGENCY'S AUTHORITY TO A COMMISSION, BUT SUCH DELEGATION MUST BE CLEAR.

CEQA allows public agencies to delegate the authority to make a final CEQA determination and approve a project to a subordinate body, as long as they also provide for an appeal to the agency's elected decision-making body if it has one. Therefore, the court concluded, the city had the authority the delegate the authority to approve the mitigated negative declaration and the project to the preservation commission.

The court, however, also decided that the city had not delegated the authority to approve the mitigated negative declaration for the project to the commission. While the preservation commission had the authority to approve permits to demolish heritage properties, the court found it did not have decision-making authority over the project, nor was there any explicit delegation of authority to approve the mitigated negative declaration. The court was not persuaded that the preservation commission's authority to provide review and comments on permit actions gave it authority to approve or disapprove the mitigated negative declaration.

The court also rejected the city's alternative argument that the city council's subsequent denial of the appeal constituted a de novo review of the mitigated negative declaration and that this cured any defect in the proceedings before the preservation commission. The court found that the city council had failed to act as the decision-making body in approving the demolition permits and failed to abide by the notice procedures and make the findings required by CEQA.

2. Evidence That Potential Future Uses Might Cause Significant Environmental Impacts Precludes Adoption of Negative Declaration For Approval Of Subdivision Map.

***Rominger v. County of Colusa*,**
229 Cal. App. 4th 690 (3rd Dist. 2014)

At issue was a 159-acre property in a rural area of unincorporated Colusa County. The existing uses on the property were agricultural-industrial. In 2001, the county had approved general plan and zoning amendments that changed the designation of the property from agricultural-industrial to industrial use.

Eight years later, the project proponent applied for a tentative subdivision map that would divide the property into 16 parcels. The application did not include any specific development proposal.

The county adopted a mitigated negative declaration and approved the subdivision map, and the petitioner filed an action seeking a writ of mandate asserting, among other things, that the county had violated CEQA by failing to prepare an EIR before approving the subdivision map.

The subdivision was a CEQA project and not subject to the common sense exemption.

The county asserted that the subdivision was not a CEQA project and it was otherwise exempt under the common sense exemption. The court agreed with the county that nothing barred the county from arguing that the environmental review it conducted— adoption of a mitigated negative declaration—exceeded what was legally required. The court, however, agreed with the petitioner that the subdivision was a project subject to CEQA. The court noted that the goal of subdividing is to make that property more useful, and with that potential for greater or different use comes the potential for environmental impacts; precisely the impacts with which CEQA is concerned.

The court also agreed with the petitioner that the project did not fall under the common sense exemption. The court stated that for the common sense exemption to apply, the county would have to show, based on the evidence in the record, that there was *no possibility* that the subdivision might result in a significant effect on the environment. The court found the county had made no such showing, however, and that it remained an "eminently reasonable possibility" that the creation of smaller parcels that are easier to finance would lead to development that might not otherwise occur.

A mitigated negative declaration was inappropriate because there was substantial evidence in the record sufficient to support a fair argument that the subdivision may result in significant traffic impacts.

The court held that the petitioner had met its burden of showing that the record contained substantial evidence supporting a fair argument that the subdivision might have significant environmental impacts related to traffic. In support of their comments on traffic impacts, the petitioner produced a letter from a traffic engineer pointing out that the county's trip generation figures were unrealistically low because they presumed no change in the number of trips generated by the existing agriculture/industrial uses. The letter explained that, due to a number of factors, trip generation would be better represented by assuming general light industrial uses which would result in ten times the trips assumed by the county's estimates. The letter went on to explain that the greater traffic generated under these projections could potentially have a significant impact on one particular intersection.

In response, the county argued that it would be impossible and inaccurate to attempt to quantify all potential future development that might occur within the subdivision and that its assumptions regarding trip generation were supported by substantial evidence. The court disagreed, carefully distinguishing the substantial evidence inquiry for EIRs and the fair argument standard that applies to negative declarations:

For our purposes, the question is not whether [the engineer's] opinion constitutes proof that the greater traffic generating industrial development will occur in the subdivision. Rather, the question is whether [the engineer's] opinion constitutes substantial, credible evidence that supports a fair argument that such development may occur and that, as a result, the greater traffic generated by such development may have a significant impact on the environment surrounding the project, and therefore an EIR was required.

The court found that the petitioner had met this burden and that none of the county's arguments supported a contrary conclusion.

Petitioner's arguments about impacts in other areas did not amount to a fair argument

The petitioner claimed that there was a substantial evidence of a fair argument that the project might cause a significant impact in other areas in addition to traffic. The court rejected all these claims. Discussed below are two impact areas the opinion addressed in some detail:

SIGNIFICANCE STANDARD FOR LOSS OF AGRICULTURAL LAND.

In analyzing agricultural impacts, the county adopted a standard of significance that differed from the initial study checklist in Appendix G of the CEQA Guidelines. In particular, the county's standards did not treat the loss of prime farmland as a significant impact unless the land was also designated for agricultural land uses by the county. The petitioner claimed that the county had no right to apply a standard of significance different from the Appendix G checklist and that any loss of prime farmland should be treated as a significant impact.

The court rejected this argument for several reasons:

- The checklist form in in Appendix G is "only suggested, and public agencies are free to devise their own format for an initial study."
- CEQA grants agencies discretion to develop their own thresholds of significance.
- Appendix G provides only a "yes" or "no" answer to whether a project will convert prime farmland to non-agricultural use but does not address the issue of the significance of the impact. A lead agency still has to evaluate the evidence to determine whether the conversion of prime farmland constitutes a significant effect on the environment.

MITIGATION OF ODOR IMPACTS.

The county found that because the project's future land uses are undetermined, the potential for odor impacts from the project were potentially significant. To address this, it adopted a mitigation measure requiring consultation with local agencies to determine what type of engineering controls or other odor-reduction measures could be implemented prior to the issuance of building permits.

The petitioner claimed that there was no indication that the engineering controls or other odor-reduction measures would be available or would reduce odor impacts to a less-than-significant level. To support this position, the petitioner presented a letter submitted by their air quality consultant that argued that the odor mitigation was not sufficient.

The court rejected both claims. First, the court concluded that the letter's arguments were too vague to amount to substantial evidence supporting a fair argument of significant odor impacts notwithstanding the adopted mitigation. The consultant failed to identify what types of odors could not be adequately mitigated with emissions control technology and what type of land uses might occur that could produce such odors.

The court rejected the petitioner's other claim that the mitigation was unenforceable and deferred. The mitigation required consultation and required the recommended measures to be installed.

D. ENVIRONMENTAL IMPACT REPORTS

1. EIR For SANDAG's Regional Transportation Plan Rejected By Court Of Appeal

***Cleveland National Forest Foundation v. San Diego Association of Governments,* 231 Cal. App. 4th 1056 (4th Dist. 2014)**

In a long-awaited decision, a court of appeal overturned the environmental impact report for the San Diego Association of Governments' 2050 Regional Transportation Plan and Sustainable Communities Strategy. The most remarkable ruling, in what is likely to be viewed as a highly controversial decision, is the majority's finding that the EIR was deficient because it did not assess the plan's consistency with the 2050 greenhouse gas emissions reduction goal contained in an executive order issued by the Governor in 2005. The majority opinion was accompanied by a stinging dissent which argued that the decision improperly intrudes on the fact-finding and policy-making functions that are reserved by law to public agencies.

BACKGROUND OF THE PLAN AND SENATE BILL 375

The decision concerns SANDAG's Regional Transportation Plan, which contains the Sustainable Communities Strategy required by SB 375. When it enacted SB 375, the Legislature recognized that cars and light duty trucks emit 30% of the state's greenhouse gases. Accordingly, SB 375 required the Air Resources Board to establish greenhouse gas emissions reduction targets applicable to cars and light duty trucks for each of the state's metropolitan planning regions. The initial targets set goals for the years 2020 and 2035. SB 375 requires the Air Resources Board to consider new targets every eight years. The targets set for the San Diego area required a 7 percent CO_2 reduction by 2020 and a 13 percent reduction by 2035.

In addition, the Legislature recognized that to achieve these targets, changes would need to be made to land use patterns and policies. For this reason, SB 375 also required Regional Transportation Plans to include land use-related strategies for achieving the targets, called Sustainable Communities Strategies. The SANDAG Regional Transportation Plan was the first in the state to be adopted with a Sustainable Communities Strategy.

The plan, however, drew fire. While it showed greenhouse gas emissions reductions through 2020, it also showed increases in greenhouse gas emissions after that date. Project opponents argued this was inconsistent with SB 375's goals, the policy in Assembly Bill 32 requiring that emissions reductions achieved by 2020 be maintained past that date, and Executive Order S-3-05, which targets larger scale emissions reductions by 2050.

EIR'S ANALYSIS OF GREENHOUSE GAS EMISSIONS

In 2005, then Governor Schwarzenegger issued Executive Order S-3-05 establishing statewide targets for greenhouse gas emissions reductions that included reducing emissions to 1990 levels by 2020 and to 80 percent below 1990 levels by 2050. The EIR found that SANDAG's plan would reduce greenhouse gas emissions until 2020, but that emissions would increase in later years. While it discussed the 2050 emissions reduction target in the executive order, it did not treat the order's 2050 emissions reduction target as a standard for assessing the significance of the plan's greenhouse gas impacts.

The court's majority agreed with the plan opponents, holding that the EIR's greenhouse gas impacts analysis was inadequate for failing to analyze the plan's consistency with the executive order. While the executive order was not a legislative enactment, and established only statewide rather than regional emissions reduction targets, the majority reasoned that the executive order led to later legislation that "validated and ratified the executive order's overarching goal of ongoing emissions reductions," and therefore the executive order continues to "underpin the state's efforts to reduce greenhouse gas emissions throughout the life of the transportation plan." According to the majority, the absence of an analysis comparing the plan with the executive order's 2050 emissions reduction target amounted to "a failure to analyze the Plan's consistency with state climate policy."

The majority rejected SANDAG's argument that the EIR's use of three different significance thresholds authorized by CEQA Guidelines section 15064.4(b) was sufficient, ruling that the EIR's failure to consider the plan's consistency with "state climate policy" as stated in the executive order "frustrates the state climate policy and renders the EIR fundamentally misleading."

MITIGATION OF GREENHOUSE GAS EMISSIONS IMPACTS

The majority also held that the EIR did not consider a sufficient range of mitigation measures for greenhouse gas emissions, and should have discussed additional mitigation options that could "both substantially lessen the transportation plan's significant greenhouse gas emissions impacts and feasibly be implemented." The EIR was deficient, according to the majority, because it did not include measures that the court said would encourage development "smart growth areas" and promotion of low carbon transportation, walking and transit use.

ALTERNATIVES ANALYSIS

Although the EIR analyzed seven alternatives to the proposed plan, the majority nonetheless concluded that the EIR failed to analyze a reasonable range of alternatives. The majority found the EIR deficient because it had not discussed an alternative which could significantly reduce total vehicle miles traveled and instead emphasized congestion relief. Pointing to the drawbacks of congestion relief as a long term strategy, the court ruled the EIR was fatally flawed because it did not include an alternative that would focus on public transit projects.

AIR QUALITY IMPACTS

The majority also found the plan's air quality impacts analysis deficient. The arguments centered on the required level of detail in a program-level EIR. The court found the EIR deficient because SANDAG had not identified sufficient evidence in the record showing it was not feasible to provide more definitive information about existing exposure to toxic air contaminants and the location of sensitive receptors, as well as the correlation of adverse health impacts with plan-related emissions. The court also found the EIR improperly deferred analysis of appropriate mitigation measures and failed to set performance standards.

AGRICULTURAL RESOURCE IMPACTS

Finally, the court found fault with the EIR's agricultural impacts analysis. SANDAG used data from the state's Farmland Mapping and Monitoring Program to analyze the agricultural impacts of the project, as permitted by Appendix G of the Guidelines, augmented by SANDAG's own geographic information system. The court nevertheless found that the EIR's analysis understated the impacts to agricultural resources because the FMMP data do not capture information for farmland under 10 acres and SANDAG's geographic information system may not have included agricultural lands that went into production after the mid-1990s.

THE DISSENTING OPINION

The dissent vehemently disagreed with the majority's rulings on greenhouse gas issues. The dissent expressed serious concern over the majority's analysis of the executive order characterizing its ruling as an improper determination by the court of what significance standards SANDAG should have used. This decision, according to the dissent, "strips lead agencies of the discretion vested in them by the Legislature and reposes that discretion in the courts." Stating the point even more bluntly, the dissent stated: "This insinuation of judicial power into the environmental planning process and usurping of legislative prerogative is breathtaking."

On January 6, 2014 SANDAG filed a petition with the California Supreme Court seeking review of the court of appeal decision. California Supreme Court No. S223603.

2. Compliance With FAA Regulations Provides Adequate CEQA Mitigation For Aviation Safety Impacts

***Citizens Opposing A Dangerous Environment v. County of Kern*, 228 Cal. App. 4th 360 (5th Dist. 2014)**

Reliance on compliance with FAA regulations as a mitigation measure to reduce impacts to air traffic safety to less than significant levels is appropriate under CEQA, according to the appellate court decision in *Citizens Opposing A Dangerous Environment*.

Two wind energy companies applied to Kern County for rezoning and a conditional use permit for mobile concrete batch plants that would be used to build and operate a wind farm in the Tehachapi Wind Resource Area. After performing an initial study, the county found that the wind farm project could result in significant impacts on the environment and that preparation of an EIR was warranted.

The county's draft EIR indicated that the project might pose a significant safety hazard to aircraft and gliders using the nearby Kelso Valley Airport. The county consequently included a mitigation measure that required the project proponents to obtain a "Determination of No Hazard to Air Navigation" from the FAA for each wind turbine before the county would issue building permits. The board of supervisors found that the mitigation measure reduced impacts to aviation safety to less than significant levels, certified the final EIR, and approved the applications.

Citizens Opposing a Dangerous Environment petitioned for writ of mandamus, challenging the county's certification of the final EIR and approval of the wind project. CODE claimed the mitigation measure's incorporation of compliance with FAA regulations was "legally infeasible," and did not adequately reduce hazards to aviation safety to less than significant levels. The court of appeal disagreed.

CODE contended the mitigation measure was legally infeasible because it would not keep the project from causing adverse impacts to aviation safety, but rather the county hid "behind the fig leaf of a non-existent federal preemption." The court of appeal found, however, that the measure's reference to the FAA's hazard determination process was appropriate. Under this process, the project sponsors were required to submit Form 7460-1, "Notice of Proposed Construction or Alteration" to the FAA and obtain a "no hazard" determination from the FAA in response to that submission. If the FAA were to respond with a hazard determination, the mitigation measure required that the project proponents work with the FAA to remedy the hazard before the county would issue a building permit. As the court observed, "A condition requiring compliance with regulations is a common and reasonable mitigation measure, and may be proper where it is reasonable to expect compliance."

Kern County also did not abdicate its responsibility to mitigate the impact to aviation safety by using compliance with FAA safety regulations as the benchmark. The court found that federal law "occupies the field of aviation safety," and exercises "sole discretion in regulating air safety." The relevant FAA regulations were enacted to establish standards for determining when a proposed structure would constitute an unsafe obstruction to aviation safety, and the process to make such an evaluation. As the court observed, these standards often apply to wind farms because the height of wind turbines often exceeds the reporting thresholds. That the FAA could not enforce the hazard/no hazard determination, because it does not have jurisdiction over land development, does not warrant finding the regulations inapplicable. Rather, the county, as the relevant land use authority, was required to do so by the mitigation measure through the exercise of its police power. Accordingly, the court found that the mitigation measure was legally enforceable, and suitably reduced any impact to aviation safety to less than significant levels.

3. CEQA Lawsuit Fails To Slow High-Speed Rail

Town of Atherton v. California High-Speed Rail Authority,
228 Cal. App. 4th 314 (3rd Dist. 2014)

Several parties, including the San Francisco Peninsula communities of Atherton, Menlo Park, and Palo Alto, challenged the California High-Speed Rail Authority's decision on where to route trains travelling between the Central Valley and the Bay Area. In *Town of Atherton*, the court of appeal upheld the Authority's program EIR for the routing, but rejected the Authority's argument that federal law preempted the application of CEQA.

The court upheld the program EIR the Authority relied on in deciding to approve a high-speed rail route through the Pacheco Pass and several Peninsula communities, rather than a northern route through the Altamont Pass, ruling that:

- The program EIR properly deferred detailed analysis of the impacts of elevating the tracks on portions of the route through the San Francisco Peninsula to a second-tier project-level EIR. Information developed shortly before the program EIR was certified showed that an aerial viaduct was the only feasible alignment in some areas of the peninsula. Petitioners argued that an analysis of the impacts of elevated tracks on peninsula communities should have been included in the program EIR's comparison of the route alternatives. Nevertheless, the court held it was appropriate for the Authority to review this "site specific" issue in a project-level EIR, rather than in the program EIR.
- Petitioners' challenge to the ridership model used in the EIR simply pointed out a "dispute between experts that does not render an EIR inadequate." The Authority was entitled to choose between divergent expert recommendations.
- The Authority was not required to study additional proposed alternatives, because they either were infeasible or were substantially the same as alternatives analyzed in the program EIR.

The Authority had asked the court of appeal to dismiss the case on the ground the federal Interstate Commerce Commission Termination Act preempts application of state environmental laws such as CEQA under these circumstances. Although the federal statute does not preempt all state and local regulations, the court noted that it creates exclusive federal regulatory jurisdiction and remedies over railroad operations. The court concluded, however, that state regulation was not preempted here, based on an exception to federal preemption which applies when a state acts as a "market participant."

This case was not analogous, the court reasoned, to a private railroad company seeking to build a rail line free of state regulations. Instead, the court wrote, the State itself would determine the high-speed train's route, acquire the necessary property, and operate the train. The Authority also had an "established practice" of complying with CEQA, and the 2008 voter-approved bond measure to fund the high-speed rail network included compliance with CEQA as a project feature. For these reasons, the court held the Authority was required to comply with CEQA.

4. No Treasure For Challenger On Appeal: Treasure Island EIR Upheld

Citizens for a Sustainable Treasure Island v. City and County of San Francisco,
227 Cal. App. 4th 1036 (1st Dist. 2014)

Three years after the San Francisco Board of Supervisors unanimously approved a major redevelopment project on Treasure Island and Yerba Buena Island, in *Citizens for a Sustainable Treasure Island* the court of appeal upheld the project's EIR.

In 2011, the board approved a comprehensive plan to redevelop a former naval station located in the middle of San Francisco Bay into a mixed-use community with updated infrastructure and amenities. A "project EIR" analyzed all phases of the project at maximum buildout. A court challenge alleged that the EIR contained insufficient detail to constitute a project EIR and, therefore, should have been prepared as a program EIR.

The court of appeal disagreed: All CEQA requires is that an EIR contain the requisite elements and a level of specificity sufficient for the proposal under consideration, both of which the court found were satisfied. Lead agencies, the court held, have the discretion to determine whether a program or project EIR should be prepared.

The court also rejected the challenger's assertion that the city improperly sought to short-circuit subsequent environmental review by preparing a project EIR, observing that courts apply the same substantial evidence standard in determining whether subsequent environmental review is required whether a project is initially evaluated in a program EIR or a project EIR.

Other attacks on the EIR also failed, including a claim it should have been recirculated in light of comments submitted by the U.S. Coast Guard about potential effects on regulation of ship traffic. The court concluded there was no significant new information that required recirculation because the parties met to discuss the Coast Guard's concerns, a project document and the EIR were revised in response to the comments, the Coast Guard expressed satisfaction with the changes, and no new significant adverse environmental impacts were shown.

5. Highway 101 EIR Felled By Redwoods

***Lotus v. Department of Transportation*, 223 Cal. App. 4th 645 (1st Dist. 2014)**

Caltrans's analysis of impacts to redwoods from realignment of a one-mile stretch of Highway 101 was rejected by the court of appeal because the EIR for the project failed to identify any significance threshold for impacts to redwoods and impermissibly labeled mitigation measures as project features.

Caltrans proposed to adjust the alignment of Highway 101 to allow industry-standard trucks to use the roadway and to improve its safety. Excavation, fill and new pavement would intrude on the structural root zones of at least 74 redwood trees. The EIR identified an extensive set of measures which had been "incorporated into the project to avoid and minimize impacts as well as to mitigate expected impacts." Because the EIR treated these measures as components of the project as proposed, it found that the project would cause no significant environmental impacts.

The appellate court found the EIR's analysis of impacts to the trees' root zones inadequate for two reasons. First, although the EIR provided detailed descriptions of the extent and depth of excavation, fill and pavement within the trees' root zones, it did not "include any information that enables the reader to evaluate the significance of these impacts," such as standards for determining whether trees would survive. In fact, the court found, "the EIR fails to identify any standard of significance, much less to apply one to an analysis of predictable impacts from the project."

Second, the court found that the "avoidance, minimization and/or mitigation measures" described in the EIR were not truly part of the project. Instead, they were mitigation measures, and CEQA requires that an EIR identify impacts before mitigation measures are incorporated in the project and then separately identify mitigation measures and discuss their effectiveness. As the court put it: "By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA."

The court acknowledged that the "distinction between elements of a project and measures designed to mitigate impacts of the project may not always be clear." In a ruling that seemed to prove the point, the court found that the use of special paving material to avoid impacts to root zones clearly was not a mitigation measure while the use of special construction equipment for the same purpose plainly was a mitigation measure, without explaining the distinction between the two.

Two expert opinions cited in the EIR, which concluded that the project would have no significant impact on the root health of the redwoods, did not cure the defect, according to the court. The opinions failed to discuss the significance of the

environmental impacts apart from the mitigation measures incorporated in the project and this meant the EIR "failed to consider whether other possible mitigation measures would be more effective."

The court's distinction between impact avoidance measures that may properly be included in a project description, and mitigation measures that must be separately considered, will prove difficult, if not impossible, to apply. Had the EIR identified a significance threshold for impacts to redwoods, perhaps the court would have viewed the "avoidance, minimization and/or mitigation measures" differently, because the EIR would have provided a context for them.

The decision in *Lotus* highlights the importance of thinking beyond customary, checklist-based significance thresholds, particularly for projects involving impacts to trees. Although the CEQA Guidelines Appendix G checklist addresses tree ordinances, habitats, "forest land" and "timberland," courts often focus on impacts to individual trees. A CEQA document that can be seen as giving short shrift to these impacts is a document in potential peril.

6. Conservation Easements Not Required As Mitigation For Loss Of Farmland

***Friends of the Kings River v. County of Fresno*,**
232 Cal. App. 4th 105 (5th Dist. 2014)

In *Friends of the Kings River,* the Fifth District Court of Appeal upheld the County of Fresno's adoption of an environmental impact report for a mining operation that will result in a permanent loss of 600 acres of farmland. Most notably, the court held that a county is not required to adopt an agricultural conservation easement as a mitigation measure for a project causing direct loss of farmland, even where agricultural conservation easements are economically feasible.

The subject of the appeal was the Carmelita Mine and Reclamation Project, a proposed aggregate mine and related processing plant in the Sierra Nevada Foothills. The 1,500-acre site has significant mineral deposits, and is currently used for growing row crops and stone fruit trees.

The petitioners, Friends of the Kings River, challenged both the project's EIR under the California Environmental Quality Act and the project's reclamation plan under the Surface Mining and Reclamation Act of 1975.

Friends first appealed approval of the project with the State Mining and Geology Board, which granted the appeal and remanded the reclamation plan to the county for reconsideration. The county approved a revised reclamation plan, and Friends appealed to the State Mining and Geology Board again. The board denied the second appeal.

While the first appeal was pending, Friends filed a CEQA lawsuit. The trial court denied the petition. On appeal, Friends argued that the trial court erred by ruling on the petition before it was ripe for review, and that the EIR was inadequate under CEQA for a plethora of reasons.

The court of appeal dismissed Friends' ripeness claim by finding that the State Mining and Geology Board's grant of Friends' first appeal did not affect the validity of the reclamation plan. Thus, the remand of the reclamation plan to the county for reconsideration did not affect the county's certification of the EIR or its approval of the project.

The court then addressed Friends' contention that the county failed to require adequate mitigation for the conversion of farmland in violation of CEQA. The court rejected Friends' argument, noting that the EIR recommended three mitigation measures, which the court upheld: maintaining the current agricultural use of the site until the land is prepared for mining; keeping 602 acres within the site but outside the surface disturbance boundary as an agricultural buffer zone for the life of the use permit; and that mine cells be reclaimed as farmland as adequate materials are generated to fill the empty mine cells.

The court also rejected Friends' contention that the county was required to establish agricultural conservation easements to mitigate the permanent loss of 600 acres of farmland. The court held that while a county must *consider* using agricultural conservation easements as a mitigation measure for direct loss of farmland, it is not *required to adopt* an agricultural conservation easement as a mitigation measure, even where such an easement is financially feasible.

Friends asserted a number of additional CEQA challenges, but those too failed, as the court found that there was substantial evidence to support the county's findings.

Fortunately for project proponents, this decision maintains the variety of mitigation alternatives available when a project will cause a loss of farmland. While recent case law indicates that agricultural conservation easements ordinarily should be evaluated as a potential mitigation measure, a lead agency has discretion to adopt other mitigation measures instead.

7. Greenhouse Gas Mitigation Measure Fails To Comply With County's General Plan Update

***Sierra Club v. County of San Diego*,**
231 Cal. App. 4th 1152 (4th Dist. 2014)

The California Court of Appeal recently invalidated the County of San Diego's climate action plan. The Court held that the CAP violated CEQA by failing to comply with a mitigation measure the County had previously adopted for its general plan update, which required detailed deadlines and enforceable measures to ensure targeted reductions in greenhouse gas emissions.

BACKGROUND

In 2005, then Governor Schwarzenegger adopted Executive Order S-3-05 setting statewide targets for reducing greenhouse gas emissions by 2010, 2020, and 2050. The state legislature then enacted Assembly Bill No. 32, which required that the California State Air Resources Board establish a statewide GHG emissions limit as the 2020 target.

The program EIR for the County's 2011 general plan update acknowledged the need to reduce GHG emissions to target levels by 2020. When it approved the update, the County adopted a group of climate change-related mitigation measures. Among those, Mitigation Measure CC-1.2 committed the County to preparing a climate action plan—CAP—with more detailed GHG emissions reduction targets and deadlines, as well as comprehensive and enforceable GHG emissions reduction measures to achieve specific reductions by 2020. The County subsequently prepared a CAP, which was intended to comply with Mitigation Measure CC-1.2.

The Sierra Club petitioned for a writ of mandate, alleging that the County did not prepare a CAP that included comprehensive and enforceable GHG emission reduction measures that would achieve reductions by 2020 as required by Mitigation Measure CC-1.2. The Sierra Club argued that the County instead prepared the CAP as a plan-level document that did not ensure reductions. The Sierra Club also alleged that CEQA review of the CAP project was performed after the fact, using an addendum to the general plan update program EIR, without: (1) public review, (2) addressing the concept of tiering, (3) addressing the County's failure to comply with Mitigation Measure CC-1.2, or (4) a meaningful analysis of the CAP's environmental impacts.

THE COURT'S ANALYSIS

The court first rejected the county's statute of limitations defense. The County had asserted that Sierra Club's claim that the mitigation measures were not enforceable was barred by the statute of limitations because the Sierra club should have challenged the County's approval of the general plan update program EIR, not the CAP. The Court disagreed, noting that the Sierra Club was not challenging the validity of the program EIR or the enforceability of the mitigation measures contained in

that document. Rather, the Court found, the Sierra Club was challenging the CAP project and was seeking to enforce a key mitigation measure set forth in the general plan EIR.

On the merits, the court held that the County had failed to proceed in a manner required by law in various respects. First, the court determined that the County had failed to adopt a CAP that complied with the requirements of Mitigation Measure CC-1.2, since the CAP did not include enforceable GHG emissions reductions required by Mitigation Measure CC-1.2. To the contrary, the CAP explicitly did not ensure the required GHG emissions reductions, and the County described the CAP strategies as recommendations. Further, the CAP contained no specific deadlines for reducing GHG emissions.

Second, the court determined that the County failed to make findings regarding the environmental impacts of the CAP project. Instead of conducting an environmental analysis, the County erroneously assumed that the CAP project was within the scope of the general plan update. However, no details or components of the CAP project had even been created at the time of the general plan update as contemplated by Mitigation Measure CC-1.2.

Third, the court determined that the County had failed to incorporate mitigation measures directly into the CAP. One of the major differences between the CAP anticipated by Mitigation Measure CC-1.2 in the general plan update program EIR and the actual CAP as prepared was that the general plan update program EIR did not analyze the CAP as a plan-level document that itself would facilitate further development. As a plan-level document, the CAP is required by CEQA to incorporate mitigation measures directly into the CAP.

Finally, the court determined that substantial evidence supported the trial court's finding that the County was required to prepare a supplemental EIR for the CAP project. As noted above, the details of the CAP were not available during the program-level analysis of the general plan. Further, the general plan update program EIR did not contemplate that the CAP itself would be a plan-level document. As such, the CAP project was required to undergo environmental review.

The court thus concluded that the CAP did not fulfill the County's commitment under CEQA and Mitigation Measure CC-1.2 to provide detailed deadlines and enforceable measures to ensure GHG emissions reductions.

8. Rule Barring Piecemeal Review Not Violated When Proposal Has Independent Purpose And Is Not An Integral Part Of Another Project

***Paulek v California Department of Water Resources*, 231 Cal. App. 4th 35 (4th Dist. 2014)**

A recent California Court of Appeal decision involving the California Department of Water Resources' Perris Dam Remediation Project addresses recurring questions relating to the scope of a "project" under CEQA, and CEQA's requirement that an EIR consider the "whole of an action" that comprises the project under review.

In its draft EIR, the Department proposed three activities: remediating structural deficiencies in the Perris dam; replacing the dam's outlet tower; and constructing a new emergency outlet extension. In response to comments on the draft EIR, the emergency outlet extension was split off from the rest of the project, to be considered in a separate environmental review process, and the final EIR was limited to the structural remediation and outlet tower replacement components of the proposal.

Paulek challenged the EIR, claiming it was improper for the Department to carve the emergency outlet extension out of the project. The court of appeal rejected the challenge, finding that the emergency outlet extension was not needed to mitigate project-related impacts and that it could stand on its own as an independent project. The court also addressed some important questions regarding an agency's obligation to respond to comments on a draft EIR.

NO LINK TO PROJECT-RELATED IMPACTS

Paulek argued that the decision to remove the new emergency outlet extension from the project left a significant project-related environmental impact unmitigated because flooding would occur in downstream areas in the event of an emergency water release without the outlet extension.

The court rejected this argument because neither the dam remediation or outlet tower replacement activities would cause or increase the risk of flooding. Because the project did not increase the baseline danger of downstream flooding, there was no obligation for the Department to mitigate that danger.

NO IMPROPER PROJECT SEGMENTATION

Paulek next argued that the Department's action deferring the emergency outlet extension constituted improper segmentation of the project in violation of CEQA's rule prohibiting "piecemeal review" of a single project. The court rejected the argument, applying a multi-part test for determining whether proposed actions amount to independent projects:

- The need for an emergency outlet expansion was not a "reasonably foreseeable consequence" of dam remediation, nor did approval of dam remediation and outlet tower replacement legally or practically compel completion of an emergency outlet extension.
- There was no basis to conclude that emergency outlet expansion was a "future expansion" of the other actions that were proposed.
- The emergency outlet extension was not an "integral part of the same project" as the dam remediation and outlet tower replacement because the dam remediation and outlet tower replacement had an entirely different purpose than the emergency outlet extension

ADEQUACY OF RESPONSE TO COMMENTS

Paulek argued that the Department's response to the final EIR comments submitted were inadequate. In rejecting this claim, the court affirmed the following:

- A response to comments is only required with respect to comments from persons who reviewed the draft EIR. An agency is not required to respond to letters submitted before the draft EIR is completed, such as a letter commenting on the notice of preparation
- A "general comment" that does not provide any specific examples of how the draft EIR fails as a CEQA information document requires only a general response.
- An agency may provide a response to a comment by referring to the portions of the EIR that address the issue raised in the comment.

9. Program EIR's Analysis of Urban Decay and Energy Impacts Found Inadequate

***California Clean Energy Committee v. City of Woodland*, 225 Cal. App. 4th 173 (3rd Dist. 2014)**

A Third Appellate District decision found the City of Woodland's EIR for a large regional commercial center inadequate, finding fault with its mitigation measures for urban decay impacts, its assessment of alternatives, and its analysis and mitigation of energy impacts.

MITIGATION MEASURES FOR URBAN DECAY IMPACTS INADEQUATE

The court found three of the city's proposed mitigation measures for urban decay impacts failed to commit Woodland to specific, concrete mitigation actions. For instance, one measure required the developer to contribute funds toward

development of a "retail strategic plan." Another measure required the city to coordinate with the current owner of a retail mall in the city to prepare a strategic land use plan that would analyze potential viable land uses for the site. The court found such measures too vague and uncertain to provide any assurance that they might actually reduce urban decay impacts There was no evidence how development of such plans might stem the deterioration of other areas of city that was expected to occur as business shifted to the new commercial center.

Cities can adopt policies intended to encourage redevelopment, or a change in uses, in declining commercial areas in an effort to respond to expected urban decay impacts. The problem highlighted in the decision in this case, however, is that it is extremely difficult, if not impossible, for a city to commit to adopt such policies at the time it approves a proposed project that might cause such impacts.

ANALYSIS OF ENERGY IMPACTS FOUND DEFICIENT

The court found the EIR's assessment of energy impacts wholly inadequate. The EIR considered the building code's energy conservation requirements, but little else.

- *No analysis of transportation energy impacts.* The court chided the city for failing to follow Appendix F's suggestion to include a study of the project's projected transportation energy use requirements and its overall use of efficient transportation alternatives.
- *Insufficient consideration of construction and operational energy impacts.* The court noted that the EIR's consideration of building standards failed to address either construction or operational energy impacts for a project that transformed agricultural land into a commercial shopping center.
- *Energy impacts for key parts of project not considered.* The city conceded that it did not consider the construction or operational energy impacts of three hotels, a 20,000 square foot restaurant, three fast food restaurants, an auto mall, and 100,000 square feet of office space.

The heightened emphasis on the need to evaluate energy use is relatively new, and many EIRs still do not address the issue in any detail. The court's focus on the standards in Appendix F will undoubtedly lengthen the list of high visibility issues that must be evaluated in EIRs going forward and will likely provide fertile ground for challenging them.

CITY'S REASONS FOR REJECTING ALTERNATIVE TO THE PROJECT FOUND INSUFFICIENT

The court also found fault with the city's findings disapproving a mixed-use alternative. The draft EIR rejected the alternative as economically infeasible, but the city ultimately rejected the alternative as environmentally inferior to the proposed project. The EIR, however, did not contain any evidence that the mixed-use alternative's environmental impacts would be any worse than the proposed project's and in fact concluded that the mixed-use alternative would result in fewer impacts related to physical deterioration and urban decay.

E. CERTIFIED REGULATORY PROGRAMS

1. Nonindustrial Timber Management Plan Passes Muster Under CEQA

Center for Biological Diversity v. California Department of Forestry and Fire Protection (North Gualala Water Company)
No. A138914 (First District, Dec. 30, 2014).

The First District Court of Appeal rejected a CEQA challenge to a Nonindustrial Timber Management Plan, reaffirming the substantial deference owed to agency factual determinations and characterizing petitioners' arguments as mere disagreements with conclusions reached by the agency based on the record.

The California Department of Forestry and Fire Protection (CalFire) approved a Nonindustrial Timber Management Plan (NTMP) authorizing logging on approximately 615 privately-held acres in Mendocino County. An NTMP is prepared by a Registered Professional Forester and evaluates the impacts of the proposed Plan's methods and operations on the environment. An NTMP is part of a certified regulatory program under CEQA and functions as the equivalent of an EIR.

The primary focus of petitioners' CEQA challenge was a 17-acre grove of older-growth timber that potentially functioned as nesting habitat for the marbled murrelet, which is classified as an endangered species under the California Endangered Species Act. CalFire approved the NTMP over petitioners' argument that the plan would have adverse impacts on the functionality of potential murrelet habitat and the murrelet population generally.

Petitioners made several arguments challenging the sufficiency of the NTMP, contending that the lack of adequate information in the NTMP regarding environmental impacts of the Plan amounted to a failure to proceed in the manner required by law. The appellate court disagreed, finding sufficient information in the document to inform the public and support CalFire's conclusions on matters such as cumulative impacts, murrelet presence, continuity of habitat, and impacts of logging on late-seral habitat functionality. Petitioners' claims on these matters, the court concluded, simply amounted to different conclusions based on the same record. The court reinforced the proposition that a reviewing court should not exercise independent judgment regarding the evidence, but should determine only whether the agency's determinations are supported by substantial evidence in light of the whole record.

Petitioners also contended that the NTMP should have been recirculated on the ground that, following public circulation of the Plan, CalFire had approved additional mitigation measures for the protection of murrelet habitat based on a memorandum by a CalFire biologist. The appellate court disagreed, pointing out that a final environmental document will almost always contain information not included in the circulating draft and that the information is not considered significant unless the public is deprived of a meaningful opportunity to comment upon a substantial adverse environmental effect or a substantial increase in the severity of an environmental effect. The court found that this standard had not been met here, finding that substantial evidence supported CalFire's decision not to recirculate the NTMP.

F. SUPPLEMENTAL CEQA REVIEW

1. Airport Challenge Does Not Fly: Court Upholds Use Of Addendum For Changes To San Jose Airport Master Plan

***Citizens Against Airport Pollution v. City of San Jose*, 227 Cal. App. 4th 788 (6th Dist. 2014)**

The City of San Jose's use of an addendum for recent modifications to the San Jose Airport's Master Plan was upheld by the court of appeal. In 1988, the City of San Jose began to prepare an update to its 1980 Airport Master Plan to accommodate projected growth in air traffic through a planning horizon year of 2010. The city completed an EIR for the Airport Master Plan update in 1997, and a supplemental EIR in 2003, and also adopted eight addenda to the EIRs from 1997 through 2010. In the eighth addendum, the city analyzed the potential impacts associated with proposed changes to the Airport Master Plan including: (1) changes in the size and location of future air cargo facilities; (2) replacement of previously planned air cargo facilities with 44 acres of general aviation facilities to accommodate a forecasted increase in use by large corporate jets; and (3) modification of two taxiways to improve access for corporate jets.

Citizens Against Airport Pollution filed suit to challenge the eighth addendum, claiming the changes to the Airport Master Plan amounted to a new project requiring preparation of a supplemental or subsequent EIR. The city responded that the proposed changes did not add up to a new project, but rather were adjustments to an existing plan that had already received environmental review, and therefore an addendum was appropriate.

Heavily relying on the principle that the standard for a court's review of an agency's use of an addendum to an EIR is "deferential," the court upheld the city's decision to adopt an addendum, finding substantial evidence in the administrative record that supported the city's determination that "the changes in the project or its circumstances were not so substantial as to require major modifications to an EIR."

The court considered, but declined to decide, whether the 1997 EIR should be considered a program EIR. Instead, the court found that the record contained substantial evidence that use of an addendum was appropriate, even assuming the 1997 EIR was a program EIR, because the proposed changes will not result in any new significant impacts or impacts that are substantially different from those described in the 1997 EIR and the supplemental EIR. As in the decision by the First District Court of Appeal in *Citizens for a Sustainable Treasure Island*, the court found that the substance of the EIR was more important than the name attached to the document, and that the standard for determining whether further environmental review is required the same for both a program and project EIR.

Turning to the substantive claims, the court rejected the claim that the addendum violated CEQA because it did not include the greenhouse gas analysis required by the 2010 amendments to the CEQA Guidelines. Following the reasoning in recent court decisions, the court observed that the potential environmental impacts of GHG emissions have been known since the 1970s and were widely known before the certification of the 1997 EIR and the 2003 supplemental EIR; as a result, the effect of GHG emissions was not "new information" that would trigger the need for further CEQA review.

The court further found that the proposed modifications did not warrant supplemental review of noise impacts, relying heavily on a detailed study comparing the noise analysis in the 1997 EIR and 2003 supplemental EIR to the noise levels projected with the proposed modifications in place. The challenger's air quality claim also fell flat, as the record reflected that the proposed modifications would neither increase the activity levels at the airport beyond those already identified in the Plan nor alter the capacity of the airport. Finally, the court agreed with the eighth addendum's conclusion that potential impacts to the burrowing owl did not warrant supplemental review, concluding that it could "reasonably assume" that the burrowing owl mitigation measures incorporated in the addendum "will maintain the environmental impacts on the Airport's burrowing owl population to a less than significant level."

G. CEQA LITIGATION

1. Court Blocks Opponents' Shot At Halting New Kings Arena

***Saltonstall v. City of Sacramento*,**
231 Cal. App. 4th 837 (3rd Dist. 2014)

The court of appeal recently upheld legislation modifying several deadlines for CEQA review of a project that includes a proposed new arena for the Sacramento Kings, rejecting a claim the statute violates separation of powers.

In 2013, the National Basketball Association approved the sale of the Kings to a local group planning to build a new downtown Sacramento entertainment and sports center, including an arena for the team. Yet the NBA also reserved the right to acquire and relocate the franchise to another city if a new arena does not open in Sacramento by 2017.

In response, the Legislature amended CEQA, exclusively for the downtown arena project, to expedite the environmental review process. The City of Sacramento complied with the accelerated deadlines, certified an environmental impact report, approved the arena project, and promptly was sued by project opponents.

The court of appeal rejected the opponents' constitutional challenge to the CEQA legislation, holding that the amendment does not materially impair the core function of the courts, the legal standard for finding a separation of powers violation.

First, the statute does not infringe on the courts' power to issue injunctive relief. The court of appeal acknowledged that the legislation changes the standards for injunctive relief in connection with the arena project, but ruled that the Legislature has the prerogative to specify which interests should be weighed against the benefits of a new arena. Indeed, the court reasoned, the Legislature has the constitutional right to exempt the arena project entirely from CEQA review, so it follows that the Legislature may determine which interests must be considered in deciding whether to halt its construction.

Second, the legislation does not unconstitutionally impose impossibly short deadlines on the courts. One statutory provision requires the Judicial Council to adopt a rule to facilitate completion of judicial review of the project's CEQA compliance within 270 days. The court upheld the challenged provision, noting that it imposes no penalty for judicial review that exceeds the specified period and thus is "suggestive" only.

On more than one occasion in recent years, the Legislature has treated large-scale sports venues differently for CEQA purposes. This decision reaffirms the Legislature's authority to do so.

2. Challenge To Annexation Dismissed Due To Failure To Comply With Required Procedures

Protect Agricultural Land v. Stanislaus County Local Agency Formation,
223 Cal. App. 4th 550 (5th Dist. 2014)

In *Protect Agricultural Land*, CEQA and other claims challenging a completed annexation were dismissed because they had not been brought in a reverse validation proceeding.

The Stanislaus County Local Agency Formation Commission approved annexation of land into the City of Ceres, relying on an EIR the City had prepared and certified. Protect Agricultural Land, a citizen's group, filed suit after the annexation was completed to challenge the decision, alleging that the LAFCO failed to comply with annexation law and with CEQA. However, PAL erred by filing the suit as a petition for writ of mandate. While a petition for a writ of mandate may be filed to challenge an annexation-related decision before the annexation is completed, a completed annexation may be challenged only in a "reverse validation" action, or a quo warranto proceeding filed by the Attorney General.

In validation and reverse validation actions, a court validates or invalidates a public agency's decisions, and the final judgment is binding on all persons who might have an interest in the outcome, whether or not they participated in the case. Validation actions may be brought by public agencies to validate certain types of decisions; reverse validation actions may be brought by challengers seeking to invalidate those decisions. The challenger must include specific language in the summons, ensure that the summons is published, and file proof of publication within 60 days of filing the complaint. If these requirements are not met, the proceeding must be dismissed on the motion of the public agency "unless good cause for such failure is shown." Code Civ. Proc. § 863.

Because PAL filed its action as an ordinary mandate case, rather than as a reverse validation action, and did not publish the summons, the trial court dismissed it. On appeal, PAL acknowledged that its annexation law claims were subject to reverse validation procedures, but argued that its failure to comply should be excused for good cause because PAL's attorney had researched the issue but had not discovered the validation procedure rule. The court found that counsel's mistake was not excusable. Longstanding case law had established that completed annexation decisions may be challenged only in reverse validation actions, and PAL's attorney's reliance on a single secondary source that did not mention the reverse validation requirement did not constitute adequate research.

The court then noted that PAL's CEQA claims were simply alleged as an additional basis for invalidating the completed annexation decision. Because they were part of a challenge to a completed annexation decision, the CEQA claims were also subject to validation procedures, and were also appropriately dismissed for failure to follow those procedures.

3. Public Agencies May Recover Costs Of Supplementing A Record, Even When Petitioners Prepare The Record Themselves

***Coalition for Adequate Review et al. v. City and County of San Francisco*, 229 Cal. App. 4th 1043 (1st Dist. 2014)**

In *Coalition for Adequate Review*, the First District Court of Appeal held that even when a petitioner prepares a record, the lead agency may still recover reasonable costs of supplementing the record if required to ensure a statutorily complete record.

After prevailing in the case, the City of San Francisco filed a memorandum of costs for $64,144 for the administrative record and other costs it had incurred. The petitioners had elected to prepare the record themselves, as allowed by CEQA's provisions on record preparation. However, the city found the record the petitioners had prepared incomplete. After the city made efforts to facilitate petitioners' completion of the record, the city prevailed on a motion to supplement the record, because petitioners had omitted documents statutorily required to be included in the record. Preparation of the supplemental record led to the majority of the costs the city sought to recover.

The trial court denied all cost recovery, and the city appealed. The court of appeal reversed the trial court's decision, and remanded the case to the trial court for consideration of whether the costs incurred were reasonably necessary. The court noted that whether a claimed cost comes within the general cost statute, and is recoverable, is a question of law subject to de novo review, but whether a cost item, including preparation of an administrative record, was reasonably necessary to the litigation presents a question of fact for the trial court.

The court of appeal disagreed with the lower court's ruling that the petitioners' election to prepare the record precluded the city from recovering costs. The court held that a petitioner's election to prepare the record itself does not mean that the public agency may not recover supplemental record preparation costs, if the costs are required to ensure a statutorily-complete record. The court easily dispensed with the trial court's rationale that awarding sizable costs to the city would have a chilling effect on lawsuits challenging important public projects, noting that this rationale is refuted by CEQA provisions allowing an agency to recover costs.

In remanding the case to the lower court for consideration of the city's cost claims the court of appeal provided considerable guidance on how reasonable costs should be determined, noting the following:

- While reasonable labor costs required to prepare the supplemental record are recoverable, time spent reviewing the record "for completeness" is not.
- Excerpts of the administrative record prepared and submitted by the city to the trial court as an aid could qualify as photocopies of exhibits, which are recoverable costs.
- Messenger costs for transporting record materials could be recoverable as labor costs of assembling the record.
- Messenger costs for court filings could also be recovered, but postage and express delivery costs are expressly disallowed under the Code of Civil Procedure.
- The cost of the city's copy of the record could qualify as recoverable if "reasonably necessary."

4. CEQA Cost Recovery Statute Includes Recovery Of Reasonably Necessary Attorney's Fees For Preparation Of Administrative Record

***The Otay Ranch, L.P. v. County of San Diego*, 230 Cal. App. 4th 60 (4th Dist. 2014)**

The Fourth District Court of Appeal in *Otay Ranch* upheld a trial court's award of costs to the County of San Diego for preparation of the administrative record. Petitioners were the former owners of a shooting range, who challenged the county's remediation plan under CEQA.

The Otay parties elected to prepare the administrative record for their CEQA claim, but after months of inaction and at the eleventh hour, they were unable to complete the record. With the Otay parties' approval, the county took over preparation of the record with just ten days to complete it. Given the history and complexity of the project, and how the records were maintained, the county determined that it did not have sufficient resources to complete the record in the time allotted and hired the attorney representing it in the litigation to help prepare the record. The county completed the record within the allotted ten days, but the Otay parties dropped the entire action the next day.

The county filed a memorandum of costs with the court seeking recovery of costs for preparation of the administrative record. The Otay parties moved to tax the county's costs associated with attorney and paralegal time. The trial court found that the attorney and paralegal costs were reasonably necessary to prepare the record, and allowed the county to recover costs incurred after the county took over preparation of the record. The Otay parties appealed.

The court of appeal first found that the trial court did not abuse its discretion in finding that attorney and paralegal costs were reasonably necessary to preparation of the administrative record and were therefore recoverable. The court explained, "given the history and complexity of the documents and how the documents were maintained, we cannot conclude the trial court exceeded the bounds of reason in determining it was 'reasonably necessary' for the county's retained counsel and paralegals to prepare the administrative record, since the county did not have the resources or experienced personnel to prepare the record."

The court of appeal next took up the issue of whether attorney costs are recoverable in record preparation, as a matter of law. The Otay parties did not challenge the labor costs charged for county staff or law firm document clerks to assist with the preparation of the record but argued that time spent by attorneys could not be claimed. The court noted that under the Otay parties' position, an attorney's labor for preparation of an administrative record could never be recovered. The court found "no reason to differentiate between labor costs incurred by individuals directly employed by a public agency and those incurred by individuals employed by a private law firm retained by the agency, so long as the trial court determines the labor costs were reasonably and necessarily incurred for preparation of the administrative record." When the trial court finds that attorney and paralegal costs were reasonably necessary, as it did here, those costs are recoverable.

This case illustrates the general principle that costs reasonably necessary to prepare an administrative record are recoverable, and attorney and paralegal costs are no different than other costs. Important to note, the circumstances here involved a complicated history and a short window of time. Thus, cities and counties must ensure that if they do expect to recover attorney costs, they ensure that the use of an attorney is indeed necessary to compile a complete record.

5. Administrative Record In CEQA Case Properly Included Recordings Of Hearings On The Project By Board Of Supervisors Committee

San Francisco Tomorrow v. City and County of San Francisco,
228 Cal. App. 4th 1239 (1st Dist. 2014)

In *San Francisco Tomorrow v. City and County of San Francisco*, the court of appeal considered a challenge to San Francisco's approvals for to the Parkmerced project. Among other issues, the court addressed whether the inclusion of certain documents in the administrative record was appropriate.

Over a ten month period, a board of supervisors committee, the Land Use and Economic Development Committee, held meetings to consider the Parkmerced project and development agreement. The last of these meetings was held the morning of May 24, hours before the board considered and certified the EIR and the project. At the May 24 meeting, the committee discussed and approved amendments to the approvals and at the end of the hearing, the committee forwarded the amended documents to the board. On the afternoon of May 24, the board of supervisors heard the appeal of the EIR, denied the appeal, and approved the project.

Following the filing of their petition for writ of mandate in the superior court, appellants moved to "clarify the record," seeking to exclude the committee hearing transcripts from the administrative record. The trial court ordered that the transcripts of these hearings be included in the record.

On appeal, appellants contended that the trial court erred in including transcripts from the May 24 committee hearing in the administrative record. Petitioners argued that transcripts of the committee hearings were not relevant to the city's decision because these documents were not "before the decision maker"— the board of supervisors.

The court of appeal rejected the argument, noting that CEQA "contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to the development," and that the Legislature intended the courts to avoid narrowly applying the categories of documents required to be included in the administrative record under CEQA.

The court held that the audio recording of the committee hearing and its transcription constituted written materials relevant to the agency's decision on the merits of the project and were therefore *required* to be included in the administrative record. The hearings, which undisputedly occurred before the board's decision was made, included testimony related to the project, and the recording of the hearings was available to members of the board, even though it was not formally submitted to them.

The court also ruled that the petitioners failed to demonstrate that they were prejudiced by the inclusion of the Committee transcripts in the administrative record, rejecting Petitioners' argument that any procedural violation of CEQA was presumptively prejudicial. The court held that "the burden of showing prejudice from any overinclusion of materials into the administrative record must be on the project opponents, who have the most to gain from any underinclusion."

6. CEQA Challenge To Tree Cutting Filed Too Late

Citizens for a Green San Mateo v. San Mateo Community College Dist.,
226 Cal. App. 4th 1572 (1st Dist. 2014)

Recent cases, including two California Supreme Court decisions, insist that the short statutory deadlines for filing CEQA lawsuits be strictly enforced. *Citizens for a Green San Mateo* is consistent with this trend. Reversing the superior court, the court of appeal held that a citizens' group sued too late to challenge tree removals at the College of San Mateo.

The college district had studied the impacts of implementing its facilities master plan in a 2007 CEQA initial study and mitigated negative declaration. The initial study explained that the project would change the aesthetic of the campus and "would result in the removal and pruning of an unknown number of trees." In 2007, the district issued a notice of determination after approving the project. In 2010, the district decided to remove trees along the campus's loop road and gave public notice of that decision, but did not issue a new NOD. Tree removals began in December 2010 and a citizens' group sued on July 1, 2011.

The court of appeal held that the petitioners had missed the CEQA statute of limitations in three different ways. First, because a notice of determination was filed and posted after the 2007 initial study was completed, opponents of tree-cutting had only 30 days from issuance of the 2007 NOD to file suit.

Second, even if the 2007 NOD had not triggered the statute of limitations, the suit was untimely under the 180-day statute of limitations, which began to run when the district made its decision in late 2010 to approve the contract for the trees to be cut.

Finally, the 1986 California Supreme Court decision in *Concerned Citizens of Costa Mesa* did not help the challengers. That case held that where a project was transmuted into a fundamentally different project with no formal agency decision, public notice or NOD, the 180-day statute of limitations was triggered on the date the challengers "knew or reasonably should have known" of the new project. Here, the tree cutting began on December 28, 2010—more than 180 days before the citizens' group filed suit. Therefore, their action was "time-barred even under a most generous interpretation of the statute of limitations."

7. CEQA Notices of Determination Don't Protect Completed Hospital From Lawsuit And New EIR

***Ventura Foothill Neighbors v County of Ventura*,**
232 Cal. App. 4th 429 (2nd Dist. 2014)

In recent years the California Supreme Court has vigorously confirmed that when an agency files a Notice of Determination or Notice of Exemption after approving a project, CEQA's very short statute of limitations takes effect and any lawsuit filed after the deadline is barred. Nevertheless, the court of appeal in *Ventura Foothill Neighbors* held that due to an error in the EIR's description of the height of a new hospital building proposed at the county medical center two NODs were not sufficient to trigger the statute of limitations. The court held that neighbors could sue after they noticed the building was taller than they expected, and that the county must prepare a supplemental EIR on the height-related impacts of the building as constructed.

Ventura County's 1994 EIR on improvements planned for the medical center stated that the hospital building would be "up to 75 feet in height" but did not mention that if the height of rooftop parapets that would screen equipment on the roof is counted, the total height would be close to 90 feet. The county filed an NOD and no lawsuit challenging the EIR was filed.

Construction was delayed, and in 2005 the county decided to change the location of the building within the medical center campus. The county prepared an addendum to the 1994 EIR which found no new impacts due to the change in location and again filed an NOD. Neither the addendum nor the NOD mentioned the height of the building. In 2008, during construction, neighbors whose views would be affected by the building in its new location inquired about its height and filed suit under CEQA, long after the expiration of the 30-day statutes of limitations that would normally have been triggered by the 1994 and 2005 NODs.

The court of appeal began by assuming that the height of the building "changed" soon after the EIR was certified, rather than that the EIR had failed to accurately describe the building's total height. In so doing, the court concluded that the failure of the 2005 addendum or NOD to describe this change in the building's height meant that the 2005 NOD did not trigger the 30-day

CEQA statute of limitations. Accordingly, the neighbors could sue after they became aware of the actual height of the building and the county was required to prepare a supplemental EIR analyzing the impacts of, and mitigation for, the purported change.

The function of a statute of limitations is to put to rest any questions regarding the merits of an agency's actions. According to the California Supreme Court's recent decisions on CEQA's statute of limitations, the statute sets out a "bright line rule" that the statute of limitations applies regardless of the merits of a lawsuit brought to challenge an agency's actions. When an NOD is filed and the 30-day statute of limitations expires, an EIR is immune from subsequent challenge even if it is later discovered to have been inaccurate and misleading in its description of a significant environmental effect. The *Ventura Foothills* case demonstrates, however, that the "bright line rule" identified by the supreme court may not be so bright after all.

H. NEW LEGISLATION

AB 52: A NEW CATEGORY OF CULTURAL RESOURCES AND NEW REQUIREMENTS FOR CONSULTATION WITH NATIVE AMERICAN TRIBES

On September 25, Governor Brown signed Assembly Bill No. 52, which creates a new category of environmental resources that must be considered under the California Environmental Quality Act: "tribal cultural resources." The legislation imposes new requirements for consultation regarding projects that may affect a tribal cultural resource, includes a broad definition of what may be considered to be a tribal cultural resource, and includes a list of recommended mitigation measures.

NEW CATEGORY OF RESOURCES

AB 52 adds tribal cultural resources to the categories of cultural resources in CEQA, which had formerly been limited to historic, archaeological, and paleontological resources. "Tribal cultural resources" are defined as either (1) "sites, features, places cultural landscapes, sacred places and objects with cultural value to a California Native American tribe" that are included in the state register of historical resources or a local register of historical resources, or that are determined to be eligible for inclusion in the state register; or (2) resources determined by the lead agency, in its discretion, to be significant based on the criteria for listing in the state register.

Under AB 52, a project that may cause a substantial adverse change in the significance of a tribal cultural resource is defined as a project that may have a significant effect on the environment. Where a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document must discuss the impact and whether feasible alternatives or mitigation measures could avoid or substantially lessen the impact.

CONSULTATION WITH TRIBES

Recognizing that tribes may have expertise with regard to their tribal history and practices, AB 52 requires lead agencies to provide notice to tribes that are traditionally and culturally affiliated with the geographic area of a proposed project if they have requested notice of projects proposed within that area. If the tribe requests consultation within 30 days upon receipt of the notice, the lead agency must consult with the tribe. Consultation may include discussing the type of environmental review necessary, the significance of tribal cultural resources, the significance of the project's impacts on the tribal cultural resources, and alternatives and mitigation measures recommended by the tribe.

The parties must consult in good faith, and consultation is deemed concluded when either the parties agree to measures to mitigate or avoid a significant effect on a tribal cultural resource (if such a significant effect exists) or when a party concludes that mutual agreement cannot be reached.

MITIGATING ADVERSE CHANGES TO TRIBAL CULTURAL RESOURCES

Mitigation measures agreed upon during consultation must be recommended for inclusion in the environmental document. AB 52 also identifies mitigation measures that may be considered to avoid significant impacts if there is no agreement on appropriate mitigation. Recommended measures include:

- preservation in place
- protecting the cultural character and integrity of the resource
- protecting the traditional use of the resource
- protecting the confidentiality of the resource
- permanent conservation easements with culturally appropriate management criteria.

CONCLUSION

AB 52 contains several important changes to CEQA. Environmental documents must now consider tribal cultural resources in their analyses, and additional consultation requirements may apply to certain projects. Project proponents should be aware of these new requirements, and tribes should be similarly aware of their consultation rights under the new legislation.