The California Environmental Quality Act in 2015 – Summary of New Court Decisions, Statutory Changes and Proposed CEQA Guidelines Amendments

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This summary outlines CEQA developments in 2015, including published CEQA decisions of the California Supreme Court and California Courts of Appeal, statutory changes, currently pending CEQA cases in the California Supreme Court, and proposed amendments to the CEQA Guidelines.

I. OVERVIEW OF CEQA DEVELOPMENTS IN 2015

A. Four Supreme Court decisions issued during the year.

1. The Cal State University must mitigate impacts of campus expansions if feasible, and cannot use lack of specific legislative appropriations as the basis to find that such mitigation is infeasible. *City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945

2. Determining that significant effects due to unusual circumstances defeats the use of a categorical exemption from CEQA is a two-step process: first, whether an unusual circumstance is evaluated under the substantial evidence standard, and then whether a significant impact is reviewed under CEQA's "fair argument" standard. This ruling makes the use of categorical exemptions generally more predictable. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086

3. It is appropriate for lead agencies to evaluate greenhouse gas impacts using a percentage reduction against "business as usual" methodology, but the state goals used in such an analysis must be adjusted or correlated to specific project conditions. Also, species that are "fully protected" under the Fish and Game Code cannot be taken and moved as part of a mitigation plan. *Center for Biological Diversity v. California Department of Fish and Wildlife* (2015) 62 Cal.4th 204

4. CEQA generally does not require an agency to analyze the impact of existing environmental conditions on a project's future users or residents. *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369

D. Five CEQA cases still pending in the Supreme Court

1. *Friends of the College of San Mateo Gardens* (what legal standard applies to decisions that a further CEQA review is required, after a project has already been through the CEQA process)

2. *Sierra Club v. County of Fresno* (what standard of review generally applies to court review of EIR determinations; the court may also address CEQA requirements for health impacts analysis)

3. *Friends of the Eel River* (to what extent does federal law preempt CEQA review of a railroad project)

4. *Cleveland National Forest Foundation v. SANDAG* (executive orders and climate change analysis)

5. *Banning Ranch Conservancy v. City of Newport Beach* (identification of environmentally sensitive habitat areas in EIR)

E. 20 Court of Appeal decisions

1. Appellate decisions generally upheld EIRs against challenge.

2. Several decisions rejected challenges to the way EIRs described the environmental baseline, upholding agency discretion to determine the best way to do this.

F. The Legislature tinkered with some CEQA exemptions – nothing significant

G. Lots of activity on the CEQA Guidelines and Guidance documents

1. SB 743 Guidelines on traffic analysis and replacing level of service (LOS) with vehicle miles travelled (VMT) were delayed in 2015 (in January 2016, the Office of Planning and Research issued a revised proposal).

2. Proposed Guidelines and draft Technical Advisory implementing AB 52 (tribal cultural resources)

3. OPR proposed a general set of proposed Guidelines changes

II. CASE LAW DEVELOPMENTS

A. Does CEQA Apply? Is the activity a "Project"?

***Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549. Term sheet and other actions did not constitute "approval".**

- Case on Sacramento arena EIR, includes several holdings under *Save Tara* ((2008) 25 Cal.4th 116) on whether various early actions relating to the project constituted a prohibited project approval before the EIR process was completed
- Public relations and advocacy did not show premature commitment or project approval under *Save Tara* – having "high esteem" for a project does not show early approval – "it is inevitable that the agency proposing a project will be favorably disposed towards it"
- Preliminary non-binding term sheet was not a project approval, just an agreement to negotiate
- Acquisition of a block of land for the project was not approval of the project – Guideline 15004 allows acquisition of the preferred site if it is conditioned on CEQA compliance, and there was a specific statutory authorization in the CEQA provisions for the arena, also allowing the acquisition.
- Forgiveness of a loan to a local museum in connection with the acquisition also was not premature approval – under the same authorities.

B. Statutory and Categorical Exemptions

***Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086[1]. Two step process for determining whether unusual circumstances exception defeats use of exemption; substantial evidence test applies to the first step.**

- Case arose out of approval of a large single family home in the Berkeley hills, City of Berkeley found that the home was categorically exempt, and that there was no unusual circumstance that defeated the exemption (applying the Guideline 15300.2(c) exception)
- Supreme Court confirmed that determining whether an unusual circumstance defeats a categorical exemption is a two-step process, and a party seeking to defeat the exemption must show both that there is an unusual circumstance and that the unusual circumstance results in a significant impact
- Whether there is an unusual circumstance is a factual question, and the agency determination is reviewed under the substantial evidence standard

[1] Michael Zischke and Andrew Sabey of Cox Castle represented the California Building Industry Association, the California Business Properties Association and the Building Industry Legal Defense Fund as *amicus* in this case.

- Once an unusual circumstance is found, then the question of whether there is a significant impact is a "fair argument" question
- The court analogized its rulings to the *Valley Advocates* line of cases on historicity of resources – citing with approval the cases holding that whether a resource is historic is a substantial evidence question, but once historic the question of significant impact is fair argument (in a negative declaration context)
- On remedy, the court also held it was inappropriate to order the agency to prepare an EIR in an exemption case, unless no other exemption was available
- Justices Werdegar and Liu concurred in the result, but would have held that a significant effect alone is enough to defeat an exemption.

***CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488. Work performed under prior exempt approval is part of the existing conditions baseline for purposes of a later exemption decision.**

- City had completed emergency storm drain repairs under the emergency exemption, and later approved revegetation plan for the area, applying the common sense exemption (Guideline 15061) and the exemptions for existing facilities and reconstruction (Guidelines 15301 and 15302)
- Court held once the emergency work complete, that work was part of the baseline, rejected claim that the baseline had to go back before the emergency work was done
- Substantial evidence showed no impact, so common sense exemption upheld
- Also, no evidence introduced to show that the City's other exemption determinations were defeated by an unusual circumstance

***Save Our Schools v. Barstow Unified School District* (2015) 240 Cal.App.4th 128. Substantial evidence did not support school transfer exemption, because district applied wrong standard.**

- Court rejected use of statutory exemption for school closings (Public Resources Code §21080.18) as applied to a project to close two schools and transfer the students to other district schools
- This statutory exemption can only be used if any associated physical changes are categorically exempt – here the district relied on Guideline 15314 which exempts minor additions to schools where the addition does not increase original capacity by more than 25% or ten classrooms
- The district compared the transfers to the current capacity of the receptor schools, rather than the original capacity, so there was no substantial evidence supporting the determination that the requirements of the statutory exemption were met

***Defend Our Waterfront v. California State Lands Commission* (2015) 240 Cal.App.4th 570. Statutory exemption for State Lands requires settlement of an actual dispute, not just fixing a title problem.**

- Statutory exemption for settlements of title or boundary disputes (Public Resources Code §21080.11) could not be used to exempt a land exchange agreement that facilitated development, but did not resolve a specific dispute
- Petitioners were excused from the requirement to exhaust administrative remedies because the State Lands Commission notice did not indicate that the Commission was considering a CEQA exemption

***Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 CA4th 943. Substantial evidence supported city finding of no unusual circumstance, and construction traffic plan was not a mitigation measure that defeated use of exemption.**

- On remand from Supreme Court, the First District applied substantial evidence test to arguments that the large size of proposed home and the setting of the home were unusual circumstances – found that substantial evidence supported the City's determinations that these were not unusual circumstances
- Traffic management plan during construction was a mitigation measure, but a standard type of condition for a project, so it did not defeat the use of a categorical exemption under the *Salmon Protection* decision.
- *Note:* This decision, originally unpublished, is important in applying the Supreme Court's ruling and applying the substantial evidence test. Notably, the first decision after the Supreme Court's Berkeley Hillside ruling incorrectly applied the fair argument standard, but that decision as depublished by the Supreme Court. *Paulek v. Western Riverside County Regional Conservation Authority,* Fourth District Division Two Case No. E059133, depublished September 9, 2015.

***Save Our Big Trees v. City of Santa Cruz* (2015) 241 CA4th 694 (deadline for review December 2). Exemptions for environmental protection cannot be used for actions that reduce environmental protections.**

- City of Santa Cruz amended its heritage tree protection ordinance to delete references to shrubs, to provide that trees could be designated as heritage trees for historical or horticultural significance only by City Council action, to allow removal for hardship or financial burden instead of adverse effect on structural integrity, and to relax the standards for removal of non-native species such as eucalyptus.
- City found the actions exempt under Guidelines 15307 and 15308 as actions to enhance natural resources and protect the environment.

- Because the revisions to the ordinance removed and relaxed some of the standards, the City did not meet its burden to demonstrate that the action was within the scope of the exemption

***Citizens for Environmental Responsibility v. State of California ex rel. 14th District Agricultural Association* (2015) 242 Cal.App.4th 555. Manure management plan was part of exempt project, not mitigation; no unusual circumstance.**

- Case had been on hold in Supreme Court, until *Berkeley Hillside* decided, this is decision on remand
- Court upheld application of Guideline 15323 categorical exemption for operation of public facilities, to a rodeo at the Santa Cruz county fairgrounds in Watsonville
- a manure management plan was part of the proposed operation, court held this was not a prohibited mitigation measure (relying on *Wollmer* and distinguishing *Salmon Protection*)
- also, there was no unusual circumstance defeating the use of the exemption

C. Negative Declaration Case Law

***Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714. Fair argument of noise and traffic impacts defeats a mitigated negative declaration.**

- Mitigated negative declaration for use permit to allow weddings on 14-acre property set aside
- Court found fair argument of possible noise impacts on neighbors, citing personal testimony
- Evidence showing compliance with code standards did not mean there was not a potential significant impact
- Fair argument of traffic impact established by study showing doubled traffic on winding road, neighborhood testimony of hazards, and higher than average accident rates

D. EIR Decisions

***City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945. Supreme Court rules Cal State cannot reject mitigation as infeasible based on lack of legislative appropriation.**

- Cal state argued that it could not feasibly mitigate off site traffic impacts without a specific legislative appropriation for that purpose – the Court rejected this argument, characterizing it as based on dicta in the *City of Marina* decision
- Court confirmed that agencies, including Cal State system, have duty to mitigate impacts, including off-site impacts.

***Center for Biological Diversity v. California Department of Fish and Wildlife* (2015) 62 Cal.4th 204 (petition for rehearing pending).[2] Supreme Court upholds "business as usual" (BAU) analysis of greenhouse gas emissions, but statewide BAU methodology must be adjusted to be used for specific local projects. No "take" of fully protected species allowed.**

- Greenhouse gas emissions analysis based on percentage reductions against "business as usual" emission upheld in general
- But use of statewide BAU reductions needs to be adjusted or justified to show it achieves sufficient reductions for a particular project
- Court suggests EIR will "in near future" need to evaluate beyond 2020
- Transplantation mitigation measures for "fully protected species" constituted an impermissible "take" under Fish & Game Code, take of a fully protected species for mitigation not allowed.
- Tribes presented comments during federal comment period, but not state – but CDFW during process said it would respond to comments during both periods, so there was sufficient exhaustion of remedies

***Friends of the Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105. Agricultural conservation easements not required as mitigation.**

- Court held agencies not required to adopt agricultural conservation easements as mitigation, and the county in this case adopted other measures to offset the impact
- Court distinguished *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230, where the court rejected a legalistic finding of infeasibility, and the county did not adopt other mitigation

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[2] Mike Zischke, Andrew Sabey, Linda Klein and Jimmy Purvis of Cox Castle represented the California Building Industry Foundation, the Building Industry Legal Defense Fund, the Building Industry Association of the Bay Area, the California Business Properties Association, and the California Association of Realtors as *amicus* in this case.

***Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214. Fish stocking EIR upheld, analysis was sufficiently specific.**

- Program EIR for CDFW statewide program of fish hatcheries and fish stocking upheld
- Level of detail sufficient – EIR included extensive analysis of stocking and hatchery impacts
- Evaluation protocol for specific stocking decisions was sufficient follow-up analysis, for impacts not evaluated in the EIR; CDFW must do further CEQA review only if a follow-up stocking action results in an impact not evaluated in the EIR
- Commitments to comply with federal regulations and other specific standards were sufficient, no deferred mitigation
- EIR baseline properly included the existing operation as part of existing environmental conditions
- EIR was not required to evaluate "no fish stocking" as an alternative

***Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549. Alternatives analysis in arena EIR upheld, stadium crowding not a CEQA impact.**

- EIR for Sacramento arena upheld, EIR was prepared under special provisions for "environmental leadership" projects
- EIR evaluated four alternatives, including continued use of the existing arena, two different sites, and a reduced project – the court rejected claim that the EIR was also required to evaluate renovating the old existing arena – it did not meet objectives and there was a sufficient range of alternatives.
- Traffic analysis upheld – city had the prerogative to resolve evidentiary conflicts, and substantial evidence including statements from Caltrans supported city position
- Crowding at the arena is a social impact, not a CEQA impact, no evidence showed a link to environmental impacts

***North County Advocates v City of Carlsbad (2015)* 241 Cal.App.4th 94 (petition for review denied January 13, 2016). Existing retail center can use historical levels of occupancy as baseline.**

- Baseline for retail based on 30 years of historical use upheld, even though major tenant had vacated the space when the CEQA process began
- Court noted that shopping centers normally fluctuate in occupancy, and that full occupancy had been achieved in the past – so this was not a prohibited hypothetical baseline

***Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627. Metro EIR upheld against recirculation and health claims.**

- Court upheld EIR by LA Metro for Purple Line extension to Westside, including a tunnel under Beverly Hills High School
- Recirculation of the EIR was not required based on additional tunneling and seismic studies, because the EIR had already evaluated tunneling under the school.
- An air quality addendum prepared before EIR certification did not trigger recirculation, as it showed lower construction air quality impacts
- Court rejected claim that a more specific correlation of air quality impacts and health was required – EIR technical study identified the health impacts of exposure to each identified pollutant, no legal basis for requiring more

***San Francisco Baykeeper, Inc. v. California State Lands Commission* (2015) 242 Cal.App.4th 202 (petition for review pending, filed December 28, 2015, Supreme Court Case No. S231496). Historical average of mining activity can be used as baseline, erosion analysis sufficient, minor notice error was not prejudicial.**

- Baykeeper contended State Lands used an artificially inflated baseline – Commission used a five year average of mining activity, rather than 2007 which was low due to economy, court held supported by substantial evidence
- Baykeeper claimed cumulative analysis of erosion inadequate because the Commission did not analyze impacts on the coast and on the SF sand bar – court said there was detailed analysis, nothing like the cursory analysis in Kings County, and no improper ratio theory. The EIR did calculate the project's share of the cumulative, but that was only a minor part of the analysis.
- Recirculation claims based on supplemental erosion studies rejected, substantial evidence question, petitioners at most created a disagreement among experts.
- Baykeeper argued that the Appendix G question on mineral resources required State Lands to evaluate the depletion of mineral resources, court said State Lands properly interpreted Appendix G as being about access to mineral resources
- Court found that Commission did not fully comply with CEQA notice requirements, but no prejudice was shown. Court refused to take notice of a Coastal Commission letter three years after EIR process that expressed concerns about sand loss, on grounds of relevancy as this did not show what Commission staff believed three years earlier (the Coastal commission has declined to comment on the original draft EIR, but was notified of the recirculated document)

- Finally, the Commission did not make any findings about whether the sand mining was consistent with the public trust, commission said it did not have to do so,

***City of Hayward v Board of Trustees of the Cal. State Univ.* (2015) 242 CA4th 833 (petition for review filed by City of Hayward on January 11, 2016, Supreme Court Case No. S231730). Fire response times not a CEQA impact.**

- Prior decision was on hold at Supreme Court pending decision in *City of San Diego v. CSU,* similar decision issued on remand
- Very general analysis of impacts of possible new fire station was sufficient, station not yet planned, no site selected, etc.
- City has obligation to provide fire services, not CSU, and fire response times not a CEQA impact
- Traffic impact analysis upheld at programmatic level, TDM program upheld against claims that it was illusory and improper deferred mitigation

E. Subsequent Review and Statute of Limitations Decisions

***Ventura Foothill Neighbors v. County of Ventura* (2015) 232 Cal.App.4th 429. Change in project triggered new statute of limitations.**

- Medical building constructed to 90 foot height, rather than 75 as analyzed in earlier EIR.
- Because there had been no earlier disclosure of 90 foot height, the time to challenge the higher height began to run when that higher height was discovered, under *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Ass'n* (1986) 42 Cal.3d 929.

***City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526. Lengthy supplemental EIR upheld**

- Court rejected claim that a subsequent EIR rather than supplemental was required; given use of "may" in CEQA Guideline 15164 lead agency has discretion to choose which one
- Most of the analysis related to surrounding changes, not project changes – and a literary court noted the length of the supplement – longer than " War and Peace", and longer than the original EIR – "like introductory novella to large novel. EIR 564 is The Hobbit to SEIR 564's Lord of the Rings"
- Delays in project did not require updating of traffic studies
- Rejection of easements, TDRs, and right to farm ordinance as mitigation measures upheld
- Responses to comments adequate and recirculation not required

F. Certified Regulatory Program/Functional Equivalent Document Decisions

***Center for Biological Diversity v. California Department of Forestry & Fire Protection* (2015) 232 Cal.App.4th 931. Analysis of alternatives in CalFire CEQA review could be more limited if all impacts mitigated.**

- Case involved CalFire's certified regulatory program under the Forest Practices Act, and a functional-equivalent document prepared for a non-industrial timber management plan (NTMP) (which allows long term plans for timber harvest on smaller properties)
- Court held that scope of alternatives evaluated may be reduced if there are no significant impacts remaining after imposition of mitigation measures (but some alternatives still required to be considered)
- Court also held no recirculation required – substantial evidence supported finding that new information did not reveal any new significant impact
- Note on standard of review – petitioners presented the range of alternatives as compliance with law issue, court stated that the real question is whether CalFire's conclusions are supported by substantial evidence – this is one of the that can be cited to this effect when defending CEQA documents

***Conway v. State Water Resources Control Board* (2015) 235 Cal.App.4th 671. Basin plan CEQA review upheld as a more general, first tier review.**

- Property owners around a lake challenged a basin plan adopted by the LA Regional Water Board that set total maximum daily load limits (TMDLs)
- The court noted that the property owners were "optimistically designated" as cooperative parties in the basin plan, they have two years to enter into an agreement on cleanup, or the Regional Board can then designate who is responsible – the main issue in the case was the propriety of setting TMDLs for the concentrations of pollutions in sediment
- The court rejected challenges to the CEQA functional equivalent document – it was a general analysis and did not include remediation, and that was appropriate, as the basin plan only set TMDLs and did not proscribe the means of remediation

G. CEQA Litigation Cases (including Litigation Holdings in cases above)

***California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369.[3] CEQA does not generally require an environmental impact report to consider the effect that environmental conditions will have on a project's future users or residents.**

- Case arose out of the promulgation of new CEQA air quality guidelines by the Bay Area Air Quality Management District, which included new thresholds and suggested methods of assessing and mitigating impacts found to be significant. CBIA argued that the thresholds were invalid because CEQA does not require analysis of the impacts that existing conditions may have on a new project's occupants.
- The Supreme Court granted review to answer the question of whether CEQA requires an analysis of how existing environmental conditions will impact future residents or users of a proposed project.
- Considering the statute's language, the Court reasoned that directing agencies to analyze the environment's effects on a project would impermissibly expand the scope of CEQA. CEQA requires an analysis of the project's impacts on the environment, not the environment's impact on the project,
- The Court held that agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents unless expressly required by certain CEQA provisions, e.g., airport, school, and housing projects.
- What CEQA does mandate, the Court further found, is an analysis of how a project might exacerbate existing environmental conditions.

***Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. Remedy for improper exemption determination is to order CEQA compliance.**

- Court of Appeal had ordered preparation of EIR, Supreme Court said that would only be appropriate if the lead agency lacked any discretion to adopt another exemption or negative declaration
- Normally the remedy when a court finds a lead agency has improperly used an exemption is to order the agency to comply with CEQA
- Same approach in *Save Our Schools v. Barstow,* where the court found that the exemption was insufficiently documented, and ordered the agency to reconsider the exemption and other exemptions that might apply

[3] Michael Zischke, Andrew Sabey, and Christian Cebrian of Cox Castle represented the California Building Industry Association in this case

***Defend Our Waterfront v. California State Lands Commission* (2015) 240 Cal.App.4th 570. Exhaustion of remedies excused when hearing notice did not mention CEQA determination.**

- Petitioners were excused from the requirement to exhaust administrative remedies because the State Lands Commission notice did not indicate that the Commission was considering a CEQA exemption

***Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2015) 238 Cal.App.4th 513. No fee recovery under catalyst theory when the project was abandoned for other reasons.**

- Target store project had been abandoned due to landowner missing contractual deadlines and separate contract litigation between the landowner and the developer
- Given that the CEQA lawsuit did not trigger the abandonment, no recovery of attorneys' fees under catalyst theory

***Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714. Litigation conferred a significant benefit, but trial court denial of fee multiplier upheld**

- Court rejected argument that there was no significant public benefit for attorney fee purposes, even though the court did not order EIR or further studies
- Also even though lawsuit brought by neighbors the issues of biological impacts and roadway safety are of general public interest
- Trial court denied multiplier with ambiguous ruling, Court of Appeal upheld that under principle deference to trial court, and because multipliers are optional, not required

***Save Our Uniquely Rural Environment v. County of San Bernardino* (2015) 236 Cal.App.4th 1179**

- $231,098 requested, $19,176 awarded
- Fee reduction for partial success appropriate
- Reduction for $10,000 charge for "run of the mill" fee motion also appropriate

III. CEQA LEGISLATION – VERY SMALL RIPPLES IN THE POND

A. Time for Environmental Leadership Projects Extended

- AB 117, Statutes 2015, chapter 16 – amends 21189.1 to extend the time for approval of certified environmental leadership projects to January 1, 2017 (note the text does not currently cite 21189.1 in the discussion of environmental leadership projects in 10.60 or 23.153A)

B. Statutory Exemptions for Certain Drought Actions

- SB 88, Statutes 2015, chapter 27 – several drought provisions, adds 21080.08 to exempt recycled water infrastructure pursuant to emergency declaration (effective to January 1, 2017), adds 21080.45 exempting state agency development of building standards for recycled water, and adds 21080.46 exempting city or county actions to limit or prohibit new groundwater wells or limit extraction from existing wells, all with a January 1, 2017 sunset.

C. Statutory Exemption for Road Repairs in Smaller Jurisdictions Extended

- AB 323, Statutes 2015, chapter 52 – amended 21080.37 to extend this existing exemption, for repair or minor alteration of an existing roadway for public safety purposes to 2020. This is a qualified exemption that applies only within jurisdictions having a population of 100,000 or less and where the project does not expand capacity, cross waterways, contain wetlands or riparian habitat, or have an impact on cultural resources.

D. Revising and Extending the Statutory Exemption for At-Grade Crossings

- SB 348, chapter 143 – adds posting notice requirements to the general exemption for eliminating or reconstructing at grade crossings; extends 21080.14 exemption for PUC-ordered rail crossing closure through January 1, 2019

IV. CEQA CASES PENDING AT THE CALIFORNIA SUPREME COURT

***Friends of the College of San Mateo Gardens v. San Mateo County Community College District*, No. S214061**

Supreme Court Case Summary: This case presents the following issue: When a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum, is the agency's decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the project constitutes a "new project altogether," as a matter of law (*Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?

Case Status: Review granted January 15, 2014; merits briefing completed April 20, 2014; amicus briefing completed September 15, 2014, awaiting assignment for oral argument.

***Sierra Club v. County of Fresno*, No. S219783**

Supreme Court Case Summary: This case presents issues concerning the standard and scope of judicial review under [CEQA] (note: the Court of Appeal also held that it was not enough to identify health impacts of pollutants, but they had to be analyzed in greater detail).

Case Status: Review granted October 1, 2014; merits briefing completed March 5, 2015, amicus briefing completed July 7, 2015, awaiting assignment for oral argument.

***Friends of the Eel River v. North Coast Railroad Authority*, No. S222472**.[4]

Supreme Court Case Summary: This case includes the following issues: (1) Does the Interstate Commerce Commission Termination Act (ICCTA) preempt the application of CEQA to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314? (2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition for receiving state funds for a state-owned rail line and/or leasing state property? .

Case Status: Review granted December 10, 2014, merits briefing completed on April 30, 2015, amicus briefing completed on September 2, 2015, awaiting assignment for oral argument.

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[4] Andrew Sabey, Mike Zischke and Linda Klein of Cox Castle are counsel for the railroad in this case.

***Cleveland National Forest Foundation v. San Diego Association of Governments*, No. S223603[5]**

Supreme Court Case Summary: The court limited review to the following issue: Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order S-03-05, so as to comply with CEQA?

Case Status: Review granted March 11, 2015, merits briefing completed August 6, 2015, amicus briefing completed November 16, 2015, awaiting assignment for oral argument.

***Banning Ranch Conservancy v. City of Newport Beach*, No. S227473**

Supreme Court Case Summary: This case presents the following issues: (1) Did the City's approval of the project at issue comport with the directives in its general plan to "coordinate with" and "work with" the California Coastal Commission to identify habitats for preservation, restoration, or development prior to project approval? (2) What standard of review should apply to a city's interpretation of its general plan? (3) Was the city required to identify environmentally sensitive habitat areas – as defined in the California Coastal Act of 1976 (Pub. Resources Code, § 3000, et seq.) – in the environmental impact report for the project?

Case Status: Review granted August 19, 2015, opening brief on the merits filed November 10, 2015, answer brief due February 8, 2016.

[5] Mike Zischke and Linda Klein of Cox Castle are counsel for SANDAG in this case.

V. PROPOSED UPDATES TO THE CEQA GUIDELINES

In August 2015, the State Office of Planning and Research released a "Preliminary Discussion Draft" of its Proposed Updates to the CEQA Guidelines. Among various cleanup items, the Proposed Updates continue OPR's work to implement the provisions of Senate Bill 743 regarding traffic impact analysis, incorporate Assembly Bill 52's requirements for consultation with Native American tribes, and further revise Appendix G's Environmental Checklist.

A. Proposed Updates to Appendix G to Implement SB 743

- Instead of analyzing a project's consistency with Level of Service (LOS) standards, lead agencies should analyze whether a project would "cause substantial additional vehicle miles traveled (per capita, per service population, or other appropriate measure)."

- Where lead agencies could previously increase roadway capacity or add roadways to improve LOS and avoid potentially significant traffic impacts, agencies should instead now analyze whether increases in roadway capacity and the addition of roadways to a network would "induce additional automobile travel" thereby indicating a potentially significant traffic impact.

B. Proposed Updates to Appendix G to Implement AB 52

- In addition to analyzing a project's impacts to historical and archaeological resources, Appendix G would now require agencies to assess a project's potential impacts to "tribal cultural resources." A tribal cultural resource is defined by Public Resources Code Section 21074 as a site, feature, place, cultural landscape, sacred place or object with cultural value to a California Native American tribe.

C. Other Proposed Updates to the Guidelines

- OPR has indicated that it will revise the Guidelines in response to the California Supreme Court's decision in *CBIA v. BAAQMD* that CEQA does not generally require an environmental impact report to consider the effect that environmental conditions will have on a project's future users or residents.

- OPR proposes to amend Section 15168 to further assist lead agencies in determining whether later activities are within the scope of a prior program EIR. These additions would: clarify that the determination of whether a later activity falls within the scope of a program EIR is a question of fact to be resolved by the lead agency; provide a list of factors that may assist a lead agency in determining that a project is within the scope of a program EIR; and add language clarifying how to proceed with analysis of the project.

- Proposed new Section 15234 would assist agencies in complying with CEQA in response to a court order requiring some correction or revision of a CEQA document. It also would clarify that in certain circumstances, portions of the project approvals or the project itself may proceed while the agency conducts further review.

- Based on the California Supreme Court's holding in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, amended Section 15125 would explain that an agency may use a different baseline where use of existing conditions would be either misleading or without informative value to decision-makers and the public.

- OPR proposes to amend Section 15126 to clarify that, while a lead agency may not defer identification of mitigation measures, a lead agency may defer specific mitigation details where it is impractical or infeasible to fully formulate the details at the time of project approval.