



CEQA YEAR IN REVIEW 2015

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

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In 2015 the California appellate courts continued to chart new ground as they grappled with some of CEQA's most difficult and controversial questions. The Supreme Court of California led the way, issuing four opinions on hotly contested issues. For the first time, the court addressed the problematic question of what thresholds of significance should be used to measure the significance of greenhouse gas emissions. In a decision that will likely please only a few, the court blessed consistency with AB 32's emissions reduction goal as an appropriate standard, but provided little guidance on how agencies might show consistency for specific projects. On the other hand, the court issued two decisions that place reasonable, common-sense limits on CEQA's reach. In one decision the court set constraints on the ability of project opponents to contest categorical exemption determinations by asserting that significant impacts will occur due to unusual circumstances. In the other decision, the court put an end to the counter-intuitive, but persistent, argument that CEQA extends beyond a project's effects on the environment to take in the environment's effects on the project. In its remaining decision, the court held that a state university cannot use the legislature's failure to appropriate earmarked funds as an excuse to avoid adopting mitigation measures for off-site impacts, but it did not decide when a public agency can reject a proposed mitigation measure as infeasible due to budgetary constraints.

A relatively large number of opinions dealing with CEQA exemptions were issued by the courts of appeal in 2015. Two of the cases upheld categorical exemptions, applying the standards set by the supreme court in its decision on the unusual circumstances exception. In three others, the courts overturned the agency's exemption determination, ruling in one case that the agency had interpreted the exemption too broadly, and in the others that the agency had failed to point to evidence in the record of its proceedings sufficient to show the exemption applied.

Seven court of appeal decisions addressed EIR adequacy, and the EIR was upheld in each one of them. The proper baseline for analyzing impacts was an important theme, with the courts making it clear that a lead agency has broad discretion to set a baseline that reflects historical conditions occurring well before CEQA review starts. In another precedent-setting decision, a court held that an increased demand for emergency services due to a project is not an environmental impact that triggers CEQA's mitigation requirements. The use and benefits of program EIRs also received significant attention in

opinions recognizing that agencies may use program EIRs to defer evaluation of project-specific impacts and mitigation strategies to a later stage of approval when the information necessary for a detailed analysis becomes available. Finally, in what may prove to be one of the year's most influential decisions, a court disapproved the practice of besieging the lead agency with burdensome comments on a draft EIR in order to stymie the EIR process, emphasizing that the purpose of comments should be to improve the EIR, and that the opportunity to comment should not be used as a means to wear out the lead agency.

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A. THE LIMITS ON THE SCOPE OF CEQA REVIEW

1. Supreme Court Rules that CEQA Does Not Require an Analysis of the Environment's Impact on Project Residents and Users

California Building Industry Ass'n v. Bay Area Air Quality Mgt. Dist., (2015) ___ C4th ___ (No. S 213478, Dec. 17)

CEQA generally does not require that public agencies analyze the impact that existing environmental conditions might have on a project's future users or residents, according to the California Supreme Court. In an opinion that resolves a long-debated question, the court held that an analysis of environmental impacts is ordinarily limited to the project's effects on the environment, and need not extend to the effects conditions in the surrounding environment might on the project. An analysis of whether environmental conditions might adversely affect a project's residents or users is required only where the project might worsen existing environmental hazards, or where one of a handful of CEQA provisions which expressly require such an analysis applies (certain airport, school, and housing projects).

Background. The California Building Industry Association, along with other organizations interested in the development of infill housing, objected to CEQA thresholds of significance proposed for adoption by the Bay Area Air Quality Management District. Their key concern was that the thresholds would impede development of infill housing by making an EIR necessary any time future residents might be adversely affected by existing air pollution, which was more likely to occur at infill sites near busy roadways and freeways. CBIA filed a legal challenge after the thresholds were adopted, arguing that CEQA does not require an analysis of the impacts that existing environmental conditions might have on a new project's residents.

An analysis of the environment's impact on a project's residents or users is generally not required. A key issue before the supreme court was the validity of a provision of the CEQA Guidelines that indicates that CEQA requires an evaluation of existing environmental conditions at the site of a proposed project that might cause significant adverse impacts to future residents or users of the project. The District contended that CEQA's references to adverse effects on people imply that such an analysis is required. The supreme court disagreed, concluding that in light of CEQA's text, structure and purpose, a general requirement for an analysis of how existing environmental conditions will affect a project's future users or residents would improperly expand the scope of the statute and add significantly to the burdens of compliance. As the court put it: "Given the sometimes costly nature of the analysis required under CEQA when an EIR is required, such an expansion would tend to complicate a variety of residential, commercial, and other projects beyond what a fair reading of the statute would support."

An analysis of whether a project may exacerbate existing environmental hazards is required. While there is no general requirement in CEQA that the environment's effects on a project be evaluated, CEQA does mandate that an analysis of a project's impacts consider whether the project might worsen the effects of existing environmental hazards. The court accordingly upheld language in the Guidelines which require an analysis of any significant effects a project might cause by bringing development and people into an area, or by locating development in areas susceptible to hazardous conditions. "Because this type of inquiry still focuses on the project's impacts on the environment—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project's future users or residents is entirely consistent with this focus and with CEQA as a whole."

Several statutory exceptions to the general rule require an analysis of impacts to project users or residents in specific situations. The court also discussed several provisions of CEQA that require an analysis of the adverse effects of existing environmental conditions on persons who will occupy or use a project site. These statutes address certain airport and school construction projects, and the applicability of certain CEQA exemptions to specified types of housing development

projects. The court emphasized, however, that “these statutes constitute specific exceptions to CEQA’s general rule requiring consideration only of a project’s effect on the environment, not the environment’s effects on project users.”

Comment. Although several court of appeal decisions make it clear that CEQA does not require an analysis of the impacts of the surrounding environment on the project, the supreme court’s decision finally puts the remarkably persistent arguments to the contrary to rest. This will not only reduce the number of unnecessary EIRs for infill residential development projects, it will also significantly reduce the burden of preparing initial studies and EIRs for a broad range of projects by directing their focus where it belongs: on the significant impacts to the environment that may result from the project.

Perkins Coie attorneys Geoff Robinson and Steve Kostka represented a coalition of organizations interested in the development of infill housing, together with various industry groups, who participated in the case as Amici Curiae.

B. EXEMPTIONS FROM CEQA

1. California Supreme Court Clarifies Unusual Circumstances Exception to Use of a Categorical Exemption

***Berkeley Hillside Preservation v. City of Berkeley,* (2015) 60 C4th 1086**

In an eagerly awaited decision, the California Supreme Court cleared up conflicting appellate decisions about how to apply the “unusual circumstances” exception when using a categorical exemption. The court took the middle ground. It recognized that the exception is not automatically triggered whenever a project may have a significant environmental impact, and that unusual circumstances must be present. But it also acknowledged that evidence that a project will have significant impacts may tend to show that its circumstances are unusual.

Summary. The case involved construction of a large single-family house in the City of Berkeley. The city granted a use permit and found the project exempt from CEQA under two categorical exemptions—Class 3 (construction of small structures) and Class 32 (in-fill development). The city also determined that no exceptions applied, including the exception for a “significant effect on the environment due to unusual circumstances,” to negate the use of the exemptions.

The court of appeal overturned the city’s determination. It ruled that the possibility that a project might have a significant environmental effect “is itself an unusual circumstance” that bars using a categorical exemption. The supreme court disagreed, holding that the project opponent needed to establish **both** that there are unusual circumstances **and** that there is a reasonable possibility of a significant environmental impact due to those unusual circumstances.

Unusual circumstances exception not triggered by significant impacts standing alone. The court began by examining the text of CEQA Guidelines section 15300.2(c), which states: “A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” Based on the plain language of this provision, the court explained that that there must be some showing of unusual circumstances to trigger the exception. Otherwise, the court reasoned, the phrase “due to unusual circumstances” would be rendered meaningless.

The court further reasoned that under the court of appeal’s interpretation, categorical exemptions would have little, if any, effect. When there is no evidence that a project will have a significant impact, “further CEQA review is unnecessary; no CEQA exemption is necessary to establish that proposition.” Thus, if categorical exemptions could be used only when there is no evidence of a significant impact—when no CEQA review is required to begin with—the exemptions would serve no purpose.

In addition to the text of the CEQA Guidelines, the court explained that its ruling found support in the legislative foundation for categorical exemptions. Specifically, the Legislature directed the Natural Resources Agency and Office of Planning and Research to identify classes of projects that they found would not have a significant environmental effect and to exempt these classes of projects from CEQA. According to the court, requiring CEQA review for projects that are claimed to cause a significant effect, but that these agencies already have determined do not cause a significant effect, would undermine the Legislature's purpose in requiring the statewide adoption of categorical exemptions.

Factors that can establish unusual circumstances. As a counterbalance to the court's ruling that unusual circumstances must be present to trigger the exception, the court adopted an expansive view of how unusual circumstances may be shown. First, the party invoking the exception may establish an unusual circumstance by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. Alternatively, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, the court stated, "if convincing necessarily also establishes a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

Two standards of review. The court established two different standards of judicial review—one for the determination whether there are unusual circumstances, and another for the determination whether there are significant effects due to those unusual circumstances. The first determination is reviewed under the deferential substantial evidence standard. Under this standard, an agency's factual determination whether a project presents circumstances that are unusual for the exempt class must be upheld if there is any substantial evidence in the agency's record, contradicted or uncontradicted, that would support that determination. But once an agency determines that a project presents unusual circumstances, the court applies the much less deferential "fair argument standard" in assessing whether there is a reasonable possibility of a significant environmental effect.

Evidence about activities not approved as part of the project is irrelevant. The court also considered how the scope of the project should be defined in assessing its potential environmental impacts. An expert had testified that the house at issue could not be built as proposed and would require additional grading and fill work that likely would result in significant impacts. The court found that this evidence was irrelevant, stating: "A finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project, as approved, cannot be built." If a project cannot be built as approved, the court reasoned, then the project proponents would have to seek approval to revise the project, and at that time the potential impacts of the revised project would have to be addressed.

The judicial remedy should allow the agency to pursue appropriate options for CEQA compliance. Finally, the court addressed the appropriate remedy where a court overturns an agency's use of a categorical exemption. In such an instance, a court generally should not order the agency to prepare an EIR (as the court of appeal had done), but instead should require the agency to take further action to comply with CEQA, without directing how the agency must exercise its discretion. Depending on the circumstances, such further action by the agency typically would consist of preparing an initial study to determine whether an EIR or mitigated negative declaration would be required.

Comment. The court's ruling charts a middle ground in two important respects: First, it requires a showing of "unusual circumstances," but allows evidence of significant environmental impacts to help make that showing. Second, it establishes two separate standards of judicial review—the more deferential substantial evidence standard to assess the agency's determination whether there are unusual circumstances, and the less deferential "fair argument" standard to assess whether there is a reasonable possibility of a significant environmental effect. It remains to be seen whether and how the court's ruling will be applied to exemption decisions that do not implicate the "unusual circumstances" exception.

2. No Unusual Circumstances Found When Berkeley Hillside Case Returns to the Court of Appeal

Berkeley Hillside Preservation v. City of Berkeley, (1st Dist. 2015) 241 CA4th 943

On remand from the California Supreme Court, the court of appeal ruled that the unusual circumstances exception did not apply and therefore upheld the City of Berkeley's determination that the proposed single-family residence was exempt from CEQA.

Substantial evidence supported use of the categorical exemptions. The project opponents continued to argue on remand that the project, a large single-family home in the Berkeley hills, posed unusual circumstances due to its size, setting, and impacts and thus should not be allowed under a categorical exemption. In rejecting this claim, the court of appeal explained the limited nature of its review of whether unusual circumstances were present, in light of the direction provided by the supreme court. The court emphasized that it must resolve all evidentiary conflicts and inferences on this issue in the city's favor and affirm the city's finding of no unusual circumstances if there is any substantial evidence to support it.

With respect to the project's size, the court acknowledged that the home "certainly could be considered unusually large, as that term is generally understood by a layperson." But the court refrained from substituting its judgment for the city's, given that evidence in the record supported a conclusion that other homes in the immediate vicinity of the project were similar in size.

With respect to the project's setting on a steep slope within an earthquake hazard zone, the court explained that while there was evidence that the area of the city where the project was located had the potential for earthquake-induced landslides, a site-specific study supported the conclusion that no such hazard was present at the project location. The opponents also asserted that the project setting made the house inconsistent with the city's general plan, but the court found a lack of evidence to support this claim.

With respect to the project's alleged geotechnical impacts, the court of appeal explained that, given the supreme court's ruling, it was not sufficient for the project opponents merely to present a fair argument of a potentially significant impact. Rather, the opponents had to show that substantial evidence did not support the city's finding that there were no unusual geotechnical circumstances. In the court's view, the opponents failed to meet this higher burden.

The traffic management plan for the project was not mitigation. The court of appeal also rejected the claim that the imposition of traffic control measures during project construction amounted to mitigation that precluded the use of a categorical exemption. In so doing, the court distinguished a prior decision in which it held that a project is not eligible for a categorical exemption if it relies on mitigation measures to reduce its significant environmental effects to a less-than-significant level. The court reasoned that managing traffic during project construction "is a common and typical concern in any urban area," and therefore did not constitute mitigation that removes a project from an exemption. In contrast, the project at issue in the prior case required special conditions to protect habitat for a threatened species, in an area the county had designated as "an environmental resource of critical concern."

Comment. The court's ruling on remand highlights the deferential standard of judicial review of the question whether the unusual circumstance exception is triggered. The court's ruling also reinforces the principle that imposition of common, generally applicable conditions on a project approval does not equate with CEQA mitigation that would preclude reliance on a categorical exemption.

3. Categorical Exemption for Rodeo Not Barred by Unusual Circumstances Exception

Citizens for Environmental Responsibility v. State of California ex rel 14th Dist. Agricultural Ass'n, (3d Dist. 2015) CA4th (No. C070836, Nov. 23)

The court upheld the use of a categorical exemption for a proposed rodeo at a county fairground despite claims that waste from the rodeo would pollute a nearby creek. Applying the standards the supreme court identified in *Berkeley Hillside*, the court rejected arguments that the applicable categorical exemption was barred by the unusual circumstances exception.

Background. In 2011, Stars of Justice proposed a two-day rodeo at the Santa Cruz County fairground. The 14th Agricultural District, which administers the fairground, found the project exempt from CEQA under the Class 23 Categorical Exemption—an exemption that applies to “normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose.” In granting the exemption, the District noted the long history of similar activities at the fairground involving equestrian events, livestock shows and several annual rodeos. The project opponent challenged the exemption asserting significant impacts would occur due to unusual circumstances and that the exemption improperly relied on mitigation measures.

No showing of unusual circumstances. In concluding the project opponent failed to establish the unusual circumstance exception, the court fashioned a “two-alternative” framework based on the supreme court’s decision in *Berkeley Hillside*.

Under the first alternative of this framework, courts must determine (1) whether the project presents circumstances unusual for projects in an exempt class, applying the substantial evidence standard and (2) whether there is a reasonable possibility that the unusual circumstance will produce a significant effect on the environment. Here, the court concluded that the project opponent did not meet the first prong of this test, emphasizing that the unusual circumstances inquiry is exemption- and facility-specific: When determining whether the circumstances of the project differ from the general circumstances covered by the exemption for normal operations of a public gathering facility, it is appropriate to look at the facility’s other activities—events or operations that comprise the normal operations of that facility—and compare those circumstances against those presented by the proposed project.

The court rejected the assertion that the basis for comparison should be public gathering facilities in general, not other activities at the fairground. The Class 23 exemption, unlike other exemptions, concerns activities that are “normal operations” of a public gathering facility; the focus, therefore, should be on the activities that make up the specific facility’s normal operations.

Applying this standard, there were no unusual circumstances: the project did not propose a significant change from normal operations at the fairground; no unusual environmental risks were presented; and the scope and size of the project were similar to other activities at the site.

This court also described the second alternative for proving the unusual circumstance exception where a party establishes that a project **will have** a significant environmental effect. The court emphasized that it was not enough to establish that there is a risk the project **may have** a significant effect on the environment; instead, a challenger must establish that the project will actually have an effect on the environment and that it will be significant. Based on the record, the court concluded that the project opponents failed to meet these requirements.

Actions to prevent water pollution were part of normal fairground operations, not a mitigation measure precluding use of an exemption. The District had concluded that its manure management plan would prevent water pollution impacts to a nearby creek. The court found the plan was not a mitigation measure (which would preclude a categorical exemption) because it was a preexisting measure adopted and implemented as part of the ongoing “normal operations” of the fairground.

Comment. The case is one of two published after the supreme court's decision in *Berkeley Hillside* that apply the requisite deferential standard of review to a lead agency's determination that a project does not present unusual circumstances. Essentially, the courts appear to be recognizing a presumption that a project that, on its face, fits within one of the Resource Agency's listed categorical exemptions will not necessitate CEQA review, despite arguments to the contrary about its environmental impacts.

4. Conditions After Completion of Emergency Repair Work Set New Baseline for Later Restoration Work on Site

***CREED-21 v. City of San Diego,*
(4th Dist. 2015) 234 CA4th 488**

The court in *CREED-21 v. City of San Diego* brought some clarity to the relationship between activities that are exempt from CEQA review and the baseline used for analysis of later, related projects. The court determined that CEQA requires that the baseline be based on circumstances existing after the exempt work is completed.

Background. In the mid-2000s, the City of San Diego was faced with significant erosion along a coastal hillside in La Jolla. The city's engineer determined that if the erosion were allowed to continue, it would present an imminent threat to public safety. The city conducted investigations into potential impacts to biological resources. Somewhat later, the city issued an emergency development permit, and found the permit exempt from CEQA due to the emergency. Pursuant to standard city requirements, the emergency permit was subject to a condition requiring that the city's engineering department "apply for a regular coastal permit to have the emergency work be considered permanent."

The city completed the emergency work and then started processing its application for the regular coastal development permit. The application included a plan to revegetate and restore the affected area, using native vegetation that would improve the biological resources of the site. The city issued the permit based on other CEQA exemptions.

The city described the project as including the emergency repair work that had already been completed, plus the proposed revegetation plan. It found the project exempt under the "common sense exemption" in Guidelines section 15061(b)(3) because the revegetation plan would not cause any adverse environmental impacts. The city also cited Guidelines sections 15301 and 15302 (minor repair or replacement of existing facilities), which it determined applied because the project replaced an existing storm drain without increasing capacity.

Baseline is site conditions after completion of emergency work. CREED-21, a group claiming to promote environmental interests, sued. All parties conceded that the emergency work was properly found exempt from CEQA, but they disagreed about the appropriate baseline for reviewing the impacts of the regular permit. CREED argued that the baseline should be circumstances existing when environmental review began, and that environmental review pre-dated the emergency work. The court ruled that the baseline should be set after the emergency work was completed, reasoning that CREED's proposal would, in effect, negate the exemption which applied to the emergency permit. The work completed pursuant to the emergency permit changed the physical environment without any requirement for CEQA review of that work, and review of any further work "must be considered based on the post emergency work physical environment of the site."

CEQA review is limited to further work on the site. The court also disagreed with CREED's argument that the condition requiring a regular permit made the emergency work temporary, and that environmental review was required to determine whether the completed work, which included storm drain repairs, may have a significant impact on the environment. The court concluded that, because the revegetation plan was the only "project" proposed to be carried out at the site after completion of the emergency work, CEQA applied only to that plan, and not to the previously-completed emergency work: in reviewing the

revegetation project under CEQA, the city was required to compare the conditions expected to be produced by the revegetation project with physical conditions as they existed after the emergency work was completed.

No adverse impacts from revegetation plan. The court then evaluated the city's determination that the revegetation plan was exempt. The evidence that the bare dirt and non-native plants existing in the baseline circumstances would be replaced by native plants was sufficient to comprise substantial evidence that supported the city's exemption determination. Because the common sense exemption of Guidelines section 15061(b)(3) was adequate, the court found it unnecessary to examine the existing facility exemptions the city also cited.

Comment. CEQA's exemption for actions taken to prevent or mitigate an emergency is intended to allow agencies to start work immediately without having to complete CEQA review before doing so. The city's determination the initial phase of work was exempt necessarily meant that only later work on the site would be subject to CEQA, and would necessarily be limited to impacts of that later phase of the work.

5. Categorical Exemption for School Closures Not Supported by Sufficient Evidence

[Save Our Schools v. Barstow Unified Bd. of Education,](#) **[\(4th Dist. 2015\) 240 CA4th 128](#)**

The Fourth District Court of Appeal held that a school district's determination that school closures were categorically exempt from CEQA was not supported by substantial evidence in the record.

Background. The Barstow Unified School District approved closure of two elementary schools and the transfer of the students to other schools. The District Board concluded that these decisions were exempt from environmental review under the categorical exemption in CEQA Guidelines section 15314 for "minor additions to existing schools," which exempts school closures and student transfers "where the addition does not increase original student capacity" of any receptor school "by more than 25% or ten classrooms, whichever is less."

No substantial evidence to support use of exemption. The court of appeal found that although the administrative record included current *enrollment* figures for the receptor schools, it did not contain any information regarding the enrollment *capacity* of these schools, rendering it impossible to determine whether the transfers would increase capacity in any of these schools by more than 25% or ten classrooms. This court found this omission was exacerbated by the Board's decision to allow transferring students to attend any receptor school of their choice. The record thus contained no substantial evidence to support the Board's conclusion that student capacity of any receptor school would not increase beyond the levels allowed under the categorical exemption, and reliance on the categorical exemption was accordingly invalid.

Comment. The court of appeal directed issuance of a writ of mandate voiding the District's decision, noting that, upon reconsideration, the Board could consider evidence not contained in the original record, including the enrollment capacity of the receptor schools. This relief is consistent with a recent trend in which reviewing courts do not dictate the specific action the agency should take in response to a decision finding a violation of CEQA, but instead leave it to the agency to determine the steps that should be taken to correct the error.

6. Agency Has Burden to Produce Evidence Showing that Categorical Exemption for Actions that Enhance or Protect the Environment Applies

[Save Our Big Trees v. City of Santa Cruz,](#) [\(6th Dist. 2015\) 241 CA4th 694](#)

The City of Santa Cruz failed to establish with substantial evidence that amendments to its Heritage Tree Ordinance and Heritage Tree Removal Resolution were categorically exempt from CEQA.

Background. In 2013, the city amended its Heritage Tree Ordinance and Heritage Tree Removal Resolution. The ordinance governs the protection of large trees and other significant trees within the city, while the resolution governs the removal of heritage trees. The city deemed the amendments categorically exempt from CEQA, reasoning that they qualified for the exemptions that apply to projects that assure the “maintenance, restoration, enhancement, and protection” of natural resources or the environment. A community group sought to have the amendments set aside, asserting that the amendments could not be exempted because they weakened existing tree protections. The trial court denied their petition, but the court of appeal reversed.

City must show terms of exemption are met. The court of appeal emphasized the standard that applies in reviewing the exemptions for activities that will protect natural resources or the environment (the Class 7 and Class 8 exemptions) is “whether substantial evidence supports the determination that the project will assure the maintenance, restoration, or enhancement of the environment.” The lead agency bears the burden of producing such evidence. The challenger is not required to produce evidence that the project will harm the environment.

The amendments would reduce some environmental protections. The court interpreted the exemptions to be limited to “projects that combat environmental harm, but not those that diminish existing environmental protections.” The court observed that the ordinance amendments removed protection from trees that formerly would have been protected, because the amendments require a city council resolution to designate a heritage tree based on its horticultural significance; previously, a tree could easily acquire a heritage tree designation, for instance, if a person planted it as a “commemorative” tree. Further, the amendments relaxed existing protections for heritage trees by making it easier to remove them. While the city’s intent may not have been to encourage the removal of such trees, that did not matter to the court: the amendments allowed for removal of heritage trees under circumstances where removal was not previously permitted, reducing the protections for such trees.

No showing the amendments would maintain or enhance the environment. The court also found that the city offered no evidence that the required replacement of trees would contribute beneficially to the urban environment in the same way as the heritage trees that could be removed. And there was little other evidence that the amendments would enhance the environment in some way. Accordingly, the court held that the city had failed to identify evidence that the amendments would assure the maintenance, restoration, or enhancement of the environment, evidence necessary to support an exemption. The court directed that the city be required to set aside its amendments of the Heritage Tree Ordinance and Heritage Tree Removal Resolution.

Comment. Lead agencies have the burden to produce evidence to support a determination that a project falls within a categorical exemption. The standard for determining whether a project will qualify for a categorical exemption is not whether significant impacts will be avoided, but rather whether there is evidence in the record sufficient to show that the terms of the exemption are satisfied. In this case, there was significant disagreement about the effects of the amendments and their desirability, and relatively little evidence showing how the amendments would enhance the environment. When the applicability of an exemption to a project is not clear on its face, the agency should make certain that the record contains evidence supporting its exemption determination.

7. Court Holds CEQA Requires Public Notice of Intent to Rely on CEQA Exemption

Defend Our Waterfront v. California State Lands Commission, (1st Dist. 2015) 240 CA4th 570

In a decision that appears to reflect an emerging judicial trend, a court of appeal has taken an expansive view of a public agency's obligation to give public notice of its intentions under the California Environmental Quality Act. The court held that the State Lands Commission violated CEQA where its public notice did not mention the agency's intent to rely on a CEQA exemption for a land exchange agreement. In addition, the court held that where there is no boundary or title dispute, CEQA's statutory exemption for "settlements of boundary and title problems by the State Lands Commission" does not apply.

Background. The State Lands Commission is responsible for enforcing California's public trust rights to submerged and formerly submerged lands. To facilitate a development along San Francisco's Embarcadero, the Commission agreed to a "trust exchange" with the City of San Francisco and developers to remove the public trust from one lot and apply it to a different area within the proposed development footprint. Project opponents petitioned for a writ of mandate, challenging the Commission's determination that the agreement was exempt from CEQA review.

Notice and exhaustion of remedies. The Commission's first defense was that the petitioner had not exhausted its administrative remedies before filing suit, as CEQA requires, because its members had not objected to the CEQA exemption before the Commission approved the trust exchange. The court held, however, that because the Commission's public hearing notice did not mention CEQA, much less the CEQA exemption being relied upon, the Commission "failed to give the notice required by law" within the meaning of CEQA section 21177(e), and therefore the petitioner was not required to exhaust its remedies by objecting to the exemption. Notably, the court did not cite any provision of CEQA or other statutes requiring that notice of intent to rely on a CEQA exemption be included in public agency notices.

Trust exchange exemption. Public Resources Code section 21080.11 provides a statutory exemption from CEQA for "settlements of title and boundary problems by the State Lands Commission and . . . exchanges or leases in connection with those settlements." In this case, the Commission conceded that the only "problem" addressed by the exchange agreement was that the public trust obstructed construction of a development project. Noting the use of the word "settlement" in the exemption, as well as the Commission's authority to "resolve boundary or title disputes," the court held that the word "problems" referred to "disputes," not to the public trust's potential interference with local economic goals. The Commission had the power to enter into a land exchange agreement, but could do so only after complying with CEQA.

Comment. Although State Lands Commission land exchange agreements are common, the most important holding of this case may be the determination that the Commission violated CEQA by issuing a public notice that did not mention the Commission's intent to rely on a CEQA exemption. Nothing in CEQA or the notice statute under which the Commission operates requires that information to be included. The case reflects a judicial trend toward demanding CEQA information in public notices even where no statute or regulation requires them, and thus creates a trap for the unwary public agency that looks only to such sources when issuing its notices.

C. NEGATIVE DECLARATIONS

1. Adoption of Mitigated Negative Declaration Proves To Be an Uphill Battle

Keep Our Mountains Quiet v. County of Santa Clara,
(6th Dist. 2015) 236 CA4th 714

CEQA sets a low bar for preparation of an environmental impact report: if substantial evidence supports a fair argument that a project may result in a significant environmental impact, the agency must prepare an EIR rather than adopt a negative declaration.

In *Keep Our Mountains Quiet*, the court reviewed a county's mitigated negative declaration for a use permit to allow weddings and other events on a rural property in the Santa Cruz mountains. Based on competing expert reports, agency comments, and lay testimony about noise and traffic, the Sixth District Court of Appeal held the county violated CEQA when it adopted the MND in instead of preparing an EIR.

Background. Candice Clark Wozniak owned a rural property in the Santa Cruz Mountains, which she regularly rented out for weddings and other events. After receiving complaints from neighbors regarding loud noise from music and party guests, the county required Wozniak to obtain a use permit. The permit limited the number of events, limited the number of guests per event, restricted amplified music, and allowed only one outdoor live band event with the potential to host additional outdoor live band events upon demonstration of compliance with county noise standards.

Evidence of noise and traffic effects. The county adopted a mitigated negative declaration based in part on noise studies performed during a test event at which an expert measured sound levels generated by music emanating from the project site. The neighbors contested the noise studies on the grounds that the expert had turned down the music to a level lower than the expert had testified commonly occurs, that the noise study did not account for crowd noise. With regard to the mitigated negative declaration's traffic conclusions, neighbors cited specific roadway conditions that could be exacerbated by increased traffic to and from the project site. Caltrans—the agency with jurisdiction over the mountain road leading to the site—opined that the project would result in significant traffic safety impacts. While Caltrans ultimately concluded it would address its concerns during its own encroachment permit process, it never clearly stated that impacts would be reduced to a less-than-significant level.

The court's analysis. First, the court ruled that compliance with general plan noise standards does not necessarily mean a project will not have a significant noise impact. Agencies also must evaluate the change in noise levels caused by a project, even if the total noise would be beneath numeric standards.

Second, the court determined information in the county's own expert report along with testimony from neighbors about the noise that they experienced during prior weddings on the same site constituted substantial evidence supporting a fair argument of a potential significant impact. Speculation about potential future impacts is not substantial evidence. But testimony based on past events can be. This was especially true where the expert reports left gaps as to why measurements were not taken at the sound levels the county's own expert had testified typically occur during weddings and other outdoor events.

Third, the court ruled that the combination of an expert report showing that the project would double peak traffic levels, testimony from neighbors about dangerous conditions on the mountain roads used to access the project site, and repeated concerns from Caltrans—the agency with jurisdiction over the access road—constituted substantial evidence supporting a fair argument that the project could result in significant traffic safety effects.

By contrast, the court ruled that there was no substantial evidence of possible adverse effects on potential users of possible future trails near the project site. The court noted that CEQA requires evaluation of impacts to the existing environment. “Thus, we need not consider the impacts on hypothetical users of nonexistent trails.”

Comment. The opinion analyzes and distinguishes prior cases addressing the question whether lay testimony is substantial evidence for purposes of triggering preparation of EIR. This case does not indicate that lay testimony regarding noise and traffic effects will always constitute substantial evidence. Rather, lay testimony that clearly shows a factual foundation, and that is based on personal observations is far more likely to be treated as substantial evidence than lay opinion or argument about possible future effects.

D. ENVIRONMENTAL IMPACT REPORTS

1. Supreme Court Establishes Complex New Requirements for CEQA Analysis of Greenhouse Gas Emissions

Center for Biological Diversity v. Cal Dept of Fish & Wildlife,
(2015) ___ C4th ___ (No. S217763, Nov. 30)

Newhall Land and Farming received still another setback in its 20-year effort to obtain entitlements to develop the 12,000-acre Newhall Ranch project, this time from the California Supreme Court. The court ruled that the California Department of Fish and Wildlife’s environmental impact report on two natural resource plans for the development project failed to pass muster under CEQA.

Summary. The county had approved the land use plan for the development project in 2003. CDFW approval of resource plans and permits were still required, however, which necessitated additional CEQA review. CDFW and the Corps of Engineers prepared a joint EIS/EIR for the resource plans.

The California Supreme Court found CDFW’s CEQA review legally inadequate, concluding that the analysis of greenhouse gas emissions was not supported by substantial evidence and that mitigation measures calling for capture and relocation of a fully protected species were invalid. The court’s rulings on how greenhouse gas impacts should be assessed, especially its treatment of goals for statewide emissions reductions that were developed to implement A.B. 32, the Global Warming Solutions Act of 2006, will likely have a major long-term effect on environmental reviews for proposed projects throughout California.

Analysis of Greenhouse Gas Emissions. The EIR/EIS analyzed GHG emissions using A.B. 32 emissions reductions targets as standards of significance, specifically the 29 percent below “business as usual” goal set out in the Air Board’s 2008 Scoping Plan. The EIR/EIS concluded that because the development project’s GHG emissions would be 31 percent below the business as usual estimates for the project, it exceeded the statewide goals set out in the Scoping Plan, and would therefore not have any significant GHG impacts.

The court approved CDFW’s use of consistency with A.B. 32 and the Scoping Plan emissions reductions goal as a standard of significance. Under the court’s reasoning, agencies may show that a project would have no significant impact due to GHG emissions by demonstrating that the project will not interfere with attainment of the Scoping Plan’s goal that GHG emissions statewide be reduced by 29 percent from business as usual.

The court, however, disagreed with CDFW’s conclusion that showing a “project-level reduction” that meets or exceeds the reduction goal of 29 percent below business as usual is sufficient to show that the individual project’s GHG emissions would be reduced sufficiently to achieve the statewide goal. A 29 percent reduction by an individual project is not necessarily consistent with the goal that all emissions throughout the state be reduced by 29 percent: “the Scoping Plan nowhere related

that statewide level of reduction effort to the percentage of reduction that would or should be required from individual projects, and nothing . . . in the administrative record indicates the required percentage reduction from business as usual is the same for an individual project as for the entire state population and economy.”

According to the court, the EIR simply assumed that the level of effort required to achieve a 29 percent reduction from business as usual statewide emissions equates to a 29 percent reduction from individual development projects. The court noted that an agency might be able to determine what level of reduction from business as usual emissions is required for an individual project based on an examination of the data behind the Scoping Plan’s model. But it provided little guidance on how such an examination might proceed. The court also noted that agencies may resort to numerical thresholds for analysis of the significance of greenhouse gas emissions but left unanswered the question of when use of such thresholds might be sufficiently supported by evidence in the record.

Species capture and relocation mitigation. CDFW adopted numerous biological impact mitigation measures for the project, including measures that provided for collection and relocation of the unarmored three spine stickleback, a fully protected species under the California Endangered Species Act. The court acknowledged that CDFW may conduct capture and relocation of the stickleback as a “conservation measure to protect the fish and aid in its recovery,” but held that an agency “may not rely in a CEQA document on the prospect of capture and relocation as mitigating a project’s adverse impacts.”

The court reasoned that Fish and Game Code section 5515 prohibits “taking” a fully protected species, and that actions to capture and relocate must be considered a taking given the statutory language, structure, and history.

Comment. The use of consistency with the Scoping Plan’s emissions reduction target as a threshold of significance has become relatively common. Although the court approved use of such a threshold of significance, it found the EIR inadequate because it failed to show “a quantitative equivalence” between that goal and the EIR’s project-level analysis of emissions reductions. In effect, the court’s ruling assumes that greenhouse gas emissions reductions by new projects must be greater than the statewide goal for that goal to be achieved. The Scoping Plan does not, however, identify specific quantitative efficiency levels that various categories of new or existing projects should meet, and it is not at all clear how such efficiency measures might be formulated for individual projects. As a result, the court’s opinion will introduce significant near-term confusion and uncertainty about how greenhouse gas emissions should be analyzed under CEQA, and may significantly increase the likelihood and risk of CEQA litigation brought to challenge project approvals.

2. Supreme Court Holds that a State Agency’s Duty to Mitigate Significant Environmental Impacts Does Not Depend on a Legislative Appropriation of Funds for Mitigation

***City of San Diego v. Board of Trustees of the Cal. State Univ.,* (2015) 61 C4th 945**

The California State University system may not condition its funding of mitigation for off-site impacts of a campus expansion project on receipt of a legislative appropriation earmarked for that purpose, according to the California Supreme Court. The effect of the supreme court’s decision is that state agencies will have to look to existing appropriations and other available sources to fund off-site mitigation for projects they undertake, and will be precluded from shifting the cost of mitigation to regional and local agencies simply because the Legislature has not appropriated funds for mitigation. The court’s opinion does, however, leave a key question unanswered: When can a public agency considering its own project decide that a measure is economically infeasible?

Background. The case involved a challenge to the environmental impact report for a plan to expand the San Diego State University campus. The plan calls for development of faculty and staff housing; a hotel and campus conference center; new

student housing; expansion and renovation of the student union; and new buildings for academic, research and medical use, along with a supporting parking structure.

The EIR found that the expansion project would worsen congestion on city streets and a nearby freeway. The CSU Board agreed with the city and CalTrans on the University's fair share of the cost of mitigation—about \$15 million—but declined to commit the funding, taking the position that the University is required to pay for off-campus mitigation only if the Legislature appropriates funds specifically for that purpose.

Reasoning that the Legislature might not appropriate funds for mitigation, the Board determined that off-campus traffic mitigation was infeasible and adopted a statement of overriding considerations.

No legal support for University's determination off-site mitigation is infeasible. The California Supreme Court unanimously rejected the University's legal arguments, concluding that:

- The court's 2006 decision discussing the University's duties under CEQA to mitigate environmental impacts through fair-share payments (*City of Marina v. Board of Trustees*) did not support the Board's claim that the University may lawfully contribute funds for off-campus mitigation only through a legislative appropriation earmarked for that purpose.
- Most of the proposed new campus facilities will be financed with non-appropriated funds through revenue bonds, student fees, donations, and joint ventures with private interests. The University's authority to undertake such projects necessarily includes the authority to budget for the costs of mitigation.
- The expansion plan EIR calls for a variety of on-site mitigation measures that will be funded through project budgets. There is no reason to conclude that off-site mitigation measures cannot be funded the same way. CEQA does not draw a distinction between on-site impacts and off-site impacts, and instead refers to the environment as the area that "will be affected by a proposed project."
- CEQA expressly subjects the Board's decisions concerning campus master plans to its requirements and does not exempt those plans from the duty CEQA imposes to mitigate significant environmental impacts when it is feasible to do so.

A rule allowing state agencies to avoid off-site mitigation would have significant negative consequences. The court also identified what it viewed as the broader consequences of a rule allowing state agencies to condition off-site mitigation on the availability of a specific legislative appropriation. Such an appropriation condition, the court concluded, would necessarily apply to all state agencies, forcing the Legislature to decide, on a case-by-case basis, whether off-site impacts of state projects should be mitigated. Any time the Legislature failed to make a requested appropriation for a state project, local and regional agencies would be saddled with the state's share of the cost of addressing the project's impacts on local infrastructure.

The court also pointed out that the Board's proposed exception would result in off-site mitigation being found infeasible for many state projects that receive funding from sources other than the Legislature. A state agency's authority to participate in such projects necessarily includes the authority to ensure that mitigation costs are included in the project budget, and an earmarked legislative appropriation for mitigation cannot necessarily be expected for such projects.

An unanswered question: When can a public agency find a mitigation measure economically infeasible? Turning to the University's more general arguments, the court rejected the contention that the University should not be required to demonstrate, in the EIR process, "that its budget has adequately balanced competing educational and environmental demands" such as whether its funds "would be better spent on more classrooms or more traffic lights."

These arguments, according to the court, missed a fundamental point: that an agency cannot leave a project's significant environmental impacts unmitigated "based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible."

Comment. CEQA specifies that a public agency may reject mitigation measures for a variety of reasons, including economic infeasibility. The opinion, however, does not address how public agencies should measure the economic feasibility of mitigation measures for the projects they undertake. The budgeting process for public agencies necessarily entails a balancing of competing agency goals and interests. Although the mitigation of environmental impacts is an important objective for all public agencies, by providing that only mitigation measures that agencies determine are feasible need be adopted, CEQA reserves their discretion to decide whether the cost of particular mitigation measures is practicable in light of the other demands on the limited financial resources available to them. While the courts have provided some guidance on how this question might be addressed when public agencies are considering the feasibility of mitigation measures for private projects, they have not yet considered the question in the context of public agency projects.

3. CDFW Program EIR that Provides Standards for Conducting Later Site-Specific Analyses of Impacts of Fish Hatchery and Stocking Programs Upheld

Center for Biological Diversity v. Department of Fish and Wildlife,
(3d Dist. 2015) 234 CA4th 214

The court of appeal held that the first-ever program environmental impact report for the state's fish hatchery and stocking programs complies with CEQA, but also found that three of the EIR's mitigation measures constituted "underground regulations" in violation of the Administrative Procedure Act.

The fish-stocking programs. Since the late 19th century, the California Department of Fish and Wildlife has been required by statute to conduct a massive fish hatchery and stocking program. But hatchery trout introduced into mountain lakes contribute to declining amphibian populations, and hatchery salmon and steelhead are causing hybridization, which reduces the genetic diversity and strength of the fish species. As the result of a CEQA lawsuit, the Department was required to prepare its first EIR on the state-mandated program. The Department decided to include in the EIR several other programs, including one that authorizes fish stocking in lakes and ponds by private aquaculture facilities.

The program EIR. The Department prepared a program EIR that analyzed the program's species impacts on a statewide, rather than a site-by-site, basis. The EIR included protocols and plans for discovering and mitigating site-specific impacts at the nearly 1,000 water bodies the Department stocks and the 24 hatcheries it oversees. The EIR's baseline for environmental review, and its no-project alternative, was ongoing operation of the program as it had functioned from 2004-2008.

As for the private fish stocking programs, the EIR identified, and the Department adopted, new prerequisites and monitoring and reporting obligations for private vendors.

CBD's CEQA challenge. The Center for Biological Diversity alleged the EIR was inadequate for failing to perform site-specific review for each fish stocking site; deferring formulation of protocols and management plans; using the current stocking enterprise as the environmental baseline; and failing to consider a reasonable range of alternatives, including cessation of all hatchery and stocking operations. The court rejected each of these claims.

First, the court found the EIR adequate because it analyzed "every impact that reasonably could occur by stocking fish in any water body in the state based on information currently known Site-specific analysis will likely not reveal any unanticipated impacts; instead, it will reveal whether the impacts discussed in the EIR are occurring at that site." The court further held that nothing in CEQA required that the later site-specific reviews occur in a public process.

Second, the court found that the EIR identified sufficient performance standards for the future development of aquatic biodiversity management plans and hatchery genetic management plans, so that mitigation of species impacts was not impermissibly deferred.

The court easily dispensed with CBD's third claim, stating: "CEQA and case authority hold the baseline for a continuing project is the current environmental condition including the project, even if the project has not undergone prior environmental review."

The court gave equally short shrift to CBD's argument that the range of alternatives studied in the EIR was inadequate, and particularly that a no-stocking alternative should have been analyzed, given that the Department was required by statute to stock millions of pounds of fish each year.

Comment. This case is most notable for its strong endorsement of program EIRs that do not include site-specific analysis, but instead set the rules for conducting them, and its approval of mitigation through management programs to be developed later and tailored to address site-specific conditions. It also stands out as a case presenting a good example of a situation in which existing conditions, measured over a period of years, can represent an acceptable baseline for CEQA review.

4. EIR for Basketball Arena Upheld Despite Multiple Challenges to Its Impact Analysis

Saltonstall v. City of Sacramento,
(3d Dist. 2015) 234 CA4th 549

Opponents took another shot at halting the new Sacramento Kings arena project, challenging the project EIR on a variety of grounds. But the court of appeal upheld the EIR, rejecting every one of the opponents' arguments.

The arena project. The Sacramento Kings have played in Sleep Train Arena, located in the Natomas area of Sacramento, since it opened in 1988. In March 2013, an investor group presented a plan to acquire the Sacramento Kings, construct a new downtown arena in partnership with the city, and keep the team in Sacramento on a long-term basis. The city council approved a preliminary nonbinding term sheet for development of a new entertainment and sports center in downtown Sacramento. In 2013, the NBA approved the sale of the Kings to the investor group, reserving the right to acquire and relocate the franchise to another city if a new arena was not opened in Sacramento by 2017.

To facilitate meeting this deadline, the Legislature amended CEQA exclusively for the downtown arena project. The legislation also specifically allowed the city to prosecute an eminent domain action to acquire the arena site before completing CEQA review.

After the EIR for the project was certified, opponents sued, challenging the constitutionality of state legislation that modified several CEQA deadlines. The court of appeal rejected the opponents' constitutional challenge to the state CEQA legislation. Undeterred, opponents filed this second case challenging various aspects of the city's CEQA review.

Premature commitment. Opponents argued that the city violated CEQA by committing itself to a definite course of action on the project by entering into the term sheet and prosecuting an eminent domain action before environmental review was completed. The appellate court rejected the claim, concluding that the term sheet did not constitute an impermissible commitment to the project. The term sheet included a disclaimer that the city had no obligation to build, finance, or approve the project until it completed CEQA review and secured all necessary permits for the project. The term sheet further stated the city retained sole discretion to weigh the environmental consequences and to reject the project entirely. Moreover, the term sheet was not a binding contract that would commit the city to proceed with the project.

The court also concluded that the city's exercise of eminent domain prior to completion of environmental review was both permissible under CEQA and explicitly sanctioned under the state legislation adopted for the Kings arena project.

Project alternatives. The court rejected opponents' argument that the city failed to study a reasonable range of alternatives by not considering a remodeled Sleep Train Arena. The city had evaluated a "no project" alternative that would have continued use of Sleep Train Arena as well as a new arena in the Natomas area, and concluded both of these alternatives failed to meet the city's key objective for the project: to revitalize the city's downtown area. The court concluded that the analyses of the arena reuse and new arena alternatives were sufficient, and the city was not required to study an alternative involving remodeling the Sleep Train Arena since that was simply a variation on the two alternatives that were examined.

Traffic impacts. Opponents also argued that while the EIR had studied the timing and extent of traffic congestion on I-5 that would result from the project, it was defective for failing to separately study the project's impacts on drivers from outside the area traveling on I-5. The court responded that the city had no obligation to separately consider the effect of the project on motorists subject to the same traffic conditions as local motorists "simply because their trip origins and destinations might have been different than local commuters."

Crowd safety. The court also rejected opponents' argument that the city failed to study post-event crowd safety and potential for violence because "mere speculation about possible crowd violence and its possible effect on the environment" does not require review in an EIR. Impacts to safety caused by event crowds, do not, according to the court "implicate an environmental issue that must be reviewed under CEQA."

Comment. *Saltonstall* represents the latest in a growing line of cases that have rejected claims a public agency improperly committed itself to approve a project before complying with CEQA. In *Save Tara v. City of West Hollywood*, decided in 2008, the California Supreme Court defined the proper test for a premature commitment to a project as being whether the agency had committed itself "as a practical matter" to approve the project before completing CEQA review. Cases addressing the issue since *Save Tara* have, however, largely ignored that test and focused instead on whether the agency had entered into a contract which prevented it from disapproving the contract or approving an alternative to it.

5. EIR Comments Should Improve the Environmental Review Process, Not Derail It

[City of Irvine v. County of Orange,](#) [\(4th Dist. 2015\) 238 CA4th 526](#)

Comments on a draft EIR are not interrogatories and should not be treated as a mechanism for wearing down the lead agency. The CEQA Guidelines require only that a lead agency give detailed responses to comments on a draft EIR that identify an important new matter or raise questions about a significant environmental issue, according to the court's decision in *City of Irvine v County of Orange*.

Background. The decision resolved the third unsuccessful attempt by the City of Irvine to stop Orange County's proposed expansion of its Musick jail facility. Orange County first prepared an EIR for the project in 1996. The plans stalled due to lack of sufficient funding, but were revived in 2012, when the county certified a supplemental EIR which reflected changes to the project since the original EIR had been prepared. Irvine sued to challenge the EIR, asserting, among other claims, that the county's responses to Irvine's comments on the draft supplemental EIR were inadequate.

The county's responses to comments adequately addressed the important environmental issues raised in the comments. The court of appeal held that the county's responses to Irvine's comments were adequate and, to the extent any of them might be viewed as lacking in some respect, Irvine did not show any prejudice. The court noted that the key purpose of the comment process is to produce a better EIR by raising issues the lead agency may have overlooked in preparing the

draft EIR. The agency must confront comments that raise a significant environmental issue or that bring a new issue not previously addressed to the table. On the other hand, it need only provide brief responses to comments that are merely objections to the project itself. And a response can be sufficient if it refers a discussion in the draft EIR that addresses the environmental concerns raised by the comment. The court also referred to a significant recurring problem—that project opponents can use the comment process to wear down a lead agency by making onerous demands for information in an effort to delay or derail the project—and noted that this type of abuse of the process should not be condoned. Based on these principles, the court concluded that the county adequately responded to Irvine’s comments.

Preparation of a supplemental EIR rather than a new EIR was appropriate. The court also rejected Irvine’s argument that the county should have prepared an entirely new EIR rather than a supplemental EIR. The court explained that a lead agency has discretion to choose whether to prepare a supplemental EIR or a new, ground-up EIR, and that “the appropriate judicial approach is to look to the substance of the EIR, not its nominal title.” The court held that the county did not abuse its discretion in choosing to prepare a supplemental EIR because many aspects of the project remained the same, and the supplemental EIR (which was several times longer than the original EIR) adequately addressed the new issues and changes to the project since preparation of the original EIR.

Interim traffic impacts need not be studied. The court held that it was sufficient for the county to evaluate traffic impacts at the beginning and end of the project, without studying interim traffic impacts during the period of time it would take to complete the project. The court concluded that an analysis of traffic impacts at the start of the project in 2014 and at the completion of the project in 2030 was sufficient, and the County was not required to do more, particularly since a comparison of the data showed no material difference in the impacts that would occur over time.

Farmland conservation not required as mitigation. Finally, the court held that the county properly concluded that three proposed mitigation measures for the loss of agricultural land on the project site—purchasing agricultural conservation easements, creating a transfer-of-development-rights program, and enacting a right-to-farm ordinance—were not feasible. A conservation easement does not actually replace lost agricultural land. And in Orange County the “astronomical expense of land” clearly supported the county’s finding that the purchase of conservation easements is a “non-starter.” And, for practical reasons, the county found neither a TDR program or a right-to-farm ordinance would be a viable option.

Comment. The court’s opinion demonstrates the substantial discretion that a lead agency has in preparing an EIR, and the heavy burden on project opponents to show a prejudicial abuse of that discretion when challenging an EIR. The court’s analysis of the arguments about the adequacy of the county’s responses to comments will likely have a significant influence on how the courts evaluate such claims in the future; the decision explicitly recognizes that the responses should focus on comments that raise important issues that were missed in preparing the EIR, rather than on comments that contain nothing more than burdensome demands for collateral information. The court’s detailed discussion of conservation easements as mitigation, and its recognition that they do not actually affect the quantity of farmland that is lost when farmland is developed, may also have an influence on how this issue is viewed in future cases.

6. Historical Level of Use May Serve as CEQA Baseline for Replacement of Vacant Building

[North County Advocates v. City of Carlsbad,](#) [\(4th Dist. 2015\) 241 CA4th 94](#)

North County Advocates is a potentially groundbreaking decision on use of historical levels of operations as the baseline for gauging the environmental impacts of a proposed project under CEQA. In this case, which concerned renovation of a large Westfield shopping center in Carlsbad, the court upheld the city’s use of a traffic baseline that assumed an existing department

store building was fully occupied, even though the store had been vacant for almost six years at the time the draft EIR was released.

Background. The shopping center was built in 1969, with five anchor department store buildings and numerous smaller retail shops, including a now-vacant Robinsons-May department store. Under the terms of an existing precise plan for the shopping center, Westfield was entitled to renovate the interior of the former department store and fully occupy it without obtaining discretionary approvals from the city. The development plan the city approved for renovation of the center, however, called for the building to be demolished and reconstructed.

The city's analysis. In its analysis of traffic impacts, the city's EIR, completed in 2012, assumed full-occupancy of the former Robinsons-May store, which had been vacant since 2006, three years before the city began work on the EIR. The EIR and supporting documents explained this baseline was appropriate because the "nature of a shopping center is that tenants change and the amount of occupied space constantly fluctuates" and that portions of the space are periodically occupied with temporary uses. The EIR noted that the new building would not increase the square footage allowed under the precise plan and that the vacant space could be reoccupied at any time without further discretionary action. It also pointed out that a full occupancy assumption comports with SANDAG's regional traffic modeling methodology, which assumes full occupancy of all entitled square footage.

The court's decision. The project opponents contended that the EIR's baseline was "incorrect and misleading" because it did not follow the general rule that conditions as they exist when environmental review begins should be used as the baseline for measuring a proposed project's changes to the environment. They asserted the city had "falsely inflated" existing traffic conditions by imputing over 5,000 daily trips from the vacant space to the baseline, resulting in a defective analysis of the project's true traffic impacts.

The court responded that CEQA does not impose a uniform, inflexible rule. Agencies may exercise discretion to account for a temporary lull or spike in operations that occurs over time. "As long as that exercise of discretion is supported by substantial evidence, the court will not disturb it."

The court held the city's use of the full occupancy traffic baseline was reasonable and supported by the evidence. Full occupancy was not a hypothetical condition. It was based on the actual historical operation of the space for more than 30 years, up until 2006. Fluctuations in occupancy are expected of a shopping center, and the city had discretion to take account of temporary swings in occupancy in selecting an appropriate baseline.

Comment. While the store had operated at such a low level for several years that operations there had virtually ceased, the court nevertheless ruled that "historical" operational levels could be used as the baseline, referring to the time during which the building had been fully occupied. The court's approval of the EIR's use of a historical conditions baseline is consistent with guidance in other recent cases on the appropriate baseline for an impact analysis. The court's opinion could be read narrowly as applying only to situations in which a vacant building is being replaced, and the owner has the right to continue operating at historical levels if the replacement project is not approved. It will likely be read more broadly, however, to mean that historical operational levels can be treated as the baseline whenever a facility is being replaced or reoccupied, despite a significant gap in occupancy or significant fluctuation in operations over time. This is an important ruling given that market conditions can cause operations to fluctuate substantially over time. Under this case, an agency can look back to historic highs in operations to establish a baseline, rather than setting a baseline based on operations that happen to occur at commencement of environmental review.

7. Recirculation Not Required for New Information that Confirms EIR's Analysis; Localized Significance Thresholds Not Required for Construction Emissions

Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority, ***(2d Dist. 2015) 241 CA4th 627***

The court upheld the CEQA analysis for an extension of the L.A. Metro subway against claims that significant new information had been disclosed relating to the viability of alternatives, and that localized air pollution and public health impacts had not been adequately studied.

Background. The Los Angeles County Metropolitan Transportation Authority prepared and certified an EIS/EIR for extension of Metro's subway system to the west side of Los Angeles. The EIS/EIR studied two alternative location options for a Century City station and recommended that the station be located at one of those locations. Metro approved the subway project with the station at the recommended location and a related tunnel alignment beneath Beverly Hills high school. The city and school district objected to the tunnel location and filed suit to challenge the EIR following Metro's approval.

Recirculation not required where new information confirms EIR's analysis. The court rejected the two CEQA claims raised by the project opponents. First, the court held that Metro was not required to recirculate the EIS/EIR for another round of public comment after introducing a fault investigation and tunnel safety reports in final EIR/EIR. The court ruled that the new information "merely confirmed" that the alternative Century City station location was not viable due to a potential seismic hazard, and "also confirmed and expanded upon" the draft EIS/EIR's analysis of the environmental impacts from the recommended station. The court also held that Metro did not trigger an obligation to recirculate by issuing an addendum to the final EIS/EIR that revised reported air quality impacts.

Air quality impacts need not be analyzed against localized significance thresholds. The court upheld the EIS/EIR's air quality analysis, concluding that CEQA did not require an assessment of localized air pollution and public health impacts from the project's construction. The court determined that Metro was not required to analyze air quality impacts against localized significance thresholds, given that the agency analyzed the impacts against thresholds established by the regional air quality management district. Similarly, the EIS/EIR appropriately included a technical report that identified potential adverse health effects from exposure to identified pollutants from construction emissions; the document did not also need to include "an analysis showing how the actual construction emissions will specifically impact public health."

Comment. Arguments that the EIR should have been recirculated are routinely made in cases challenging EIR adequacy. Courts, however, are generally reluctant to overturn an EIR on that ground, and tend to uphold a lead agency's decision that recirculation is not required, except where the new information added to the EIR relates to a new significant impact that was not previously disclosed.

8. Court Upholds Average Level of Operations as Baseline Used in EIR for Sand Mining

San Francisco Baykeeper, Inc. v. California State Lands Commission, ***(2015) 242 CA4th 202***

In *San Francisco Baykeeper*, the court of appeal confirmed that the State Lands Commission complied with CEQA when it renewed sand mining leases in San Francisco Bay. Among other rulings, the court upheld the environmental impact report's use of a five-year average operations baseline rather than a single-year baseline.

The court held, however, that before entering into the lease, the Commission was required to make findings that sand mining constituted a permissible use of public trust property. Because the Commission had made no such findings—taking the position that sand mining was indisputably a public trust use of sovereign land—the court remanded

Five-year average of extractions an appropriate baseline. The challengers' first claim was that because the Notice of Preparation for the EIR was issued in 2007, the level of sand extraction activity in 2007 was the only baseline the Commission could use to analyze the impacts of the lease renewals. The court, however, upheld the Commission's conclusion that the five-year average of extractions from 2002-2007 was a better indicator of existing mining conditions, because mining fluctuated from year to year, and 2007 was a particularly slow year due to economic factors.

Detailed erosion and sedimentation analysis upheld. The EIR concluded, based on multiple technical studies conducted throughout the EIR process, that the sand mining leases would contribute approximately 0.2-0.3 percent to long-term cumulative erosion, and that this effect was not cumulatively considerable. Challengers argued that this approach was based on a "ratio" theory which improperly assumed the project contribution was insignificant because it was a small proportion of a larger environmental problem. The court disagreed. The small proportion of erosion was not used as an excuse not to study the issue; the Commission had conducted an exhaustive analysis of erosion and sedimentation issues. In addition, the court held that adding new technical studies at the time of the Final EIR did not require the EIR to be recirculated for public comment, because the new studies did not alter any of the substantive conclusions of the Draft EIR or any of the points of disagreement between the parties.

Extraction of minerals is not an adverse impact on mineral resources. The challengers made the novel claim that the EIR's significance thresholds for mineral resource impacts, adopted from CEQA Guidelines Appendix G, required the Commission to treat extraction of minerals as an environmental impact on mineral resources. The court agreed with the common interpretation of the Appendix G language, which is that a project causes impacts to mineral resources if it interferes with access to those valuable resources, not if it extracts the resources.

No prejudicial error from deficient notice to other agencies. Without specifying which notice requirements it believed were violated, the court found that the Commission failed to consult properly with the California Coastal Commission and the City of San Francisco during the CEQA process. The court held, however, that no prejudice resulted; the challengers had failed to show that the violations resulted in the omission of pertinent information from the environmental review process.

Public trust findings required. Although the Commission's CEQA analysis was adequate, the court held that its public trust compliance was not. The public trust applies to submerged lands; uses that are consistent with the public trust include navigation, commerce, fishing, hunting, bathing, swimming, and preservation of trust lands in their natural state. The Commission enforces this trust and has traditionally assumed that sand mining is a valid public trust use, but did not make any findings to that effect. The court observed, however, that the fact that a use of a material serves a public need does not necessarily mean that its extraction is a public trust use. Because the Commission did not adopt findings supporting a determination that sand mining is consistent with the public trust, and the EIR had not analyzed the issue, the court ruled the Commission had erred in approving the lease.

Comment. This case is significant in two respects. First, it contributes to the substantial line of recent CEQA decisions upholding lead agencies' use of a baseline for analysis that differs from operations during the year environmental review began. Second, the case appears to reflect an increased willingness by courts to recognize that defects in the notice process are not fatal unless the error is shown to be prejudicial.

9. Increased Demand for Emergency Services Not an Environmental Impact that Must Be Mitigated

City of Hayward v. Board of Trustees of the Cal. State Univ.,
(1st Dist. 2015) CA4th (No. A131413, November 30)

Two important, recurring CEQA questions are addressed by the court of appeal's opinion in this case: whether CEQA requires funding of mitigation for a project's effects on public services; and whether an adaptive mitigation program amounts to improper deferral of mitigation. The court answered no to both questions.

Mitigation not required for increased demand for emergency services. The first question involved a claim that the California State University was required to mitigate the impacts of expansion of its Hayward campus on fire and emergency medical services that are provided by the City of Hayward. The court of appeal rejected the city's argument that an increased demand for emergency services is an environmental impact. It is instead, the court ruled, a social and economic effect that need not be mitigated under CEQA. Noting that providing fire and emergency medical services is the city's legal responsibility, the court found no legal support for the claim "that CEQA shifts financial responsibility for providing fire and emergency response services to the sponsor of a development project."

Adaptive mitigation program does not impermissibly defer mitigation. The second question involved the legal adequacy of a transportation demand management plan for mitigating traffic and parking impacts, which included a menu of measures to be put in place in stages, evaluated and then adjusted as conditions evolved. Ruling that the plan did not improperly defer decisions about mitigation, the court highlighted the components of the plan that together made it sufficiently concrete to pass legal muster:

- performance goals;
- identification of the types of policies to be evaluated;
- an implementation plan, including timelines;
- monitoring of effectiveness of measures as they are deployed; and
- an enforceable commitment to implement mitigation.

Comment. Three years ago, the supreme court accepted review of this case, but put the case on hold pending its decision in the San Diego State University case, discussed above. The case was transferred back to the court of appeal after the decision in the SDSU case was issued. The court of appeal then republished its earlier opinion, with modifications relating only to the question the supreme court had resolved in the SDSU case. The opinion leaves intact the court's key ruling that increased demand for emergency services is a social and economic impact, not an environmental impact that must be mitigated under CEQA.

E. CERTIFIED REGULATORY PROGRAMS

1. Detailed Environmental Review Not Required for Adoption of TMDL for Lake Bed Sediment

Conway v. State Water Resources Control Bd.,
(2d Dist. 2015) 235 CA4th 671

The court of appeal upheld the Regional Water Quality Control Board's adoption of the total maximum daily load limit for concentration of pollutants in the sediment in McGrath Lake. It also ruled that an environmental analysis of the impacts of

dredging was not required for adoption of the TMDLs because TMDLs are informational and do not dictate the remedial action that must be taken to meet their goals.

Background. The Clean Water Act requires states to identify polluted water bodies within their jurisdictions, and to set TMDLs for those water bodies. A TMDL is the maximum amount of pollutants that can be discharged into an impaired water body from point and nonpoint sources. California implements the TMDL program through the Porter-Cologne Water Quality Control Act.

McGrath Lake, located in Ventura County, was placed on the Clean Water Act section 303(d) list of impaired waters due to excessive levels of organochlorine pesticides and PCBs. The Los Angeles Regional Water Quality Control Board then established TMDLs for the lake through an amendment to the Los Angeles Basin Plan. The Board concluded that exposure of the McGrath Lake ecosystem to the organochlorine pesticides and PCBs had impaired beneficial uses, including aquatic life and recreational uses. The plan amendment set TMDLs for contaminants from two primary sources: agricultural runoff from surrounding fields and from lake bed sediment.

The Basin Plan Amendment designated landowners within the lake's watershed as "cooperating parties," giving them two years from the effective date of the amendment to enter into agreements with the Regional Board to implement the TMDLs. Adjacent landowners challenged the TMDL in the plan amendment, contending that the TMDL violated provisions of the Clean Water Act, the Porter-Cologne Act and CEQA.

No basis for Clean Water Act and Porter-Cologne Act claims. The challengers argued that the Clean Water Act did not authorize the Regional Board to set load allocations expressed in terms of concentrations of pollutants in lake bed sediments. The court of appeal summarily rejected the claim, concluding that: "The lake is its water and its sediment." The court also concluded that the lake bed sediment TMDL was consistent with Clean Water Act regulations, which give the Regional Board broad authority to select an "appropriate measure" of TMDL, and that such selection deserved substantial deference, particularly where, as here, the EPA had reviewed and approved the lake bed sediment TMDL. The petitioners' additional claim that dredging was the only way to meet the TMDL, and that the TMDL therefore inappropriately dictated the means of compliance in violation of the Porter-Cologne Act, also failed. The court observed that no showing had been made that there were no alternatives to dredging, and even if such a showing had been made, there can be no violation "where lack of available alternatives is a constraint imposed by present technology and the law of nature" rather than a Board-specified manner of compliance.

Review of environmental impacts of implementing TMDL not required. The challengers asserted that the CEQA-equivalent document the Board prepared was deficient because it inadequately analyzed the environmental impacts associated with dredging. The court rejected the argument, reasoning that the lake bed sediment TMDL the Board adopted does nothing more than establish maximum pollution loads. "A TMDL is an informational document, not an implementation plan." It does not prohibit or require any particular actions, but instead "represents a goal for the level of a pollutant in a water body." Dredging, by contrast, is a potential remediation measure, and the TMDL does not dictate remediation measures. The remediation plan to implement the goal set by the TMDL had not yet been developed, and, according to the court, a full environmental analysis would not be required until the plan is formulated.

The challengers also argued that the impacts of dredging should have been evaluated because dredging is the only practical method of remediation. The court disagreed, noting again that an environmental analysis of any particular method of remediation, before a remediation plan is developed, would be premature.

Comment. Under the standard test for defining the scope of a project, CEQA review should include not only the activity being approved, but also extend to related future activities that are a reasonably foreseeable consequence of project approval. The decision in this case could be taken to illustrate a limiting principle that has been applied by some courts: that environmental

review need not extend to future activities, even if they could be viewed as a foreseeable consequence of the project, that are not sufficiently well-defined to allow a useful environmental review to be conducted.

F. CEQA LITIGATION

1. Appellate Court Reaffirms Broad Discretion of Trial Courts to Limit Attorneys' Fees Award when a Petitioner Fails to Prevail on Most Claims

Save Our Uniquely Rural Environment v. County of San Bernardino, *(4th Dist. 2015) 235 CA4th 1179*

The court of appeal upheld the trial court's award of less than 10 percent of the fees requested by the prevailing petitioner in a CEQA case, finding no abuse of the broad discretion trial courts have in determining the proper amount of a fee award.

Background. Al-Nur Islamic Center proposed to build an Islamic community center and mosque in a residential neighborhood in an unincorporated area of San Bernardino County. The county adopted a mitigated negative declaration and issued a conditional use permit for the project. A community group, Save Our Uniquely Rural Community Environment, challenged the negative declaration, but prevailed on only one of many grounds asserted. The trial court found a CEQA violation for failure to study environmental impacts relating to wastewater disposal. SOURCE sought an award of \$231,098 for attorneys' fees.

The trial court granted the motion for a fee award, but reduced the award to \$19,176, noting that SOURCE had succeeded on only one of its six CEQA arguments and on none of its four conditional use permit arguments.

The court of appeal decision. The court of appeal upheld the trial court's fee award, holding that SOURCE failed to demonstrate any abuse of discretion. The extent of a party's success, the court stated, is a key factor in determining the amount of attorneys' fees to be awarded to the prevailing party. SOURCE had advanced multiple land-use and CEQA claims and sought an order setting aside the approvals pending preparation of an EIR. However, it succeeded on only one of its CEQA claims and obtained only an order setting aside the approvals pending further review on the single issue of wastewater treatment. The trial court thus acted well within its discretion in reducing the requested fee award based on the degree of success.

The trial court likewise did not abuse its discretion in finding several elements of the fees excessive, including 40 hours preparing a reply brief that essentially repeated the arguments made in the opening brief; charging nearly \$10,000 for a "run-of-the-mill" attorneys' fees motion; and billing time at partner rates for research on basic matters such as standards of review, "CEQA law and guidelines" and "requirements for opening brief."

Additionally, the court remarked that while SOURCE claimed its attorneys' rates were reasonable for the Los Angeles area, it failed to show why those rates were reasonable in San Bernardino County. Absent a specific showing of why adequate lawyers in the local market could not be obtained, the trial court was justified in calculating attorneys' fees based on reasonable local market rates.

The court also found no justification for petitioner's request for a multiplier of two based on the purported risk assumed by the law firm, the complexity of the questions involved, or the superior skills allegedly displayed by its attorneys in presenting them.

Comment. In CEQA cases, trial courts often award attorneys' fees to a prevailing petitioner for all of the time its lawyers spent on the case, without considering how much of that time was devoted to pursuit of fruitless claims. *Save Our Uniquely Rural Environment* stands out as one of the few reported appellate decisions that have recognized a trial court's broad discretion to deny attorneys' fees to a petitioner for time its attorneys incurred pressing non-meritorious claims.

2. A Petitioner Cannot Recover Attorneys' Fees When Pendency of Suit Challenging Approvals Was Not the Catalyst for Revocation of Entitlements

[Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa,](#) [\(4th Dist. 2015\) 238 CA4th 513](#)

Commenting that “we have not found a threat of victory in this record,” the court of appeal ruled against a citizens’ group that brought a motion for attorneys’ fees after losing a CEQA challenge in the trial court.

In 2005, Target entered into a contract to purchase land for a shopping center. The City of Yucaipa city council approved the shopping center project two years later based on an EIR. Target then sued to force the property owner to complete the land sale. Petitioner, a citizens’ group, then filed suit challenging the project entitlements under CEQA. Target defended the action on the city’s behalf pursuant to an indemnity requirement in its conditions of approval. The trial court ruled against the citizens’ group. While the citizens’ group’s appeal was pending, Target abandoned the project and withdrew its defense of the entitlements. The city then revoked the shopping center entitlements, rendering the appeal moot.

The citizens’ group sought attorneys’ fees, claiming that its CEQA lawsuit, and specifically its appeal from the trial court’s judgment, was the “catalyst” that motivated the city to revoke the entitlements. The appellate court had no difficulty concluding otherwise. Citing city council hearing minutes indicating that the entitlements were revoked because Target had breached the indemnity condition by withdrawing from defending the case. The court determined that the city “did not revoke the entitlements for any reason related to the EIR or any violation of CEQA.” Consistent with prior decisions and common sense, the court held that the “fact that [plaintiff] filed an appeal from the adverse judgment did not convert the action into a meritorious one under the catalyst theory.”

Comment. A petitioner in a CEQA case can receive an award of attorneys’ fees, even though it did not obtain a judgment in its favor, if the lawsuit led the respondents to take action which gives the petitioner the relief it seeks. For a petitioner to obtain a fee award under this “catalyst” theory, the petitioner must show that the lawsuit motivated the respondents to provide the “primary relief” sought in the litigation and that it had that effect by presenting a threat of victory. The petitioner here failed to show that either requirement was met.

G. CASES PENDING IN THE CALIFORNIA SUPREME COURT

1. What Greenhouse Gas Reduction Targets Must Be Used in an EIR on a Long Range Transportation Plan in Order to Comply with CEQA?

[Cleveland National Forest Foundation v. San Diego Association of Governments,](#) [\(4th Dist. 2014\) 231 CA4th 1056, No. S223603, review granted March 11, 2015.](#)

The California Supreme Court has agreed to review the appellate court decision in *Cleveland National Forest Foundation v. San Diego Association of Governments*. The court of appeal in that case invalidated the EIR for the Association’s 2050 Regional Transportation Plan and Sustainable Communities Strategy.

In its petition for review filed with the supreme court, SANDAG raised a number of issues. However, the supreme court’s order granting review limits the issues it will consider to the most important and controversial one raised in the case: whether the EIR for a regional transportation plan must include an analysis of the plan’s consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 issued by Governor Schwarzenegger in 2005.

The reduction goals in the executive order call for emissions to be reduced 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 would

increase them after that. While the EIR discussed the executive order's 2050 emissions reduction target, it did not treat the 2050 target as a standard for assessing the significance of the plan's greenhouse gas impacts. The court of appeal ruled that the EIR's greenhouse gas impacts analysis was inadequate because it had not analyzed the plan's consistency with the executive order's 2050 emissions reduction target.

The supreme court will be reviewing the case to consider the following question: Whether the environmental impact report for a regional transportation plan must include an analysis of the plan's consistency with the greenhouse gas emission reduction goals in Executive Order No. S-3-05 in order to comply with the California Environmental Quality Act.

Comment. The supreme court's decision in this case will have a far-ranging effect on how analyses of greenhouse gas emissions will be conducted in the future. Unlike the Executive Order's 2020 standards, which were adopted by the State Legislature in A.B. 32, the 2050 goals are not legislatively imposed and have no legal effect on local agencies. To require agencies to treat goals in an Executive Order as CEQA thresholds of significance would transmute such goals into the equivalent of statutory policy requirements.

2. What Information Must an EIR Include in Order to Adequately Consider Environmentally Sensitive Habitat Areas on a Project Site?

[Banning Ranch Conservancy v. City of Newport Beach, \(4th Dist. 2015\) 236 CA4th 1341, No. S227473, review granted Aug. 19, 2015.](#)

The California Supreme Court will consider three issues in this case. First, whether the city's approval of the project complied with the provisions of its general plan directing that the city "coordinate with" and "work with" the California Coastal Commission to identify habitats for preservation, restoration, or development before the project was approved. Second, what standard of review should apply when a court considers a city's interpretation of its own general plan. And third, whether the city's environmental impact report was required to identify environmentally sensitive habitat areas, as that term is defined by the California Coastal Act, on the project site.

Comment. The deference that a court affords to a city's interpretation of its own general plan stems from the separation of powers doctrine. For a court to second-guess the sufficiency of "coordination" efforts in determining whether general plan consistency has been achieved could place the court in the role of fact-finder and policy-maker-- a role that courts necessarily should decline to accept.