



CEQA YEAR IN REVIEW 2020

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

Despite relatively few published opinions this year, there were significant rulings on a range of topics, including whether projects are properly classified as discretionary or ministerial, the adequacy of mitigation, agencies' document retention obligations, the remedy for an inadequate EIR, mootness, and statutes of limitations.

The California Supreme Court addressed the distinction between discretionary and ministerial projects, the latter of which are statutorily exempt from CEQA. In *Protecting Our Water and Environmental Resources v. County of Stanislaus*, the court held that the agency's issuance of certain well permits was discretionary because the permit approval process required exercising independent judgment and the agency could modify a project in response to environmental concerns.

A key theme in several cases, involving both EIRs and negative declarations, was courts' critical look at the adequacy of mitigation measures. In three cases, the court of appeal held that agencies had improperly deferred formulation of mitigation. In one case, the court held that a greenhouse gas mitigation measure allowing for carbon offsets was inadequate because it lacked assurances that the offsets would be effective mitigation and it did not specify objective standards for implementation. In another, the court of appeal held that a mitigation measure requiring oil and gas drillers to develop and implement a plan to reduce their water use improperly deferred formulation and implementation of mitigation and lacked enforceability. The court also ruled that agricultural conservation easements are not adequate mitigation for the loss of farmland because they do not offset that loss or create new farmland. In a third case, the court of appeal held inadequate a mitigation measure that required construction monitoring and development of a data recovery excavation program if avoidance of archaeological sites was not possible; the agency had not analyzed whether archaeological sites could be avoided and the mitigation measure did not specify performance criteria for evaluating the feasibility of avoidance.

In a significant decision on administrative records, the court of appeal held that a lead agency must save all emails about a project, notwithstanding any contrary records retention policy. The court further held that a lead agency could be compelled to produce potential administrative record documents through discovery.

One court of appeal applied the mootness doctrine to dismiss a case where construction of the project was completed during litigation. In that case, the developer did not begin construction in violation of any court orders or in bad faith, and the petitioners waited to seek an injunction until construction was nearly completed.

In a decision that conflicts with holdings from other appellate districts, the Fifth District held that partial decertification of an EIR is never permissible when the EIR has been adjudged inadequate; rather, decertification of the entire EIR is the only remedy. The court also held that even under the rule used by other courts, partial decertification was not allowed in that case because the EIR's defects could not be severed from the statement of overriding considerations that supported the agency's approval of the project.

The following summaries are intended to identify the key issues in the cases decided in 2020. Each summary is linked to a more detailed post describing the court's opinion on californialandusedevelopmentlaw.com.

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A. EXEMPTIONS FROM CEQA

Ministerial Determinations: County Improperly Classified All Well Permits As Ministerial

Protecting Our Water and Environmental Resources v. County of Stanislaus 10 Cal.5th 479 (2020)

Projects that require only a ministerial approval are exempt from CEQA. A ministerial decision involves the application of fixed, objective standards in a statute, ordinance or other regulation and requires the exercise of little to no personal judgment by the decisionmaker regarding the wisdom or manner of carrying out the project. When an approval entails both ministerial and discretionary decision-making, the project must be treated as discretionary, and is not exempt.

In *Protecting Our Water*, the California Supreme Court determined that while many of the County's well permitting decisions were ministerial, the permitting ordinance required discretionary decision-making in some situations. For example, a standard relating to the permissible distance between a well and a potential contamination source allowed the County to exercise discretion when deciding to approve or disapprove the permit, depending on the specific circumstances. Because the process required the exercise of independent judgment for at least some projects, the Court determined that the County's blanket classification of all well permits as ministerial violated CEQA.

B. NEGATIVE DECLARATIONS

Mitigated Negative Declarations: Deferred and Ineffective Measures Rejected

Save the Agoura Cornell Knoll et al. v. City of Agoura Hills et al. 46 Cal.App.5th 665 (2020)

The court of appeal determined that several of the mitigation measures in a negative declaration for a mixed-use development were ineffective or improperly deferred mitigation.

Impacts on cultural resources. The mitigation measures called for monitoring of the site during ground-disturbing activities and required excavation and data recovery if cultural resources could not be avoided. They did not, however, contain any performance standards or guidelines that would ensure the effectiveness of these actions. The MND also failed to define the boundaries of the archaeological site or consider whether resources could actually be avoided and did not contain criteria for assessing the feasibility of avoidance as an alternative to excavation.

Impacts on sensitive plant species. Special-status plant species on the site would be significantly affected by grading, landscaping, and fuel modification. The court found the mitigation plan, which included restoration, preservation and enhancement measures, failed to define performance criteria that would ensure effective mitigation, relied on outdated botanical surveys, and did not identify alternatives that would be implemented if proposed salvage and replanting efforts failed.

Impacts on native oak trees. The court found the mitigation measures for loss of native oak trees inadequate because they did not take account of the risk that grading might reduce subsurface water flow to the retained and replacement oak trees on the site and did not include any measures for mitigating that risk. Expert evidence in the record also showed that efforts to recreate or restore oak woodlands had failed in the past, so the City erred in

presuming, without supporting evidence, that in-lieu fee payments for off-site tree planting would provide feasible and effective mitigation.

C. ENVIRONMENTAL IMPACT REPORTS

Mitigation Measures: Standards for Use of GHG Offset Credits Found Inadequate

Golden Door Properties, LLC v. County of San Diego **50 Cal.App.5th 467 (2020)**

The court issued the first published decision on the use of purchased offset credits to mitigate the impact of GHG emissions. The court concluded the measure was inadequate because it did not ensure that offset credits would represent emissions reductions that are genuine, quantifiable, additional and verifiable, and gave the County planning director authority to approve offset credits for a project without providing objective standards for determining their adequacy.

The *Golden Door* case arose from San Diego County's approval of a climate action plan. The key issue in the case was whether a greenhouse mitigation measure in the plan EIR (GHG-1) complied with CEQA. That measure required that certain projects mitigate GHG impacts through onsite design features and allowed use of offsite mitigation, including purchase of GHG offset credits, if additional mitigation was required.

The County argued that GHG-1 provided for effective mitigation because it mirrors California's cap and trade program, which is designed to ensure that offset credits are real, additional, quantifiable, permanent, verifiable, and enforceable. The court disagreed, finding that while GHG-1 required that offset credits be purchased from CARB-approved offset project registries, it did not require application of CARB-approved protocols which ensure offset credits accurately and reliably represent actual emissions reductions. The court also concluded that offsets generated outside California which are allowed under GHG-1 might not be genuine, verifiable and enforceable. Further, the court found that GHG-1 did not incorporate the cap and trade program's requirements that offsets be *additional* to any greenhouse gas emission reduction that would otherwise be required by law.

Finally, the court ruled that GHG-1 was deficient because it did not specify an objective performance standard, but rather left it to the planning director's unguided discretion to decide whether the offsets identified for a project would be sufficient to provide adequate mitigation of its GHG emissions.

Impact Analysis and Mitigation Measures: Noise Analysis and Mitigation for Impacts of Oil and Gas Drilling Ordinance Held Inadequate.

King and Gardiner Farms, LLC v. County of Kern **45 Cal.App.5th 814 (2020)**

The court held the EIR for an ordinance designed to streamline permitting for new oil and gas wells was inadequate because it: applied a significance threshold for noise impacts that did not consider the magnitude of noise increases, deferred formulation and implementation of mitigation measures for impacts to water supplies and failed to analyze their effectiveness, and improperly relied on conservation easements over offsite farmland to mitigate the loss of farmland that would result from the project.

Significance threshold for noise impacts. The County based its assessment of the significance of noise impacts on whether noise would exceed the 65-decibel threshold in the general plan. The court held the County failed to show this significance threshold adequately accounted for the impact of the change in noise levels relative to existing noise levels.

Water supply impacts. The court concluded that mitigation measures to address water supply impacts — including requiring oil industry users to work together to develop and implement a plan to reduce water use — inappropriately deferred formulation of the measures or delayed their implementation. The statement of overriding considerations the County adopted did not cure the deficiency because the EIR did not adequately describe the feasibility of mitigation measures and explain the uncertainty in their effectiveness.

Conversion of agricultural land. The court held the County’s determination that conversion of agricultural land would be adequately mitigated through acquisition of conservation easements over off-site agricultural land was unfounded; conservation easements do not create new agricultural land to replace the land that is converted and do not otherwise offset the impact. The court also held purchase of credits from a farmland mitigation bank or equivalent preservation program was not adequate given the absence of evidence that such programs were in existence and could provide legally adequate mitigation. The EIR also failed to consider potentially effective mitigation measures for impacts to agricultural land such as clustering of wells.

Project Description: An EIR Is Not Required to Assess Impacts That Might Occur If a Planned Component of the Project Is Not Constructed

***Environmental Council of Sacramento v. County of Sacramento* 45 Cal.App.5th 1020 (2020)**

The court of appeal found the EIR for a master planned community adequately described and analyzed the project, which included a proposed university, and was not required to evaluate the possibility that the university would never be built.

The petitioners claimed the EIR’s impact analysis was “based upon a falsehood and speculation” given evidence that a university might never be built. The court concluded, however, that the evidence petitioners relied on was not sufficient to show that the proposed university was “an illusory element of the project.” An EIR is required to assume that all proposed phases of the project will be built if they are reasonably foreseeable consequences of the project. Accordingly, the EIR did not misrepresent the significance of the project’s impacts to air quality, climate change, and traffic by assuming the plan for a university would be realized.

The court also rejected petitioners’ claim that the County should have required construction to be phased to correspond with development of the university because the community’s environmental impacts would be significantly reduced once the university was constructed. The Board of Supervisors, in its findings and statement of overriding considerations, had found such a measure infeasible and petitioners failed to demonstrate the County’s findings were not supported by evidence in the record.

D. RESPONSIBLE AGENCY REVIEW

Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Board
No. A157127 (1st Dist., Dec. 29, 2020)

The Water District challenged waste discharge requirements imposed by the Regional Water Quality Control Board on one of its projects. It argued that Regional Board's failure to impose such mitigation through the CEQA process barred it from subsequently imposing these requirements through waste discharge requirements under the Porter-Cologne Act. The court rejected the challenge, observing that CEQA does not constrain an agency's authority to administer and enforce any other laws, including those authorizing imposition of mitigation requirements. Thus, even after an EIR for a project has been certified, a regional water board, as a responsible agency, can impose additional mitigation on the project through waste discharge requirements.

E. SUPPLEMENTAL ENVIRONMENTAL REVIEW

Subsequent Approvals: CEQA Applies to Discretionary Decision to Increase Enrollment at a Public University.

Save Berkeley's Neighborhoods v. Regents of the University of California
51 Cal.App.5th 226 (2020)

The court of appeal rejected the University of California's argument it was not required to prepare a subsequent or supplemental EIR to address the impacts of decisions it made over time to increase enrollment on the Berkeley campus.

The petitioners alleged the University had made a series of discretionary determinations to increase enrollment at the campus well beyond the levels projected in the 2005 campus long range development plan, and the program EIR for that plan. These decisions, according to petitioners, amounted to changes to the previously approved project which triggered the requirement that further CEQA review be undertaken.

Under Guidelines section 15162, a public agency must consider whether further CEQA review is required whenever it makes a discretionary determination to change an approved project in a way that would result in new or substantially more severe environmental impacts. Had the University's enrollment decisions been within the range evaluated in the LRDP EIR, the University could have relied on that EIR for CEQA compliance. However, according to the petitioners, the University did not take any action to comply with CEQA when it made those decisions. The court accordingly agreed with the petitioners that if the University had decided to increase enrollment above the levels described in the LRDP and LRDP EIR, it was required to review the impacts of those changes as provided by CEQA.

The court also held the allegation the University decided to increase enrollment without filing a notice of determination or exemption extended their time to file their suit until 180 days from the date they knew or reasonably should have known of the University's action. That date would be determined by the court based on evidence to be produced at its hearing on the merits of the case.

Project Implementation: An Agency May Take Steps to Carry Out an Approved Project Without Undertaking Further CEQA Review.

Willow Glen Trestle Conservancy v. City of San Jose
49 Cal.App.5th 127 (2020)

Once a public agency has approved a project, further CEQA review is not needed for actions it takes to implement the project which do not require a discretionary approval.

The project involved replacement of a railroad bridge with a new pedestrian bridge that would connect with a local trail system. After approving the project based on a mitigated negative declaration, the City obtained a streambed alteration agreement from the California Department of Fish and Wildlife. Several years later, the stream alteration agreement expired and the City applied for a new agreement. In the meantime, the railroad bridge was added to the state Register of Historical Resources.

The court rejected the challengers' claim that further CEQA review was required for the City's decision to apply for and accept the second streambed alteration agreement. That decision was not a subsequent discretionary approval of the project that would trigger further CEQA review, but instead simply implemented the project the City had previously approved.

Use of a Prior EIR: CEQA review for a change to a project cannot be based on the EIR for a different project.

Martis Camp Community Association v County of Placer
53 Cal.App.5th 569 (2020)

The court upheld a CEQA challenge to the County's decision to abandon public easement rights in a road based on an addendum to an EIR, finding the County had relied on the wrong EIR when making that decision.

The addendum concluded a partial abandonment of easement rights in the road would not result in new environmental impacts because it would simply restore the traffic patterns assumed in the EIR for the development that would primarily be affected by the abandonment, the Martis Camp community. The court concluded, however, that the road was a component of an adjacent development, the Retreat at Northstar, not Martis Camp. Although the road was built to connect the two communities (for transit and emergency access only), it had been constructed and dedicated in accordance with the conditions of approval for the Retreat project. Although the court recognized that relying on the Martis Camp EIR offered practical advantages relative to the Retreat EIR, it concluded that CEQA does not allow an agency to conduct subsequent environmental review of a change to a project by relying on an EIR for a different project.

F. CEQA LITIGATION

Record of Proceedings: Agencies Must Preserve Emails For Inclusion in Record

Golden Door Properties v. Superior Court (County of San Diego)
52 Cal.App.5th 837 (2020)

An agency's duty to preserve documents for inclusion in the record of proceedings under CEQA prevails over a local agency's document retention and destruction policies.

In a case challenging an EIR, petitioners sought to have included in the record of the County's proceedings all emails about the project and the environmental review process. Consistent with its document retention policy the County had automatically deleted all emails not flagged as "official records" and argued that only those that remained should be included in the record.

The court held that the requirement in Public Resources Code section 21167.6 that all written evidence or correspondence to and from the agency, and internal agency communications regarding compliance with CEQA or the project, be included in the record was mandatory. This, the court said, clearly means "*all* and not *some*" correspondence and internal agency communications. Further, the agency's duty to include these documents in the record required that the agency retain them, notwithstanding any contrary records retention policies.

Remedies: Entire EIR Must be Decertified When Single Aspect of Impact Analysis Is Legally Deficient

Sierra Club v. County of Fresno **57 Cal.App.5th 979 (2020)**

The court of appeal held that CEQA requires decertification of the entire EIR rather than partial decertification when a court has found the EIR legally inadequate in any respect. Following its own precedent and rejecting contrary precedent from other courts, the court of appeal held that because CEQA requires certification of an EIR that is "complete," partial decertification of an EIR is never permitted.

The court also considered the factors other courts have analyzed when considering partial decertification of an EIR. These focus on whether the EIR's defects are severable from the decisions or activities the project proponent seeks to preserve while the EIR's defects are being corrected. Here, the court ruled that the EIR's deficient air quality analysis was not severable because the County relied on that analysis in adopting the statement of overriding considerations that supported project approval.

Importantly, the court also concluded that even with complete decertification of the EIR, the project proponent would not be forced to relitigate the adequacy of other parts of the EIR once the air quality analysis was corrected and the EIR recertified. Principles of res judicata and collateral estoppel, and the requirement for exhaustion of administrative remedies, would bar such challenges.

Justiciability: Completion of Construction Can Moot CEQA Challenge.

Parkford Owners for a Better Community v. County of Placer **54 Cal.App.5th 714 (2020)**

The court of appeal held that legal challenges to permits for expansion of a commercial self-storage facility based on claimed violations of CEQA and the Planning and Zoning Law were moot. The petitioner did not request that the trial court enjoin construction until the project was nearing completion and the trial court declined to grant the petitioner's application. The court of appeal noted that the developer did not violate any court orders by starting construction and there was no indication it had attempted to evade the requirements of CEQA or other laws by proceeding with the project. Because construction of the project had been completed by the time judgment was entered in the trial court, the court of appeal held the case was moot, and dismissed the petitioner's appeal.

Limitation of Actions: Agency Misrepresentations Can Bar It From Relying on Statute of Limitations

Citizens for a Responsible Caltrans Decision v. California Department of Transportation **46 Cal.App.5th 1103 (2020)**

The court held an agency could be barred from relying on the 35-day CEQA statute of limitations based on the filing of a notice of exemption where the petitioners alleged the agency had led the public to expect it would instead circulate a final EIR for review and comment and file a notice of determination after approving the project.

Caltrans prepared a draft and final EIR for an interchange project which indicated the project was exempt from CEQA, but also stated that Caltrans would decide whether to approve the project after the final EIR was circulated, and would adopt findings and file a notice of determination if it approved the project. A few weeks after the final EIR was released, Caltrans approved the project and filed a notice of exemption. The petitioner asserted that Caltrans should not be allowed to rely on the notice of exemption to trigger the statute of limitations because it had misled the public into believing it planned to approve the project only after it certified the EIR, and that it would then file a notice of determination.

The court held that the petitioner's allegations that it was misled by CalTrans' representations, if shown to be true, would bar Caltrans from relying on the notice of exemption. The petitioner alleged that it was unaware of Caltrans's position that it would approve the project and file a notice of exemption; that it relied on Caltrans's representation that it would circulate the final EIR before approving the project and would file a notice of determination; that CalTrans made no effort to inform the public it would file a notice of exemption; and that petitioner relied on Caltrans's conduct to its injury. The court held that these allegations, if proven to be true, would bar CalTrans from raising the statute of limitations as a bar to the lawsuit based on principles of equitable estoppel.

Limitation of Actions: Statute of Limitations Bars Untimely Action Even Though It Challenges The Agency's Authority to Approve The Project.

Coalition for an Equitable Westlake/Macarthur Park v. City of Los Angeles **47 Cal.App.5th 368 (2020)**

The court of appeal held that CEQA claims filed more than 30 days after the City filed a facially valid notice of determination were barred by the statute of limitations even if the petition alleged that decision-making body which approved the project had lacked the authority to do so.

The petitioner challenged the City's approval of a mitigated negative declaration for a large mixed-use project claiming it did not adequately disclose, analyze, and mitigate the project's impacts and that an EIR was required. The court of appeal held that the petitioner's challenge was barred because the case was filed almost a full year after the notice of determination was filed.

The court found that the notice of determination included all the information required by law and was not defective on its face. It also rejected the petitioner's argument that the body which acted on the project approvals and certified the negative declaration was not authorized to do so by the municipal code and that the procedures the city followed to comply with CEQA and approve the project were improper. The court concluded that claims that

the agency's decision-making process was defective challenged the agency's action on the merits, and were therefore subject to the limitations period that was triggered by the filing of the notice of determination.

Attorneys' Fees: Successful Party Must Prove Litigation Enforced Important Right And Conferred Significant Public Benefits to Obtain Fee Award.

Canyon Crest Conservancy v. County of Los Angeles
46 Cal.App.5th 398 (2020)

To obtain a court award of attorneys' fees under the private attorney general statute, Code of Civil Procedure section 1021.5, a successful party must show the litigation resulted in the enforcement of an important right affecting the public interest and that it conferred a significant benefit on the public or a large class of persons.

The petitioner, a group of neighbors, challenged a negative declaration and permit approvals for a 1,500 square foot single-family home. At the petitioner's request, shortly after the case was filed, the trial court issued a stay of the permits. The property owner responded by requesting that the County vacate the permit approvals, which the County did, and the petitioner then dismissed the case. The petitioner then sought an attorney fee award arguing that it succeeded in preventing the house from being built and had vindicated an important public right by enforcing compliance with CEQA.

The court of appeal rejected the petitioner's argument that bringing a "viable CEQA claim" was sufficient to show that an important right had been enforced, noting that the right must have actually been enforced through the litigation. It also rejected the petitioner's assertion that the court-ordered stay benefitted the general public. The stay order did not involve a ruling on the merits, the court reasoned, and there was no evidence that the lawsuit would cause the County to reconsider its CEQA review for the project, or change its conclusions relating to CEQA compliance in this or any other case. Finally, the court concluded that given the limited nature of the project, the petitioner had not shown that stopping it conferred a benefit on the general public or a large class of persons.