LATHAM & WATKINS LLP

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CEQA: 2022 Year in Review

Introductions

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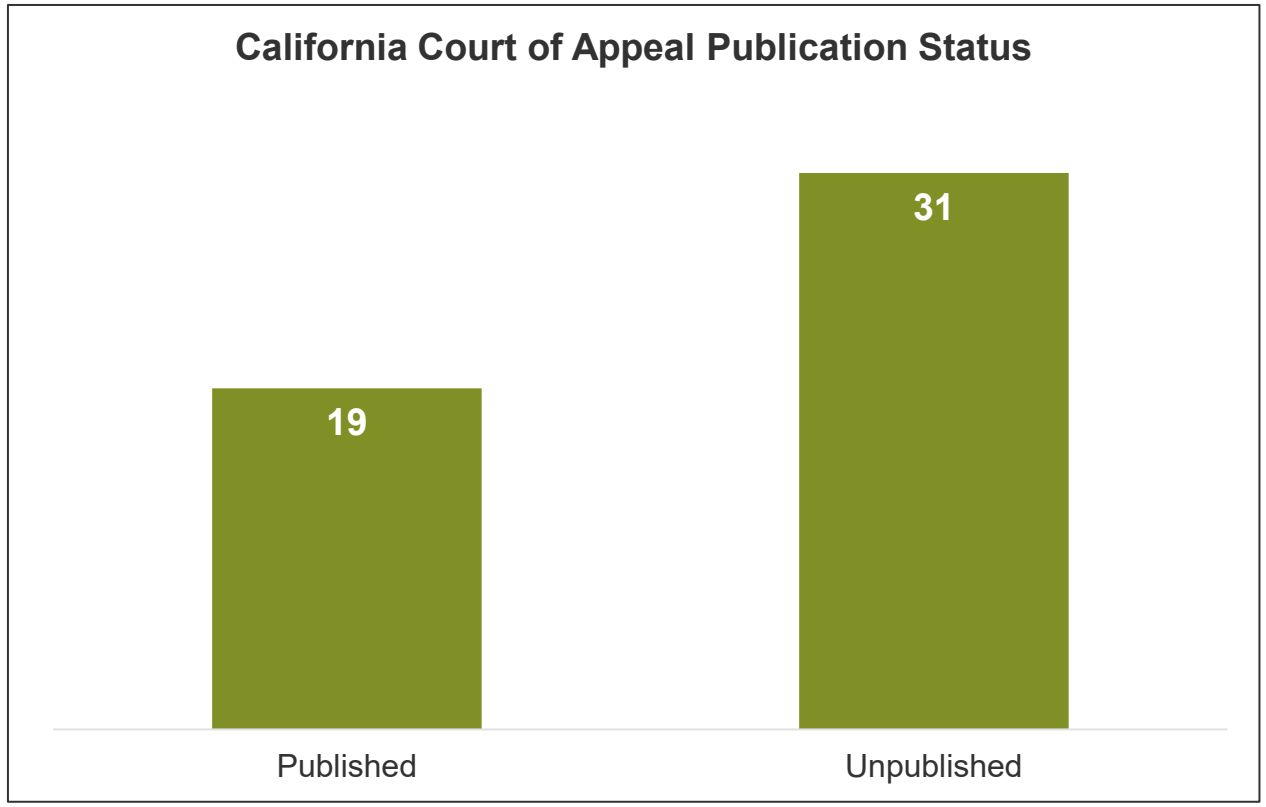
CEQA 2022 Overview

By the Numbers

- 48 Court of Appeal opinions
- 1 California Supreme Court opinion
- 1 California Supreme Court dissent to a denial to petition for review



Data – Subject Matter

Cases divided in five categories:

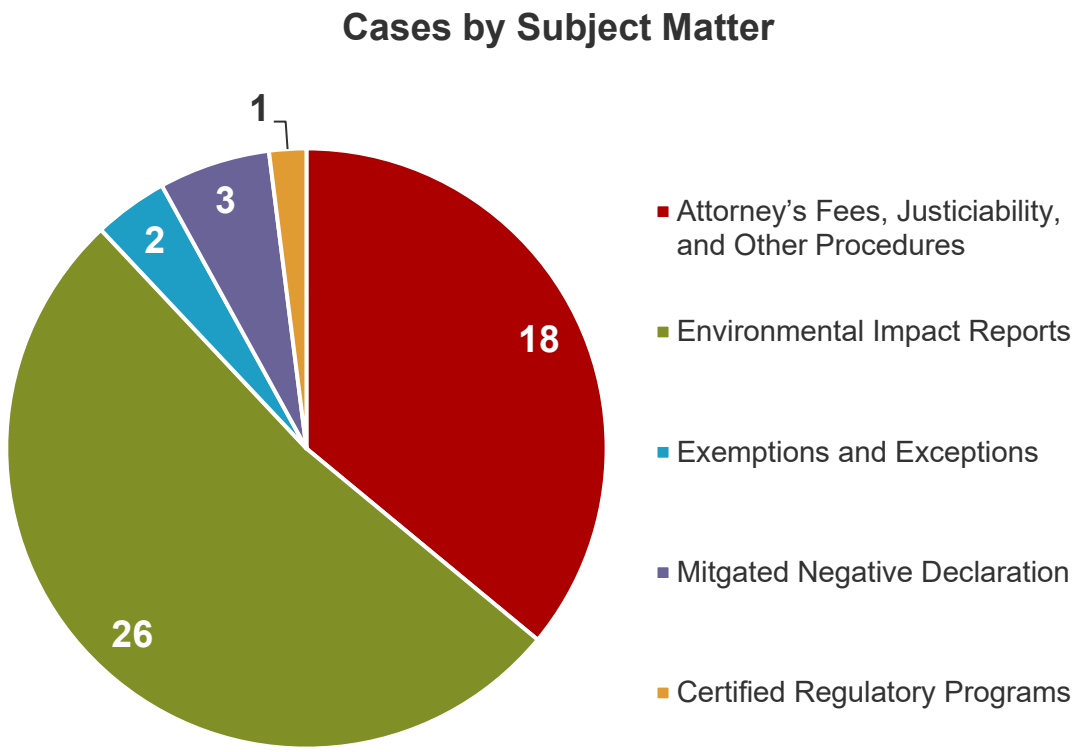
(1) Attorneys Fees, Justiciability, and Other Procedures

(2) EIRs

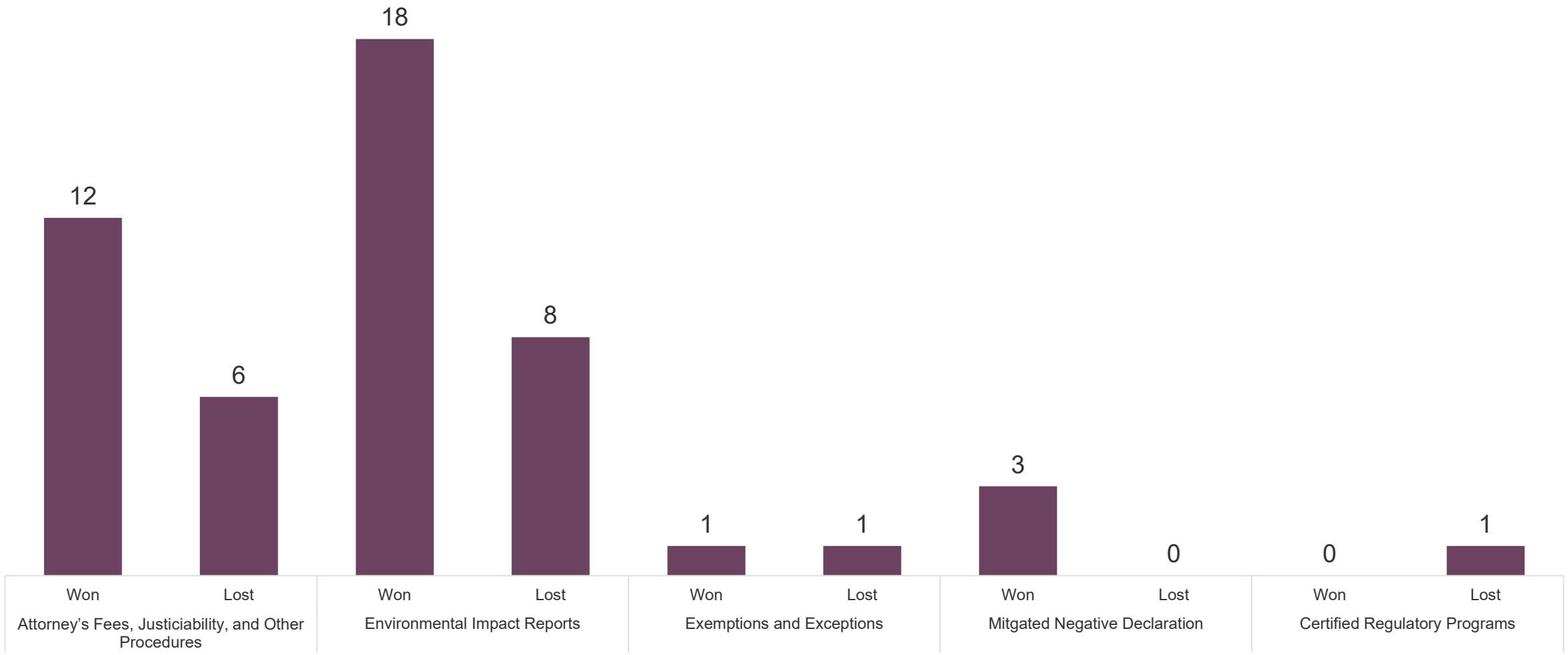
(3) Exemptions and Exceptions

(4) MNDs

(5) Certified Regulatory Programs

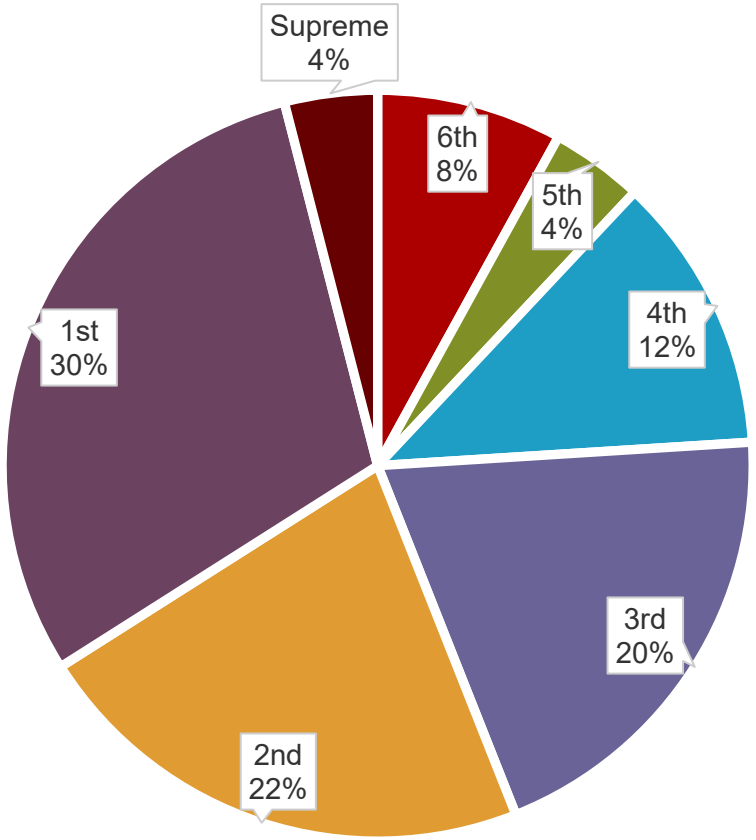


Data – Public Agency Success

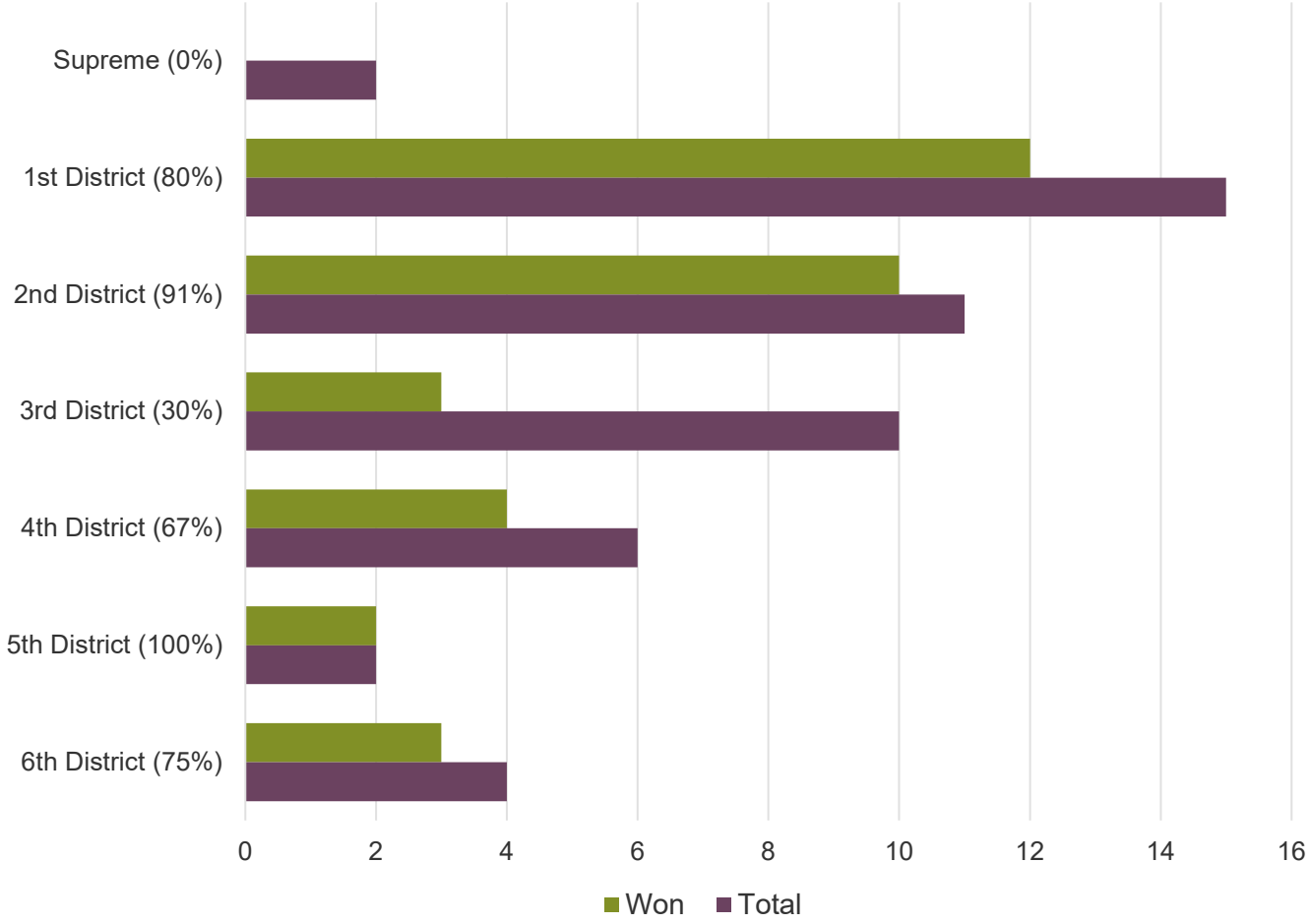


Data – Overview of Individual Districts

Cases by District



Agency Success by District



County of Butte v. Department of Water Resources (2022) 13 Cal.5th 612

County of Butte v. Department of Water Resources (2022) 13 Cal.5th 612

Background:

- The California Department of Water Resources planned to renew its 50-year license to operate the Oroville Facilities—a group of public works in Butte County
- DWR issued an EIR and pursued a federal alternative licensing process under FERC
- Butte and Plumas Counties rejected the agreement and sued, challenging DWR's CEQA compliance
- The Superior Court found DWR's EIR was adequate
- The Court of Appeal did not reach the merits of the Counties' CEQA claims, holding instead that the CEQA claims were preempted by the Federal Power Act (FPA)
- The Supreme Court granted review

County of Butte v. Department of Water Resources (2022) 13 Cal.5th 612

Holdings:

1. The FPA preempts CEQA challenges arising out of a dispute over a settlement reached under the federal licensing process because that would impede the FPA, which preempts conflicting state regulatory licensing requirements.
2. However, the Court distinguished precedent that state regulatory efforts that conflict with the FPA's exclusive federal licensing authority were preempted because those cases involved private actors as opposed to the state itself.
3. The Court reasoned that when the state acts on its own accord, CEQA operates as a form of self governance, not a classic regulatory scheme. DWR could apply CEQA as long as it did not directly conflict with or impede the FPA.

Dissent:

- The FPA's unique licensing scheme was designed to duplicate and supplant the need for state environmental review

County of Butte v. Department of Water Resources (2022) 13 Cal.5th 612

Practical Lessons:

- Holding is narrow and limited to the unique set of facts presented
- Nonetheless, the holding highlights the Court's willingness to search for and find exemptions to broad federal preemption of CEQA.
- Holding raises difficult questions about the state's ability to enforce CEQA mitigation or alternatives if FERC ultimately controls the license. The Court sited to the FPA's amendment process, but that would reopen the applicant to more federal review and NEPA analysis.

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer (2022) 75 Cal.App.5th 63

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer (2022) 75 Cal.App.5th 63

Background:

- Real Party in Interest owned two forested parcels of land in Martis Valley, in the shadow of Lake Tahoe, zoned in part for residential development and in part for forest conservation.
    - Environmental groups met with the landowner with a goal of expanding forest conservation
    - Landowner sought a specific plan amendment, zoning change, and other approvals consistent with its understanding of their agreement
- County issued an EIR and eventually approved the Project
- Environmental groups challenged the County's approval under CEQA
- The Superior Court found in favor of the County on all but one issue; environmental groups appealed

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer (2022) 75 Cal.App.5th 63

Holdings (among others):

- The EIR adequately considered Project impacts on emergency evacuations.
  - Project did conflict with existing evacuation plan even though project had significant traffic impact on SR 267.
- The EIR's greenhouse gas mitigation measure was inadequate because it deferred determination to unknown date
  - The measure required landowner to mitigate impacts *if* the Project conflicted with a *future* emissions target adopted by the state that has a substantial link to the Project.
  - As written, this relied on performance standards that do not exist and may never exist, defers the determination of the impact's significance to an unknown time, and does not sufficiently commit the County and the project applicants to mitigating the impact.
- The EIR failed to consider expansion of public transit to address significant traffic impact
  - While the EIR proposed to mitigate Project impacts on public transit via a traffic fee, it failed to consider the possibility of expanding public transit.
- The EIR failed to consider whether renewables could be incorporated into the Project in Energy section
  - CEQA requires <u>both</u>: (1) whether renewables can be incorporated into the project when considering the project's energy impacts, *and* (2) if the project has a significant impact, whether renewables would reduce the impact.

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer (2022) 75 Cal.App.5th 63

Practical Lessons:

1. **Wildfire** – Consistency with evacuation plans offers lead agencies discretion if supported by substantial evidence (but caution rapidly evolving area of law).
2. **Energy** – Very little leeway to ignore considering the incorporation of renewables based on this holding.
3. **Mitigation Measures**
    1. Deferral considerations
    2. For significant impacts, must consider all feasible mitigation measures
    3. Little leeway to ignore considering the incorporation of renewables under this holding.
4. **Standard of Review** – *"Friant Ranch"* precedent – Although court applies substantial evidence standard to factual determinations, a much less lenient standard applies where the court determines if the EIR did not function as an informational document. Difficult to predict when this standard will be applied.

We Advocate Thorough Environmental Review v. County of Siskiyou (2022) 78 Cal.App.5th 683

We Advocate Thorough Environmental Review v. County of Siskiyou (2022) 78 Cal.App.5th 683

Background:

- Crystal Geyser purchased an existing, defunct bottling plant with the intent to revive it. Crystal Geyser sought a permit from the County of Siskiyou to build a caretaker's residence for the plant, as well as a permit from the City of Mt. Shasta to allow the plant to discharge wastewater into the City's sewer system.
- The County, as lead agency, prepared an EIR
- Petitioners sued, alleging that the County violated CEQA and Planning & Zoning Law because:
  - The EIR defined the project's objectives in an impermissibly narrow manner;
  - The EIR improperly evaluated the project impacts;
  - The EIR provided a misleading project description; and
  - The Project would be inconsistent with the County's and City's general plans
- The Superior Court rejected all of Petitioners' arguments

We Advocate Thorough Environmental Review v. County of Siskiyou (2022) 78 Cal.App.5th 683

Primary Holdings:

1. The EIR's project objectives were "so narrow[] as to preclude any alternative other than the Project."
   - The EIR contained eight project objectives – focusing primarily on locating the bottling facility at the existing plant.
   - Because the objectives mirrored the project proposal itself, they left no room for any alternative.
     - "[A]s a result, [this] transformed the EIR's alternative section—often described as part of the 'core of the EIR'…—into an **empty formality**."
   - The County's reasoning in rejecting the "no project" alternative was also fundamentally flawed, as it was premised on the same impermissibly narrow project objectives.
2. The EIR should have been recirculated because the County's GHG impact analysis had "fatal defects."
   - In the Draft EIR, the County estimated the project would result in emissions 35,000 metric tons of CO_2 equivalent ($MTCO_2e$) per year, a significant impact compared to the 10,000 $MTCO_2e$ per year threshold
   - But in the Final EIR, the County estimated the project would emit more than 61,000 $MTCO_2e$ per year, and concluded that this increased number did not constitute "significant new information" requiring recirculation of the EIR
     - County both reevaluated and revised GHG mitigation measures in the Final EIR
   - The Court found it was illogical to say emissions over 10,000 $MTCO_2e$ would have a significant impact, while at the same time positing that an increase in emissions of over 25,000 $MTCO_2e$ per year would not merit and opportunity for public comment.

We Advocate Thorough Environmental Review v. County of Siskiyou (2022) 78 Cal.App.5th 683

Practical Lessons:

- Project objectives should be sufficiently broad to allow the evaluation of alternatives that are meaningfully different than the proposed project
- Recirculation may be required if a Final EIR identifies more severe significant impacts than identified in a Draft EIR
    - But where does one draw the line?

We Advocate Thorough Environmental Review v. City of Mount Shasta (2022) 78 Cal.App.5th 629

We Advocate Through Environmental Review v. City of Mount Shasta (2022) 76 Cal.App.5th 629

Background:

Sister case to WATER v. County of Siskiyou

- The City of Mount Shasta served as one of several "responsible agencies"
- Petitioners sued the City, alleging that it violated CEQA when issuing the wastewater permit because:
  - The City failed to make appropriate CEQA findings before issuing the wastewater permit
  - The City should have adopted mitigation measures to address some of the facility's environmental impacts before approving the permit
  - The City should have performed additional environmental review
- The Superior Court rejected all of Petitioners' arguments

We Advocate Through Environmental Review v. City of Mount Shasta
76 Cal.App.5th 629

Holdings:

- As a responsible agency, the City was required to make certain findings with respect to each significant effect and provide rationale for each finding
  - While the lead agency under CEQA must consider all environmental impacts of a project before approving it, a responsible agency need only consider the direct or indirect environmental effects of those parts of the project that it carries out or approves
  - Both, however, must make certain written findings for the significant impacts identified
  - Because the County identified several potentially significant impacts associated with the City's permit, the City needed to make its own findings before issuing its permit
    - The City's brief statement – "The City has reviewed the County's report on the project and 'finds no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods'" – was insufficient
    - Even if mitigation measures would reduce effects to an insignificant level, the City still must make written findings
- The Court also held that the City is not required to adopt mitigation measures if those measures are within the responsibility and jurisdiction of another agency
  - But the Court did not address the substance of Petitioners' claims for particular measures because of the City's inadequate findings
- The City was also not required to conduct additional environmental review before it approved a version of the wastewater permit that was slightly different from the initial version included in the EIR

We Advocate Through Environmental Review v. City of Mount Shasta
76 Cal.App.5th 629

Practical Lessons:

- Although responsible agencies may have a more limited scope of review under CEQA, they are still responsible for adopting CEQA findings if there will be significant impacts within their permitting authority
- If a responsible agency determines that a mitigation measure falls within the authority of another agency, it must make a finding to that effect that is supported by substantial evidence

Southwest Regional Council of Carpenters v. City of Los Angeles (2022) 76 Cal.App.5th 1154

Southwest Regional Council of Carpenters v. City of Los Angeles (2022) 76 Cal.App.5th 1154

Background:

In March 2018, the City Planning Commission's Advisory Agency approved a mixed-use Project, after two circulated draft EIRs and a final EIR

- Both the Draft EIRs and the Final EIR contemplated a development with 422 residences and 200,000 square feet of commercial and four project alternatives.
- The Final EIR included a new "Alternative 5" consisting of 675 residences and 60,000 square feet of commercial.
- At the approval stage, the Advisory Agency approved a modified, smaller version of "Alternative 5," that was not included in any prior EIR. Specifically, the approved project contained 52 fewer residences than "Alternative 5," resulting in almost 100,000 fewer square feet than what was described in the Final EIR.

Petitioners challenged the City's EIR certification and Project approval

- Petitioners argued (1) that the City violated CEQA by not providing a stable and accurate Project description in any of the circulated EIRs, and (2) that the City failed to properly evaluate the Project's environmental impacts.
- The Superior Court held the EIR failed to accurately describe the Project, and thus never gave the public adequate chance to review

Southwest Regional Council of Carpenters v. City of Los Angeles (2022) 76 Cal.App.5th 1154

Holdings:

1. The City's consideration of additional project alternatives after the Draft EIR was circulated did not render the project description "unstable"
   - The essential elements of the project remained the same throughout the process: it was still a mixed-use, commercial/residential development on the same defined project site.
   - That the changed composition and ratio of the residential to commercial footprint was insufficient to determine that the revised project was unstable.
   - The FEIR was not internally inconsistent nor was Alternative 5 much larger in scope than the alternatives in the FEIR, nor did the DEIRs and FEIR confuse the public by presenting varying alternatives with different footprints and variable environmental impacts. Instead, Icon's project alternatives all had the same footprint, "and the Revised Project was very similar in scope and use to alternatives considered."
2. The City was not required to solicit public comment on a revised project alternative because the revised project retained the same components as the previously circulated project alternatives
   - Additional public comment on Alternative 5 was not required because the City compiled fully with CEQA's information requirements by providing for a total of 92 days of public comment, resulting in revisions to the original project and alternatives based on public comment, such that there was no prohibited impediment to informed decision making.

Southwest Regional Council of Carpenters v. City of Los Angeles (2022) 76 Cal.App.5th 1154

Holdings (cont.):

3. The City was not required to recirculate the EIR

- The Court found that substantial evidence supported the City's claim that Alternative 5 did not constitute "significant new information" depriving the public of meaningful opportunity to comment upon a substantial adverse environmental effect or a feasible way to mitigate or avoid such an effect, and so recirculation was not required under CEQA.

4. The City adequately responded to public comments

- The Sanitation Department commented that the City's main water reclamation plant, the Hyperion Plant, would have sufficient capacity to accommodate the development, that it would assess the local sewage line capacity at the time of permitting, and any capacity improvements to the line would be at Icon's expense.
- In response to the comment, the City stated that Sanitation's analysis was consistent with the information provided in the DEIR and that there was no "additional analysis" needed.
- The Court concluded that no evidence showed any necessary local sewer work would cause environmental harms other than temporary traffic delays.

Southwest Regional Council of Carpenters v. City of Los Angeles (2022) 76 Cal.App.5th 1154

Practical Lessons:

- Consideration of additional project alternatives *after* a Draft EIR is circulated does not render a project description "unstable" where the Draft EIR contains the mandatory elements under CEQA
  - Agencies have flexibility to craft and revise alternatives throughout the CEQA process so long as the core elements of the project remain the same
- Agencies have considerable leeway regarding providing the required good-faith, reasoned analysis in response to public comment
  - Public comment on a revised project alternative is not required where the revised project retains the same components as the circulated project alternatives and there was no prohibited impediment to informed-decision making

Save North Petaluma River and Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207

Save North Petaluma River and Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207

Background:

- The Project involves a proposed 180-unit apartment complex in Petaluma.
- The Project and Draft EIR were revised several times in response to interim General Plan amendments and community concerns about potential impacts to the Petaluma River, special status species, traffic patterns, and emergency evacuations.
- Petitioners filed a CEQA action alleging that the EIR inadequately analyzed several potential Project impact areas.
- The Superior Court denied the petition in full.
- Petitioners appealed the trial court's decision on two grounds:
  - The EIR's special status species analysis was legally inadequate because it did not establish the Project's baselines close in time to the Notice of Preparation
  - The EIR's analysis of potential impacts to public safety in emergencies was inadequate because it did not conduct a formal analysis of specific public concerns regarding egress and evacuations

Save North Petaluma River and Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207

Holdings:

1. Information collected before and after the NOP can adequately establish the Project's baselines under CEQA.

   - The City issued the NOP for the Project in 2007. The EIR's special status species impact analysis drew upon a 2004 Special Status Species Report, which relied, in part, upon a 2001 site assessment.
   - Petitioners failed to identify any inaccuracies in the 2004 Report or changed conditions since its publication. Instead, Petitioners' argument focused solely on the Report's timing relative to the Notice of Preparation.
   - The Court of Appeal noted that "[a]gencies enjoy the discretion to decide, in the first instance, how to realistically measure the existing physical conditions without the proposed project …." Pg. 228 [citing *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328].
   - The Court then held that information from before and after the NOP can adequately establish a project's baselines under CEQA, absent evidence of inadequacy or inaccuracy.

Save North Petaluma River and Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207

Holdings:

2. The EIR and a staff memorandum could adequately analyze Project impacts to public safety in emergencies without conducting an additional formal analysis of late-stage public comments.

   - Public comments, made just before the Final EIR's certification hearing, stated concerns about the Project's potential impacts to evacuations in flood and wildfire emergencies.
   - City staff issued a supplemental memorandum corroborating the EIR's findings and examining egress and evacuation risks in flood and wildfire scenarios. The staff memorandum again determined that the Project would not impair the implementation of any adopted emergency response plan or evacuation plan.
   - Petitioners argued that the City should have conducted a more formal analysis of the potential risks to public safety raised by the late-stage comments.
   - The Court of Appeal held that the City may rely on the expertise of its staff to determine that a project will not have a significant impact. The EIR and the staff memorandum adequately analyzed the Project's potential public safety impacts despite not including a formal analysis of public commenters' concerns.

Save North Petaluma River and Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207

Practical Lessons:

Courts look for substantive inadequacy rather than formal merit.

- The Court reiterated the City's discretion in establishing the Project's baselines with respect to special status species and applauded City staff for addressing late-stage public comments in its memorandum.
- Ultimately, however, the Court's holdings on each issue turned on the Petitioners' failure to prove any inadequacy or inaccuracy in the City's analysis:
  - "But again, petitioners do not challenge the accuracy or completeness of the EIR's description of the Project site's existing biological and habitat conditions; nor do their point to anything indicating that such conditions were materially different in 2007 for purposes of a special status species analysis."
  - "In short, petitioners have not met their burden of proving any inadequacy of the EIR with regard to its analysis of public safety impacts relating to emergencies."

Save the Hill Group v. City of Livermore & Lafferty Communities, Inc. (2022) 76 Cal.App.5th 1092

Save the Hill Group v. City of Livermore & Lafferty Communities, Inc. (2022) 76 Cal.App.5th 1092

Background:

Real Party in Interest applied to develop residential housing, roadways and bridges in Garaventa Hills

- The City of Livermore released a draft EIR that stirred significant public opposition to the Project proposal
- The Draft EIR showed that the Project threatened habitats for protected species—including vernal pool fairy shrimp and the California red-legged frog—and could increase precipitation levels at neighboring wetlands
- Real Party revised its proposal twice, finally securing approval from the City after certification of a reissued final EIR

Save the Hill Group challenged the City's approval under CEQA, arguing:

- The Reissued Final EIR failed to adequately consider a no-project alternative
- The Reissued Final EIR failed to adequately mitigate risks to protected species
- The Reissued Final EIR failed to describe and mitigate potential impacts to neighboring wetlands
- The City violated CEQA when it failed to attempt to preserve the Project site to mitigate other development in accordance with existing settlement agreements

The Superior Court found in favor of the City on all grounds, and Save the Hill Group appealed

Save the Hill Group v. City of Livermore & Lafferty Communities, Inc. (2022) 76 Cal.App.5th 1092

Procedural Holdings:

1. Save the Hill Group successfully exhausted its administrative remedies with respect to the no-Project alternative, despite not raising a proper objection during the administrative process.
   - Save the Hill Group fairly apprised the City of the EIR's failure to consider the No-Project alternative by merely making public comments that questioned the feasibility of a permanent open space designation at the Project site
   - "[C]ourts have acknowledged less specificity is required to preserve an issue for appeal in an administrative proceeding than in a court proceeding because parties are not generally represented by counsel before administrative bodies …."
2. Save the Hill Group lacked standing under CEQA to challenge City compliance with existing settlement agreements to which it was not a party.
   - Existing agreements obligated the City to attempt to acquire environmentally important properties as compensatory mitigation for other City-approved projects.
   - However, Save the Hill Group was not a party to the agreements and therefore lacked standing to challenge the City's compliance with them

Save the Hill Group v. City of Livermore & Lafferty Communities, Inc. (2022) 76 Cal.App.5th 1092

Substantive Holdings:

1. The EIR inadequately considered the No-Project alternative when it failed to consider funds available for the purchase (and conservation) of the Project site.
   - The EIR concluded that future development at the Project site was impossible to preclude, even though the City possessed funds to acquire and permanently conserve the Project site.
2. The EIR's mitigation plan with respect to vernal pool fairy shrimp was adequate despite being conditional.
   - The mitigation plan appropriately required the developer to take action *if* the presence of vernal pool fairy shrimp were detected at the Project site.
3. The EIR adequately assessed Project impacts on a distant wetland via a relative analysis.
   - The City appropriately relied upon a study showing less than significant Project impacts on an adjacent wetland, implying that the Project would also have a less than significant impact on more distant wetlands.
4. The EIR's compensatory mitigation plan with respect to loss of sensitive habitat was adequate even though the compensatory mitigative site was already protected.
   - Save the Hill Group argued that the mitigation was inadequate because the mitigative area was already zoned for conservation.
   - The Court held, however, that the mitigation was adequate because it "requires this site, which is currently privately owned, to be placed 'under [a] permanent easement with an endowment for restoration and management in perpetuity.' The general plan requires nothing of the sort."

Save the Hill Group v. City of Livermore & Lafferty Communities, Inc. (2022) 76 Cal.App.5th 1092

Practical Lessons:

1. Mitigative conditionality is acceptable; mitigative uncertainty violates CEQA
   - In *League to Save Lake Tahoe Mountain Area*, a mitigation measure which was contingent on potential future regulation was inadequate because it was uncertain
   - By contrast, the mitigation in *Save the Hill Group* that was conditioned upon finding vernal pool fairy shrimp at the Project site merely "defer[red]" mitigation and was therefore acceptable
   - The critical question appears to be about certainty in time: will a point exist where the mitigation measure is conclusively required or not required?
2. CEQA embraces relativity even despite requiring strict procedural compliance
   - The EIR adequately considered Project impacts on distant wetlands by comparing Project impacts on immediately adjacent wetlands
   - The EIR adequately mitigated loss of habitat by more permanently securing an already-conserved area for perpetual conservation
   - The EIR failed to adequately consider the feasibility of a no-Project alternative when it failed to disclose that it had the funds to permanently ensure the land was preserved as open space

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700

Background:

- Landowner sought to develop its 110 acres with residential units
- Local community brought suit
- This litigation resulted in a judicial stipulation that the County would approve no less than 43 units being built on the property.
- In 2017, the County approved a development plan pursuant to the 2007 judicial stipulation
- Petitioners sued, arguing among other things that the stipulated judgments amounted to an illegal agreement by the County to avoid full CEQA review

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700

Holdings:

1. County's compliance with CEQA was not compromised by the stipulated judgment
   - EIR fulfilled CEQA requirements because the County appropriately determined that alternatives that violated the stipulated judgment would be legally infeasible
2. County's specific mitigation measures were adequate as to traffic safety, traffic density, and pedestrian safety
   - Good faith effort to buffer traffic consequences, and Plaintiffs had otherwise failed to meet their burden on remaining issues
3. County did not violate CEQA by claiming impacts on the California Red-Legged Frog could be mitigated to a less-than-significant level
   - County had not deferred mitigation, and Court gave significant judicial deference because the mitigation efforts were a reasonable plan, which is all that CEQA requires

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700

Practical Lessons:

- CEQA recognizes that public agencies may be subject to obligations that impact the scope of environmental review they may otherwise undertake
    - However, that does not mean agencies can agree to exempt a class of applicants or quit a particular regulatory field, and use that as a basis to truncate or avoid CEQA review
- Perfect mitigation is not required, so long as there is a good faith attempt to reduce or address potential consequences with a reasonable plan for mitigation
    - Courts hesitate to assess the technical sufficiency of mitigation because they lack the resources and scientific expertise to do so

Jenkins v. Brandt-Hawley (2022) 86 Cal.App.5th 1357

Jenkins v. Brandt-Hawley (2022) 86 Cal.App.5th 1357

Background:

The Jenkinses applied for permits to demolish two structures on their property and build a new single-family home.

- The Planning Commission approved the project after determining that it was exempt from CEQA as a single-family home and that the existing structures were not historically significant
- The Planning Commission's approval was appealed to the Town Council, which denied the appeal

Petitioners, represented by an experienced CEQA attorney, filed a CEQA action challenging the approval.

- Petitioners argued that the Town incorrectly determined the project was exempt
- The trial court dismissed the petition, holding that it was barred by the exhaustion doctrine
- Petitioners filed a notice of appeal, but voluntarily dismissed the appeal when the opening brief was due

The Jenkinses subsequently filed suit against Petitioners' counsel for malicious prosecution.

- Petitioners' counsel responded by filing an anti-SLAPP motion to strike
- The trial court denied the anti-SLAPP motion to strike

Jenkins v. Brandt-Hawley (2022) 86 Cal.App.5th 1357

Overall Holding: The Jenkinses demonstrated probability of prevailing on probable cause and malice

1. Petitioners failed to exhaust their administrative remedies, such that their CEQA claim was barred
   - Petitioners' counsel argued that an exception to CEQA's categorical exemption for single-family homes precluded the Town from relying on the exemption.
   - However, nothing in the record indicated that Petitioners objected to the Town's determination
2. Petitioners' counsel failed to address the required two-part test for determining when CEQA's single-family home exemption does not apply.
   - The "unusual circumstances exception" to a categorical CEQA exemption requires a showing that (1) an unusual circumstance exists unique to the project, and (2) that such unusual circumstance gives rise to a "reasonable possibility that the activity will have a significant effect on the environment." [*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105].
3. Petitioners' counsel repeatedly misrepresented material facts and failed to demonstrate that she performed supporting legal research
   - The court walked through specific misrepresentations from counsel and noted that counsel's declaration supporting the anti-SLAPP motion failed to identify that counsel performed any legal research

Jenkins v. Brandt-Hawley (2022) 86 Cal.App.5th 1357

The Court's Concluding "Observations":

The Court rejected amici arguments that CEQA cases should be immune or insulated from malicious prosecution claims

- Amicus briefs asserted that malicious prosecution claims could chill CEQA actions challenging government approvals and diminish environmental justice and enforcement
- The Court instead "observed" that malicious prosecution claims can ensure that CEQA is not manipulated into a "tool of obstruction." [quoting *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 782]

Practical Takeaway:

Courts have little tolerance for meritless CEQA claims intended to achieve private objectives

- The Court highlighted the total absence of legitimate bases for Petitioners' CEQA claims
- The Court strikingly endorsed and even quoted the Jenkinses' brief, which described the underlying CEQA petition as advanced by "a group of well-off, 'NIMBY' neighbors living in one of the most expensive zip codes in the country trying to prevent their fellow neighbor from rebuilding a decrepit and dangerous residence on their property because the neighbors were concerned about privacy and the design aesthetics of the new build."

Save Berkeley's Neighborhoods v. The Regents of the University of California
Case No. S273160 (March 3, 2022)

Save Berkeley's Neighborhoods v. The Regents of the University of California Case No. S273160 (March 3, 2022)

Background:

In 2019, Save Berkeley's Neighborhoods filed suit against the Regents of the University of California

- Petitioner alleged that UC Berkeley's over-enrollment caused the University to violate the EIR for a long-range development plan
- The trial court ruled against the University, holding the University must cap its enrollment to 2020-2021 levels, resulting in a reduction of 3,050 students and a tuition loss of $57 million
- The University sought a stay of the trial court's judgment

The Court of Appeal declined to stay the judgement pending appeal

- The Court of Appeal found the University failed to demonstrate "irreparable harm" that would outweigh the harm suffered by Petitioner

UC Berkeley petitioned the Supreme Court of California for review

- The Supreme Court denied the University's petition and request for a stay
- However, Justice Liu, with Justice Groban concurring, dissented

Save Berkeley's Neighborhoods v. The Regents of the University of California Case No. S273160 (March 3, 2022)

Dissent's Key Points:

Third party concerns should be considered as part of a stay of an injunction

- Multiple parties would be harmed by a disruption of the status quo, including students who would lose admission opportunities and the City of Berkeley
- On the other hand, Petitioner would not suffer any new harm by staying the injunction since the University had been exceeding its projected enrollment for almost 15 years
- Justice Liu highlighted that the economic and social considerations in this case should be considered heavily when analyzing UC Berkeley's impact on the environment because ultimately, UC Berkeley also has a long-term interest in the health of the environment surrounding its campus

Save Berkeley's Neighborhoods v. The Regents of the University of California Case No. S273160 (March 3, 2022)

Takeaways:

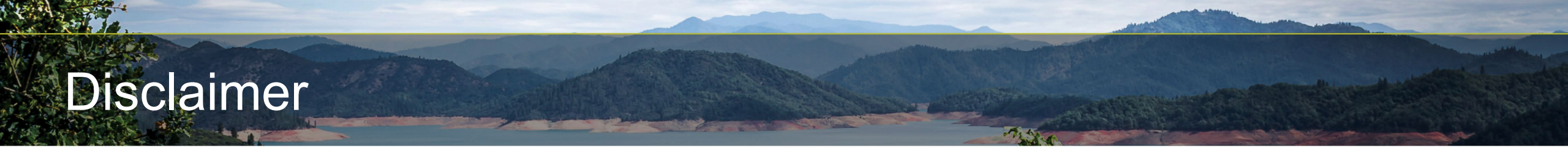
CEQA as a vehicle for environmental protection is not intended to be a "zero-sum game"

Highlights alternative mechanisms for addressing potential CEQA disputes

- "A durable settlement may provide an effective means to vindicate [Petitioner's] asserted interests in environmental protection."

Potential call for political action?

- "I would not be surprised if this stark consequence prompts political actors to rethink the balance that CEQA currently strikes between the interests of parties like SBN and UC Berkeley."



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