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Land Use & Development Law Breakfast Briefing

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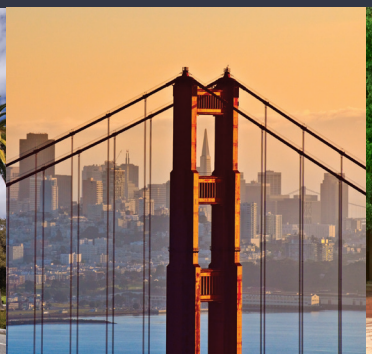

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Land Use and Real Estate Case Summaries

2014 Breakfast Briefing

I. PLANNING & ZONING

AMERICAN TOWER CORPORATION V. CITY OF SAN DIEGO

763 F.3d 1035 (9th Cir. 2014)

Owners of telecommunications facilities challenged the City of San Diego's denial of their request to renew conditional use permits for three cell towers, contending that the permits were "deemed approved" under the Permit Streamlining Act (PSA). The court held that the applications were not deemed approved because the public notice required by law did not occur. Such notice, the court stated, must include not only the notice required by statute, but also notice to neighbors required under the due process clause of the California Constitution, as interpreted by the California Supreme Court in Horn v. County of Ventura. The court rejected the claim that denial of the extension violated plaintiffs' fundamental vested property rights, since the terms of the original permits required the towers to be removed after 10 years. Further, there was no violation of the Equal Protection Clause because the City's decision was rationally related to its legitimate interest in minimizing the aesthetic impact of wireless facilities.

CITY OF PATTERSON V. TURLOCK IRRIGATION DISTRICT

227 Cal.App.4th 484 (2014)

Turlock Irrigation District imposed a surcharge on electrical rates charged customers in a service area outside of the District's boundaries and were not eligible to vote in Irrigation District elections and thus were not represented in the District's rate-setting process. The City of Patterson sought to remedy this by asking the Local Agency Formation Commission to approve annexation of the area to the District. The court of appeal concluded the city's application failed to comply with the mandatory requirement that an application for annexation include a plan for providing services to the annexed territory that describes the services to be extended to the affected territory. The city's application, however, did not seek to extend services to the affected territory; it sought annexation solely for the purpose of obtaining voting rights for city residents. The city's application was therefore fatally flawed because it was not based on a statutorily authorized reason for annexation under the statute's plain language. (A more detailed discussion of this case appears in Section 2, below).

ESKELAND V. CITY OF DEL MAR

224 Cal.App.4th 936 (2014)

Neighbors challenged the City's grant of a variance for a hillside property on which the owners wished to tear down and reconstruct their home. The existing house did not comply with setback requirements, although it had conformed to the zoning code when originally built. Plaintiffs argued that the City's municipal code provision on nonconforming structures made it unlawful to expand a structural nonconformity, and that this provision took precedence over the more general provision allowing zoning variances. Observing that the City's construction of its own code is entitled to deference, the court concluded that the city's interpretation of the nonconforming structure and variance provisions was reasonable and therefore upheld it.

FOOTHILL COMMUNITIES COALITION V. COUNTY OF ORANGE (ROMAN CATHOLIC DIOCESE OF ORANGE)

222 Cal.App.4th 1302 (2014)

Unlawful "spot-zoning" -- the discriminatory zoning of a small parcel surrounded by land within a different zone -- had generally been thought to be limited to cases in which a small parcel is zoned more restrictively than the property surrounding it. In this

case, however, the court of appeal held that spot zoning can be found where an isolated parcel is zoned either more or less restrictively than surrounding property. The court concluded, however, that the county's rezoning decision in this instance was supported by evidence in the record of its proceedings, and therefore was not unlawful spot zoning. (A more detailed discussion of this case appears in Section 2, below).

LYNCH V. CALIFORNIA COASTAL COMMISSION

229 Cal. App. 4th 658 (2014), petition for review granted December 14, 2014

Two families challenged conditions imposed by the Coastal Commission on a permit allowing repair and replacement of a seawall and related structures destroyed during a storm, including prohibition of reconstruction of a section of stairway and a condition limiting the permit to 20 years. Plaintiffs contended that they submitted to the conditions under protest and duress. A divided appellate panel held that, by proceeding with the reconstruction under the permit, plaintiffs waived their right to challenge any permit conditions. The court found the pay-under-protest provisions of the Mitigation Fee Act inapplicable because this statute applied only to conditions that divested the property owner of money or a possessory interest in property, not to restrictions on the manner in which property could be used.

The California Supreme Court recently granted plaintiffs' petition for review, resulting in automatic decertification of the Court of Appeal opinion.

SAN FRANCISCO TOMORROW V. CITY AND COUNTY OF SAN FRANCISCO

228 Cal. App. 4th 1239 (2014)

The court of appeal turned back a challenge to San Francisco's approval of redevelopment of an existing 3,200-unit residential project. According considerable deference to the agency's interpretation of its general plan, even when the relevant policies were adopted by voter initiative, the court found that the project was consistent with San Francisco's General Plan and that the plan contained adequate standards for population density and building intensity. The court rejected plaintiffs' claim that they had a due process right to notice and an opportunity to be heard before the project was approved, observing that only adjudicative approvals are subject to procedural due process and that the approvals in question -- a development agreement and general plan amendment -- were legislative.

II. LAND USE LITIGATION

PROTECT AGRICULTURAL LAND V. STANISLAUS COUNTY LOCAL AGENCY FORMATION COMMISSION (CITY OF CERES)

223 Cal.App.4th 550 (2014)

Plaintiff sought to challenge a completed annexation through an ordinary mandate action. Because annexations can only be challenged through a reverse validation action, with published summons, the trial court dismissed the case. On appeal, plaintiff acknowledged that its annexation law claims were subject to reverse validation procedures, but argued that its failure to comply should be excused for good cause because its attorney had researched the issue without discovering the reverse validation requirement. The court found that counsel's mistake was not excusable, since the validation requirement had long been established by the caselaw and the attorney's reliance on a single secondary source did not constitute adequate research. (A more detailed discussion of this case appears in Section 2, below).

ROBERSON V. CITY OF RIALTO

226 Cal.App.4th 1499 (2014)

The City of Rialto approved a large retail project anchored by a Wal-Mart store. Plaintiff challenged the approval on the ground that the city's notice of the council hearing was defective for failing to include the planning commission's recommendation regarding the project. The court of appeal rejected the challenge on two grounds. First, plaintiff failed to meet his burden to

show prejudice resulting from the minor and technical defects in the notice. Second, plaintiff's claims were barred under the doctrine of res judicata because parties with whom he shared common interests had previously challenged the approval and raised the same issue. (A more detailed discussion of this case appears in Section 2, below).

EL DORADO ESTATES V. CITY OF FILLMORE

765 F. 3d 1118 (9th Cir. 2014)

The owner of a seniors-only mobile home park sued the City alleging violations of the Fair Housing Act based on allegedly unreasonable delays and extralegal conditions imposed on its application for subdivision of the mobile home park. The court of appeals concluded that the owner had standing to bring its FHA claims because, under the facts alleged, the owner suffered a concrete and particularized injury in the form of additional expenses resulting from the delays and conditions. Plaintiffs also stated a claim under the Fair Housing Act based on the allegation that the city discriminated against families by interfering with its subdivision application and conditioning its approval on the owners' promise not to open the park to families.

OTAY RANCH LP V. COUNTY OF SAN DIEGO

230 Cal.App.4th 60 (2014)

The trial court awarded the county over $37,000 in costs for preparation of the administrative record in a mandamus action, including $30,000 in fees and costs for the county's outside counsel and paralegals. The court of appeal affirmed, holding that the trial court properly exercised its discretion to allow recovery of attorney and paralegal time after determining the time was reasonable and necessary for preparation of the administrative record.

3. TAKINGS

POWELL V. COUNTY OF HUMBOLDT

222 Cal.App.4th 1424 (2014)

Plaintiffs challenged a county condition requiring dedication of an overflight easement as a condition to issuance of a building permit as an unconstitutional exaction. The appellate court concluded that a taking could be established only if the easement requirement was so onerous that it would have constituted a compensable taking if the property right had simply been appropriated by the government outside the permitting process. This required a showing that the overflight easement completely deprived plaintiffs of any beneficial use of their property, interfered with their investment-backed expectations, or was a permanent physical occupation of their physical property. Because plaintiffs had not established any of these requirements, the court concluded that they had failed to establish a taking. (A more detailed discussion of this case appears in Section 2, below).

PROPERTY RESERVE, INC. V. SUPERIOR COURT (DEPT. OF WATER RESOURCES)

224 Cal.App.4th 828 (2014), petition for review granted June 25, 2014

The California Supreme Court has granted review in this case, in which the court of appeal held that if the State intends to acquire a direct interest in private property, no matter how small, it must initiate a condemnation suit that provides the affected landowner with all applicable constitutional protections. The court also ruled that the "entry statutes"—the California Eminent Domain Law's precondemnation entry provisions—failed to pass constitutional muster where the Department of Water Resources proposed to undertake extensive geological and environmental studies on private property without first filing an eminent domain complaint. The issues to be argued before the Supreme Court are: (1) Whether the geological and environmental testing activities proposed by the Department of Water Resources constitute a taking; and (2) if so, whether the precondemnation entry statutes provide a constitutionally valid eminent domain proceeding for the taking. (A more detailed discussion of this case appears in Section 2, below).

BOWMAN V CALIFORNIA COASTAL COMMISSION

230 Cal.App.4th 1146 (2014)

The County issued a coastal development permit for rehabilitation of an existing home conditioned on dedication of an easement for public access along the shorefront part of the property although the house was a mile from the shore. The applicant later applied for a second coastal development permit to replace a barn and make the same improvements covered by the earlier permit but without the easement condition. The County approved the application, including removal of the access easement, expressly acknowledging that the condition would result in an unconstitutional taking of property. On appeal, the Coastal Commission determined that the applicant was bound by the original condition. The court of appeal rejected the argument that the applicant was stuck with the easement condition because it had not filed a legal challenge to it after the first permit was issued, concluding that it would be inequitable to apply collateral estoppel under the facts of the case. The court also validated the County's determination that the dedication condition was unconstitutional because there was neither a rational nexus nor rough proportionality between the work on a private residence a mile from the coast and a lateral public access easement. (A more detailed discussion of this case appears in Section 2, below).

LEVIN V. CITY AND COUNTY OF SAN FRANCISCO

No. 3:14-cv-03352-CRB (N.D. Ca Oct 21, 2014).

Plaintiffs, owners of rent-controlled properties in San Francisco, challenged 2014 amendments to the City's rent control ordinance requiring landlords to make relocation payments to tenants as a condition of withdrawing rent-controlled property from the market. The required payment was the greater of a specified sum or an amount equal to twenty-four times the difference between the unit's current monthly rate and the fair market value of a comparable unit in San Francisco. The District Court concluded that the ordinance failed to satisfy the Nollan/Dolan requirements of essential nexus and rough proportionality. The court rejected the City's argument that the essential nexus requirement was met because the withdrawal of the rental unit "caused" the evicted tenant to be exposed to market rents, holding that more than mere "but-for" causation was insufficient. Because the monetary exaction lacked an essential nexus with the impact of the change in use, it followed that the exaction was not roughly proportional to the impact of the withdrawal of the rental unit. While acknowledging the severity of the affordable housing crisis, the court held that the City could not "force the property owner to pay for a broad public problem not of the owner's making." (A more detailed discussion of this case appears in Section 3, below).

IV. ESA/NEPA

CENTER FOR BIOLOGICAL DIVERSITY V. DEPARTMENT OF FISH & WILDLIFE

224 Cal.App.4th 1105 (2014), petition for review granted July 9, 2014

The California Supreme Court has granted review in this case involving a challenge to a conservation plan and other environmental plans and permits for the Newhall Ranch Specific Plan project, a large, mixed-use development. The court of appeal rejected plaintiffs' claim that mitigation measures intended to protect the endangered Stickleback would themselves constitute a "take" of the species under the California Endangered Species Act. The California Supreme Court has granted review on this issue as well as other CEQA and procedural issues.

HONOLULUTRAFFIC.COM V. FEDERAL TRANSIT ADMINISTRATION

742 F.3d 1222 (9th Cir. 2014)

Plaintiffs challenged the approval of the Honolulu Rail Transit Project under NEPA and other federal statutes, contending that the approving agencies did not consider alternatives that had earlier been ruled out in an alternatives analysis conducted by the City. Plaintiffs contended that the Environmental Impact Statement improperly relied on this process to exclude alternatives such as the light rail and high-occupancy vehicle lanes from detailed consideration. However, the court held that an agency does not violate NEPA by refusing to discuss alternatives already considered in prior studies conducted at the state

level, as long as the federal lead agency furnished guidance upon and independently evaluates the state document, and the analysis is conducted with public review and a reasonable opportunity to comment. (A more detailed discussion of this case appears in Section 2, below).

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY V JEWEL,

747 F.3d 581 (9th Cir. 2014)

In the latest in a series of decisions addressing impacts of the Central Valley Project and the State Water Project upon water quality and endangered species from diversions of water from the Sacramento-San Joaquin Delta to the Central Valley and Southern California, the Ninth Circuit reversed the district court's invalidation of a biological opinion issued by the U.S. Fish and Wildlife Service. The Biological Opinion had concluded that the two water projects jeopardized the continued existence of the delta smelt and required reasonable and prudent alternatives to be implemented by the U.S. Bureau of Reclamation and the State of California Department of Water Resources, including reductions in water diversions. While acknowledging some issues with the Biological Opinion, the court held that the district court had failed to give the Service the substantial deference it was due under the Administrative Procedure Act. Based on its independent review of the record, the panel found that the components of the Biological Opinion invalidated by the district court were within the substantial discretion of the Service and were reasonably supported by the record and hence valid. (A more detailed discussion of this case appears in Section 4, below).

NATURAL RESOURCES DEFENSE COUNCIL V. JEWELL

749 F.3d 776 (9th Cir., en banc, 2014)

In this opinion, the en banc Court of Appeals for the Ninth Circuit addressed the requirement under Section 7(a)(2) of the Endangered Species Act that federal agencies must consult with the United States Fish and Wildlife Service or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service prior to taking any agency action that could affect an endangered or threatened species or its critical habitat. The court concluded that the federal Bureau of Reclamation was required to engage in such consultation before renewing long-term contracts of Central Valley Project water because, in renewing the challenged contracts, it retained "some discretion" to act in a manner that would benefit the delta smelt. (A more detailed discussion of this case appears in Section 4, below).

V. WATER LAW

LIGHT V. STATE WATER RESOURCES CONTROL BOARD

226 Cal. App. 4th 1463 (2014)

The State Water Resources Control Board adopted a regulation potentially limiting diversion of water from the Russian River for frost protection. Plaintiff growers challenged the regulation, contending that because the Board lacks regulatory authority to limit diversions by riparian users and pre-1914 appropriators, it had no authority to regulate their use of water. The court of appeal held that although the Board lacked authority to require such users to obtain a permit to divert water, it had the power to prevent riparian users and pre-1914 appropriators from using water in an unreasonable manner. It concluded that, in regulating the unreasonable use of water, the Board could weigh the use of water for certain public purposes, notably the protection of wildlife, against commercial use of water by riparian users and early appropriators. (A more detailed discussion of this case appears in Section 2, below).

VI. PUBLIC RECORDS ACT

ARDON V. CITY OF LOS ANGELES

174 Cal. App. 4th 369 (2014)

In response to a Public Records Act request, the City inadvertently produced several privileged documents. The court of appeal held that the disclosure -- even if inadvertent -- waived all applicable privileges. The court rejected the city's argument that Public Records Act requests are akin to discovery requests in litigated disputes, in which inadvertent production of material does not waive privileges. The court observed that inadvertent disclosure in litigation is expressly protected by the Evidence Code, whereas section 6245.4 of the Public Records Act states that disclosure of "a public record which is otherwise exempt . . . to any member of the public [waives privileges] specified in [the Act] or other similar provisions of law." The court also rejected the city's argument that a statutory privilege held by the city could not be disclosed by a clerk without authorization by the City Council, stating that "it is not our function to rewrite legislation [and] such an exception would put it within the power of the public entity to make selective disclosures through 'low level employees.'"

VII. REAL ESTATE

RICHMAN V. HARTLEY

224 Cal. App. 4th 1182 (2014)

As part of the sale of property with one to four dwelling units, the seller is required to deliver to the buyer a real estate transfer disclosure statement (TDS). In this case, the seller did not provide a TDS because the property was "mixed-use," i.e., was improved with both residential and commercial buildings. The court concluded, however, that a TDS is required in any transfer of real property "improved with or consisting of not less than one nor more than four dwelling units," even if the property also has commercial uses. The court also held that seller's delivery of a TDS was a statutory condition precedent to the buyer's duty to perform under their real estate purchase agreement, and that any purported waiver of this requirement was void as against public policy.

VIII. CLEAN AIR ACT

SIERRA CLUB V. U.S. EPA

762 F.3d 971 (9th Cir. 2014)

Avenal Power applied to the U.S. Environmental Protection Agency for a permit to build and operate a 600-megawatt natural gas-fired power plant. Although EPA had a statutory duty under the Clean Air Act to grant or deny the permit within one year, it failed to do so, and subsequently tightened the applicable air quality standards. However, EPA subsequently granted Avenal's request to issue the permit under the standards that would have applied had EPA acted within the statutory deadline. The Ninth Circuit ruled that the Clean Air Act unambiguously required the application to comply with the regulations in effect at the time the permit was issued, and hence that EPA erred in grandfathering the project under the old regulations.

1. SPOT ZONING DOCTRINE APPLIES WHERE PROPERTY IS ZONED LESS RESTRICTIVELY AS WELL AS MORE RESTRICTIVELY THAN SURROUNDING PROPERTY

FOOTHILL COMMUNITIES COALITION V. COUNTY OF ORANGE

222 Cal.App.4th 1302 (2014)

"Spot-zoning" refers to the discriminatory zoning of a small parcel surrounded by land that is zoned differently. It had been generally assumed that the doctrine only applies where a small parcel is zoned more restrictively than the property surrounding it. The court of appeal in this case concluded that spot zoning can be found where an isolated parcel is zoned either more or less restrictively than surrounding property. On the record before it, however, the court held that the county's rezoning decision was reasonable under the circumstances, and was therefore not unlawful spot zoning.

The county rezoned a parcel, owned by the Roman Catholic Diocese, for a senior housing project. The petitioner, an association of grassroots community groups and homeowners, challenged the decision, arguing it amounted to impermissible spot zoning. The county responded that because the smaller parcel was zoned less restrictively than the surrounding property, the rezoning did not constitute spot zoning. The appellate court disagreed, stating that "the creation of an island of property with less restrictive zoning in the middle of properties with more restrictive zoning is spot zoning."

Nonetheless, the court rejected the argument that the rezoning was impermissible spot zoning. Not all spot zoning is impermissible -- it can be justified, the court said, where a "substantial public need exists" or if it is in the public interest. Here, the court found, the spot zoning was in the public interest based on the state legislature's encouragement of senior housing development and the county's own directives to develop senior housing in its general plan and ordinances. As a consequence, the court held, the county's spot zoning was permissible.

The petitioner also argued that the project's objective to provide "faith-based independent and assisted living facilities for seniors" violated the First Amendment's Establishment Clause. The court rejected this argument, finding that the project's approval and the zoning change had a secular purpose to provide needed senior housing, and that the zoning change would not have the primary effect of promoting religion nor would it foster any entanglement between government and religion.

2. REQUIRING DEDICATION OF OVERFLIGHT EASEMENT AS CONDITION TO ISSUANCE OF BUILDING PERMITS IS NOT AN UNCONSTITUTIONAL EXACTION

POWELL V. COUNTY OF HUMBOLDT

222 Cal.App.4th 1424 (2014)

The court of appeal considered the argument that a county requirement that property owners dedicate an overflight easement as a condition to issuance of a building permit was an unconstitutional exaction. The court concluded that it did not because the owners were unable to show that the government simply appropriating the overflight easement, instead of requiring it as a condition of approval for the permit, would have been an unconstitutional taking.

In 1993, Humboldt County adopted an Airport Land Use Compatibility Plan for the Arcata-Eureka Airport. In 2004, the Powells purchased property roughly one mile from the airport, located in "Airport Compatibility Zone C" of the Airport Land Use Compatibility Plan. The Plan required that all owners of residential real property located in Zone C dedicate an overflight easement as a condition to issuance of a building permit. The purpose was to ensure that any improvement was compatible with the safe operation of the airport.

The Powells sued, contending that the overflight easement condition, as applied to their building permit application, was an unconstitutional exaction under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. The appellate court concluded that the Nollan/Dolan analysis applied only if the public easement required as a condition of the permit was so onerous that it would have constituted a compensable taking if the property right had simply been appropriated by the

government outside of the permit process. This required the Powells to establish, as a threshold matter, that the overflight easement condition completely deprived them of any beneficial use of their property, interfered with their investment-backed expectations, or was a permanent physical occupation of their physical property (i.e., a per se physical taking). Unless that test was satisfied, the court reasoned, the government was not demanding that the landowner trade a constitutional right—the right to just compensation for the taking of property—in order to receive a discretionary government benefit.

The court concluded that the Powells failed to provide evidence to meet this threshold. They put forth no evidence that the easement deprived them of the beneficial use of their property or interfered with their investment-backed expectations. The court also found that the overflight easement was not a per se physical taking, reasoning that unless the overflight easement, by its express terms, authorized frequent incursions into the Powell's private airspace at altitudes causing noise and disturbance to the Powells, it would not amount to a taking under federal or state law. Because the easement did not expressly permit such overflights — and the Powells' property rights did not include a right to exclude airplanes from using the navigable airspace above their property in accordance with applicable safety regulations — the court found no basis to conclude that the overflight easement was a per se physical taking.

3. CLAIMS CHALLENGING A COMPLETED ANNEXATION MAY ONLY BE BROUGHT THROUGH A REVERSE VALIDATION PROCEEDING

PROTECT AGRICULTURAL LAND V. STANISLAUS COUNTY LOCAL AGENCY FORMATION
223 Cal.App.4th 550 (2014)

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

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

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

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

4. AGENCY DOES NOT VIOLATE NEPA BY FAILING TO EVALUATE ALTERNATIVES ALREADY CONSIDERED IN PRIOR STUDIES CONDUCTED AT THE STATE LEVEL

HONOLULUTRAFFIC.COM V FEDERAL TRANSIT ADMINISTRATION

742 F.3d 1222 (2014)

The Ninth Circuit dismissed a NEPA challenge to the approval of the Honolulu Rail Transit Project, rejecting claims that agencies unreasonably restricted the Project's purpose and need and failed to consider all reasonable alternatives.

Nearly a decade ago, the City of Honolulu, along with the Federal Transit Administration and the U.S. Department of Transportation, embarked on a project to address Honolulu's severe traffic congestion. In 2005, the FTA published a notice of intent to prepare an Environmental Impact Statement under NEPA, and an alternatives analysis required by the DOT's funding program for transit service in Oahu. The City prepared the alternatives analysis and eliminated certain alternatives from consideration through the analysis' review process. The two federal agencies subsequently approved the EIS.

Plaintiffs, a consortium of interest groups and individuals opposing the project, challenged the agencies' actions under NEPA and other federal statutes. On appeal, Plaintiffs made two claims under NEPA. First, they argued that the agencies violated NEPA by unreasonably restricting the project's purpose and need. The court found no basis for this claim: the statement of purpose and need was reasonable because it did not foreclose all alternatives and because it was shaped by federal legislative purposes. It was broad enough to allow the agency to assess various routing options and technologies for a high-capacity, high-speed transit project, and hence was sufficient under NEPA.

Plaintiffs' other NEPA claim was that the agencies did not consider alternatives that had earlier been ruled out in the alternatives analysis conducted by the City. Plaintiffs contended that the EIS improperly relied on this process to exclude certain alternatives such as the light rail and high-occupancy vehicle lanes from detailed consideration. However, the court held that an agency does not violate NEPA by refusing to discuss alternatives already considered in prior studies conducted at the state level, as long the federal lead agency furnished guidance upon and independently evaluated the state document, and the analysis was conducted with public review and a reasonable opportunity to comment. These conditions were satisfied in this case, and hence the agencies did not violate NEPA by failing to discuss alternatives rejected in the state process.

5. GEOLOGICAL AND ENVIRONMENTAL TESTING ON PRIVATE PROPERTY THAT AMOUNTS TO AN INTENTIONAL TAKING REQUIRES THE AGENCY TO FILE AN EMINENT DOMAIN COMPLAINT PRIOR TO ON-SITE TESTING.

PROPERTY RESERVE, INC. V. SUPERIOR COURT

224 Cal.App.4th 828 (2014), petition for review granted June 25, 2014

The California Supreme Court has agreed to review this case, in which the court of appeal held that precondemnation investigative activities by the State constituted a taking of plaintiffs' property, and were not permissible under the precondemnation entry provisions of the Eminent Domain Law.

The State Department of Water Resources sought to study the geological and environmental suitability of hundreds of properties upon which it proposed to build a freshwater transport canal or tunnels to divert water from Northern California to Southern California to implement its Bay Delta Conservation Plan. The court of appeal held the State's request to enter onto private property to perform geological and environmental testing — prior to filing a complaint under the Eminent Domain Law — would effect a taking, reasoning that if the State intends to acquire an interest in private property directly, "no matter how small an interest, the California Constitution requires it to initiate a condemnation suit that provides the affected landowner with all of his constitutional protections against eminent domain in that action." Under this standard, the court concluded, the State's conduct failed to comply with the Eminent Domain Law.

In compliance with the statutory procedure for precondemnation entry for testing purposes, the State had filed a "master petition" seeking a court order granting it rights of entry from more than 150 owners of more than 240 land parcels totaling tens of thousands of acres. For all of the properties, the State proposed conducting environmental studies including mapping the properties and surveying botany, hydrology, plant and animal species, cultural resources, utilities, and recreational uses. The geological studies proposed for a portion of the parcels involved tests penetrating soil with rods one and one-half-inches in diameter in depths up to 200 feet, along with soil borings to depths of 205 feet which would leave bore holes six inches in diameter. At the conclusion of testing, the holes would be filled with "permanent columns of cement."

The court of appeal found that both the geologic testing and the environmental investigation would affect takings of compensable property interests.

The court reasoned that the proposed geological testing would result in a "permanent physical occupation" constituting a taking per se, regardless of the "public interests" served. While acknowledging there is "no bright-line rule" for determining whether a temporary physical invasion constitutes a taking, the court also found that the proposed environmental study activities would work a taking because they "intentionally acquire a temporary property interest of sufficient character and duration to require being compensated." After weighing factors including whether the invasions were intended, the character of the invasions, the duration of the invasions, and the invasions' economic impact, the court determined the State had sought a "blanket temporary easement" that had to be acquired in a condemnation suit rather than through the precondemnation entry statutes.

Resolving a question of first impression, the court held the State's precondemnation entry statutes do not constitute an "eminent domain proceeding" sufficient to comply with the constitutional limits on the State's exercise of the power to condemn property. If a public agency "intentionally seeks to take property or perform activities that will result in a taking," the California Constitution requires that it "directly condemn" the affected property interest in an authorized condemnation suit in which the landowner receives "all of his constitutional protections against eminent domain." The State's "acquisition of a property interest, permanent or temporary, large or small" requires direct condemnation of the property interest and payment of the property owner in a condemnation suit that gives the landowner "all of his constitutional protections against the state's authority."

The California Supreme Court has described the issues to be resolve by it as: (1) Whether the geological and environmental testing activities proposed by the Department of Water Resources constituted a taking; and (2) if so, whether the precondemnation entry statutes provided a constitutionally valid eminent domain procedure for the taking.

6. STATE WATER RESOURCES CONTROL BOARD MAY WEIGH USE OF WATER FOR PUBLIC PURPOSES AGAINST COMMERCIAL USE BY RIPARIAN USERS AND EARLY APPROPRIATORS IN DETERMINING REASONABLENESS OF COMMERCIAL USE

LIGHT V. STATE OF WATER RESOURCES CONTROL BOARD

226 Cal.App.4th 1463 (2014)

A court of appeal, for the first time, has upheld the State Water Resources Control Board's authority to restrict valid pre-1914 and riparian water rights on the ground that their exercise has become an unreasonable use of water under current circumstances.

While it has long been accepted that California law requires that water be put to a use that is both beneficial and reasonable, what constitutes an "unreasonable use of water" has received little attention. This opinion, in finding the use in question to be unreasonable, is significant both for the principles it relies on and its articulation of the sideboards of the "reasonable use" requirement.

In April 2008, a particularly cold month during a dry year, young salmon were found stranded along the banks of the Russian River. Federal scientists concluded that the deaths were caused by the abrupt declines in water level due to diversions of

water that was sprayed on vineyards and orchards to prevent frost damage. The salmon are classified as threatened or endangered under the Federal Endangered Species Act.

Following a series of hearings and the preparation of an environmental impact report, the State Water Resources Control Board adopted a regulation — Regulation 862 — that will likely require the reduction in diversion of water for frost protection under certain circumstances. Regulation 862 delegated the task of formulating regulations governing water use programs to local bodies comprised of diverting growers. The regulation declares that any water use inconsistent with the programs promulgated (and later approved by the Board) is unreasonable and prohibited.

Plaintiff growers challenged Regulation 862 contending that:

- The Board lacked authority to enact regulations on unreasonable use of water
- The Board lacked authority to limit water use by riparian and pre-1914 appropriators
- The regulation violated the rules of priority

The court of appeal found that Regulation 862 – which provides in part that "a diversion of water that is harmful to salmonids is an unreasonable use of water if the diversion can't be managed to avoid harm" – was valid and within the Board's authority. It also held that the regulation applied to riparian users as well as pre-1914 appropriators. The court concluded that while the Board cannot require pre-1914 appropriators and riparian users to obtain a permit, that does not mean that the Board cannot prevent such users from diverting water for a use the Board determines to be unreasonable. In that regard, the Board has authority to determine what has become an unreasonable use and prohibit such use.

The court reasoned that the "vested rights" doctrine does not prevent the Board from redefining existing beneficial uses as unreasonable. Consequently, the extent of a particular users' vested right to use water may change. "A riparian users' vested water rights extend only to reasonable beneficial water use, which is determined at the time of use." The court held that the Board has ultimate authority to allocate water in a manner inconsistent with a rule of priority when to do so is necessary to prevent the unreasonable use of water. According to the court, that power is buttressed by the State's obligation under the public trust doctrine that applies to all water rights.

The court stressed that the legislature has declared that the use of water for recreation and the preservation and enhancement of fish and wildlife resources is a beneficial use of water. It has thus recognized that the welfare of wildlife is a beneficial use on a par with the type of commercial uses that have traditionally been recognized as beneficial. Consequently, balancing the use of water for frost protection against the use for salmon habitat is the application of a fundamental policy decision within the power of the Board.

The opinion endorses the proposition that the Board has broad authority to determine reasonableness at any time and, based upon changed circumstances, may declare well established uses unreasonable and, therefore, waste and impermissible. It also suggests that the Board's determination of priority between two otherwise reasonable uses can result in the termination of one without the implication of a taking.

7. LACK OF PREJUDICE BARRED RELIEF DESPITE DEFECTIVE HEARING NOTICE

ROBERSON V. CITY OF RIALTO (WAL-MART REAL ESTATE BUSINESS TRUST)

226 Cal.App.4th (2014)

An opponent of a Wal-Mart project was thwarted in his attempts to use an admittedly defective hearing notice as a basis for overturning project approvals. The court ruled that his claims were defeated by his failure to present evidence of prejudice and by a prior appellate decision.

The City of Rialto approved a large retail project to be anchored by a Wal-Mart store. The city's notice of the council hearing was defective for failing to include the planning commission's recommendation that the council approve the project.

Two lawsuits followed, both seeking to have the project approvals overturned based on the defective notice. The first was brought by Rialto Citizens for Responsible Growth, a nonprofit corporation. The appellate court in that case cited Government Code section 65010, which states that procedural errors will not render a decision invalid "unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred." Because Rialto Citizens made no showing of prejudice, the appellate court denied relief.

The second lawsuit was brought by another project opponent, Marcus Roberson. He submitted a declaration claiming he did not attend the council hearing but would have done so and shared his views opposing the project had he known the planning commission had recommended approval. The Roberson court denied relief, on two grounds.

First, it ruled that Roberson failed to meet his burden to show prejudice. Roberson, who was represented by the same attorney as Rialto Citizens, did not show what evidence he would have submitted other than the evidence his attorneys had already submitted for Rialto Citizens (which had been found insufficient to demonstrate prejudice). The court distinguished cases involving either no notice at all or failure to give notice to an entire class of affected landowners. In those cases the defect was extreme, making it reasonable to presume a different result would have been probable had there been proper notice. Here, in contrast, the defect in the notice was minor and technical, and no prejudice was shown.

Second, the court held that Roberson's claims were barred under the doctrine of res judicata by the decision in the Rialto Citizens case. The defective notice claims in the two cases were identical. Roberson was in privity with Rialto Citizens, meaning the two parties shared the same interest; in that both parties were seeking to vindicate a public interest. Roberson's claim that he was protecting his individual interests was belied by his declaration stating that his opposition to the Wal-Mart store was based upon his view that "it is likely to harm the community," and that he brought suit to vindicate the public's interest in seeing that the city followed the noticed hearing procedures required by law. Because the cases involved the same issue raised by parties pursuing the same interest, the decision in the first case barred re-adjudication in the second.

8. ANNEXATION TO DISTRICT IS NOT AUTHORIZED FOR SOLE PURPOSE OF EXTENDING RIGHT TO VOTE IN DISTRICT ELECTIONS

CITY OF PATTERSON V. TURLOCK IRRIGATION DISTRICT

227 Cal.App.4th 484 (2014)

Turlock Irrigation District imposed a surcharge on electrical rates charged customers in a service area outside of the District's boundaries. Because they reside outside the District, electrical service customers in the City of Patterson were not eligible to vote in Irrigation District elections or sit on the District's board, and thus they were not represented in the Irrigation District's rate-setting process. Despite this lack of representation, they had to pay the surcharge on electrical rates.

The California Public Utilities Commission had authorized the Irrigation District to provide extraterritorial service in 2003 when it approved the District's acquisition of PG & E's electric distribution and transmission facilities in western Stanislaus County. Over eight years later, the city sought to obtain voting rights for its disenfranchised customers by asking the Stanislaus Local Agency Formation Commission to approve annexation of the area to the District.

The Irrigation District opposed the city's application for annexation and submitted a resolution to the LAFCO requesting termination of the proceedings, under Government Code § 56857(b), which allows proceedings for annexation of territory to a district to be terminated when justified by a financial or service-related concern.

The city responded by filing suit to challenge the validity of the Irrigation District's resolution. The city claimed that the financial and service concerns relating to provision of water for irrigation described in the resolution were not legitimate because the city's annexation application was limited to retail electrical service and would not expand the District's obligations relating to irrigation water. The trial court ruled for the District, concluding that its resolution requesting termination of the proceedings complied with the statute.

The city appealed and the court of appeal affirmed the trial court judgment. However, rather than basing its decision on the Irrigation District's resolution requesting termination of the annexation proceedings, it found the city's annexation application was legally deficient.

The court concluded the city's application failed to comply with the mandatory requirement in Government Code § 56653 that an application for annexation include a plan for providing services to the annexed territory that describes the services to be extended to the affected territory. The city's application did not, however, seek to extend services to the affected territory; it sought annexation solely for the purpose of obtaining voting rights for city residents.

The court noted at the outset of its opinion: "This appeal echoes a familiar cry from the American Revolution— 'No taxation without representation!'" But it explained that this "purported evil" that the city's application sought to redress had not been identified by the Legislature as a problem that annexation of territory is intended to solve. The city's application was therefore fatally flawed because it was not based on a statutorily authorized reason for annexation, based on the statute's plain language.

9. COASTAL COMMISSION ERRED IN FINDING PROPERTY OWNER IS STUCK WITH UNCONSTITUTIONAL DEDICATION CONDITION

BOWMAN V. CALIFORNIA COASTAL COMMISSION
230 Cal.App.4th 1146 (2014)

In an opinion on rehearing, the court of appeal overturned a California Coastal Commission decision that a condition of a county-issued coastal development permit could not be eliminated by a second coastal development permit the county issued for the same project. Focusing on the equities of the case, and the unfairness of the condition, the court refused to find that the county was barred from deleting the condition.

The owner of a 400-acre parcel that included a lengthy stretch of shoreline in San Luis Obispo County applied to the county for a coastal development permit to rehabilitate an existing home on the property. Two years later, the county, acting as the local coastal permitting authority, issued the permit to the applicant's successor, a family trust. The permit was conditioned on the trust dedicating an easement for public access along the shorefront part of the property, even though the house was a mile from the shore. The trust didn't appeal the dedication requirement to the coastal commission.

Nine months later, the trust applied for a second coastal development permit to replace a collapsed barn and to make the same improvements covered by the earlier permit. The application also asked the county to remove the condition to the earlier permit requiring dedication of a coastal access easement. The county approved the application, including removal of the access easement condition, expressly acknowledging that the condition required an unconstitutional taking of property.

Concerned that the county had eliminated a valid existing coastal access easement, the Sierra Club, Surfrider Foundation, and two coastal commissioners appealed the county's approval of the second coastal development permit to the coastal commission. The Commission granted the appeal, determining that the easement was permanent and the applicant was bound by it because it didn't contest the condition after it was imposed.

The court of appeal overturned the Coastal Commission's determination. The court rejected the opponents' argument that the trust was stuck with the easement condition because it had not filed a legal challenge to it after the first permit was issued. The opponents relied on the general rule that when an administrative tribunal renders a quasi-judicial decision and an

administrative mandamus petition is not filed to contest it, collateral estoppel bars the agency from reconsidering the same issues. The court disagreed, concluding that it would be inequitable to apply collateral estoppel given the facts of the case.

Crucially, the trust did not start any of the improvements covered by the first coastal development permit and had limited its work to repairs authorized by “over-the-counter” permits exempt from coastal development permit requirements. Because the trust had not benefited from the first coastal development permit by performing work under it, it was not bound by its conditions.

The court also found the dedication condition clearly unconstitutional. Stating its conclusion simply but directly, the court noted the Nolan/Dolan “rough proportionality” test for imposing conditions on a permit was not met because “there is no rational nexus, no less rough proportionality, between the work on a private residence a mile from the coast and a lateral public access easement.”

Recent Challenges Associated with Affordable Housing Mandates

PIVOTAL AFFORDABLE HOUSING CASE CURRENTLY BEFORE THE CALIFORNIA SUPREME COURT

CALIFORNIA BUILDING INDUSTRY ASSOCIATION V. CITY OF SAN JOSÉ

216 Cal.App.4th 1373 (2013), *petition for review granted* Sept. 11, 2013

Pending before the California Supreme Court is a highly-anticipated case that addresses how closely courts should scrutinize affordable housing ordinances. The case arose from a challenge to the City of San José's ordinance, which required for-sale and rental developments with 20 or more units to make 15% of their units affordable to very low, low, and moderate income households or to pay an in-lieu fee of $122,000 per unit. The court of appeal found the ordinance to be a valid exercise of the City's police powers, reversing a trial court ruling that the City had not shown a reasonable relationship between the impact of new development and the need for affordable housing.

The trial court accepted the position of the challenger, the California Building Industry Association (CBIA), that the affordable housing requirement was an exaction, and that the City had failed to make the required showing of a reasonable relationship between the impact of new development and the need for affordable housing. To advance its claim, CBIA pointed to the absence of any evidence in the record showing how new residential development projects of 20 or more units would create a need for additional, subsidized housing. CBIA acknowledged the significant need for affordable housing, but challenged the fundamental premise that new development caused or contributed to that need. The City argued that the ordinance was not an exaction—because nothing in it required developers to give anything to the City—but rather was a development restriction or condition, similar to rent control.

The court of appeal agreed with the City's position and reversed the lower court. The appellate court held that the affordable housing requirement was not an exaction, but rather simply was an exercise of the City's police powers. As a result, CBIA had the burden of showing the ordinance did not bear a reasonable relationship to the public welfare, and the trial court was ordered to reexamine the case using that standard.

CBIA petitioned the California Supreme Court for review, contending that the court of appeal's decision conflicted with an earlier appellate decision and was undermined by the U.S. Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), which determined that in-lieu development fees were "functionally equivalent to other types of land use exactions." The state supreme court granted review, and the case now is fully briefed.

The dispute in *CBIA v. City of San José* is the latest chapter in a statewide debate over a difficult question: What exactly is an affordable housing mandate? Is it akin to zoning or other development controls, or is it more like a fee or an exaction? The issue is knotty. Developers are often required to expend—or give up—a great deal to comply with zoning and subdivision requirements, some of which are deemed exactions and some not. Size, density, height, lot size, setback, and other restrictions on development can be costly, but are not considered exactions. By contrast, requirements to provide infrastructure and fund parks, fire stations, and schools do qualify as exactions.

Both sides of the debate agree that the lack of affordable housing in California is a major social problem, but they differ on the solution. Cities contend developers need to build more affordable housing, either of their own volition or as a condition of developing at all. Developers point to the high cost of land and of complying with development requirements, and cite data showing that housing cannot be produced at rates affordable to lower income Californians and still generate a reasonable return. They also question the assumption that providing housing leads to a need for more housing, affordable or otherwise.

The legislature has chosen not to join the debate. As such, cases like this one ultimately may determine who wins the argument.

FEDERAL COURT INVALIDATES SAN FRANCISCO TENANT RELOCATION REQUIREMENTS

LEVIN V. CITY AND COUNTY OF SAN FRANCISCO
NO. 3:14-CV-03352-CRB (N.D. Cal. Oct. 21, 2014)

In a decision that may have important implications for monetary exactions in local land use permitting, the Northern District of California has struck down part of San Francisco's rent control ordinance as an unconstitutional taking under the Fifth Amendment.

At issue before the District Court were the relocation payments required by the 2014 amendments to the San Francisco rent control ordinance. Under the ordinance, owners of rent-controlled property were required to make certain payments for tenants evicted under the Ellis Act. Under the 2014 amendments to the rent ordinance, in order to withdraw the unit under the Ellis Act, property owners were required to pay the greater of the lump sum required under the original ordinance or an amount equal to twenty-four times the difference between the unit's current monthly rate and the fair market value of a comparable unit in San Francisco.

Plaintiffs, owners of rent-controlled properties in San Francisco, filed suit, bringing a facial challenge against the 2014 ordinance as violating the Takings Clause of the Fifth Amendment.

The court ruled in favor of the plaintiffs, finding that the 2014 ordinance constituted an exaction that violated the Takings Clause. The court first held that the San Francisco ordinance, which demanded monetary payment from the property owners in exchange for a permit to remove a unit from the rental market, had to satisfy the *Nollan/Dolan* requirements of essential nexus and rough proportionality. Next, the court found that the ordinance could not meet either of those requirements. Both steps in the court's analysis may prove important in future cases involving monetary exactions.

The *Nollan/Dolan* standard constitutes a special application of the unconstitutional conditions doctrine to the government's land use permitting power. The *Nollan* and *Dolan* cases specifically applied to adjudicative land use exactions involving a government demand for property owners to dedicate an easement as a condition of obtaining a development permit. The central concern in these two cases was that the government may use its substantial power in land use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the property.

The Supreme Court's 2013 decision in *Koontz v. St. Johns River Water Management District* expanded the reach of *Nollan* and *Dolan* to monetary exactions. Because of the direct link between the government's demand and a specific piece of real property, the Court held that the central concern in *Nollan* and *Dolan* was implicated and application of the standard to monetary exactions was appropriate.

- The District Court's opinion followed the *Koontz* logic in applying *Nollan* and *Dolan* to San Francisco's rent ordinance:
- The court held that applying the Nollan/Dolan standard to the demand for relocation payments was appropriate because the demand for payments operated upon an identified property interest by directing the owner of a particular piece of property to make a monetary payment. Thus, even though the rent ordinance did not impose a deed restriction, a covenant, or even a lien on the property, the *Nollan/Dolan* standard still applied because the fees demanded were directed at a particular piece of property.
- Prior to *Koontz*, Ninth Circuit precedent held that the *Nollan/Dolan* standard was limited to ad hoc or adjudicatory exactions and did not apply to legislatively imposed exactions. The District Court, however, interpreted *Koontz* as removing the

legislative/adjudicative decision and held that the rent ordinance relocation payments, despite being legislatively imposed, were nevertheless subject to the requirements of *Nollan/Dolan*.

- Prior to *Koontz*, it was thought that the *Nollan/Dolan* standard did not apply to facial takings claims. The District Court read *Koontz* as abrogating this precedent in finding the rent ordinance unconstitutional on its face.

The court's decision also provides an important discussion of the necessary relationship between the impact of the permitted action and the fee demanded under *Nollan/Dolan*. The city argued that the relocation payment was justified because the property owner's withdrawal of a unit from the housing market "causes" the evicted tenant to be exposed to market rents. This justification, however, was not sufficient to meet the requirements of *Nollan/Dolan*. The District Court stressed that mere "but-for" causation is insufficient to satisfy the requirements of essential nexus and rough proportionality. While an eviction arguably results in certain costs such as relocation costs, it does not cause the gap in affordability that the property owners were forced to pay under the 2014 ordinance. As a result, the court concluded, the monetary exaction demanded neither shared an essential nexus with nor was roughly proportional to the impact of the withdrawal of the rental unit.

DENSITY BONUS LAW AMENDMENTS COMPLICATE MULTI-FAMILY REDEVELOPMENT

California's Density Bonus Law incentivizes the creation of moderate, low, or very low income housing units by requiring local agencies to allow increased density and to grant concessions on development standards in exchange for the provision of certain percentages of affordable units within a new housing development project.

Housing advocates have expressed concern over the past few years that application of the Density Bonus Law to certain multi-family redevelopment projects has had the effect of a net reduction in the number of affordable units created. AB 2222 seeks to address this concern and to expand other key aspects of the Density Bonus Law. In the process, the bill stands to significantly complicate application of the Density Bonus Law to any project that redevelops existing residential units in California.

AB 2222's changes to the Density Bonus Law include:

- **Replacement of Existing Affordable Units Required:** Perhaps the most expansive and significant elements of AB 2222 are those requiring the replacement of existing affordable units before a project can be eligible for a density bonus. AB 2222 provides:
  - An applicant is ineligible for a density bonus where its housing development project or condominium project is proposed on parcels where rental units are subject to, or where units have been vacated or demolished in the previous five years but were subject to: i) a recorded covenant, ordinance, or law that restricts rents to low- or very-low income levels; ii) subject to any other form of rent or price control implemented through a public agency's police power; or iii) occupied by low- or very low-income households; unless the proposed housing development project or condominium project replaces those units and either the project contains affordable units at certain ratios identified in the Density Bonus Law or each unit in the project is affordable to and occupied by a low- or very low-income household. Govt. Code § 65915(c)(3)(A).
  - For existing units (occupied or unoccupied) as of the date of application for a density bonus, the replacement of units means providing at least the same number of units of equivalent size or type, or both, to be made affordable to, and occupied by, households in the same or lower income category as those households in occupancy within the project. Govt. Code § 65915(c)(3)(B)(i).
  - For units vacated or demolished within five years before the application for a density bonus, the replacement of units means providing at least the same number of units of equivalent size or type, or both, as existed at the highpoint of those units in the previous five years to be made affordable to, and occupied by, households in the same or lower income category as those households in occupancy at that time, if known. If the income of households in occupancy at the highpoint are not known, then one-half of the required units shall be made affordable to very low-income households and one-half shall be made available to low-income households. Govt. Code § 65915(c)(3)(B)(ii).

- AB 2222's new requirements for replacement of existing affordable units do not apply to applications for a density bonus that were submitted to, or processed by, a public agency before January 1, 2015.

- **Increase in Required Affordability Term:** Previously, the term of affordability for low- and very low-income rental units was a minimum of thirty (30) years. AB 2222 extends the minimum affordability term for low- and very low-income units from thirty (30) years to fifty-five (55) years. Govt. Code § 65915(c)(1).
- **Expansion of Equity Sharing – For-Sale Affordable Units:** Previously, developers were required to implement equity sharing agreements upon resale of moderate income affordable units. AB 2222 expands the application of such equity sharing requirements to low- and very low-income for sale units. Govt. Code § 65915(c)(2).

WETLANDS, ENDANGERED SPECIES & WATER QUALITY: MAJOR DEVELOPMENTS IN 2014

I. WETLANDS

PROPOSED CLEAN WATER ACT RULES DEFINING "WATERS OF THE UNITED STATES"

In April 2014, the Environmental Protection Agency and the Army Corps of Engineers jointly published a proposed rule under the Clean Water Act to define the phrase "waters of the United States." See 79 Fed. Reg. 22,188 (Apr. 21, 2014). This definition is of critical importance in determining whether the EPA and the Corps have regulatory jurisdiction over small, non-navigable water bodies such as isolated wetlands and ponds and intermittent streams. If finalized, the proposed rule would represent a significant expansion of federal permitting and enforcement authority. This expanded authority would affect virtually every category of land development and resource utilization. Not surprisingly, the proposed rule is extremely controversial and its ultimate fate is highly uncertain. It reportedly has attracted hundreds of thousands of comments and the House of Representatives passed a bill in September 2014 to block the adoption of the rule (H.R. 5078, "The Waters of the United States Regulatory Overreach Protection Act"). The EPA and the Corps nevertheless are pushing forward with the proposed rule and have indicated that they plan on adopting a final rule in the spring of 2015, although this will be an extraordinarily difficult schedule to meet.

BACKGROUND

Historically, the EPA and the Corps have interpreted the phrase "waters of the United States" very broadly. But in 2001, the Supreme Court ruled that this statutory language did not cover isolated, non-navigable ponds whose only connection to interstate commerce was their use by migratory birds. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC). Then, in 2006, a fractured Supreme Court, through Justice Kennedy's oft-cited concurring opinion, further limited the CWA's coverage to those waters that have a "significant nexus" to a navigable waterway. *Rapanos v. United States*, 547 U.S. 715 (2006).

Since the Supreme Court issued its decision in *Rapanos*, the fundamental threshold issue of what constitutes a "water of the United States" has been notoriously unclear. The EPA and Corps tried to address this uncertainty through interpretive guidance documents issued in 2008 and 2011. But the guidance has done little to clarify the boundaries of CWA jurisdiction. The 2011 guidance unleashed a political firestorm and was never finalized. In short, since *Rapanos*, jurisdictional determinations often have required extensive case-by-case scientific analysis for each individual permitting decision, the factors used by different Corps districts throughout the country have been far from uniform, and Corps permitting decisions have been increasingly subject to challenge in litigation.

In the midst of this uncertainty, in September 2013, the EPA published a draft scientific report that set the stage for the proposed new rule. The draft report, entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, finds that all streams—regardless of their size or how frequently they flow—are connected to and have important effects on downstream navigable waters. The draft report also finds that wetlands and open waters in floodplains and riparian areas are integrated with and strongly influence downstream waters. The findings of the draft report support a very broad reading of what constitutes a "significant nexus" under the *Rapanos* decision for purposes of asserting federal permitting jurisdiction under the CWA. The report is intended to provide the scientific basis for the proposed rule.

COMPONENTS OF THE PROPOSED RULE

The rule would place waters into three categories. The first category consists of waters that would be considered jurisdictional per se, without the need for any site-specific analysis. These include traditional navigable waters (such as rivers and lakes),

interstate waters, and the territorial seas, as well as "tributaries" and "adjacent" waters. It is the last two categories that are controversial.

The *Rapanos* decision raised considerable doubt as to whether tributaries with only intermittent or ephemeral flows are subject to the CWA. The new rule would resolve this uncertainty by categorically establishing federal jurisdiction over virtually any natural or man-made channel— regardless of its size or duration of flow—that directly or indirectly contributes flow to a downstream water body. In explaining this broad definition, the preamble to the proposed rule states that such a channel "does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." Further, a wetland or pond qualifies as a tributary, even it lacks an ordinary high water mark, if it directly or indirectly contributes flow to a downstream water.

Further, the new rule would expand the definition of "adjacent" waters in two important ways. First, whereas the exiting Clean Water Act regulations cover only adjacent wetlands, the new rule would encompass adjacent water bodies regardless of whether they exhibit wetland characteristics. Second, whereas the existing rules and guidance envision "adjacency" in terms of physical proximity to a water body such as a river or a lake, the new definition would eliminate this restriction and encompass all water bodies within a floodplain or riparian area.

The second category under the proposed rule consists of "other waters," which include isolated waters such as mudflats, sandflats, wet meadows, ponds and prairie potholes that do not qualify as "tributaries" or "adjacent waters." The agencies may assert jurisdiction over "other waters" on a case-by-case basis, if such a water body alone—or in combination with other similarly situated waters located in the same region—has more than a "speculative or insubstantial" effect on the chemical, physical, or biological characteristics of a downstream water body.

The third category under the proposed rule would be categorically excluded from the definition of "waters of the United States." This category includes (among other things) wholly upland ditches, which previously were evaluated on a case-by-case basis to determine whether they were covered by the CWA.

IMPLICATIONS OF THE PROPOSED RULE

The preamble to the proposed rule states that the revised definition of "waters of the United States" is intended to make the CWA permitting process "less complicated and more efficient" by "increasing transparency, predictability, and consistency," leading to "increased clarity" and "less litigation." But this outcome is far from clear, as the new rule will almost certainly be challenged in court upon its adoption. The rule's impact will be felt particularly in the West, where there are numerous intermittent and seasonal water bodies that likely would fall under the coverage of the new definition.

The fundamental problem is the lack of any clear direction from Congress on what the Clean Water Act term "waters of the United States" means. As Justice Alito lamented in his concurring opinion in *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), "the words themselves are hopelessly indeterminate" and since the CWA was enacted in 1972 "Congress has done nothing to resolve this critical ambiguity." As Justice Alito's plea for congressional action goes unanswered, the EPA and the Corps now seem poised to reassert and expand their authority in response to the Supreme Court's limiting decisions in *SWANCC* and *Rapanos*. Whatever the outcome of the proposed rule, ultimately the boundaries of CWA jurisdiction likely will be for the courts to decide.

II. ENDANGERED SPECIES

NINTH CIRCUIT UPHOLDS BIOLOGICAL OPINIONS RESTRICTING OPERATIONS OF THE STATE WATER PROJECT & CENTRAL VALLEY PROJECT

DELTA SMELT BIOLOGICAL OPINION

In March 2014, the Ninth Circuit issued its long-awaited decision in the latest round of the delta smelt litigation, upholding the 2008 Biological Opinion prepared by the U.S. Fish & Wildlife Service (FWS) for the combined operations of the Central Valley Project and the State Water Project. The Biological Opinion found that the projects would jeopardize the delta smelt, currently listed as an endangered fish species, and therefore imposed significant restrictions on the operation of the projects, which supply water to more than 25 million agricultural and domestic users in Central and Southern California. The court reversed most of the district court's decision, which had agreed with claims by numerous California water districts, water contractors and agricultural water users that the restrictions in the Biological Opinion were scientifically unsupported and in violation of the Endangered Species Act. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014). On January 12, 2015, the U.S. Supreme Court declined to review the Ninth Circuit's decision.

The Ninth Circuit recognized the "enormous practical implications" of its decision, but emphasized that it was required by the standard of judicial review to defer to the FWS's scientific determinations and judgment. The court also emphasized that the ESA's protections are "afforded the highest priorities by Congress, even if means the sacrifice of the anticipated benefits of the projects and of many millions of dollars in public funds." According to the decision, the ESA prohibits courts from making "utilitarian calculations to balance the smelt's interests against the interests of the citizens of California." Rather, the broader policy questions about the allocation of water resources in California lie "with Congress and the agencies to which Congress has delegated authority" and "ultimately, the populace as a whole."

Although the court upheld the Biological Opinion, it acknowledged that the document was rushed, incoherent ("a jumble of disjointed facts and analyses"), and "largely unintelligible." But the court blamed this problem largely on the district court, which had imposed strict and unrealistic time frames on the FWS for completing its analysis. The court also faulted the district court for having "overstepped its bounds" by failing to observe the proper standards for judicial review. While the ESA requires the use of "the best scientific and commercial data available," the court emphasized that this does not mean the best scientific data that is possible, and it also explained that the determination of what scientific data and methodology to use in a Biological Opinion is a matter within the FWS's expertise and discretion.

Based on these deferential principles of judicial review, the court held:

- The district court erred in admitting declarations from experts hired by the parties, rather than confining its review to the administrative record that was before the FWS at the time it approved the Biological Opinion, as supplemented by limited testimony of experts appointed by the court to explain the highly technical material in the Biological Opinion.
- The Biological Opinion did not err in establishing flow-based water pumping limits that relied on the number of smelt salvaged at project fish screening facilities. The FWS reasoned that salvage data typically is used to provide an indication of the number of fish that are entrained and killed in the water pumping facilities. But the district court ruled that the use of raw salvage numbers was improper, and that the numbers should have been scaled to the smelt's overall population. The district court reasoned that the number of fish salvaged in any given year depends on the total smelt population, which can vary from year to year. While the Ninth Circuit acknowledged that the FWS could have done a more rigorous analysis to establish the pumping limits, it found that the evidence in the record supported the FWS's conclusions.
- The Biological Opinion did not err in establishing the location of X2, which is the point in the Bay-Delta estuary where the salinity is two parts per thousand, and the center point of the Low Salinity Zone, which is considered suitable spawning habitat for the smelt. The location of X2 is critical because it is controlled by the amount of water pumped out of the Bay-Delta by the water projects. The court deferred to the scientific modelling conducted by the FWS, acknowledging that while the particular model used was flawed, the FWS explained the basis for using it and why other suggested modeling

techniques also were flawed. The court stated: "The fact that the FWS chose one flawed model over another flawed model is the kind of judgment to which we must defer."

- The court upheld the Biological Opinion's Incidental Take Statement, finding that it sufficiently explained the rationale for using separate data sets to establish different take limits for juvenile and adult smelt and for using an averaging methodology that the district court had found unsupported and overly restrictive.
- The court upheld the Biological Opinion's analysis of the indirect effects of water project operations on delta smelt food supply, pollution, predation, aquatic vegetation, and toxic bacteria. Disagreeing with the district court, the Ninth Circuit examined the administrative record on each of these issues, and found that the evidence supported the FWS's conclusions that the water projects would cause adverse indirect impacts. The court emphasized: "we decline to review with a fine-toothed comb the studies on which the FWS relied in reaching its conclusions."
- The FWS is not required to explain how the Reasonable and Prudent Alternatives set out in the Biological Opinion—which are required to reduce impacts to protected species when the FWS determines the species is jeopardized by a project—are economically and technologically feasible, and can be implemented in a manner consistent with the project's intended purpose and the authority of the Bureau of Reclamation (which operates the Central Valley Project). The court held that the FWS's consideration of these factors could be readily discerned from the record in any event.
- The FWS is not required to segregate discretionary from non-discretionary actions when it considers the environmental baseline, which is the starting point for evaluating the impacts of a proposed project on a protected species.

Aside from the "enormous practical implications" of its decision as explicitly recognized by the Ninth Circuit, the decision is particularly noteworthy given the very high level of deference it affords to the federal agency's findings and determinations under the ESA. It remains to be seen whether the Ninth Circuit will consistently apply this same deferential standard of review to ESA challenges that claim that a Biological Opinion, rather than being overly restrictive, is not sufficiently protective against impacts to listed species.

BIOLOGICAL OPINION FOR SALMONID SPECIES

On December 22, 2014, the Ninth Circuit echoed its delta smelt ruling by upholding the companion Biological Opinion issued in 2009 by the National Marine Fisheries Service (NOAA Fisheries) covering the impacts on protected salmonid species from the combined operations of the Central Valley Project and the State Water Project. *San Luis & Delta-Mendota Water Authority v. Locke*, No. 12-15144 (9th Cir. Dec. 22 2014). As in the delta smelt opinion, the court recognized the weighty practical implications of its decision, emphasizing that the water supplied by the projects "is essential to the continuing vitality of agriculture in the Central Valley, and some 25 million Californians depend on it for daily living." The court put the crux of the issue succinctly: "People need water, but so do fish."

Relying extensively on its prior delta smelt decision, the court reversed the district court and upheld the restrictions imposed on the projects by NOAA Fisheries' Biological Opinion, emphasizing the substantial deference that courts owe to the technical analysis and factual findings of the federal agency under the ESA, especially when complex scientific issues are involved.

The court first ruled that the district court exceeded the scope of its review by admitting expert declarations that were outside the administrative record that was before NOAA Fisheries when it issued the Biological Opinion and by substituting the analysis in those declarations for that of the agency. The court then went through each challenged provision of the Biological Opinion and found that the agency's findings and decisions were reasonable and supported by the evidence in the administrative record. As in the delta smelt decision, the court emphasized that the agency need not explain with precision why one particular measure to protect species was selected over other potential approaches. The court explained: "Rather, we give the agency flexibility to choose among several appropriate alternatives. We will uphold that choice so long as it is reasonably supported based on a review of the record as a whole."

This recent decision reinforces the highly deferential standard of review when a court assesses the validity of a Biological Opinion, as well as the difficult challenges California faces in supplying water to its large and growing populace. And as the

court acknowledged, in all probability, this is not the end of the ESA litigation over the operation of the federal and state water projects: "This is not the first time we have addressed this conflict, nor is it likely to be the last."

BUREAU OF RECLAMATION WAS REQUIRED TO CONSULT WITH FEDERAL ENVIRONMENTAL AGENCIES BEFORE RENEWING LONG-TERM CONTRACTS FOR CENTRAL VALLEY PROJECT WATER

In *Natural Resources Defense Council v. Jewell,* 749 F.3d 776 (9th Circuit 2014), the en banc Court of Appeals for the Ninth Circuit held that, under Section 7(a)(2) of the Endangered Species Act, the Bureau of Reclamation was required to consult with the United States Fish and Wildlife Service or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service before renewing Central Valley Water Project contracts that could affect the delta smelt.

The Bureau of Reclamation manages California's Central Valley Project ("CVP"), which—through a series of dams, reservoirs, canals and pumps—diverts water from the Sacramento-San Joaquin River Delta and transports it to the Central Valley and Southern California. The delta smelt has been adversely affected by historical Delta water diversions, and is listed as a threatened species under the Endangered Species Act.

In 2004-2005, the Bureau prepared biological assessments concluding that renewal of contracts for CVP water would not adversely affect the smelt. The Fish & Wildlife Service concurred, concluding that although the new contracts would increase the use of Delta water, this would not adversely affect the smelt. The Service did not assess the contracts' potential effects on the smelt beyond the reasoning contained in Bureau's biological assessments. Plaintiffs challenged the validity of many of the renewed contracts on the ground that the Bureau had failed to adequately consult with the Service before renewing the contracts.

The district court held that the Bureau was not required to consult under Section 7(a)(2) prior to renewing some of the contracts because the Bureau's discretion in renegotiating these contracts was "substantially constrained." The en banc appellate panel disagreed. It pointed out that consultation is required whenever an agency has "some discretion" to take action for the benefit of a protected species. The obligation to consult, the court held, does not turn on the degree of discretion, but whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat. Here, the court found, the Bureau had such discretion for, among other things, it could have refused to renew the contracts or renegotiated the pricing scheme or timing of water distributions. The discretion retained by the Bureau in these matters triggered the obligation to engage in section 7(a)(2) consultation.

AGENCIES RELEASE DRAFT DESERT RENEWABLE ENERGY CONSERVATION PLAN

The issuance of the Draft Desert Renewable Energy Conservation Plan is the next step in a large-scale renewable energy and conservation planning effort covering over 22 million acres of federal, state, and local lands in the California desert. The planning area includes lands in Imperial, Inyo, Kern, Los Angeles, Riverside, San Bernardino and San Diego counties. The planning process is a joint effort of federal and state agencies participating in the Renewable Energy Action Team, including the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service, the California Energy Commission, and the California Department of Fish and Wildlife.

The release of the Draft Plan is a culmination of an extensive multi-year effort. The Plan seeks to balance the development of renewable energy and associated transmission projects with the conservation of the desert ecosystem. More particularly, the stated purpose of the Draft Plan is to create an efficient and effective biological mitigation and conservation program providing renewable project developers with certainty over permit timing and costs under the federal Endangered Species Act and the California Endangered Species Act, while at the same time preserving, restoring and enhancing protected natural communities. The Draft Plan consists primarily of the following components: (1) a BLM Land Use Plan Amendment, (2) an FWS General Conservation Plan, (3) a CDFW Natural Communities Conservation Plan, and (4) a Draft Environmental Impact Statement/Environmental Impact Report to analyze the plan's potential environmental impacts, mitigation measures and alternatives.

The Draft Plan aims to use best available science to identify Development Focus Areas suitable for development of up to 20,000-MW of renewable energy projects and associated transmission upgrades over the next 25 years. To provide a certain level of flexibility in the siting of these projects, the Development Focus Areas include lands that should be larger than needed to accommodate the projected amount of renewable energy and thus these areas are not intended to be fully developed.

Renewable projects sited in the Development Focus Areas could use a streamlined approval process under the Plan. For instance, such projects could obtain Endangered Species Act permits under the FWS's General Conservation Plan and California Endangered Species Act permits under the CDFW's Natural Community Conservation Plan.

Finally, while the Draft Plan acknowledges that transmission lines are linear projects that would cross areas both within and outside of the planning area, the Draft Plan would not cover portions of transmission projects outside of the planning boundary.

The comment period on the Draft Plan and associated EIS/EIR has been extended through February 23, 2015. Extensive information about the Draft Plan is available at www.drecp.org.

FINAL POLICY DEFINING KEY TERM FOR LISTING OF SPECIES

On July 1, 2014, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service jointly published a final policy providing their interpretation of the phrase "significant portion of its range," which is part of the Endangered Species Act's definitions of "endangered species" and "threatened species." See 79 Fed. Reg. 37,578 (July 1, 2014). In particular, the ESA protects any species found to be endangered or threatened "throughout all or a significant portion of its range." A clear and consistent interpretation of this phrase has proved elusive over the years, and the new policy seeks to harmonize the ESA's different provisions, while satisfying the varying instructions courts have provided on how the phrase should be applied.

The new policy, which is legally binding, contains four key elements:

- If a species is found to be endangered or threatened within a significant portion of its range, then the species will be listed under the ESA, and the ESA's protections will apply to the species, throughout all of its range.
- A portion of the range of a species is "significant" if the species is not currently endangered or threatened throughout all of its range, but the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.
- A species' "range" is the general geographical area within which the species is found at the time the listing decision at issue is made.
- If the species is endangered or threatened throughout a significant portion, but not all, of its range—and if the population in that significant portion qualifies as a "distinct population segment" (DPS)—then only the DPS, and not the entire species, will be listed.

BACKGROUND

In 2001, the Ninth Circuit observed that the phrase "significant portion of its range" was "inherently ambiguous" and that the agencies had wide discretion to interpret it. *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001). However, the court struck down the reading offered by the FWS in the case, which posited that the phrase was merely clarifying language and did not provide an independent basis for listing a species. Under that reading, the only circumstance in which a species would be in danger of extinction in a significant portion of its range was where the species was in danger of extinction throughout all of its range. The court ruled that this reading conflicted with the ESA by failing to give meaning to each part of the statutory text.

In response to the Ninth Circuit's decision and other cases following it, the Department of the Interior issued an opinion in 2007 (known as the M-Opinion) that sought to give independent meaning to the phrase "significant portion of its range" by positing that a species could be listed as endangered or threatened in a significant portion of its range while at the same time not being listed throughout all of its range. But this reading was struck down by a pair of district court decisions in 2010 that ruled that

the ESA allows only for the listing of a "species," which in turn is defined as either a "species," "subspecies," or "distinct population segment." Conversely, these courts ruled that the ESA does not allow for the listing of some members, but not others, of the same species, subspecies or distinct population segment. In response to these court decisions, the M-Opinion was withdrawn in May 2011.

COMPONENTS OF THE FINAL POLICY

The first element of the new policy is the proviso that if a species is found to be endangered or threatened within "a significant portion of its range," then it will be listed throughout all of its range. It seems that this part of the policy seeks to navigate between one set of court rulings holding that the quoted phrase must be given independent meaning and another set of rulings holding that a species may not be listed only within a portion of its range.

The implications of listing a species throughout all of its range are important to recognize. If a species is listed under the policy because it is found to be imperiled within a significant portion—but not all—of its range, the ESA's protections (such as the requirement for inter-agency consultation, the prohibitions against the "take" of a protected species, the requirement to designate critical habitat, etc.) are not limited to that portion and generally would extend to the species' entire range.

The second element of the policy concerns the definition of what a "significant" portion of a species' range is. The policy articulates this definition in terms of the biological importance of this portion to the overall species. The agencies have emphasized that by using a biological approach, the ESA's protections will be applied to those species in greatest need of conservation, rather than simply looking to the geographical size of the portion of the species' range. The agencies characterize their definition of "significant" as a relatively high threshold to trigger a listing. But according to the agencies, a more protective threshold—such as listing a species if the loss of a portion of its range would result in any increase in the species' extinction risk—would require a devotion of resources under the ESA that would be disproportionate to the conservation benefit.

The third element of the policy deals with the definition of "range." Whereas the term "significant" is defined in biological terms, the term "range" is defined in geographical terms. The policy defines "range" as the general area within which the species is found at the time the listing decision is made. The policy excludes from this definition lost historical range. This is based largely on the ESA's text, which uses the present tense and looks to whether and where the species "is in danger" of extinction. While lost historical range does not count toward determining "a significant portion of its range" under the policy, it may nevertheless be an important factor in evaluating the current status of a species and its future recovery.

The fourth element of the policy seeks to define the relationship between "a significant portion its range" and a "distinct population segment." Put in simple terms, the first phrase looks to the biological importance of the geographical area in question, while the second ascertains whether some members of a species or subspecies are sufficiently distinct from other members of their taxonomic group. The policy recognizes the possibility that the range of a DPS may also comprise a significant portion of the range of the larger species or subspecies. If the DPS is found to be imperiled in such a situation, only the DPS would be listed, but not the larger species or subspecies. This is permissible under the ESA, since the law specifically allows the listing of either a species, subspecies or valid DPS.

PROPOSED CRITICAL HABITAT RULES

On May 12, 2014, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service jointly published two proposed regulations and a draft policy concerning critical habitat designations under the Endangered Species Act.

"DESTRUCTION OR ADVERSE MODIFICATION"

The first proposed regulation would revise the definition of "destruction or adverse modification" of critical habitat. 79 Fed. Reg. 27,060 (May 12, 2014). Under the ESA, federal agencies must ensure that their actions and the projects they fund or approve are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. In 1986, the Services adopted a regulation defining "destruction or

adverse modification" to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species."

But two federal appellate courts found that the definition violated the ESA and did not afford sufficient protection to critical habitat. *See Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). The courts found that the definition provided for an adverse modification only if the survival of the species is diminished, instead of also encompassing the situation where the species' recovery is impaired but its survival is not threatened. In striking down the regulatory definition, the courts emphasized that the ESA is intended to promote both the survival and recovery of listed species.

As a result of these court decisions, the proposed rule would amend the definition of "destruction or adverse modification" to "a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery."

PROCEDURES AND CRITERIA FOR DESIGNATING CRITICAL HABITAT

The second proposed regulation would amend the procedures and criteria specified for designating critical habitat. 79 Fed. Reg. 27,066 (May 12, 2014). To make a critical habitat designation, it is important first to know what area the species occupies. Under the proposed regulation, this area would be defined to include "those areas used throughout all or part of the species' life cycle, even if not used on a regular basis." The proposed regulation also would clarify the process to be followed when designating critical habitat.

EXCLUSIONS FROM CRITICAL HABITAT

The draft policy issued concurrently with the two proposed regulations addresses exclusions from critical habitat and how the Services consider a variety of issues as part of the exclusion process, including partnerships and conservation plans, habitat conservation plans permitted under section 10 of the ESA, tribal lands, national security and homeland security impacts, federal lands and economic impacts. 79 Fed. Reg. 27,052 (May 12, 2014). This policy is meant to complement the proposed regulations and to provide for a simplified exclusion process.

IMPLICATIONS OF THE PROPOSALS

The first proposed rule has long been anticipated as needed clarification of court decisions from over a decade ago. The proposal is significant because it will create a clear distinction between prohibited federal actions that create jeopardy to a species on the one hand, and adverse modification of critical habitat on the other. Under the rules that these court decisions struck down, jeopardy and adverse modification have similar definitions. Under the proposed regulation, the prohibited act of adverse modification would be more stringent in some cases, applying to federal actions that adversely affect only the potential recovery of the species, even if the species' survival is not diminished. Jeopardy, on the other hand, would continue to apply to actions that present a likelihood of extinction of the species. This regulatory change, if adopted, would raise the bar for ESA compliance for certain activities occurring within designated critical habitat.

The proposed policy guidance on exclusions from critical habitat also is significant. For many years, the Services have excluded from critical habitat those lands and waters that are subject to habitat conservation plans approved under the ESA, as well as government agency and tribal plans that have comparable conservation benefits. The basis for this exclusion has been that such plans sufficiently protect the species and their habitat such that a critical habitat designation is not required. Under the new draft policy, the Services would only exclude areas subject to such plans based on a case-by-case analysis of the specific conservation benefits of the plans. In doing so, the Services appear to be moving away from a principle that has been uniformly applied for many years to all such plans.

The proposed policy retains significant discretion for the Services to decide whether to exclude an area from critical habitat. In general, an area subject to a habitat conservation plan will be excluded if the plan is being properly implemented and

specifically addresses the habitat needs of the species subject to the critical habitat proposal. Thus, the proposed policy would apply more detailed review of the plan that would be used as the basis for the exclusion than has been the case previously.

III. WATER QUALITY

STATE WATER BOARD ADOPTS NEW INDUSTRIAL STORMWATER PERMIT

On April 1, 2014, the State Water Resources Control Board adopted a new statewide general permit covering stormwater discharges from industrial facilities. SWRCB Order No. 2014-0059-DWQ (General Permit for Stormwater Discharges Associated with Industrial Activities). The new permit, which takes effect on July 1, 2015, is the culmination of a multi-year review process to replace the existing statewide permit, which has not been updated since 1997. The new permit, which applies to specified types of industrial facilities, imposes substantially heightened requirements as compared to the prior permit.

There are many changes in the new permit, including additional monitoring, sampling, reporting, and personnel training requirements. One of the most important changes is that the new permit prescribes a detailed list of Best Management Practices that must be followed to reduce stormwater pollution, whereas the prior permit afforded more flexibility and left the formulation and implementation of such BMPs up to the discharger. In addition, the new permit establishes numeric action levels, which—if exceeded—trigger the requirement to implement response actions as well as heightened reporting obligations.

The requirements in the new permit are part of a larger trend in California and at the federal level to impose stricter requirements on stormwater discharges from construction activities, industrial activities, and residential and commercial development projects.

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
) ss.
County of _____)

On _____, 20___, before me, _____,
a Notary Public, personally appeared _____,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Affix seal here]

_____
Signature of Notary Public

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
) ss.
County of _____)

Subscribed and sworn to (or affirmed) before me on this _____ day of _____, 20__, by _____ and _____, proved to me on the basis of satisfactory evidence to be the person(s) appeared before me.

[Affix seal here]

_____
Signature of Notary Public

CEQA YEAR IN REVIEW 2014: A Summary of Published Appellate Opinions and Legislation Under CEQA

By Kathryn Bilder, Christopher Chou, Marie Cooper, Julie Jones, Alan Murphy, Barbara Schussman, Ned Washburn and Laura Zagar

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

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

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

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

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

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

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LIST OF CASES

A. WHEN DOES CEQA APPLY?

1. CEQA COMPLIANCE NOT REQUIRED FOR COUNCIL-ADOPTED LAND USE INITIATIVE MEASURE

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

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

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

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

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

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

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

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

2. ACTIONS BY THE GOVERNOR ARE NOT SUBJECT TO CEQA

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

The Picayune Tribe, the operator of a casino in Madera County, brought an action against the Governor challenging the Governor's concurrence in the approval of a competing casino by the Secretary of the Interior under the Indian Gaming Regulatory Act. The Tribe claimed that the Governor's concurrence constituted an approval of a "project" subject to CEQA

and that the Governor was required to comply with CEQA before issuing a concurrence. The lower court dismissed the case, finding that CEQA does not apply to actions taken by the Governor, and the court of appeal upheld that ruling.

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

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

B. EXEMPTIONS FROM CEQA

1. IS THE POSSIBILITY OF A SIGNIFICANT EFFECT ENOUGH TO DISQUALIFY PROJECTS FROM QUALIFYING FOR A CATEGORICAL EXEMPTION?

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

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

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

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

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

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

Petitioner argued that even if the project fell within the Class 3 exemption, environmental review was necessary due to evidence that the project fell within the "unusual circumstance" exception. Once an agency determines that a project falls within a categorical exemption, the burden shifts to the challenging party to produce evidence showing that one of the exceptions which bars a categorical exemption applies. The court recognized that there is a split of authority regarding the standard of proof and the standard of review that applies to an agency's determination of whether a project falls within an exception to the categorical exemptions. However, the court held that under either of the standards, petitioners failed to meet their burden.

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

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

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

The categorical exemption did not rely on mitigation measures.

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

2. PLASTIC BAG INDUSTRY LOSES ANOTHER CEQA CHALLENGE TO LOCAL ORDINANCE

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

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

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

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

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

Third, the Coalition argued that even if categorical exemptions would otherwise apply, "unusual circumstances" precluded the city's use of those exemptions. The court ruled that, even assuming a challenger-friendly "fair argument" standard applied to this question—an issue that the California Supreme Court is currently considering in another case—the Coalition had

established no fair argument that unusual circumstances showed the plastic bag ordinance would harm the environment. Discerning two claims of unusual circumstances, the court began by rejecting as "unsupported theory" the assertion that tourists and commuters would not use, or would throw away, reusable bags. The court then rejected the Coalition's reliance on studies indicating that paper bags are more damaging to the environment than plastic bags, noting that the San Francisco ordinance is not a plastic bag ordinance, but rather is intended to reduce all single-use bags.

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

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

3. RENEWAL OF INTERIM CONTRACTS FOR DELIVERY OF CENTRAL VALLEY PROJECT WATER TO DISTRICTS AN ONGOING PROJECT EXEMPT FROM CEQA

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

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

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

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

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

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

show that the brief period involved in the interim renewal contracts—only two years—would potentially have a significant environmental effect.

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

C. NEGATIVE DECLARATIONS

1. COURT REAFFIRMS CITY'S DISCRETION TO IDENTIFY LOCAL HISTORIC RESOURCES

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

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

Background

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

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

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

The substantial evidence standard, not the fair argument standard, applies to a public agency's determination of historicity.

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

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

CEQA permits delegating a lead agency's authority to a commission, but such delegation must be clear.

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

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

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

2. EVIDENCE THAT POTENTIAL FUTURE USES MIGHT CAUSE SIGNIFICANT ENVIRONMENTAL IMPACTS PRECLUDES ADOPTION OF NEGATIVE DECLARATION FOR APPROVAL OF SUBDIVISION MAP.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Significance standard for loss of agricultural land.

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

The court rejected this argument for several reasons:

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

Mitigation of odor impacts.

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

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

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

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

D. ENVIRONMENTAL IMPACT REPORTS

1. EIR FOR SANDAG'S REGIONAL TRANSPORTATION PLAN REJECTED BY COURT OF APPEAL

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

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

Background of the Plan and Senate Bill 375

The decision concerns SANDAG's Regional Transportation Plan, which contains the Sustainable Communities Strategy required by SB 375. When it enacted SB 375, the Legislature recognized that cars and light duty trucks emit 30% of the state's greenhouse gases. Accordingly, SB 375 required the Air Resources Board to establish greenhouse gas emissions reduction targets applicable to cars and light duty trucks for each of the state's metropolitan planning regions. The initial targets set goals for the years 2020 and 2035. SB 375 requires the Air Resources Board to consider new targets every eight years. The targets set for the San Diego area required a 7 percent CO2 reduction by 2020 and a 13 percent reduction by 2035.

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

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

EIR's Analysis of Greenhouse Gas Emissions

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

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

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

Mitigation of Greenhouse Gas Emissions Impacts

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

Alternatives Analysis

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

Air Quality Impacts

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

Agricultural Resource Impacts

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

The Dissenting Opinion

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

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

2. COMPLIANCE WITH FAA REGULATIONS PROVIDES ADEQUATE CEQA MITIGATION FOR AVIATION SAFETY IMPACTS

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

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

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

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

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

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

Kern County also did not abdicate its responsibility to mitigate the impact to aviation safety by using compliance with FAA safety regulations as the benchmark. The court found that federal law "occupies the field of aviation safety," and exercises "sole discretion in regulating air safety." The relevant FAA regulations were enacted to establish standards for determining when a proposed structure would constitute an unsafe obstruction to aviation safety, and the process to make such an evaluation. As the court observed, these standards often apply to wind farms because the height of wind turbines often exceeds the reporting thresholds. That the FAA could not enforce the hazard/no hazard determination, because it does not

have jurisdiction over land development, does not warrant finding the regulations inapplicable. Rather, the county, as the relevant land use authority, was required to do so by the mitigation measure through the exercise of its police power. Accordingly, the court found that the mitigation measure was legally enforceable, and suitably reduced any impact to aviation safety to less than significant levels.

3. CEQA LAWSUIT FAILS TO SLOW HIGH-SPEED RAIL

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

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

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

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

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

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

4. NO TREASURE FOR CHALLENGER ON APPEAL: TREASURE ISLAND EIR UPHELD

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

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

In 2011, the board approved a comprehensive plan to redevelop a former naval station located in the middle of San Francisco Bay into a mixed-use community with updated infrastructure and amenities. A "project EIR" analyzed all phases of the project

at maximum buildout. A court challenge alleged that the EIR contained insufficient detail to constitute a project EIR and, therefore, should have been prepared as a program EIR.

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

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

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

5. HIGHWAY 101 EIR FELLED BY REDWOODS

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

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

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

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

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

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

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

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

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

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

6. CONSERVATION EASEMENTS NOT REQUIRED AS MITIGATION FOR LOSS OF FARMLAND

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

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

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

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

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

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

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

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

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

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

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

7. GREENHOUSE GAS MITIGATION MEASURE FAILS TO COMPLY WITH COUNTY'S GENERAL PLAN UPDATE

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

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

Background

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

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

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

The Court's Analysis

The court first rejected the county's statute of limitations defense. The County had asserted that Sierra Club's claim that the mitigation measures were not enforceable was barred by the statute of limitations because the Sierra club should have challenged the County's approval of the general plan update program EIR, not the CAP. The Court disagreed, noting that the Sierra Club was not challenging the validity of the program EIR or the enforceability of the mitigation measures contained in that document. Rather, the Court found, the Sierra Club was challenging the CAP project and was seeking to enforce a key mitigation measure set forth in the general plan EIR.

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

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

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

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

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

8. RULE BARRING PIECEMEAL REVIEW NOT VIOLATED WHEN PROPOSAL HAS INDEPENDENT PURPOSE AND IS NOT AN INTEGRAL PART OF ANOTHER PROJECT

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

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

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

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

No Link To Project-Related Impacts

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

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

No Improper Project Segmentation

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

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

Adequacy of Response to Comments

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

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

9. PROGRAM EIR'S ANALYSIS OF URBAN DECAY AND ENERGY IMPACTS FOUND INADEQUATE

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

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

Mitigation Measures for Urban Decay Impacts Inadequate

The court found three of the city's proposed mitigation measures for urban decay impacts failed to commit Woodland to specific, concrete mitigation actions. For instance, one measure required the developer to contribute funds toward development of a "retail strategic plan." Another measure required the city to coordinate with the current owner of a retail mall in the city to prepare a strategic land use plan that would analyze potential viable land uses for the site. The court found such measures too vague and uncertain to provide any assurance that they might actually reduce urban decay impacts There was no evidence how development of such plans might stem the deterioration of other areas of city that was expected to occur as business shifted to the new commercial center.

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

Analysis of Energy Impacts Found Deficient

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

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

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

City's Reasons for Rejecting Alternative to the Project Found Insufficient

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

E. SUPPLEMENTAL CEQA REVIEW

1. AIRPORT CHALLENGE DOES NOT FLY: COURT UPHOLDS USE OF ADDENDUM FOR CHANGES TO SAN JOSE AIRPORT MASTER PLAN

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

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

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

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

The court considered, but declined to decide, whether the 1997 EIR should be considered a program EIR. Instead, the court found that the record contained substantial evidence that use of an addendum was appropriate, even assuming the 1997 EIR was a program EIR, because the proposed changes will not result in any new significant impacts or impacts that are

substantially different from those described in the 1997 EIR and the supplemental EIR. As in the decision by the First District Court of Appeal in *Citizens for a Sustainable Treasure Island*, the court found that the substance of the EIR was more important than the name attached to the document, and that the standard for determining whether further environmental review is required the same for both a program and project EIR.

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

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

F. CEQA LITIGATION

1. COURT BLOCKS OPPONENTS' SHOT AT HALTING NEW KINGS ARENA

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

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

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

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

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

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

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

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

2. CHALLENGE TO ANNEXATION DISMISSED DUE TO FAILURE TO COMPLY WITH REQUIRED PROCEDURES

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

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

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

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

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

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

3. PUBLIC AGENCIES MAY RECOVER COSTS OF SUPPLEMENTING A RECORD, EVEN WHEN PETITIONERS PREPARE THE RECORD THEMSELVES

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

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

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

petitioners had omitted documents statutorily required to be included in the record. Preparation of the supplemental record led to the majority of the costs the city sought to recover.

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

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

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

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

4. CEQA COST RECOVERY STATUTE INCLUDES RECOVERY OF REASONABLY NECESSARY ATTORNEY'S FEES FOR PREPARATION OF ADMINISTRATIVE RECORD

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

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

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

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

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

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

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

5. ADMINISTRATIVE RECORD IN CEQA CASE PROPERLY INCLUDED RECORDINGS OF HEARINGS ON THE PROJECT BY BOARD OF SUPERVISORS COMMITTEE

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

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

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

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

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

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

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

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

6. CEQA CHALLENGE TO TREE CUTTING FILED TOO LATE

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

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

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

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

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

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

7. CEQA NOTICES OF DETERMINATION DON'T PROTECT COMPLETED HOSPITAL FROM LAWSUIT AND NEW EIR

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

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

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

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

The court of appeal began by assuming that the height of the building "changed" soon after the EIR was certified, rather than that the EIR had failed to accurately describe the building's total height. In so doing, the court concluded that the failure of the 2005 addendum or NOD to describe this change in the building's height meant that the 2005 NOD did not trigger the 30-day CEQA statute of limitations. Accordingly, the neighbors could sue after they became aware of the actual height of the building and the county was required to prepare a supplemental EIR analyzing the impacts of, and mitigation for, the purported change.

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

G. NEW LEGISLATION

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

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

New category of resources

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

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

Consultation with tribes

Recognizing that tribes may have expertise with regard to their tribal history and practices, AB 52 requires lead agencies to provide notice to tribes that are traditionally and culturally affiliated with the geographic area of a proposed project if they have requested notice of projects proposed within that area. If the tribe requests consultation within 30 days upon receipt of the

notice, the lead agency must consult with the tribe. Consultation may include discussing the type of environmental review necessary, the significance of tribal cultural resources, the significance of the project's impacts on the tribal cultural resources, and alternatives and mitigation measures recommended by the tribe.

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

Mitigating adverse changes to tribal cultural resources

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

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

Conclusion

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

California Supreme Court Poised To Decide Key CEQA Questions: The Court's Lineup For 2015

By Stephen Kostka and Geoffrey Robinson on January 5, 2015

The California Supreme Court's involvement in CEQA cases has been relatively limited since the statute's enactment in 1970, with the court taking review of at most one or two appellate court decisions a year. The last two years have, however, seen a dramatic shift in this trend, with the result that the court now has nine pending cases on its docket. The pending cases span a broad range of issues, but they all involve fundamental questions: the breadth of CEQA's reach, the scope of agency discretion, the vitality of categorical exemptions, limits on mitigation obligations, and procedural limitations on CEQA litigation.

- The court's review in one case will include a key issue regarding CEQA's scope — does required environmental review end with effects of the project on the environment, or must the environment's impact on the project also be examined? The court's decision should squarely resolve this issue.
- A pair of cases before the court involve categorical exemptions and the exception for significant impacts resulting from "unusual circumstances." Courts of appeal have issued conflicting decisions on this topic, and the high court's decision on this question could have a major effect on the efficacy of these commonly used exemptions.
- Limits on judicial review of an agency's CEQA decisions is the subject of two cases before the court. In both cases, the courts of appeal took an expansive view of the powers of the court to reevaluate agency decisions. The high court may conclude that greater deference is owed lead agencies in light of their knowledge and expertise in the subject matter.
- In two cases, the court will address potential limitations on the mitigation required for environmental impacts, including whether fiscal constraints can be used to limit mitigation measures and whether impacts on public services such as emergency and fire services must be mitigated.
- The court will decide the important question of whether judicial review is limited to CEQA claims raised prior to the close of the period for public comment on a draft EIR, or whether issues raised for the first time during later hearings may also be considered.
- Finally, the court will tackle another subject of conflicting appellate decisions — the effect of federal preemption on application of CEQA to publicly operated railroads. Resolution of the case will likely have significant implications for California's High Speed Rail project.

1. IS THE POSSIBILITY OF A SIGNIFICANT EFFECT ALONE SUFFICIENT TO PRECLUDE USE OF A CATEGORICAL EXEMPTION, OR MUST THE IMPACT RESULT FROM UNUSUAL CIRCUMSTANCES?

BERKELEY HILLSIDE PRESERVATION V. CITY OF BERKELEY

Supreme Court No. S201116 (Review granted May 23, 2012)

In a highly controversial decision, the court of appeal invalidated building permits for a single-family home, ruling that the project did not qualify under CEQA's categorical exemptions for construction of a single-family residence or for infill development, and that an EIR was required.

The City of Berkeley determined that none of the exceptions to the categorical exemptions applied to construction of the proposed home, including the exception for significant effects on the environment "due to unusual circumstances." The trial court agreed, finding that while there was evidence significant impacts might occur, it had not been shown that the impacts were due to unusual circumstances.

The court of appeal rejected this construction of the "unusual circumstances" exception, ruling that the applicability of the exception does not depend on whether the potential impact arises from unusual circumstances. Rather, the court held, the possibility a project will have a significant effect on the environment "is itself an unusual circumstance" that bars resort to a categorical exemption. The court also held that the "fair argument" test applies when use of a categorical exemption is contested which means that an exemption determination cannot survive a legal challenge if there is any substantial evidence before the agency that a significant effect might occur.

Countless activities are routinely found exempt under one or more of the categorical exemptions every year. Because the court of appeal's ruling could severely limit the circumstances under which categorical exemptions may be used, the case is being closely watched by public agencies.

This case was argued on December 2, 2014, and a decision is expected in January 2015.

2. DOES CEQA REQUIRE ANALYSIS OF EFFECTS OF THE ENVIRONMENT ON THE PROJECT, OR IS CEQA LIMITED TO EFFECTS OF THE PROJECT ON THE ENVIRONMENT?

CALIFORNIA BUILDING INDUSTRY ASS'N V. BAY AREA AIR QUALITY MANAGEMENT DISTRICT

Supreme Court No. S213478 (Review granted November 26, 2013)

The California Supreme Court has agreed to address a key question that has vexed CEQA practitioners for decades: Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

In *CBIA v. BAAQMD*, the court of appeal rejected a CEQA challenge to a local air district's published significance thresholds for assessing air pollution impacts. The district first adopted the thresholds in 1999 to provide guidance to Bay Area public agencies in their analysis of air pollution impacts. In 2009, the district proposed changes to the thresholds, in its revised "CEQA Air Quality Guidelines," to address new information about the effects of small particulates, toxic air contaminants, and greenhouse gases. The changes prompted concerns among housing advocacy groups and public agencies that application of the proposed thresholds would hamper development of housing in urban infill locations.

The CBIA's suit alleged the air district violated CEQA by failing to review the potential environmental impacts of the revised thresholds before adopting them. The court of appeal disagreed, finding that adoption of the thresholds was not subject to CEQA.

As an alternative basis for its decision, the court of appeal held that adoption of the thresholds was not a "project" subject to CEQA because environmental changes that might result from their adoption were too speculative to be considered "reasonably foreseeable" under CEQA.

The court of appeal declined to address the claim that the thresholds were contrary to established case law by treating impacts of existing air pollution on a proposed project's occupants as an impact on the environment. The appellate court found it unnecessary to reach this issue, reasoning there were circumstances in which the thresholds could lawfully be applied, which defeated CBIA's facial challenge.

The Supreme Court has identified this last question as the key issue for its review.

3. ARE CEQA CLAIMS RAISED IN COURT LIMITED TO THOSE RAISED PRIOR TO CLOSE OF THE PUBLIC COMMENT PERIOD ON THE DRAFT EIR, OR MAY CLAIMS RAISED DURING SUBSEQUENT HEARINGS ON THE EIR ALSO BE CONSIDERED?

CENTER FOR BIOLOGICAL DIVERSITY V. DEPARTMENT OF FISH & WILDLIFE

Supreme Court No. S217763 (Review granted July 9, 2014)

The California Supreme Court has granted review in this case involving a challenge to an EIR that assessed impacts of a conservation plan and other environmental plans and permits for the Newhall Ranch Specific Plan project, a large, mixed-use development.

The EIR for the project used a threshold of significance for greenhouse gas emissions based on whether the project would impede the state's objective of attaining a 29 percent reduction in emissions when compared to the "business as usual" scenario under which no further efforts to reduce emissions would be made. Consistent with other appellate courts that have considered the issue, the court of appeal sustained this approach. The court of appeal also rejected plaintiffs' claim that mitigation measures intended to protect the endangered Stickleback would themselves constitute a "take" of the species under the California Endangered Species Act

The supreme court granted review on the two above issues, as well as on a significant procedural question – whether plaintiffs failed to exhaust administrative remedies as to challenges based on impacts to Native American cultural resources because they were not raised during the public comment period on the Draft EIR. The court of appeal held that the claims were barred under Public Resources Code section 21117(a), which requires CEQA claims to have been presented "orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project . . . ." In their petition for review, plaintiffs argued they had complied with section 21117(a) by raising their arguments in comments on the *Final EIR* and prior to a noticed public hearing held by the agency on the Final EIR. The high court granted review on this ground, framing is issue as whether CEQA "restrict[s] judicial review to the claims presented to an agency before the close of the public comment period on a *draft* environmental impact report?" (emphasis added). The court's full description of the issues for review appears *here*.

4. MAY A STATE AGENCY FIND A MITIGATION MEASURE ECONOMICALLY INFEASIBLE IF THE LEGISLATURE DECLINES TO APPROPRIATE FUNDING FOR THE MEASURE?

CITY OF SAN DIEGO V. BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY

Supreme Court No. S199557 (Review granted April 18, 2012)

In the latest in a string of CEQA cases the California Supreme Court has taken involving the California State University system, the court will consider whether state agencies may make mitigation measures in an EIR contingent upon the availability of state funding.

The court of appeal in *City of San Diego* reviewed the EIR for a plan to expand the California State University San Diego campus. To mitigate off-site traffic impacts, the EIR recommended measures consisting primarily of "fair share" payments by CSU toward the costs of building various traffic improvements. However, the EIR concluded that any fair share contributions by CSU would be conditioned upon obtaining funds from the California Legislature for that purpose. The EIR explained that "if the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable."

The court of appeal ruled, however, that in deciding whether funds are available for mitigation, state agencies such as CSU are not limited to legislative appropriations earmarked for that purpose. CSU erred, according to the court, because it did not consider other sources of funds besides specific legislative appropriations that might be available for mitigation.

The issue under review, as framed by the California Supreme Court, is: "Does a state agency that may have an obligation to make 'fair-share' payments for the mitigation of off- site impacts of a proposed project satisfy its duty to mitigate under CEQA by stating that it has sought funding from the Legislature to pay for such mitigation and that, if the requested funds are not appropriated, it may proceed with the project on the ground that mitigation is infeasible?"

5. IS MITIGATION UNDER CEQA REQUIRED FOR IMPACTS ON PUBLIC SERVICES?

CITY OF HAYWARD V. BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY

Supreme Court No. S203939 (Review granted October 17, 2012)

The California Supreme Court has granted review and deferred briefing in this case pending the Court's resolution of the *City of San Diego v. California State University* case.

In *City of Hayward*, the city sued to challenge the EIR for a California State University Hayward campus master plan. The court of appeal's ruling addressed two important, recurring CEQA questions: (1) whether CEQA requires funding of mitigation for a project's effects on public services; and (2) whether an adaptive mitigation program for traffic and parking impacts improperly defers decisions about mitigation. The court of appeal answered no to both questions.

The court of appeal rejected the city's argument that an increased demand for emergency services, and the lengthened response times that would result, was an environmental impact requiring mitigation. The court noted that providing fire and emergency medical services is the city's legal responsibility. While campus expansion will increase the demand for those services, this is an economic effect, the court said, not an environmental effect that must be mitigated under CEQA. As the court put it, there is 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."

The second question before the court of appeal 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 of appeal identified specific components of the plan — including performance goals, implementation plans and monitoring of the effectiveness of mitigation measures — that the court found made it sufficiently concrete to pass legal muster.

It is not yet clear how the decision in the *City of San Diego* case will affect the *City of Hayward* case, if at all.

6. DOES THE "UNUSUAL CIRCUMSTANCES" EXCEPTION TO A CATEGORICAL EXEMPTION APPLY TO IMPACTS FROM ACTIVITIES NORMALLY SUBJECT TO THE EXEMPTION?

CITIZENS FOR ENVIRONMENTAL RESPONSIBILITY V. STATE OF CALIFORNIA EX REL. – 14TH DIST. AGRICULTURAL ASSOCIATION

Supreme Court No. S203939 (Review granted July 9, 2014)

In a case raising issues similar to those in *Berkeley Hillside Preservation,* the court of appeal upheld the use of a CEQA exemption for a proposed rodeo at a county fairground, rejecting the claim that because the rodeo activities would pollute a nearby creek, the exemption was inapplicable due to significant impacts from unusual circumstances.

The court of appeal concluded that the plaintiff had failed to establish unusual circumstances triggering the exception. In contrast to the appellate decision in *Berkeley Hillside Preservation,* the court reasoned that the unusual circumstances inquiry is exemption- and facility-specific, i.e., the court must determine whether the circumstances of the project differ from those normally justifying use of the categorical exemption. The court found nothing to suggest anything unusual compared to past activities at the fairground, and hence upheld use of the categorical exemption.

The California Supreme Court granted review of the court of appeal decision pending consideration and disposition of *Berkeley Hillside Preservation,* in which the court will consider similar questions relating to interpretation and application of the unusual circumstances exception to the categorical exemptions.

7. WHAT STANDARD OF REVIEW APPLIES TO CHANGES IN A PROJECT THAT HAS PREVIOUSLY UNDERGONE CEQA REVIEW?

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS V SAN MATEO COMMUNITY COLLEGE DISTRICT

California Supreme Court No. S214061 (Review granted January 15, 2014)

The California Supreme Court granted review of the unpublished decision in this case, which addresses the standard for determining whether changes in a previously approved project require additional environmental review under CEQA.

The San Mateo Community College District approved a plan to renovate ten campus buildings and demolish sixteen others, using a mitigated negative declaration to address the impacts of its plans. The District later revised its plans to include demolition of one building that had been set for renovation and renovation of two buildings previously slated for demolition. The District evaluated the possible environmental consequences of the change in plans and concluded that the revisions were not extensive enough to require preparation of a subsequent EIR, and instead adopted an addendum to the negative declaration.

Consistent with Public Resources Code section 21166 (which establishes a presumption against subsequent environmental review for the same project), courts generally apply the deferential substantial evidence standard to an agency's decision not to prepare a subsequent EIR when changes are proposed to a previously-approved project. The CEQA Guidelines make it clear that the same presumption applies in the case of a negative declaration. The inquiry in both instances is limited to whether the changes would require major revisions of the previous environmental document "due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." In this case, the District concluded that more severe environmental impacts would not occur due to the changes in plans.

The court of appeal, however, framed the issue as whether the change in plans constituted a "new" project (rather than simply a revision to an existing project under Section 21166), and held that this was a question of law to be reviewed de novo, without any deference to the lead agency's review of the factual circumstances of the project. Neither CEQA nor the Guidelines contain any standards for determining whether revisions to an existing project may constitute a "new" project, and the appellate court's opinion furnishes little guidance on the subject.

The California Supreme Court's decision in this case is likely to resolve the disagreement among the appellate courts regarding the degree of deference to be accorded an agency's determinations regarding the potential environmental consequences of changes in a project.

8. WHAT STANDARD OF REVIEW APPLIES TO THE QUESTION WHETHER AN EIR INCLUDES SUFFICIENT INFORMATION TO COMPLY WITH CEQA?

SIERRA CLUB V. COUNTY OF FRESNO

Supreme Court No. S219783 (Review granted October 1, 2014)

In this case, involving a challenge to the EIR for the Friant Ranch project, the Fifth District Court of Appeal concluded, as a matter of law, that the EIR failed to include sufficient information regarding air quality impacts to satisfy CEQA.

The EIR's air quality analysis included a qualitative description of health effects associated with the project's air pollutants, and relied upon quantitative thresholds established by the local Air Quality Management District. The appellate court held, however, that the EIR violated CEQA because it did not include a health impact analysis correlating the project's air emissions with the specific health impacts that will result.

Consistent with other decisions in the Fifth District, the court ruled that the sufficiency of the EIR's air quality analysis was a "question of law subject to independent review by the Courts." Based on this independent review standard, the court gave no deference to the county's decisions regarding the contents or methodology used in the EIR.

The court of appeal's approach conflicts with decisions in other appellate districts, which apply the more deferential "substantial evidence" standard to such claims on the ground that decisions about the amount, type, and scope of information to include in an EIR are factual decisions best left to the discretion of the agency. The California Supreme Court's decision in this case is likely to resolve the conflict.

9. ARE PUBLICLY OWNED RAILROAD SYSTEMS EXEMPT FROM CEQA?

FRIENDS OF EEL RIVER V. NORTH COAST RAILROAD AUTHORITY

Supreme Court No. S222472 (Review granted December 10, 2014)

The California Supreme Court recently granted review of the appellate court's determination that the federal Interstate Commerce Commission Termination Act preempted state laws governing railroads, including CEQA.

The North Coast Railroad Authority, a public agency, entered into a contract with the Northwestern Pacific Railroad Company, allowing it to conduct freight rail service on tracks controlled by NCRA. Environmental groups challenged the Authority's EIR and approval of the freight operations. The First District Court of Appeal found that the federal Interstate Commerce Commission Termination Act preempted the Authority's CEQA review of rail operations, which fell within the exclusive jurisdiction of the federal Surface Transportation Board. The court also held that the Authority's preparation of an EIR for the project did not estop it from contending that CEQA review was preempted.

The decision conflicts with the Third District's ruling in *Town of Atherton v. California High-Speed Rail Authority*, 228 *Cal.App.4th* 314 (2014) that an exception to federal preemption – the market participation doctrine – applied to block any preemption of CEQA in the context of California's High Speed Rail project because the state was acting its capacity as an owner rather than a regulator. The appellate court in *Friends of the Eel River* disagreed, ruling that the market participation doctrine did not apply in the context of a CEQA enforcement action because the preparation of an EIR is regulatory, not proprietary, in nature.

In a recent determination that may have a bearing on the case, the federal Surface Transportation Board issued a decision (*Docket No. FD35861, December 12, 2014*), disagreeing with *Town of Atherton* and concluding that the Interstate Commerce Commission Termination Act preempted application of CEQA to construction of the California High Speed Rail line between Fresno and Bakersfield. The Board found that 49 U.S.C. § 10501(b) prevents states and localities from intruding into matters that are "directly regulated by the Board (*e.g.*, rail carrier rates, services, construction, and abandonment)" or from "imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations." The Board noted that the California Supreme Court had accepted review in the *Friends of the Eel River* case, and stated: "Lastly, this decision will inform interested parties and the California Supreme Court of our views on federal preemption of CEQA and the market participant doctrine as they relate to this matter involving railroad transportation within the Board's jurisdiction under §10501(b). The Board employs the rationale that 'Section 10501(b) [ ] is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.'" *Id*.

The California Supreme Court has framed the issues for review as follows: (1) Does the Interstate Commerce Commission Termination Act preempt application of CEQA to a state agency's proprietary acts regarding a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine?; and (2) Does the Act preempt a state agency's *voluntary* decision to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property? In effect, the court will decide which of the two appellate courts was correct.

Proposed New CEQA Guideline on Traffic Impact Assessments

By Steve Kostka and Barbara Schussman

Senate Bill 743, enacted in 2013, was designed to create a process for changing the way traffic impacts are examined under CEQA. The concept was to take the focus away from vehicle delay, measured by level of service, which has resulted in mitigation requirements to increase intersection and road capacity. Instead, SB 743 seeks to shift the focus to greenhouse gas emissions resulting from trip length, encouragement of transit use, and promotion of a mix of land uses that will reduce travel demand.

SB 743 requires that the Governor's Office of Planning and Research amend the CEQA Guidelines to target these goals by providing an alternative to the level of service test for evaluating traffic impacts.

OPR's discussion draft (proposed new Guideline 15064.3) issued on August 6, provides proposed changes to the CEQA Guidelines together with an explanation of the proposed changes and detailed background information. A brief summary:

DESCRIPTION OF PURPOSES

- The primary consideration in a CEQA analysis of transportation effects is the amount and distance that a project might cause people to drive, measured by automobile trips generated and trip distance.
- Impacts to transit and the safety of other roadway users, such as pedestrians and bicyclists, are relevant factors in an environmental analysis.
- Air quality and noise impacts related to traffic are still relevant in a CEQA analysis, but are typically analyzed in the air quality and noise sections of CEQA documents.
- Automobile delay, as gauged by level of service or similar measures of capacity or traffic congestion, shall not be considered a significant impact on the environment.

CRITERIA FOR ANALYZING IMPACTS AND DETERMINING SIGNIFICANCE

The proposed Guideline contains detailed guidance for determining impact significance:

VEHICLE MILES TRAVELED AND LAND USE PROJECTS

Vehicle miles traveled are identified as "generally" the most appropriate measure of transportation impacts, recognizing that a lead agency may include other measures in appropriate situations. Factors agencies may consider in determining impact significance include a comparison with the regional average, as well as examples of projects that might have a less than significant impacts such as projects in areas served by transit and land use plans shown to decrease vehicle miles as compared to existing conditions.

INDUCED TRAVEL AND TRANSPORTATION PROJECTS

Impacts that can result from transportation projects— the environmental impacts of increasing road capacity—should also be part of the analysis. This part of the proposed Guideline would require lead agencies that add new road capacity in congested areas to consider the potential growth-inducing impacts of increased capacity. It would also indicate that some transportation projects, such as those that are designed to improve safety, would not necessarily be expected to increase vehicle miles traveled and result in significant impacts.

LOCAL SAFETY

The criteria on local safety are intended to recognize that vehicle miles traveled may not be the only impacts associated with transportation. It provides that lead agencies should consider whether a project may cause unsafe conditions for roadway users.

METHODOLOGY

The proposed Guideline would also provide general guidance on methodology for evaluating vehicle miles traveled and traffic modeling while recognizing the role of professional judgment in using traffic models.

MITIGATION AND ALTERNATIVES

The Guidelines would be amended to identify potential mitigation measures and alternatives in existing Guidelines Appendix F, to make it clear that agencies retain the ability to require projects to achieve levels of service designated in general plans or zoning codes (even though delay is not to be treated as a significant impact under CEQA), and to provide that previously adopted mitigation measures may still be enforced.

IMPLEMENTATION SCHEDULE

The Guidelines would be implemented in phases. The changes would apply prospectively to new projects that had not already commenced environmental review upon their effective date. The new procedures would apply immediately upon their effective date to projects located within one-half mile of major transit stops and transit corridors provided for in SB 375. Public agencies may opt-in to the new procedures provided by the Guidelines if they update their own CEQA procedures to do so. Otherwise, the new rules would apply statewide after January 1, 2016.

Updating Transportation Impacts Analysis in the CEQA Guidelines

Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing Senate Bill 743 (Steinberg, 2013)

Governor's Office of Planning and Research
8/6/2014

Senate Bill 743 (Steinberg, 2013)

Excerpt of Public Resources Code § 21099

(b) (1) The Office of Planning and Research shall prepare, develop, and transmit to the Secretary of the Natural Resources Agency for certification and adoption proposed revisions to the guidelines adopted pursuant to Section 21083 establishing ***criteria for determining the significance of transportation impacts*** *of projects within transit priority areas. Those criteria shall* ***promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses****. In developing the criteria, the office shall recommend potential metrics to measure transportation impacts that* ***may include, but are not limited to, vehicle miles traveled****, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated. The office may also establish criteria for models used to analyze transportation impacts to ensure the models are accurate, reliable, and consistent with the intent of this section.*

(2) Upon certification of the guidelines by the Secretary of the Natural Resources Agency pursuant to this section, ***automobile delay****, as described solely by level of service or similar measures of vehicular capacity or traffic congestion* ***shall not be considered a significant impact on the environment*** *pursuant to this division, except in locations specifically identified in the guidelines, if any.*

(3) This subdivision does not relieve a public agency of the requirement to analyze a project's potentially significant transportation impacts related to air quality, noise, safety, or any other impact associated with transportation. The methodology established by these guidelines shall not create a presumption that a project will not result in significant impacts related to air quality, noise, safety, or any other impact associated with transportation. Notwithstanding the foregoing, the adequacy of parking for a project shall not support a finding of significance pursuant to this section.

(4) This subdivision ***does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements*** *pursuant to the police power or any other authority.*

(5) ***On or before July 1, 2014****, the Office of Planning and Research shall circulate* ***a draft*** *revision prepared pursuant to paragraph (1).*

(c) (1) The Office of Planning and Research ***may adopt guidelines*** *pursuant to Section 21083* ***establishing alternative metrics to the metrics used for traffic levels of service for transportation impacts outside transit priority areas****. The alternative metrics may include the retention of traffic levels of service, where appropriate and as determined by the office.*

(2) This subdivision shall not affect the standard of review that would apply to the new guidelines adopted pursuant to this section.

Executive Summary

On September 27, 2013, Governor Brown signed Senate Bill 743 (Steinberg, 2013). Among other things, SB 743 creates a process to change the way we analyze transportation impacts under the California Environmental Quality Act (Public Resources Code section 21000 and following) (CEQA). Currently, environmental review of transportation impacts focuses on the delay that vehicles experience at intersections and on roadway segments. That delay is often measured using a metric known as "level of service," or LOS. Mitigation for increased delay often involves increasing capacity (i.e. the width of a roadway or size of an intersection), which may increase auto use and emissions and discourage alternative forms of transportation. Under SB 743, the focus of transportation analysis will shift from driver delay to reduction of greenhouse gas emissions, creation of multimodal networks and promotion of a mix of land uses.

SB 743 requires the Governor's Office of Planning and Research (OPR) to amend the CEQA Guidelines (Title 14 of the California Code of Regulations sections and following) to provide an alternative to level of service for evaluating transportation impacts. The alternative criteria must "promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses." (New Public Resources Code Section 21099(b)(1).) Measurements of transportation impacts may include "vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated." (*Ibid*.)

This document contains a ***preliminary discussion draft*** of changes to the CEQA Guidelines implementing SB 743. In developing this preliminary discussion draft, OPR consulted with a wide variety of potentially affected stakeholders, including local governments, metropolitan planning organizations, state agencies, developers, transportation planners and engineers, environmental organizations, transportation advocates, academics, and others. OPR released its preliminary evaluation of different alternatives for public review and comment in December 2013. Having considered all comments that it received, and conducted additional research and consultation, OPR now seeks public review of this preliminary discussion draft.

This document contains background information, a narrative explanation of the proposed changes, text of the proposed changes, and appendices containing more detailed background information.

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Proposed New Section 15064.3 and Proposed Amendments to Appendix F

Background

Californians drive approximately 332 *billion* vehicle miles each year. That driving accounts for 36 percent of all greenhouse gases in the state. (California Air Resources Board, First Update to the Climate Change Scoping Plan (May 2014).) Meanwhile, existing roadway networks are deteriorating. While new development may pay the capital cost of installing roadway improvements, neither the state nor local governments are able to fully fund operations and maintenance. (See, e.g., Nichols Consulting Engineers, California Statewide Local Streets and Roads Needs Assessment (January 2013).) While the health benefits of walking, bicycling and transit use are becoming more well-known, planning has literally pushed those other modes aside. Why?

Traffic studies used in CEQA documents have typically focused on one thing: the impact of projects on traffic flows. By focusing solely on delay, environmental studies typically required projects to build bigger roads and intersections as "mitigation" for traffic impacts. That analysis tells only part of the story, however.

Impacts on pedestrians, bicyclists and transit, for example, have not typically been considered. Projects to improve conditions for pedestrians, bicyclist and transit have, in fact, been discouraged because of impacts related to congestion. Requiring "mitigation" for such impacts in the CEQA process imposes increasing financial burdens, not just on project developers that may contribute capital costs for bigger roadways, but also on taxpayers that must pay for maintenance and upkeep of those larger roads. Ironically, even "congestion relief" projects (i.e., bigger roadways) may only help traffic flow in the short term. In the long term, they attract more and more drivers (i.e., induced demand), leading not only to increased air pollution and greenhouse gas emissions, but also to a return to congested conditions. (Matute and Pincetl, "Use of Performance Measures that Prioritize Automobiles over Other Modes in Congested Areas;" Handy and Boarnet, "DRAFT Policy Brief on Highway Capacity and Induced Travel," (April 2014).) Under current practice, none of these impacts are considered in a typical project-level environmental review.

Such impacts have not completely escaped notice, however. For many years, local governments, transportation planners, environmental advocates and others have encouraged the Goveror's Office of Planning and Research (OPR) to revise the CEQA Guidelines to reframe the analysis of transportation impacts away from capacity. In 2009, the Natural Resources Agency revised the Appendix G checklist to focus more on multimodal, "complete streets" concepts. (Natural Resources Agency, Final Statement of Reasons: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97 (December 2009).)

Just last year, the Legislature passed, and Governor Brown signed into law, Senate Bill 743 (Steinberg, 2013), which requires OPR to develop alternative methods of measuring transportation impacts under CEQA. At a minimum, the new methods must apply within areas that are served by transit; however, OPR may extend the new methods statewide. Once the new transportation guidelines are adopted, automobile delay will no longer be considered to be an environmental impact under CEQA. SB 743 requires OPR to circulate a first draft of the new guidelines by July 1, 2014. The preliminary discussion draft below satisfies that requirement.

Before turning to a detailed explanation of the proposed text, OPR urges reviewers to consider the following:

- This is a ***preliminary discussion draft*** of a proposal that responds to SB 743. It reflects the information and research contained in OPR's Preliminary Evaluation of Alternative Methods of Transportation Analysis (December 2013), as well as comments submitted on that evaluation and informal consultation with stakeholder groups across the state. However, OPR expects this draft to evolve, perhaps substantially, in response to this larger vetting and review process.
- Because this is a preliminary discussion draft, reviewers may notice some terms that should be defined, or concepts that should be further explored. OPR invites your suggestions in that regard.
- This proposal involves changes to the CEQA Guidelines. Because the CEQA Guidelines apply to all public agencies, and all projects, throughout the state, they generally must be drafted broadly. Similarly, this proposal reflects CEQA's typical deference to lead agencies on issues related to methodology. The background paper accompanying this proposal, however, provides additional detail on a sample methodology for conducting an analysis, lists models capable of estimating vehicle miles traveled, and ideas for mitigation and alternatives. We invite reviewers to let us know if greater or less detail should be included in the new Guidelines.

This preliminary discussion draft consists of several parts. First, it contains a proposed new section 15064.3 of the CEQA Guidelines, which itself contains several subdivisions. Second, it proposes amendments to Appendix F (Energy Impacts) to describe possible mitigation measures and alternatives. Each of these components is described below.

Explanation of Proposed New Section 15064.3

OPR proposes to add a new section 15064.3 to the CEQA Guidelines to provide new methods of measuring transportation impacts. OPR initially considered whether to put the new methods in an appendix or in a new section of the Guidelines. OPR chose the latter, because experience with Appendix F, which requires analysis of energy impacts, has shown that requirements in appendices may not be consistently applied in practice.

Having decided to add a new section to the Guidelines, the next question was where to put it. As required by SB 743, the new guidelines focus on "determining the significance of transportation impacts." Section 15064 of the CEQA Guidelines contains general rules regarding "determining the

significance of the environmental effects caused by a project." Since the new Guideline section focuses on the specific rules regarding transportation impacts, OPR determined that it would be appropriate to place the new rules close to the section containing the general rules. Also, the new section 15064.3 would be contained within Article 5 of the Guidelines, which address "preliminary review of projects and conduct of initial study," and therefore would be relevant to both negative declarations and environmental impact reports.

The proposed new section 15064.3 contains several subdivisions, which are described below.

Subdivision (a): Purpose

Subdivision (a) sets forth the purpose of the entire new section 15064.3. First, the subdivision clarifies that the primary consideration, in an environmental analysis, regarding transportation is the amount and distance that a project might cause people to drive. This captures two measures of transportation impacts: auto trips generated and trip distance. These factors are important in an environmental analysis for the reasons set forth in the background materials supporting vehicle miles traveled as a transportation metric. These factors were also identified by the legislature in SB 743. (Pub. Resources Code § 21099(b)(1).) Specifying that trip generation and vehicle miles traveled are the primary considerations in a transportation analysis is necessary because impacts analysis has historically focused on automobile delay.

The second sentence in subdivision (a) also identifies impacts to transit and the safety of other roadway users as relevant factors in an environmental analysis. Impacts to transit and facilities for pedestrians and bicyclists are relevant in an environmental impacts analysis because deterioration or interruption may cause users switch from transit or active modes to single-occupant vehicles, thereby causing energy consumption and air pollution to increase. Further, impacts to human safety are clearly impacts under CEQA. (Pub. Resources Code § 21083(b)(3) (a significance finding is required if "a project will cause substantial adverse effects on human beings, either directly or indirectly").) Finally, SB 743 requires the new guidelines to promote "multimodal transportation" and to provide for analysis of safety impacts. (Pub. Resources Code § 21099(b)(1), (b)(3).)

The third sentence clarifies that air quality and noise impacts related to transportation may still be relevant in a CEQA analysis. (Pub. Resources Code § 21099(b)(3) (the new guidelines do "not relieve a public agency of the requirement to analyze a project's potentially significant transportation impacts related to air quality, noise, safety, or any other impact associated with transportation").) However, those impacts are typically analyzed in the air quality and noise sections of environmental documents. Further, there is nothing in SB 743 that requires analysis of noise or air quality in a transportation section of an environmental document. In fact, the content of any environmental document may vary provided that any required content is included in the document. (State CEQA Guidelines § 15120(a).)

Finally, the last sentence clarifies that automobile delay is not a significant effect on the environment. This sentence is necessary to reflect the direction in SB 743 itself that vehicle delay is not a significant environmental impact. (Pub. Resources Code § 21099(b)(2) ("Upon certification of the guidelines by the Secretary of the Natural Resources Agency pursuant to this section, automobile delay, as described

solely by level of service or similar measures of vehicular capacity or traffic congestion shall not be considered a significant impact on the environment pursuant to this division, except in locations specifically identified in the guidelines, if any").) As noted above, traffic-related noise and air quality impacts, for example, may still be analyzed in CEQA and mitigated as needed. Mitigation would consist of measures to reduce noise or air pollutants, however, and not necessarily the delay that some vehicles may experience in congestion.

Subdivision (b): Criteria for Analyzing Transportation Impacts

While subdivision (a) sets forth general principles related to transportation analysis, subdivision (b) focuses on specific criteria for determining the significance of transportation impacts. It is further divided into four subdivisions: (1) vehicle miles traveled and land use projects, (2) induced travel and transportation projects, (3) safety, and (4) methodology.

The lead-in sentences to these subdivisions clarify two things. First, CEQA's general rules regarding the determination of significance apply to all potential impacts, including transportation impacts. These general rules include the necessity to consider context and substantial evidence related to the project under consideration, as well as the need to apply professional judgment. These rules are contained in section 15064 of the CEQA Guidelines, which is included as a cross-reference in subdivision (b). The second lead-in sentence clarifies that the new section 15064.3 contains rules that apply specifically to transportation impacts.

Subdivision (b)(1): Vehicle Miles Traveled and Land Use Projects

The first sentence in subdivision (b)(1) states that vehicle miles traveled is generally the most appropriate measure of transportation impacts. It uses the word "generally" because OPR recognizes that the CEQA Guidelines apply to a wide variety of project types and lead agencies. Therefore, this sentence recognizes that in appropriate circumstances, a lead agency may tailor its analysis to include other measures.

SB 743 did not authorize OPR to set thresholds, but it did direct OPR to develop Guidelines "for determining the significance of transportation impacts of projects[.]" (Pub. Resources Code § 21099(b)(2).) Therefore, to provide guidance on determining the significance of impacts, subdivision (b)(1) describes factors that might indicate whether the amount of a project's vehicle miles traveled may be significant, or not.

For example, a project that results in vehicle miles traveled that is greater than the regional average might be considered to have a significant impact. Average in this case could be measured using an efficiency metric such as per capita, per employee, etc. Travel demand models can provide information on those regional averages. "Region" refers to the metropolitan planning organization or regional transportation plan area within which the project is located. Notably, because the proposed text states that greater than regional average "may indicate a significant impact," this subdivision would not prevent a local jurisdiction from applying a *more stringent* threshold. (Pub. Resources Code § 21099(e) (the new Guidelines do not "affect the authority of a public agency to establish or adopt thresholds of

significance that are more protective of the environment").) Note, this potential finding of significance would not apply to projects that are otherwise statutorily or categorically exempt.

Why regional average? First, the region generally represents the area within which most people travel for their daily needs. Second, focusing on the region recognizes the many different contexts that exist in California. Third, pursuant to SB 375, metropolitan planning organizations throughout the state are developing sustainable communities strategies as part of their regional transportation plans, and as part of that process, they are developing data related to vehicle miles traveled. Fourth, average vehicle miles traveled per capita, per employee, etc., can be determined at the regional level from existing data. Finally, because SB 375 requires all regions to reduce region-wide greenhouse gas emissions related to transportation, projects that move the region in the other direction may warrant a closer look.

Subdivision (b)(1) also gives examples of projects that might have a less than significant impact with respect to vehicle miles traveled. For example, projects that locate in areas served by transit, where vehicle miles traveled is generally known to be low, may be considered to have a less than significant impact. (See, e.g., California Air Pollution Control Officers Association, "Quantifying Greenhouse Gas Mitigation Measures," (August 2010).) Further, projects that are shown to decrease vehicle miles traveled, as compared to existing conditions, may be considered to have a less than significant impact. Such projects might include, for example, the addition of a grocery store to an existing neighborhood that enables existing residents to drive shorter distances. Notably, in describing these factors, the Guidelines use the word "may" to signal that a lead agency should still consider substantial evidence indicating that a project may still have significant vehicle miles traveled impacts. For example, the addition of regional serving retail to a neighborhood may draw customers from far beyond a single neighborhood, and therefore might actually increase vehicle miles traveled overall. Similarly, a project located near transit but that also includes a significant amount of parking might indicate that the project may still generate significant vehicle travel.

Most of the examples in this subdivision are most relevant to specific development projects. Land use plans, such as specific plans or general plans, might be considered to have a less than significant effect at the plan level if they are consistent with an adopted sustainable communities strategy.

Subdivision (b)(2): Induced Travel and Transportation Projects

While subdivision (b)(1) addresses vehicle miles traveled associated with land use projects, subdivision (b)(2) focuses on impacts that result from certain transportation projects. Specifically, research indicates that adding new traffic lanes in areas subject to congestion tends to lead to more people driving further distances. (Handy and Boarnet, "DRAFT Policy Brief on Highway Capacity and Induced Travel," (April 2014).) This is because the new roadway capacity may allow increased speeds on the roadway, which then allows people to access more distant locations in a shorter amount of time. Thus, the new roadway capacity may cause people to make trips that they would otherwise avoid because of congestion, or may make driving a more attractive mode of travel. Research also shows that extending new roadway capacity, like the addition of water or sewer infrastructure, may remove barriers to growth in undeveloped areas. Subdivision (b)(2) would therefore require lead agencies that add new physical roadway capacity in congested areas to consider these potential growth-inducing impacts.

Subdivision (b)(2) also clarifies that not all transportation projects would be expected to cause increases in vehicle miles traveled. For example, projects that are primarily designed to improve safety or operations would not typically be expected to create significant impacts. The same is true of pedestrian, bicycle and transit projects, including those that require reallocation or removal of motor vehicle lanes.

Subdivision (b)(3): Local Safety

Subdivision (b)(3) recognizes that vehicle miles traveled may not be the only impacts associated with transportation. While vehicle miles traveled may reflect regional concerns, transportation impacts may also be felt on a local level. The convenience of drivers and the layout of local roadway systems are issues that can, and likely will continue to be, addressed in local planning processes. Safety impacts, as noted above, are local impacts that are appropriate in a CEQA analysis.

Specifically, subdivision (b)(3) clarifies that lead agencies should consider whether a project may cause substantially unsafe conditions for various roadway users. The potential safety concern must be one that affects many people, not just an individual. Further, the potential safety concern must relate to actual project conditions, and not stem solely from subjective fears of an individual. Subdivision (b)(3) includes a non-exclusive list of potential factors that might affect the safety of different roadway users.

Subdivision (b)(4): Methodology

Subdivision (b)(4) provides guidance on methodology. First, it clarifies that analysis of a project's vehicle miles traveled is subject to the rule of reason. In other words, a lead agency would not be expected to trace every possible trip associated with a project down to the last mile. Conversely, to the extent that available models and tools allow, a lead agency would be expected to consider vehicle miles traveled that extend beyond the lead agency's political boundaries. (See, e.g., State CEQA Guidelines § 15151 ("An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible").) This clarification is needed because under current practice, some lead agencies do not consider the transportation impacts of their own projects that may be felt within adjacent jurisdictions.

Subdivision (b)(4) also recognizes the role for both models and professional judgment in estimating vehicle miles traveled. Many publicly available models are available that can estimate the amount of vehicle miles traveled associated with a project. Models, however, are only tools. A model relies on certain assumptions and its use may, or may not, be appropriate given a particular project and its context. For similar reasons, model outputs may need to be revised. Thus, subdivision (b)(4) expressly recognizes the role of professional judgment in using models. Notably, this is consistent with general CEQA rules in determining significance. (See, e.g., State CEQA Guidelines § 15064(b) (determining significance "calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data").) To promote transparency, subdivision (b)(4) requires that any adjustments to model inputs or outputs be documented and explained. Further, this documentation should be made plain in the environmental document itself.

Subdivision (c): Mitigation and Alternatives

Subdivision (c) restates the general rule that when a lead agency identifies a significant impact, it must consider mitigation measures that would reduce that impact. The selection of particular mitigation measures, however, is always left to the discretion of the lead agency. Further, OPR expects that agencies will continue to innovate and find new ways to reduce vehicular travel. Therefore, OPR proposes to identify several potential mitigation measures and alternatives in existing Appendix F (regarding energy impacts analysis), and include a cross-reference to Appendix F in subdivision (c). Subdivision (c) also makes explicit that this section does not limit any public agency's ability to condition a project pursuant to other laws. For example, while automobile delay will not be treated as a significant impact under CEQA, cities and counties may still require projects to achieve levels of service designated in general plans or zoning codes. (Pub. Resources Code § 21099(b)(4) ("This subdivision [requiring a new transportation metric under CEQA] does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements pursuant to the police power or any other authority").) Similarly, with regard to projects that have already undergone environmental review, subdivision (c) clarifies that nothing in these proposed rules would prevent a lead agency from enforcing previously adopted mitigation measures. In fact, within the bounds of other laws, including adopted general plans, lead agencies have discretion to apply or modify previously adopted mitigation measures. (*Napa Citizens for Honest Government v. Napa County Bd. of Sup*. (2001) 91 Cal. App. 4th 342, 358 (because "mistakes can be made and must be rectified, and … the vision of a region's citizens or its governing body may evolve over time… there are times when mitigation measures, once adopted, can be deleted").) Notably, deletion of measures imposed solely to address automobile delay should not require any additional environmental review because section 21099 of the Public Resources Code states that automobile delay is not a significant impact under CEQA.

Subdivision (d): Applicability

OPR recognizes that the procedures proposed in this section may not be familiar to all public agencies. OPR also recognizes that this section proposes a new way to evaluate transportation impacts. Therefore, to allow lead agencies time to familiarize themselves with these new procedures, OPR proposes a phased approach to implementation. Doing so will also allow OPR to continue studying the application of vehicle miles traveled in the environmental review process, and to propose further changes to this section if necessary.

Subdivision (d) explains when these new rules will apply to project reviews. The first sentence restates the general rule that changes to the CEQA Guidelines apply prospectively to new projects that have not already commenced environmental review. (See State CEQA Guidelines § 15007.)

The second sentence provides that the new procedures will apply immediately upon the effective date of these Guidelines to projects located within one-half mile of major transit stops and high quality transit corridors. Those transit-served areas have been the focus of planning under SB 375 and jurisdictions containing such areas may be more likely to be familiar with tools that estimate vehicle miles traveled.

The third sentence allows jurisdictions to opt-in to these new procedures, regardless of location, provided that they update their own CEQA procedures to reflect the rules in this section. (See State CEQA Guidelines § 15022.) This is intended to provide certainty to project applicants and the public regarding which rules will govern project applications. Notably, a lead agency's adoption of updates to its own CEQA procedures will not normally be considered a project that requires its own environmental review. (*See California Building Industry Assn. v. Bay Area Air Quality Management Dist*. (2014) 218 Cal. App. 4th 1171, 1183-1192 (certiorari granted on other grounds).)

Finally, the last sentence states that after January 1, 2016, the rules in this section will apply statewide.

Explanation of Amendments to Appendix F: Energy Impacts

OPR proposes to provide suggestions of potential mitigation measures and alternatives that might reduce a project's vehicle miles traveled in Appendix F of the State CEQA Guidelines. Appendix F provides detailed guidance on conducting an analysis of a project's energy impacts. Inclusion of the list of suggested measures in Appendix F is proposed for at least two reasons. First, vehicle miles traveled may be a relevant consideration in the analysis and mitigation of a project's energy impacts. Second, the list of potential mitigation measures is lengthy and is more appropriate for an appendix than the body of the Guidelines.

Notably, the suggested mitigation measures and alternatives were largely drawn from the California Air Pollution Control Officers Association's guide on Quantifying Greenhouse Gas Mitigation Measures. That guide relied on peer-reviewed research on the effects of various mitigation measures, and provides substantial evidence that the identified measures are likely to lead to quantifiable reductions in vehicle miles traveled.

Explanation of Amendments to Appendix G: Transportation

OPR proposes several changes to the questions related to transportation in Appendix G to conform to the proposed new Section 15064.3. First, OPR proposes to revise the question related to "measures of effectiveness" so that the focus is more on the circulation element and other plans governing transportation. Second, OPR proposes to revise the question that currently refers to "level of service" to focus instead on a project's vehicle miles traveled. Third, OPR proposes to recast the question related to design features so that it focuses instead on whether a roadway project would tend to induce additional travel. Fourth, OPR proposes to revise the question related to safety to address the factors described in subdivision (b)(3) of the proposed new Section 15064.3.

Text of Proposed New Section 15064.3

Proposed New **Section 15064.3. Determining the Significance of Transportation Impacts; Alternatives and Mitigation Measures**

(a) Purpose.

When analyzing a project's potential environmental impacts related to transportation, primary considerations include the amount and distance of automobile travel associated with the project. Other relevant considerations include the effects of the project on transit and non-motorized travel and the safety of all travelers. Indirect effects of project-related transportation, such as impacts to air quality and noise, may also be relevant, but may be analyzed together with stationary sources in other portions of the environmental document. A project's effect on automobile delay does not constitute a significant environmental impact.

(b) Criteria for Analyzing Transportation Impacts.

Section 15064 contains general rules governing the analysis, and the determination of significance, of environmental effects. Specific considerations involving transportation impacts are described in this section. For the purposes of this section, "vehicle miles traveled" refers to distance of automobile travel associated with a project.

(1) Vehicle Miles Traveled and Land Use Projects. Generally, transportation impacts of a project can be best measured using vehicle miles traveled. A development project that is not exempt and that results in vehicle miles traveled greater than regional average for the land use type (e.g. residential, employment, commercial) may indicate a significant impact. For the purposes of this subdivision, regional average should be measured per capita, per employee, per trip, per person-trip or other appropriate measure. Also for the purposes of this subdivision, region refers to the metropolitan planning organization or regional transportation planning agency within which the project is located. Development projects that locate within one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor generally may be considered to have a less than significant transportation impact. Similarly, development projects, that result in net decreases in vehicle miles traveled, compared to existing conditions, may be considered to have a less than significant transportation impact. Land use plans that are either consistent with a sustainable communities strategy, or that achieve at least an equivalent reduction in vehicle miles traveled as projected to result from implementation of a sustainable communities strategy, generally may be considered to have a less than significant impact.

(2) Induced Vehicle Travel and Transportation Projects. To the extent that a transportation project increases physical roadway capacity for automobiles in a congested area, or adds a new roadway to the network, the transportation analysis should analyze whether the project will induce additional automobile travel compared to existing conditions. The addition of general purpose highway or arterial lanes may indicate a significant impact except on rural roadways where the primary purpose is to improve safety and where speeds are not significantly altered. Transportation projects that do not add physical roadway capacity for automobiles, but instead are for the primary purpose of improving safety or operations, undertaking maintenance or rehabilitation, providing rail grade separations, or improving transit operations, generally would not result in a significant transportation impact. Also, new managed lanes (i.e. tolling, high-occupancy lanes, lanes for transit or freight vehicles only, etc.), or short auxiliary lanes, that are consistent with the transportation projects in a Regional Transportation Plan and Sustainable Communities Strategy, and for which induced travel was already adequately analyzed, generally would not result in a significant transportation impact. Transportation projects (including lane priority for transit, bicycle and pedestrian projects) that lead to net decreases in vehicle miles traveled, compared to existing conditions, may also be considered to have a less than significant transportation impact.

(3) Local Safety. In addition to a project's effect on vehicle miles traveled, a lead agency may also consider localized effects of project-related transportation on safety. Examples of objective factors that may be relevant may include:

(A) Increase exposure of bicyclists and pedestrians in vehicle conflict areas (i.e., remove pedestrian and bicycle facilities, increase roadway crossing times or distances, etc.).

(B) Contribute to queuing on freeway off-ramps where queues extend onto the mainline.

(C) Contribute to speed differentials of greater than 15 miles per hour between adjacent travel lanes.

(D) Increase motor vehicle speeds.

(E) Increase distance between pedestrian or bicycle crossings.

(4) Methodology. The lead agency's evaluation of the vehicle miles traveled associated with a project is subject to a rule of reason; however, a lead agency generally should not confine its evaluation to its own political boundary. A lead agency may use models to estimate a project's vehicle miles traveled, and may revise those estimates to reflect professional judgment based on substantial evidence. Any assumptions used to estimate vehicle miles traveled and any revisions to model outputs should be documented and explained in the environmental document prepared for the project.

(c) Alternatives and Mitigation.

Examples of mitigation measures and alternatives that may reduce vehicle miles travelled are included in Appendix F. Neither this section nor Appendix F limits the exercise of any public agency's discretion provided by other laws, including, but not limited to, the authority of cities and counties to condition project approvals pursuant to general plans and zoning codes. Previously adopted

measures to mitigate congestion impacts may continue to be enforced, or modified, at the discretion of the lead agency.

(d) Applicability.

The provisions of this section shall apply prospectively as described in section 15007. Upon filing of this section with the Secretary of State, this section shall apply to the analysis of projects located within one-half mile of major transit stops or high quality transit corridors. Outside of those areas, a lead agency may elect to be governed by the provisions of this section provided that it updates its own procedures pursuant to section 15022 to conform to the provisions of this section. After January 1, 2016, the provisions of this section shall apply statewide.

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Sections 21099 and 21100, Public Resources Code; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal. App. 4th 173.

Text of Proposed Amendments to Appendix F

Appendix F

Energy Conservation

I. Introduction

The goal of conserving energy implies the wise and efficient use of energy. The means of achieving this goal include:

(1) decreasing overall per capita energy consumption,

(2) decreasing reliance on fossil fuels such as coal, natural gas and oil, and

(3) increasing reliance on renewable energy sources.

In order to assure that energy implications are considered in project decisions, the California Environmental Quality Act requires that EIRs include a discussion of the potential energy impacts of proposed projects, with particular emphasis on avoiding or reducing inefficient, wasteful and unnecessary consumption of energy (see Public Resources Code section 21100(b)(3)). Energy conservation implies that a project's cost effectiveness be reviewed not only in dollars, but also in terms of energy requirements. For many projects, cost effectiveness may be determined more by energy efficiency than by initial dollar costs. A lead agency may consider the extent to which an energy source serving the project has already undergone environmental review that adequately analyzed and mitigated the effects of energy production.

II. EIR Contents

Potentially significant energy implications of a project shall be considered in an EIR to the extent relevant and applicable to the project. The following list of energy impact possibilities and potential conservation measures is designed to assist in the preparation of an EIR. In many instances specific items may not apply or additional items may be needed. Where items listed below are applicable or relevant to the project, they should be considered in the EIR.

A. Project Description may include the following items:

1. Energy consuming equipment and processes which will be used during construction, operation and/or removal of the project. If appropriate, this discussion should consider the energy intensiveness of materials and equipment required for the project.

2. Total energy requirements of the project by fuel type and end use.

3. Energy conservation equipment and design features.

4. Identification of energy supplies that would serve the project.

5. Total estimated daily vehicle trips to be generated by the project and the additional energy consumed per trip by mode.

B. Environmental Setting may include existing energy supplies and energy use patterns in the region and locality.

C. Environmental Impacts may include:

1. The project's energy requirements and its energy use efficiencies by amount and fuel type for each stage of the project including construction, operation, maintenance and/or removal. If appropriate, the energy intensiveness of materials maybe discussed.

2. The effects of the project on local and regional energy supplies and on, requirements for additional capacity.

3. The effects of the project on peak and base period demands for electricity and other forms of energy.

4. The degree to which the project complies with existing energy standards.

5. The effects of the project on energy resources.

6. The project's projected transportation energy use requirements and its overall use of efficient transportation alternatives.

D. Mitigation Measures may include:

1. Potential measures to reduce wasteful, inefficient and unnecessary consumption of energy during construction, operation, maintenance and/or removal. The discussion should explain why certain measures were incorporated in the project and why other measures were dismissed.

2. The potential of siting, orientation, and design to minimize energy consumption, including transportation energy, increase water conservation and reduce solid-waste.

3. The potential for reducing peak energy demand.

4. Alternate fuels (particularly renewable ones) or energy systems.

5. Energy conservation which could result from recycling efforts.

6. Potential measures to reduce vehicle miles traveled include, but are not limited to:

a. Improving or increasing access to transit.

b. Increasing access to common goods and services, such as groceries, schools, and daycare.

c. Incorporating affordable housing into the project.

d. Improving the jobs/housing fit of a community.

e. Incorporating neighborhood electric vehicle network.

f. Orienting the project toward transit, bicycle and pedestrian facilities.

g. Improving pedestrian or bicycle networks, or transit service.

h. Traffic calming.

i. Providing bicycle parking.

j. Limiting parking supply.

k. Unbundling parking costs.

***l*. Parking or roadway pricing or cash-out programs.**

m. Implementing a commute reduction program.

n. Providing car-sharing, bike sharing, and ride-sharing programs.

o. Providing transit passes.

E. Alternatives should be compared in terms of overall energy consumption and in terms of reducing wasteful, inefficient and unnecessary consumption of energy. **Examples of project alternatives that may reduce vehicle miles traveled include, but are not limited to:**

1. Locating the project in an area of the region that already exhibits below average vehicle miles traveled.

2. Locating the project near transit.

3. Increasing project density.

4. Increasing the mix of uses within the project, or within the project's surroundings.

5. Increasing connectivity and/or intersection density on the project site.

6. Deploying management (e.g. pricing, vehicle occupancy requirements) on roadways or roadway lanes.

F. Unavoidable Adverse Effects may include wasteful, inefficient and unnecessary consumption of energy during the project construction, operation, maintenance and/or removal that cannot be feasibly mitigated.

G. Irreversible Commitment of Resources may include a discussion of how the project preempts future energy development or future energy conservation.

H. Short-Term Gains versus Long-Term Impacts can be compared by calculating the project's energy costs over the project's lifetime.

I. Growth Inducing Effects may include the estimated energy consumption of growth induced by the project.

Note: Authority cited: Sections 21083**, 21083.05** and 21087, Public Resources Code. Reference: Sections 21000-21176. Public Resources Code.

Text of Proposed Amendments to Appendix G

The following is an excerpt of Section XVI of existing Appendix G, as proposed to be amended to conform to proposed Section 15064.3:

[…]

XVI. TRANSPORTATION~~/TRAFFIC~~ -- Would the project:

a) Conflict with a~~n applicable~~ plan, ordinance or policy ~~establishing measures of effectiveness for the~~ **addressing the safety or** performance of the circulation system, **including transit, roadways, bicycle lanes and pedestrian paths?** ~~taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit?~~

b) **Cause vehicle miles traveled (per capita, per service population, or other appropriate measure) that exceeds the regional average for that land use?** ~~Conflict with an applicable congestion management program, including, but not limited to level of service standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways?~~

c) Result in **substantially unsafe conditions for pedestrians, bicyclists, transit users, motorists or other users of public rights of way by, among other things, increasing speeds, increasing exposure of bicyclists and pedestrians in vehicle conflict areas, etc.?** ~~a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?~~

d) Substantially **induce additional automobile travel by increasing physical roadway capacity in congested areas (i.e., by adding new mixed-flow lanes) or by adding new roadways to the network?** ~~increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?~~

e) Result in inadequate emergency access?

~~f) Conflict with adopted policies, plans, or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance or safety of such facilities?~~

[…]

Providing Input

This is a preliminary discussion draft, which we expect to change for the better through public input. We hope that you will share your thoughts and expertise in this effort.

When and Where to Submit Comments

Input may be submitted electronically to CEQA.Guidelines@ceres.ca.gov. While electronic submission is preferred, suggestions may also be mailed or hand delivered to:

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Please submit all suggestions before **October 10, 2014** at **5:00 p.m**.

Tips for Providing Effective Input

OPR would like to encourage robust engagement in this update process. We expect that participants will bring a variety of perspectives. While opposing views may be strongly held, discourse can and should proceed in a civil and professional manner. To maximize the value of your input, please consider the following:

- In your comment(s), please clearly identify the specific issues on which you are commenting. If you are commenting on a particular word, phrase, or sentence, please provide the page number and paragraph citation.
- Explain why you agree or disagree with OPR's proposed changes. Where you disagree with a particular portion of the proposal, please suggest alternative language.
- Describe any assumptions and support assertions with legal authority and factual information, including any technical information and/or data. Where possible, provide specific examples to illustrate your concerns.
- When possible, consider trade-offs and potentially opposing views.
- Focus comments on the issues that are covered within the scope of the proposed changes. Avoid addressing rules or policies other than those contained in this proposal.
- Consider quality over quantity. One well-supported comment may be more influential than one hundred form letters.
- Please submit any comments within the timeframe provided.

Appendices

Appendix A: Frequently Asked Questions

Appendix B: Vehicle Miles Traveled, Air Quality and Energy

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Appendix A

Frequently Asked Questions

1. *What is "level of service" and how is it used in environmental review?*

   Many jurisdictions use "level of service" standards to measure potential transportation impacts of development projects and long range plans. Commonly known as LOS, level of service measures vehicle delay at intersections and on roadways and is represented as a letter grade A through F. LOS A represents free flowing traffic, while LOS F represents congested conditions. LOS standards are often found in local general plans and congestion management plans. LOS is also often used in traffic impact studies prepared under the California Environmental Quality Act (CEQA). Exceeding LOS standards can require changes in proposed projects, installation of additional infrastructure, or, in some cases, financial penalties.

2. *What is wrong with treating congestion as an environmental impact under CEQA?*

   Stakeholders have reported several problems with level of service, and congestion generally, as a measure of environmental impact under CEQA. First, as a measure of delay, congestion measures more of social, rather than an environmental impact. Second, the typical way to mitigate congestion impacts is to build larger roadways, which imposes long-term maintenance costs on tax-payers, pushes out other modes of travel, and may ultimately encourage even more congestion. Third, addressing congestion requires public agencies to balance many factors, including fiscal, health, environmental and other quality of life concerns. Such balancing is more appropriate in the planning context where agency decisions typically receive deference.

3. *How does SB 743 affect the use of level of service to measure transportation impacts?*

   SB 743 requires the Governor's Office of Planning and Research (OPR) to amend the CEQA Guidelines to provide an alternative to level of service for evaluating transportation impacts. The alternative approach must "promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses." (*New* Public Resources Code Section 21099(b)(1).) According to the statute, potential alternative measurements of transportation impacts may include "vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated." (*Ibid*.) OPR must develop an alternative approach for areas near transit, but also has discretion to develop such alternative criteria beyond those areas, if appropriate. (*Id*. at subd. (c).)

Transportation impacts related to air quality, noise and safety must still be analyzed under CEQA where appropriate. (*Id*. at subd. (b)(3).)

4. *Will the new CEQA Guidelines eliminate the use of level of service in all cases?*

   No. Automobile delay will no longer be considered a significant environmental impact under CEQA in areas specified in the Guidelines. As currently proposed, those areas would initially include areas near transit, as well as those jurisdictions that wish to opt-in to this new approach. After a period of time, the new Guidelines would apply throughout the state. Level of service may still be used, however, for planning purposes outside of CEQA (see below).

5. *Some communities still use level of service to plan their transportation networks. Will the new guidelines prevent my city/county from using it for that purpose?*

   No. The Guidelines only address impacts analysis under CEQA. Many jurisdictions have level of service standards in their general plans, zoning codes and fee programs. These proposed Guidelines would not affect those uses of level of service. Maintaining level of service in planning allows a jurisdiction to balance automobile delay with other interests, e.g. mode share objectives, human health, fiscal health, etc.

6. *Doesn't level of service help indicate whether the project will cause safety concerns? How will the new Guidelines address local safety?*

   Safety is an issue that both the statute and these proposed Guidelines identify as a potential area of study under CEQA. Level of service does not itself measure safety. For example, higher level of service often indicates higher vehicle speeds, which put all road users at greater risk in the event of a collision. On the other hand, it may indicate areas where large speed differentials might occur, for example an off ramp backing up onto a highway mainline. Where analysis is needed to determine the significance of potential safety impacts, that analysis will still be required under these proposed Guidelines.

7. *Traffic causes air quality and noise problems. How will those issues be addressed in the new Guidelines?*

   SB 743 and these proposed Guidelines explicitly specify that potential impacts from transportation other than delay, for example air quality and noise, continue to be analyzed under CEQA. The methods for addressing those factors remain unchanged.

8. *How will the new Guidelines affect fee programs in my community?*

   SB 743 and these proposed Guidelines both recognize that jurisdictions maintain their ability to retain and enact fee programs, including those based on level of service. The proposed Guidelines explicitly state that they do not limit the discretion of public agencies in implementing other laws, including city and county general plans, zoning codes and other planning laws.

9. *Why not limit the change to just transit priority areas?*

   OPR looked broadly, but did not find a geographic area of the state or project type for which use of level of service would do a better job of protecting the environment or human health, or achieving the interests specified in the statute (promoting reduction of greenhouse gas emissions, development of multimodal transportation networks, and a diversity of land uses) than vehicle miles traveled. However, as noted above, the proposed guideline would phase-in application of the new methodology, and would start in areas near transit.

10. *My community does not have frequent transit. What options are available for reducing VMT?*

    Extensive research has been conducted on different ways that local governments can reduce vehicle miles traveled. Some useful sources of information include:

    - California Air Pollution Control Officers Association, "Quantifying Greenhouse Gas Mitigation Measures," (August 2010)
    - California Energy Commission, "Energy Aware Planning Guide" (February 2011)
    - Salon, Deborah, "Quantifying the effect of local government actions on VMT," Prepared for the California Air Resources Board and the California Environmental Protection Agency (September 2013)

11. *Didn't SB 743 make other changes to CEQA related to infill projects?*

    Yes. SB 743 created a new exemption from CEQA for certain projects that are consistent with a Specific Plan. (See New Public Resources Code Section 21155.4.) SB 743 also provides that certain types of infill projects are not required to analyze aesthetic impacts or impacts related to parking. (New Public Resources Code Section 21099, subd. (d).) Those changes went into effect January 2014. Additional information regarding those provisions is available here.

12. *When would the new rules go into effect?*

    OPR released a ***preliminary discussion draft*** on August 6, 2014. That draft will likely undergo significant revisions in response to public input. After a full public vetting, OPR will then submit a draft to the Natural Resources Agency, which will then conduct a formal rulemaking process. That rulemaking process will itself entail additional public review, and may lead to further revisions. New rules would not go into effect until after the Natural Resources Agency adopts the new Guidelines, and the package undergoes review by the Office of Administrative Law. Notably, the new Guidelines would apply prospectively only, and would not affect projects that have already commenced environmental review.

Appendix B

Vehicle Miles Traveled, Air Quality and Energy

Vehicle travel leads to a number of direct and indirect impacts to the environment and human health. Among other effects, loading additional vehicle miles traveled, or VMT, onto the roadway network leads to increased emissions of air pollutants, including greenhouse gases, as well as increased consumption of energy. Some direct effects of increased VMT are described below.

Air Pollution

In California, transportation is associated with more greenhouse gas emissions than any other sector. Increased tailpipe emissions are a direct effect of increased VMT.

As VMT increases, so do carbon dioxide (CO2), (Chester and Horvath, 2009) methane (CH4), and nitrogen dioxide (N20) emissions. (U.S. Environmental Protection Agency, Emission Facts: Greenhouse Gas Emissions from a Typical Passenger Vehicle (February 2005).) The U.S. Environmental Protection Agency estimates that model 2005 passenger vehicles in the US emit an average of 0.0079 grams of N2O and 0.0147 grams of NH4 per mile. (U.S. Environmental Protection Agency, Climate Leaders Greenhouse Gas Inventory Protocol Core Module Guidance: Direct Emissions from Mobile Combustion Sources (May 2008).) Other air pollutants also directly result from increased VMT. Per mile traveled, California's light vehicles emit:

- 2.784 grams of CO
- 0.272 grams of NOX
- 0.237 grams of ROC (reactive organic gases, similar to volatile organic compounds)

(California Air Resources Board, Methods to Find the Cost-Effectiveness of Funding Air Quality Projects (May 2013).) While technological improvements are reducing vehicle emissions, those improvements are being eroded by a dramatic increase in vehicle miles traveled. (U.S. Environmental Protection Agency, Our Built and Natural Environments 2nd Ed. (June 2013).)

Energy

In addition to generating air pollution, vehicle travel can consumes substantial amounts of energy. Over 40 percent of California's energy consumption occurs in the transportation sector. (See California Energy Commission, "Energy Aware Planning Guide" (February 2011).) Passenger vehicles account for 74 percent of emissions from the transportation sector. (*Ibid*.)

Appendix C

Technical Considerations in Assessing Vehicle Miles Traveled

Many practitioners are familiar with accounting for vehicle miles traveled, commonly referred to as VMT, in connection with long range planning, or as part of the analysis of a project's greenhouse gas emissions or energy impacts. This Appendix provides background information on how vehicle miles traveled may be assessed as part of a transportation impacts analysis under the California Environmental Quality Act.

What VMT to Count

The simplest and most straightforward counting method is to simply estimate VMT from trips generated or attracted by a project (i.e., from trips made by residents, employees, students, etc.). This method is known as trip-based VMT. Agencies with access to more sophisticated modeling capabilities have can examine VMT in a more comprehensive manner, examining projected travel behavior, including effects the project has on other trip segments. For projects that might replace longer trips with shorter ones, a lead agency might analyze total area-wide VMT to see whether it would decrease were the project to be built. These methods are described below. [Additional background information regarding travel demand models is available in the California Transportation Commission's "2010 Regional Transportation Plan Guidelines," beginning at page 35.]

Trip-based VMT

Trip-based VMT includes all VMT from trips that begin or end at the project. It answers the question, "How much driving would be needed to get people to and from the project?" Standard 4-step travel demand models can measure trip-based VMT. For residential development, trip-based VMT is called home-based VMT.

Tour-based VMT

A tour is defined as a series of trips beginning and ending at the residence. Tour-based VMT includes all VMT from the entire tour that includes a stop at the project. As such, it captures the influence the project has on broader travel choices; for example, a project which is accessible by automobile can influence a traveler to choose travel by automobile for their day's needs, and this choice necessitates automobile use along the rest of their tour, which in turn can influence destination choices. Tour-based models, which are typically activity-based models, model entire tours rather than trips. Tour-based VMT for a residential development, for example, would count all the travel undertaken by its residents; this is called household VMT.

A shortcut: mapping trip- and tour-based VMT

Trip- or tour-based travel can be calculated on a project-by-project basis, but it is also possible to use a travel demand model to map the VMT of existing development. Because the travel behavior of new development tends to mimic that of existing development, such maps could be used to estimate VMT from new development in those locations.

Area-wide VMT

An area-wide analysis compares total VMT with and without the project. It answers the question, "What is the net effect of the project on area VMT?" The area for analysis should be chosen to capture the full VMT effects of the project; it should avoid truncating the analysis. In some cases, a strategically located project can reduce the total amount of VMT by substituting shorter trips for longer ones. For example, a grocery store in an area that previously had none could allow shorter shopping trips to substitute for longer ones. The area-wide VMT method should also be used when calculating the VMT impacts of transportation infrastructure projects.

Choosing a Denominator

A transportation analysis for a land use project should measure transportation efficiency, rather than the total amount of VMT generated. Therefore, a VMT metric used for trip- or tour-based assessments should include a denominator. Typical denominators include per capita for residential, per employee for office, and per trip for other uses. Per person-trip is another option that could be used for all land use types. Note, examination of area-wide VMT typically does not include a denominator, because the objective is to examine the magnitude of increase or decrease in total VMT.

Measuring VMT for Land Use Projects

The proposed Guidelines suggest that projects generating or attracting greater than regional average VMT may be an indication of a significant transportation impact. Similarly, the proposed Guidelines suggest that a net reduction in VMT may be an indication of a less than significant impact. The paragraphs below provide additional detail on how an agency might make those determinations.

Calculating Regional Average VMT

When comparing project VMT to regional average VMT, the same denominator and VMT counting method (trip-based or tour-based) should be used. For example, a trip-based VMT analysis for a residential project, which estimates home-based VMT per capita, should be compared with the regional total home based VMT divided by the total regional population. Totals should be taken over the entire region, i.e. the full geography of the MPO or RTPA.

Demonstrating a Reduction in Area-Wide VMT

The area-wide method of counting VMT may be used to determine whether total VMT increases or decreases with the project. The area chosen for analysis should cover the full area over which the project affects travel behavior.

Transportation projects should assess VMT using the area-wide method. Transit and active transportation projects can generally be presumed to reduce total VMT, unless substantial evidence demonstrates otherwise, because their largest effect on VMT is typically mode shift away from automobile use. Projects that increase physical roadway capacity typically induce additional vehicle travel, generally leading to increases in total VMT. However, a roadway project that improves connectivity can, in some cases, shorten trip lengths sufficiently to outweigh the induced travel effect, leading to an overall reduction in VMT.

Appendix D

Sample Trip-Based VMT Calculation

This sample describes the steps in estimating the vehicle miles traveled associated with a project. In this example, a 100 unit residential subdivision is proposed in a low-density large lot development pattern (i.e., one unit per 5 acres). This type of pattern has no mix of uses and relatively long distances to jobs, schools, and services. As such, residents typically have to rely on private vehicles for any trip and each trip is many miles. With no mix of uses, no 'internal' vehicle trips are projected to occur. To estimate daily VMT for the project, the following steps are used.

1. Multiply the number of residential units (100) by an average vehicle daily trip rate. This rate can be obtained by conducting local surveys of at least three similar sites, but in absence of this data, the analyst can rely on the ITE *Trip Generation Manual*. The manual contains an average daily vehicle trip rate for single family detached homes of 9.52. It should be noted that this rate only captures trip to/from the home (i.e., home-based work (HBW) and home-based other (HBO)) and not all trips made by the residents of the home.

   100 single-family detached residential dwelling units x 9.52 vehicle trips per unit =

   952 daily vehicle trips

2. Multiply the number of home-based trips by trip lengths. If trip lengths are available by trip purpose, then the trip generation estimate should be divided into purposes based on household survey data or travel forecasting model estimates. Potential sources for trip lengths by purpose are available through the California Household Travel Survey, the National Household Travel Survey, and MPO model estimates. In this simple estimate, only one trip length is assumed to be available and it represents the average weekday trip length for California based on the National Household Travel Survey.

   952 daily vehicle trips x 10 miles per trip = 9,520 daily VMT

   9,520 daily VMT/100 residential units =

   95.2 daily VMT per residential unit

3. Divide by the expected average project household occupancy. A specific estimate based on project characteristics (i.e. unit sizes and number of bedrooms) and location is preferable. Here we use the average for Sacramento County, 2.69 persons per household:

   95.2 daily VMT generated per residential unit / 2.69 persons per unit =

   35.4 daily VMT per capita

Appendix E

Estimating VMT From Roadway Capacity Increasing Projects

Introduction

CEQA requires analysis of a project's potential growth-inducing impacts. (Public Resources Code § 21100(b)(5); State CEQA Guidelines, § 15126.2(d).) Many agencies are familiar with the analysis of growth inducing impacts associated with water, sewer and other infrastructure. As part of its effort to reform the analysis of transportation impacts in the CEQA Guidelines, the Office of Planning and Research is proposing criteria for determining the significance of growth-inducing impacts related to transportation projects. This document provides additional background and information related to induced travel.

Because a roadway project can induce substantial vehicle miles traveled, or VMT, incorporating estimates of induced travel is critical to calculating both transportation and other impacts of a roadway expansion project. Induced travel also has the potential to reduce congestion relief benefits, and so any weighing of cost and benefit of a highway project will be inaccurate if it is not fully accounted for.

How Does Roadway Capacity Relate to Throughput?

The capacity of a road is the maximum number of vehicles per hour that the road can service. Throughput, meanwhile, is the number vehicles per hour that the road is servicing at any given time. In general, adding lanes to roads increases capacity. The magnitude of the increase depends on the type of lane (e.g. general purpose lanes, managed lanes, auxiliary lanes).

When a roadway is serving vehicles at capacity, adding more vehicles will disrupt traffic flow causing speed reductions (i.e., congestion) and reduce throughput. Conversely, reducing the number of vehicles entering a congested roadway will reduce congestion and increase throughput. So, travel demand management programs or traffic systems management programs that reduce vehicle miles traveled loaded onto a roadway can improve throughput without increasing capacity.

What is Induced VMT?

Additional roadway capacity may lead to additional VMT, a phenomenon known as induced travel, or induced VMT. It occurs when congestion is already present and a capacity expansion will lead to an appreciable reduction in travel time. With lower travel times, the modified facility becomes more attractive to travelers, resulting in the following trip-making changes, which have implications for total VMT:

- **Longer trips.** The ability to travel a long distance in a shorter time increases the attractiveness of destinations that are further away, increasing trip length and VMT.
- **Changes in mode choice.** When transportation investments are devoted to reducing automobile travel time, travelers tend to shift toward automobile use from other modes, which increases VMT.

- **Route changes.** Faster travel times on a route attract more drivers to that route from other routes, which can increase or decrease VMT depending on whether it shortens or lengthens trips.
- **Newly generated trips.** Increasing travel speeds can add trips, which increases VMT. For example, an individual who previously telecommuted or purchased goods on the internet might choose to travel by automobile as a result of increased speeds.
- **Land Use Changes.** Faster travel times along a corridor lead to land development further along that corridor; that development generates and attracts longer trips, which increases VMT.

These effects operate over different time scales. For example, changes in mode choice might happen immediately or within a few years, while land use changes typically take a few years or longer.

Has Induced VMT Been Studied?

On the whole, evidence links highway capacity expansion to VMT increases. Numerous studies have estimated the magnitude of the induced travel phenomenon. Most of these studies express the amount of induced travel as an "elasticity," which is a multiplier that describes the percent increase in VMT resulting from a given percent increase in lane miles of new roadway capacity. Many distinguish "short run elasticity" (increase in vehicle travel in the first few years) from "long run elasticity" (increase in vehicle travel beyond the first few years). Long run elasticity is typically larger than short run elasticity, because as time passes, more of the components of induced travel materialize. Generally, short run elasticity can be thought of as excluding the effects of land use change, while long run elasticity includes them. Most studies find long run elasticities between 0.6 and just over 1.0 (California Air Resources Board *DRAFT Policy Brief on Highway Capacity and Induced Travel*, p. 2.)

How Would an Agency Estimate Induced VMT for Proposed Projects?

Transportation analysis undertaken for transportation infrastructure projects typically requires use of a travel demand model. Proper use of a travel demand model will yield a reasonable estimate of short run induced VMT, generally including the following components:

- Trip length (generally increases VMT)
- Mode shift (generally shifts from other modes towards automobile use, increasing VMT)
- Route changes (can act to increase or decrease VMT)
- Newly generated trips (generally increases VMT; note that not all travel demand models have sensitivity to this factor, so an off-model estimate may be necessary)

Estimating long run induced VMT requires consideration of changes in land use. At a minimum, VMT resulting from land use changes induced by the project should be acknowledged and discussed. The analysis should disclose any limitations related to VMT forecasting that may have not been sensitive to induced travel effects and how these effects could influence the analysis results. Quantitative analysis is also possible using integrated transport and land use models or by relying on expert panels employing techniques such as the Delphi method. Once developed, the estimates of land use changes can then be analyzed by the travel demand model to assess VMT effects.

Alternately, the travel demand model analysis can be performed without an estimate of land use changes, and then the results can be compared to empirical studies of induced travel found in the types of studies described above. If the modeled elasticity falls outside of that range, then the VMT estimate can be adjusted to fall within the range, or an explanation can be provided describing why the project would be expected to induce less VMT than the subjects of those studies. (For an example of an EIR that includes a number of these elements, see *Interstate 5 Bus/Carpool Lanes Project Final EIR, pp. 2-52--2-56.*)

Example Outline for induced Travel Analysis

The following is a sample outline for describing induced VMT in the analysis of a project which includes a roadway capacity increase:

- Description of potential sources of induced travel due to the project alternatives resulting from
    - Longer trips
    - Changes in mode choice
    - Route changes
    - Newly generated trips
    - Land Use Changes
- If an estimate of land use change resulting from project alternatives is available from an expert panel or a land use model, that estimate should be used in the travel demand model to estimate VMT. Alternately, include:
    - A calculation of the long run elasticity of induced VMT for each project alternative (change in VMT divided by change in lane miles)
    - A comparison of that elasticity to empirical studies OR an estimate of land use changes
    - A discussion of potential sources for error in the induced travel estimate made by the travel demand model
    - An estimate of induced VMT that provides a best estimate correction to the results from the travel demand model

Variations in Induced VMT by Lane Type

The amount of VMT induced by a roadway capacity expansion depends on the amount of capacity added. All else being equal, as capacity is added, more VMT would be induced. Different types of lanes induce different amounts of VMT because they have different capacities or different abilities to influence travel time. Travel demand models can reflect these distinctions, as the capacities of lane types are programmed into the model and they are sensitive to travel time.

General purpose lanes can be used by any vehicle, and tend to exhibit the greatest vehicle capacity. Managed lanes are designated for use by vehicles occupied by at least a certain number of passengers (HOV lanes), those vehicles plus ones that have paid a toll (HOT lanes), or only ones that have paid a toll (Toll lanes). They are typically managed to prevent congestion by placing a restriction on the vehicles that may use the lane. Typically the target throughput is somewhat below capacity, for the purpose of having the managed lane maintain a speed advantage over the general purpose lanes. Thus, effective capacity of a managed lane is typically reduced.

Auxiliary lanes are defined as lanes that are only one link in length (starting at an on ramp and terminating at the next off ramp). The purpose of an auxiliary lane is to provide additional roadway capacity to accommodate the weaving that takes place near ramps as vehicles maneuver to enter or exit the freeway. Auxiliary lanes add capacity to a roadway, but near ramps their capacity is reduced, because cars are weaving into and out of them require extra space. Portions of an auxiliary lane away from ramps behave like a general purpose lane. Auxiliary lanes of approximately 1 mile or less in length can generally be assumed to have a reduced capacity along their full length, but longer auxiliary lanes may function like general purpose lanes. (See, Sacramento Area Council of Governments, Sacramento Activity-Based Travel Simulation Model: Model Reference Report, at p. 3-3.)

Transit lanes, which are designated for transit vehicles only, and truck lanes, which are designated for freight vehicles only, do not directly provide capacity for private passenger vehicles. However, these lane types attract trucks or transit vehicles from general purpose lanes, freeing up capacity in those lanes, and as a result can induce private passenger vehicle travel.

Mitigation and Alternatives

Induced travel has the potential to reduce congestion relief benefits, increase VMT, and increase other environmental impacts that result from vehicle travel. These effects may be considered potential impacts requiring consideration of mitigation or the development of alternatives. If the impact is determined to be significant, the lead agency must consider feasible measures to mitigate the impact, or consider project alternatives. In the context of increased travel induced by capacity increases, appropriate mitigation and alternatives that a lead agency might consider include managing the new lane or improving the passenger throughput of existing lanes. For example, a planned general purpose lane could instead be built as an HOV or HOT lane, reducing induced VMT. Travel demand management off site can also reduce VMT.

Appendix F

Available Models for Estimating Vehicle Miles Traveled

Overview

Our ability to anticipate the transportation outcomes of land use development has increased greatly in recent years. Research undertaken by academics, consulting firms, and public agencies provide the basis for estimating future vehicle travel, and advances in computing power have allowed more sophisticated application of that research.

Models range in complexity and sensitivity to factors that can influence vehicle miles traveled, or VMT. Simpler tools make assumptions, but are easier to implement. More complex models consider more variables, but are not always necessary or feasible. Models generally fall into one of two categories:

Sketch models use statistical characterizations of land use projects and transportation networks to estimate project VMT. For example, a sketch model might characterize the transportation network using statistics like intersections per square mile and number of transit stops per day within a half mile, rather than actually containing a detailed representation of the network itself. They range in sophistication from simple spreadsheet tools, which often require a smaller number of inputs and are therefore easier to use but sensitive to fewer variables, to complex software packages. A number of sketch models can be downloaded free of charge.

Three sketch models commonly used in California include:

- Urban Emissions Model (URBEMIS) - *California Air Resources Board*
- California Emissions Estimator Model (CalEEMod) – *California Air Pollution Control Officers' Association*
- EPA Mixed-Use Development Model (MXD) - *U.S. EPA*

Travel demand models represent links and nodes in the transportation network explicitly rather than statistically. As a result, they generally require more data, maintenance, and run time than sketch models. Because of their greater complexity, and because their use is typically required for various statutory functions (e.g. determining air quality conformity), travel demand models are maintained by all MPOs and RTPAs, and also by some cities and counties. For this reason, a regional travel demand model already exists in most locations and can be used to develop estimates of VMT. Because they represent the transportation network explicitly, travel demand models are required when analyzing the VMT impacts of transportation projects.

Travel demand models can supply inputs for sketch models, particularly trip lengths; a single travel demand model run can supply these inputs for sketch model runs throughout the region. Travel

demand models can also be used to develop maps depicting VMT generation across the model's geography, providing a quick method for estimating VMT of a project in a certain location.

Catalog of Models

This section catalogs many of the models that generate estimates of VMT. Some were primarily designed to estimate project VMT, while others calculate VMT primarily in order to estimate GHG emissions and/or other outcomes. Please note, this inventory of possible models should not be construed as an endorsement of any particular model.

Name: VMT+

Developer: Fehr and Peers

Year: 2013

Accessibility: Free, only web browser and Internet access required

Description: This free website functions like a spreadsheet tool, estimating weekly VMT and GHG by the size and type of land uses developed. The calculation is based on trip generation. ITE data are provided as a default for "Average Western US City" and for four California metropolitan areas. All default data (including trip generation, average trip length, and internal trip rates) can be replaced with project specific information. This tool is useful for development projects or land use plans of various sizes.

URL: http://www.fehrandpeers.com/vmt

Name: RapidFire

Developer: Calthorpe Associates

Year: 2011

Accessibility: Paid, spreadsheet software (e.g. Microsoft Excel) required

Description: This spreadsheet tool can estimate VMT and GHG, among many other factors, and is appropriate for a neighborhood and larger scale development. RapidFire, as deployed during the Plan Bay Area project in the San Francisco Bay Area, applies a user-friendly web interface to allow the public to explore the VMT and GHG outcomes of their development preferences.

URL: http://www.calthorpe.com/scenario_modeling_tools

Documentation:
http://www.calthorpe.com/files/Rapid%20Fire%20V%202.0%20Tech%20Summary_0.pdf

Name: Transportation Emissions Guidebook and Calculator

Developer: Center for Clean Air Policy

Year: 2007

Accessibility: Free, spreadsheet software (e.g. Microsoft Excel) required

Description: This spreadsheet tool uses a trip generation model to estimate neighborhood VMT and GHG, and then estimates the impact of 19 mitigation strategies. Required inputs include present day mode share, trip generation rates, and average trip length. This model is unique among those listed here in that it includes school siting as a potential VMT mitigation strategy.

URL: http://www.ccap.org/safe/guidebook/guide_complete.html

Documentation:

http://www.ccap.org/guidebook/CCAP%20Transportation%20Guidebook%20(1).pdf

Name: Sketch7 VMT Spreadsheet Tool

Developer: UC Davis Institute of Transportation Studies

Year: 2012

Accessibility: Free, spreadsheet software (e.g. Microsoft Excel) required

Description: This Excel spreadsheet and online GIS application use elasticities for seven "D's" (density, diversity, distance, design, destination, demographics, and development scale) to compare site or neighborhood plans, and estimate the VMT and GHG produced by each.

URL: http://ultrans.its.ucdavis.edu/projects/improved-data-and-tools-integrated-land-use-transportation-planning-california

Documentation:
http://downloads.ice.ucdavis.edu/ultrans/statewidetools/Appendix_G_VMT_Spreadsheet_Tool.pdf

Name: COMMUTER

Developer: United States Environmental Protection Agency (U.S. EPA), Cambridge Systematics, Inc.

Year: 2011

Accessibility: Free, spreadsheet software (e.g. Microsoft Excel) required

Description: This spreadsheet tool estimates the impact on VMT and GHG of several common transportation demand management strategies, including pricing/subsidy, transit improvements, carpooling, and telecommute promotion. The model allows the user to provide baseline mode share, trip generation and length, and population as inputs, or alternately can provide defaults from MOBILE6.

URL: http://cfpub.epa.gov/crem/knowledge_base/crem_report.cfm?deid=74941

Documentation: http://www.epa.gov/otaq/stateresources/policy/transp/commuter/420b05017.pdf

Name: Envision Tomorrow

Developer: Fregonese Associates, U.S. Office of Housing and Urban Development (HUD)

Year: 2014 (version 3.4)

Accessibility: Free, spreadsheet software (e.g. Microsoft Excel) required

Description: This suite of linked spreadsheets allows users to "paint" changes to land use and transportation at the neighborhood or site level and model the resulting impacts on travel behavior. Inputs include employment characteristics, intersection counts, transit coverage, and assumed average vehicle speeds. The spreadsheets use trip generation rates to estimate VMT and GHG. Envision Tomorrow is distributed under a Creative Commons license, is free to use, and is open source.

URL: http://www.envisiontomorrow.org/site-level-travel-model

Documentation: http://www.envisiontomorrow.org/storage/user_manuals/20131029ENVISION%20TOMORROW%20PLUS_USER%20MANUAL_1st%20COMPLETE%20VERSION_updated_sm2.pdf

Name: Urban Emissions Model (URBEMIS)

Developer: California Air Resources Board (CARB)

Year: 2007

Accessibility: Free

The Urban Emissions Model (URBEMIS) was developed to model VMT and GHG from new development, and is appropriate for small and large site developments. The tool was developed with the support of California air districts, and is free to download and use. As it was designed with local data, URBEMIS is used across California, including in the San Joaquin Valley. It has faced and passed legal challenges. The model calculates impacts from many mitigation measures, including affordable housing, free transit passes, and transit availability, as well as decisions throughout the construction phase.

URL: http://www.urbemis.com

Documentation: http://www.urbemis.com/support/manual.html

Name: California Emissions Estimator Model (CalEEMod)

Developer: California Air Pollution Control Officers Association (CAPCOA)

Year: 2013

Accessibility: Free

Description: This user-friendly tool is appropriate for any size site development, and estimates VMT and GHG based on the size and land use(s) of the project. The model integrates with the California Air Pollution Control Officers Association (CAPCOA) Quantification of GHG Mitigation Measures.

URL: http://www.caleemod.com

Documentation: http://www.aqmd.gov/caleemod/user's-guide

Name: Smart Growth INDEX 2.0

Developer: United States Environmental Protection Agency (U.S. EPA), Criterion Planners/Engineers

Year: 2002

Accessibility: Free

Description: This tool requires users to upload a map of the project's surrounding neighborhood into a GIS system such as ESRI ArcMap. Inputs (shapefile format) include: land use, transportation, demographics, housing, and other community features. Once uploaded, users can configure and compare development scenarios, projecting 56 indicators that include VMT and GHG. Designed for stakeholder engagement, the tool can be set to rank the performance of multiple scenarios by community-defined metrics.

URL: http://www.epa.gov/smartgrowth/topics/sg_index.htm

Documentation: http://www.epa.gov/dced/pdf/4_Indicator_Dictionary_026.pdf

Name: Low-Carb Land

Developer: Sonoma Technology, Inc., Washington State Department of Transportation

Year: 2011

Accessibility: Paid

Description: This sketch-planning tool is intended primarily for site development in suburban and rural areas because it uses simple and high-level inputs, and doesn't account for the complexities of more centrally-located development. Users model a base case and one or more project scenarios. Aside from location, the other inputs are the "5 D's" commonly discussed in VMT mitigation: density, diversity, destination, distance and design. The tool incorporates prevailing VMT rates and elasticities for the area.

URL: http://www.sonomatech.com/project.cfm?uprojectid=672

Documentation: http://www.trpc.org/regionalplanning/transportation/Documents/Modeling/Low-Carb%20Land_TRB%20Presentation_2011.pdf

Name: CommunityViz

Developer: Placeways

Year: 2014 (version 4.4)

Accessibility: Paid, ESRI ArcGIS required

Description: CommunityViz, is a model designed to facilitate an engaging experience between planners and the public. Optional inputs include demographic data, transportation network characteristics, land use, water use, and jobs. Outputs include VMT and GHG. The user-friendly, interactive interface was designed to invite community members step up during public meetings, enter their own preferences, and then model and display the results in real-time, using with 3-D visualizations, charts, and maps.

URL: http://placeways.com/communityviz/

Documentation:
http://placeways.com/communityviz/resources/downloads/items/WhitePaperIndicators2011.pdf

Name: Transportation Impacts of Mobility Management Strategies (TRIMMS)

Developer: United States Environmental Protection Agency (U.S. EPA), Center for Urban Transportation Research, University of South Florida

Year: 2012

Accessibility: Free, spreadsheet software (e.g. Microsoft Excel) required

Description: Using constant elasticities of demand, TRIMMS predicts VMT and GHG changes brought about by the application of several mitigation strategies, including Smart Growth land use development, transit fare reduction, transit service enhancements, and parking pricing. TRIMMS also estimates GHG emissions.

URL: http://www.nctr.usf.edu/abstracts/abs77805.htm

Documentation: http://ntl.bts.gov/lib/43000/43600/43635/77932-final.pdf

Name: Emme

Developer: INRO (Canada)

Year: 2014 (version 4.1)

Accessibility: Paid

Description: Used in the United States and internationally, Emme is a desktop-based model that uses neighborhood-level household information to estimate the impacts of a variety of transportation policy and infrastructure decisions, including transit service, bicycle facilities, carpooling, and tolling. Emme is appropriate for neighborhood-level development and outputs VMT and GHG.

URL: http://www.inro.ca/en/products/emme/index.php

Name: I-PLACE3S

Developer: Parson Brinkerhoff, Freonese Calthorpe Associates

Year: 1996

Accessibility: Free, ESRI ArcGIS required

Description: I-PLACE3S was launched in 2002 as a web-based modeling tool commissioned by the California Energy Commission, and is appropriate for larger developments and plans. The model works by developing a comprehensive land use and transportation network for a base year, before estimating effects of the development on VMT and GHG, among other variables. I-PLACE3S has a user-friendly interface, and is currently being used in several cities across the United States.

URL: http://www.smartcommunities.ncat.org/articles/place3s.shtml

Documentation: http://www.smartcommunities.ncat.org/pdf/places.pdf

Name: Surface Transportation Efficiency Analysis System

Developer: Federal Highway Administration (FHWA), Cambridge Systematics, Inc.

Year: 1997

Accessibility: Free

Description: Though STEAM requires substantial base year data; it is well suited for exploring many VMT mitigation strategies in a sub-region or along a corridor. Inputs include baseline vehicle occupancy, trip length, and population as well as several elasticities. Outputs include VMT and GHG.

URL: https://www.fhwa.dot.gov/steam/products.htm

Documentation: https://www.fhwa.dot.gov/steam/20manual.htm

Name: Urban Footprint

Developer: Calthorpe Associates

Year: 2012

Description: Developed for the Vision California process, this web-based tool allows users to estimate VMT and GHG at a large site or neighborhood scale. Urban Footprint also outputs land consumption, fiscal impact (household and government), household resource use, and public health. Within California, Urban Footprint is currently being used by the Sacramento Area Council of Governments (SACOG), San

Diego Association of Governments (SANDAG) and the Southern California Association of Governments (SCAG).

URL: http://www.calthorpe.com/scenario_modeling_tools

Documentation: http://www.calthorpe.com/files/UrbanFootprint%20Technical%20Summary%20-%20July%202012.pdf

Name: UrbanSim

Developer: Synthicity

Year: 2014 (ongoing open source improvements)

Accessibility: Free, ESRI ArcGIS required

Description: UrbanSim is an open-source transportation and land use scenario-planning tool, which can model VMT and GHG, among many other outcomes. The Metropolitan Transportation Commission (MTC) applied UrbanSim to forecast its Plan Bay Area outcomes. Modeling site and neighborhood development with UrbanSim is most feasible if the surrounding region already uses UrbanSim.

URL: http://www.urbansim.org/Main/UrbanSim

Documentation: https://github.com/synthicity/urbansim/wiki

Name: EPA Mixed-Use Development (MXD) Model

Developer: United States Environmental Protection Agency (U.S. EPA)

Year: 2007

Accessibility: Free, spreadsheet software and ESRI ArcGIS required

Description: The MXD Model is a spreadsheet tool designed to model VMT production from project sites and neighborhoods that apply Smart Growth principles. The model must integrate with a desktop GIS application, and for inputs, it requires household and employment characteristics, intersection density, and transit availability.

URL: http://www.epa.gov/smartgrowth/mxd_tripgeneration.html

Name: MXD+ / Plan+ / TDM+ Toolkit

Developer: Fehr and Peers

Year: 2013

Accessibility: Paid

Description: These proprietary tools build on the EPA MXD model, estimating VMT for site and neighborhood-scaled development. MXD+ adjusts trip generations rates downward for mixed use development. Plan+ introduces new land use mitigations (parking pricing, connection to transit, bicycle parking) to estimate further reductions. TDM+ models the effects of the CAPCOA Guideline mitigations.

URL: http://asap.fehrandpeers.com/tools/sustainable-development/plan

Name: CUTR_AVR

Developer: Federal Highway Administration (FHWA)

Year: 1999

Accessibility: Free

Description: The CUTR_AVR model is ideal for large office developments with 100 or more employees with innovative TDM programs. The model estimates the mode share and ridership effects of the TDM programs, which can be input into other models to estimate VMT and GHG. The model is based on a dataset including 7,000 employer TDM programs from three metropolitan areas in Arizona and California.

Information:
http://www.fhwa.dot.gov/environment/air_quality/conformity/research/transportation_control_measures/emissions_analysis_techniques/descriptions_cutr_avr.cfm

Download: http://www3.cutr.usf.edu/tdm/registercutravr.htm

Documentation: http://www3.cutr.usf.edu/tdm/pdf/CUTRAVR.PDF

Name: National Energy Modeling System (NEMS): Transportation Sector Module (TSM)

Developer: United States Department of Energy (DOE) Energy Information Administration

Year: 2001

Accessibility: Free

Description: This model focuses exclusively on the impact of changes in the vehicle fleet on VMT and GHG. Input data includes the vehicle fleet (personal, transit, and freight), fuel prices, fuel economy, passenger miles, population, income, and changes in costs and income.

URL: http://www.eia.gov/bookshelf/models2002/tran.html

Documentation: http://www.eia.gov/FTPROOT/modeldoc/m0702001.pdf

Name: VMT Impact Tool

Developer: California Air Resources Board (CARB)

Year: 2014

Accessibility: Free, spreadsheet software (e.g. Microsoft Excel) required

Description: This spreadsheet tool calculates the effect of changes in seven factors on VMT: pricing, transit utilization, job access, activity mix, active mode share, road network connectivity, and mixing of uses. It does not calculate absolute VMT quantities, but can be used to estimate the change in VMT that would result from policy changes. The results can be exported to GIS to visualize spatial relationships.

URL (Tool and Documentation): http://www.arb.ca.gov/research/single-project.php?row_id=64861

Biographies

LOUISE C. ADAMSON | PARTNER | SAN FRANCISCO, CA

www.perkinscoie.com/LAdamson/

Louise Adamson is a partner with the firm's Real Estate & Land Use practice. She focuses her practice on real estate, land use and development, including the acquisition and disposition, leasing, financing, entitlement, development, and construction of properties located throughout the United States, together with related business and corporate matters including entity structure and formation and tax deferred exchanges.

Louise has represented clients on a wide variety of projects including urban and suburban office buildings, commercial campuses, retail warehouse development, shopping centers, renewable energy projects, industrial and manufacturing facilities, data centers, subdivisions, residential care facilities, mixed-use developments, schools, vineyards, high-end residential, resorts and golf courses. Associated with these projects, she has conducted due diligence and title reviews, successfully secured land use entitlements, coordinated CEQA compliance, prepared reciprocal easement and CC&R agreements, and negotiated complex development, disposition and exclusive negotiation agreements.

Louise was one of the first attorneys in the United States to be certified as a Leadership in Energy and Environmental Design Accredited Professional (LEED®-AP) by the U.S. Green Building Council. She has an in-depth understanding of sustainable building practices and the experience necessary to assist clients with rapidly evolving issues including building certification, government regulation, and related tax and financial incentives. Notably, Louise developed a first-of-its-kind green leasing program for a global technology company which not only integrates sustainable building practices but also tracks the LEED rating system through each stage of the lease negotiation process so that the lease itself facilitates LEED certification for the tenant space. Louise is also a member of the City of Orinda Planning Commission. She served as the Commission’s chairman from 2010 to 2013.

CECILY T. BARCLAY | PARTNER | SAN FRANCISCO, CA

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Cecily Barclay focuses her practice on land use and entitlements, real estate acquisition and development and local government law. She regularly assists landowners, developers and public agencies throughout Northern California in all aspects of acquisition, entitlement and development of land, including land use application processing, drafting and negotiating purchase and sale agreements, negotiating and securing the approval of development agreements, general plan amendments, specific plans, planned development zoning, annexations, initiatives and referenda, and tentative and final subdivision maps. She also advises clients on riparian and appropriative water rights, including in connection with vineyard and agricultural properties.

In addition to processing entitlements for large mixed-use master planned communities, as well as for reuse of former military facilities and other infill development sites, Cecily also has significant experience negotiating school fee mitigation agreements, preparing conservation easements to mitigate for loss of biological resources, drafting affordable housing programs, Williamson Act contracts and related issues pertaining to agricultural properties; and assisting local agencies in drafting ordinances relating to updating general plans and housing elements, planned development zoning, specific plans, mitigation fees, affordable housing and growth management.

Cecily's most recent engagements include entitlement and new redevelopment projects, such as Candlestick/Hunters Point in San Francisco, The Village at Corte Madera, Broadway Plaza in Walnut Creek, numerous life sciences campuses in South San Francisco, Newark and Foster City, office/R&D redevelopment and reuse projects in Palo Alto, Mountain View, Menlo Park and Sunnyvale, multi-family and single-family residential development projects in Corte Madera, Hercules, Walnut Creek, San Jose, Redwood City, Mountain View, Contra Costa County and Santa Clara County, and other retail/commercial projects in Cupertino, Antioch, South Lake Tahoe, Walnut Creek and San Jose.

Cecily is a lead author of Curtin's California Land Use and Planning Law, a well-known publication which definitively summarizes the major provisions of California's land use and planning laws. Cecily recently co-authored Development by Agreement, an ABA publication providing a national analysis of laws and practices concerning various forms of development agreements. She regularly speaks and writes on topics involving land use and local government law, including programs and articles for the American Bar Association, American Planning Association, California Continuing Education of the Bar, League of California Cities, University of California Extension programs, Urban Land Institute, and other state and national associations and conferences. Cecily is also the president of two nonprofit affordable housing corporations in Oakland and has served for several years on the ABA, state and local government Section's Publications Oversite Board.

Cecily serves on the firm's Executive Committee.

MARC R. BRUNER | PARTNER | SAN FRANCISCO, CA

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Marc Bruner represents governmental entities and private companies in a wide variety of environmental matters. He regularly works with clients in resolving complex compliance issues under the federal Clean Water Act, the California Porter-Cologne Water Quality Control Act, the federal and California Endangered Species Acts, the National Environmental Policy Act, the California Environmental Quality Act, the California Integrated Waste Management Act, and the panoply of California laws and regulations governing water supply, air quality, coastal development, development along the banks of streams and rivers, historic resources, and the management and disposal of solid and hazardous wastes.

Marc is particularly well-versed in the rules and regulations governing the management of industrial, municipal and construction stormwater and the treatment and discharge of process wastewater under federal NPDES permits and state law waste discharge requirements. He is very familiar with the recent developments in this rapidly emerging area of the law, and with the regulations and proceedings of the State Water Resources Control Board and the California Regional Water Quality Control Boards. He has advised companies and local governments on a broad range of stormwater and wastewater compliance issues.

Marc has a keen understanding of the differences between the federal and state law requirements as well as the areas of overlap and the opportunities and best practices for coordination. Marc also understands the strategic and practical considerations involved in negotiating compliance issues with the federal and state regulators.

Marc is co-author of the chapters covering wetlands and endangered species in *Curtin's California Land Use and Planning Law*, a leading treatise routinely relied upon by landowners, developers and local governments throughout the state. He speaks regularly on environmental and land use topics, including CEQA, NEPA, water quality, wetlands and endangered species and water supply requirements for new developments.

MATTHEW S. GRAY | PARTNER | SAN FRANCISCO, CA

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Matthew Gray focuses his practice on land use entitlement processing, environmental compliance, and real estate transactions. He represents a range of local agencies, real estate developers and landowners in all stages of the land use entitlement and development process. He assists clients in negotiating and securing approval of development agreements, general plan amendments, specific plans, zoning, subdivision approvals, and annexation of property into cities and special districts; regularly appears before planning commissions and city councils; and advises clients on compliance with the California Environmental Quality Act and other federal and state regulatory programs during the development process. Matt also has experience negotiating affordable housing agreements, complex mitigation fee agreements and conservation easements; forming land-based financing mechanisms, including Mello-Roos Districts; securing cancellation or termination of Williamson Act contracts on agricultural lands; advising clients on issues relating to water supply; and using the initiative and referendum process in the land use planning context. Matt negotiates purchase and sale agreements; site development agreements; CC&R's and easement agreements; and related transactional documents in connection with mixed-use, commercial, and residential development projects.

Matt litigates land use matters in the state and federal courts, having defended clients in challenges under the California Environmental Quality Act, the Planning & Zoning Law, the Subdivision Map Act, the National Environmental Policy Act, the Federal Land Policy and Management Act, the National Historic Preservation Act, as well as local zoning ordinances, conditions of approval and general plans. He also regularly defends landowners in eminent domain litigation.

Matt has worked on a wide variety of significant land use projects throughout California, including large urban redevelopment projects, military base reuse projects, mixed-use waterfront developments, renewable energy and related infrastructure projects, regional shopping centers, and master-planned residential communities.

Matt teaches an Annual Land Use Law Review and Update course at University of California Davis Extension. He has also taught Planning Law and Legal Process at University of California Berkeley Extension. He regularly lectures on the Subdivision Map Act through California Continuing Education of the Bar (CEB) and before local municipal engineers' associations.

He is an active member of San Francisco Planning and Urban Research (SPUR). He has served on the board of directors of the AIDS Legal Referral Panel and as chair of the Amicus Committee of Bay Area Lawyers for Individual Freedom.

JULIE JONES | PARTNER | SAN FRANCISCO, CA

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Julie focuses on environmental and land use counseling and litigation for complex development projects. She resolves issues that arise under the California Environmental Quality Act, the National Environmental Policy Act, the Clean Water Act, federal and state species protection statutes, and a range of other local, state and federal statutes and common law doctrines that affect land use. An experienced litigator in California and federal courts, Julie defends projects and uses this experience to help clients obtain the approvals they need while minimizing litigation risk.

Julie's strategic problem solving has assisted private and public entities in permitting major university, traditional and renewable energy, water supply, maritime, and master planned community projects. Recent accomplishments include:

- Assisting Stanford University in obtaining approval of a 1.5-million-square-foot office, research and development and medical clinic project in Redwood City. The project involved complex traffic, air quality and greenhouse gas issues. No litigation was filed.
- Helping a homebuilder with CEQA compliance following litigation. Although some opposition remained, the new CEQA document was not challenged and the project has been completed.
- Conducting land use and environmental due diligence – including CEQA, NEPA, endangered species, Federal Land Policy and Management Act and local land use issues – for proposed acquisitions of utility-scale solar projects.

Litigation successes include overcoming challenges to a university/county agreement for trails, a transportation sales tax ballot measure, a city/county agreement for urban services, a transportation authority's light rail extension, and a university development and roadway project. Julie also represented a port in the successful defense of major expansion and dredging projects against NEPA and Endangered Species Act claims.

Julie is the author of the sustainable development chapter of *Curtin's California Land Use and Planning Law* and has co-authored the treatise's chapters on federal and state wetland regulation and endangered species protections. She is also a regular contributor to the California Land Use and Development Law Report, and frequently lectures on CEQA and NEPA for clients, professionals and industry associations.

ALAN MURPHY | COUNSEL | SAN FRANCISCO, CA

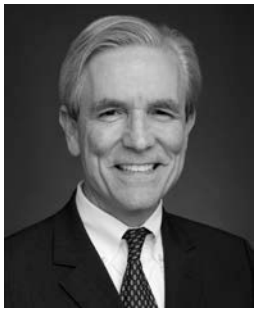
www.perkinscoie.com/AMurphy/

Alan Murphy is a counsel with the firm's Environment, Energy & Resources practice. Alan focuses his practice on land use and development matters, including associated environmental review. He secures and defends land use entitlements, advises clients in preparing development applications and provides counseling during the due diligence period. Alan has experience in CEQA and NEPA litigation over project approvals. He also has worked on a citizens' initiative to amend a city's general plan, specific plan, zoning and other ordinances to accommodate a major development project.

Alan's clients have included developers, landowners, financial and educational institutions, energy companies and public agencies. His experience includes processing a proposal for a 1,950-acre wildlife preserve and 200-acre rural residential development in Santa Clara County, analyzing reuse rights for a former Hewlett-Packard campus in Mountain View, representing the City of Alameda in litigation related to a redevelopment proposal, and representing energy companies in litigation over major solar power projects in Southern California.

Active in the firm's pro bono efforts, Alan helped draft a U.S. Supreme Court amicus brief in support of the Patient Protection and Affordable Care Act, on behalf of a group of Catholic nuns. He also has provided legal services to environmental non-profit organizations.

Alan is accredited as a LEED Green Associate and can assist clients in complying with U.S. Green Building Council certification requirements.



GEOFFREY L. ROBINSON | PARTNER | SAN FRANCISCO, CA

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Geoff Robinson focuses his practice on land use, development and real estate litigation. He represents clients in civil and administrative proceedings involving planning and zoning laws, CEQA, development fees and exactions, and public facilities financing. He is an authority on writs of mandate in the trial court and is co-author of the treatise California Administrative Mandamus (CEB, Third Edition - 2012) and other publications on civil writ practice. He also has substantial experience in the area of development mitigation and has litigated numerous cases involving challenges to development exactions, mitigation requirements and public financing districts. He has also handled a broad range of water law matters, including a ground water basin rights adjudication, and appellate litigation involving the validity of a water supply assessment and an Urban Water Management Plan.

Geoff has been an active participant in pro bono efforts, representing individuals, nonprofits and public agencies before state and federal courts, including several matters in the California Supreme Court. He is the recipient of the California State Bar President's Pro Bono Award.

Geoff served as law clerk to Judge Thomas J. MacBride of the U.S. District Court for the Eastern District of California and as extern to Judge Joseph T. Sneed of the U.S. Court of Appeals for the Ninth Circuit.

BARBARA J. SCHUSSMAN | PARTNER | SAN FRANCISCO, CA

www.perkinscoie.com/BSchussman/

Barbara Schussman, a partner in the firm's Environment, Energy & Resources practice, focuses on securing federal, state and local agency approvals needed to develop a wide range of private and public projects, including industrial scale solar facilities, university campuses, hospitals, research and development facilities, water supply and storage projects, oil refineries, maritime port and airport expansions, and numerous industrial, commercial, housing and mixed use developments. Barbara counsels clients regarding compliance with the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA), legislative and quasi-adjudicatory approvals required under the California Planning and Zoning Law, and permits and approvals required by other land use and environmental regulations, including the Clean Air Act, Clean Water Act, federal and state Endangered Species Acts, California Coastal Act and the Subdivision Map Act. She also is an experienced litigator, and has defended approvals and environmental permits in both the state and federal courts, including the California Supreme Court.

Barbara advises and represents private developers and local agencies processing environmental impact reports and studies, negative declarations, environmental assessments, requests for annexation, general plan amendments, specific plans, rezoning applications, use permits, development agreements, subdivisions, initiatives, referenda, and other approvals. She has appeared before numerous boards, city councils, and other public agencies and practices in both the trial courts and courts of appeal.

She is the author of the CEQA chapter of *Curtin's California Land Use and Planning Law*. She also teaches and lectures on CEQA and NEPA compliance and litigation issues for a variety of organizations. Barbara co-chairs a two-day NEPA conference for CLE International presented annually in California. Her recent presentations and papers include an analysis of judicial decisions and regulatory requirements pertaining to climate change effects under NEPA.

Barbara's recent engagements include representing Renewable Resources Group in CEQA compliance and securing use permits for a 650 MW photovoltaic solar facility, representing Stanford University, Stanford Hospital and Lucile Packard Children's Hospital in securing land use approvals for major campus and hospital expansion projects in Santa Clara County and Redwood City; representing the Port of Stockton as special counsel in litigation challenging the Environmental Impact Report (EIR) prepared for reuse of a 1,500-acre former Navy facility as expanded port maritime and industrial facilities; representing Eagle Marine Services in securing approvals for expansion of its shipping terminal at the Port of Los Angeles; and representing Contra Costa Water District in expansion of the Los Vaqueros Reservoir.

LAURA GODFREY ZAGAR | PARTNER | SAN DIEGO, CA

www.perkinscoie.com/LZagar/

An environmental law counselor and litigator, Laura Godfrey Zagar has played a prominent part in several innovative transmission line and renewable energy projects. Laura is a partner in the Environment, Energy & Resources practice, and regularly manages multijurisdictional, complex energy and infrastructure projects as well as complex environmental litigation.

Laura represents utilities, energy developers and others before federal, state and local agencies. Her project experience includes numerous major transmission lines, as well as wind and solar projects. Laura has extensive experience with the California Public Utilities Commission, as well as federal, state and local land use and natural resource agencies. One area of her in-depth knowledge is the transmission planning process, particularly as conducted by the California Independent System Operator (CAISO).

Highly experienced before federal, state and local authorities with jurisdiction over natural resources or infrastructure projects, Laura represents clients before regulatory bodies such as:

- California Public Utilities Commission (CPUC)
- Bureau of Land Management (BLM)
- U.S. Forest Service
- U.S. Fish and Wildlife Service
- U.S. Army Corps of Engineers
- U.S. National Park Service
- Federal Aviation Administration (FAA)
- California Fish and Wildlife Service
- California Coastal Commission

Laura provides clients with comprehensive counseling on compliance with a wide array of environmental statutes. Areas of focus include the National Environmental Policy Act (NEPA), federal and California Endangered Species Acts (ESA), Clean Air Act, Clean Water Act, Federal Aviation Act, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and California Environmental Quality Act (CEQA). Laura also advises clients on statutes and regulations governing the use of federal lands, including the Federal Land Policy and Management Act (FLPMA) and the National Forest Management Act (NFMA). Laura has counseled clients on the implications of California's Global Warming Solutions Act of 2006 (AB 32), as well California's Renewables Portfolio Standard (RPS).

Laura is also an experienced litigator in both federal and state court, with substantial experience in complex and appellate litigation. She represents clients in litigation related to approvals of energy and infrastructure projects, and also has extensive experience in environmental and toxic tort litigation. Laura works closely with numerous environmental, energy, and engineering experts in both administrative and court proceedings on a wide range of topics including natural resources, biology, civil engineering, cultural resources, transmission planning, geology, energy modeling, toxicology, transport and fate modeling, and remediation.