



CEQA Case Report

Understanding the Judicial Landscape for Development
2017 Year in Review

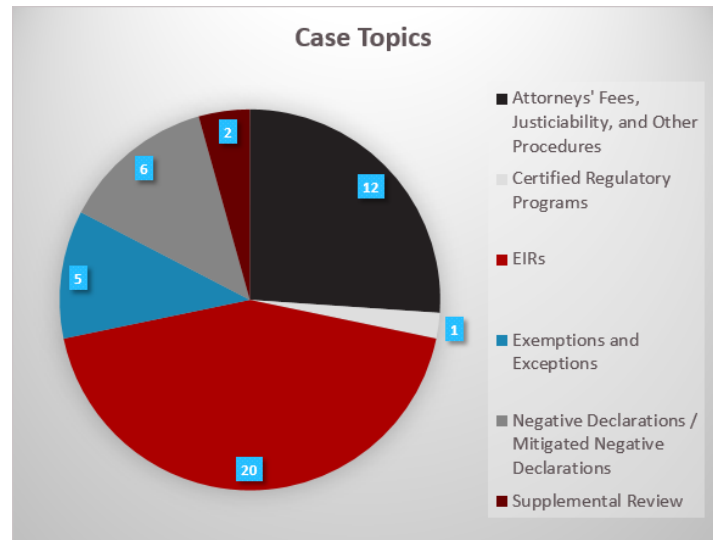
CEQA Case Report: Understanding the Judicial Landscape for Development

California higher courts rule in favor of public agencies on small majority of environmental impact report cases.

Over the course of 2017, Latham lawyers reviewed all 46 California Environmental Quality Act (CEQA) cases, both published and unpublished, that came before California appellate courts. These cases covered a wide variety of CEQA documents and other topics. Below is a compilation of information from the review and a discussion of the patterns that emerged in these cases. Latham will continue to monitor CEQA cases in 2018, posting summaries to this blog.

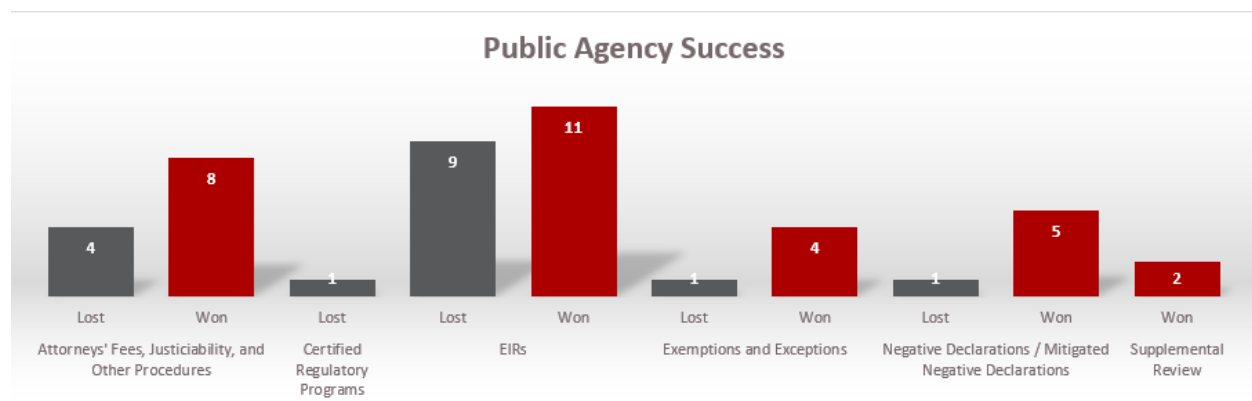
The California Court of Appeal heard 43 CEQA cases, while the California Supreme Court heard the following three cases:

Banning Ranch Conservancy v. City of Newport Beach, *Friends of the Eel River v. North Coast Railroad Authority*, and *Cleveland National Forest Foundation v. San Diego Association of Governments*. Exactly half of all CEQA cases decided in 2017 were published.



The above chart shows all 46 cases sorted by topic. The greatest number of cases (20 of the 46) focused on Environmental Impact Reports (EIRs). Attorneys' Fees, Justiciability, and Other Procedures accounted for 12 cases. This category includes issues such as standing, preemption, statute of limitations, and res judicata. Six cases focused on negative declarations or mitigated negative declaration, while five cases focused on CEQA exemptions and exceptions to these exemptions. The remaining three cases involved supplemental review or certified regulatory programs.

In the below chart, cases are also sorted by topic but include additional information on whether the public agency prevailed in each kind of case. For purposes of this summary, if the public agency lost on any issue it is deemed to have not prevailed. Overall, public agencies prevailed in 30 of 46 cases, or 65%, but won only 55% of EIR cases. Public agencies saw their greatest level of success in exemption/exception, negative declaration, and supplemental review cases.



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2017 CEQA CASE SUMMARIES

Attorneys' Fees, Justiciability, and Other Procedures

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
1	<i>Martha Bridges v. Mount San Jacinto Community College District</i>	✓	4 th	✓	1
2	<i>Coastal Environmental Rights Foundation v. County of San Diego</i>	✓	4 th	✗	3
3	<i>Creed-21 v. City of Wildomar</i>	✓	4 th	✓	5
4	<i>Jensen v. County of Santa Clara</i>	✓	6 th	✗	7
5	<i>North Modesto Groundwater Alliance v. City of Modesto</i>	✓	5 th	✗	9
6	<i>Sierra Club v. County of Sonoma</i>	✓	1 st	✓	11
7	<i>Towers v. County of San Joaquin</i>	✓	3 rd	✗	14
8	<i>Watertrough Children's Alliance v. County of Sonoma</i>	✓	1 st	✗	16
9	<i>Association of Irrigated Residents v. California Department of Conservation</i>	✗	5 th	✓	18
10	<i>City of Selma v. Fresno County Local Agency Formation Commission</i>	✗	5 th	✗	20
11	<i>Friends of the Eel River v. North Coast Railroad Authority</i>	✗	Supreme Court	✓	22
12	<i>Friends of Outlet Creek v. Mendocino County Air Quality Management District</i>	✗	1 st	✓	24

Certified Regulatory Programs

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
13	<i>Pesticide Action Network North America v. California Department of Pesticide Regulation</i>	✗	1 st	✓	26

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
14 <i>Cleveland National Forest Foundation v. San Diego Association of Governments</i>		Supreme Court		29
15 <i>Eureka Village Homeowners Association v. City of Rancho Cordova</i>		3 rd		33
16 <i>Highway 68 Coalition v. County of Monterey</i>		6 th		35
17 <i>Living Rivers Council v. State Water Resources Control Board</i>		1 st		37
18 <i>Los Angeles Conservancy v. City of West Hollywood</i>		2 nd		40
19 <i>Marin Community Alliance v. County of Marin</i>		1 st		42
20 <i>Old Orchard Conservancy v. City of Santa Ana</i>		4 th		46
21 <i>Pacific Shores Property Owners Association v. Superior Court of Del Norte County</i>		1 st		48
22 <i>Placerville Historic Preservation League v. Judicial Council of California</i>		1 st		50
23 <i>Residents Against Specific Plan 380 v. County of Riverside</i>		4 th		52
24 <i>Sierra Club v. County of San Benito</i>		6 th		55
25 <i>Association of Irrigated Residents v. Kern County Board of Supervisors</i>		5 th		57
26 <i>Banning Ranch Conservancy v. City of Newport Beach</i>		Supreme Court		59
27 <i>Center for Biological Diversity v. California Department of Fish & Wildlife</i>		2 nd		63
28 <i>Cleveland National Forest v. San Diego Association of Governments (COA)</i>		4 th		65





29	<i>Hills for Everyone v. Oslic Holdings LLC</i>		4 th		67
30	<i>Poet, LLC. v. State Air Resources Board</i>		5 th		70
31	<i>Protect Our Homes and Hills v. County of Orange</i>		4 th		72
32	<i>SJJC Aviation Services, LLC v. City of San Jose</i>		6 th		74
33	<i>Washoe Meadows Community v. Department of Parks & Recreation</i>		1 st		76

Exemptions and Exceptions





Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
34 <i>Coury v. Marin County</i>		1 st		78
35 <i>Pleasant Valley County Water District. v. Fox Canyon Groundwater Management Agency</i>		2 nd		80
36 <i>Protect Telegraph Hill v. City and County of San Francisco</i>		1 st		82
37 <i>Respect Life South San Francisco v. City of South San Francisco</i>		1 st		84
38 <i>Communities for a Better Environment v. San Joaquin Valley Unified Air Pollution Control District</i>		5 th		86

Negative Declarations / Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
39 <i>Aptos Council v. County of Santa Cruz</i>		6 th		88
40 <i>Citizen's Voice v. City of St. Helena</i>		1 st		90
41 <i>Clews Land & Livestock v. City of San Diego</i>		4 th		92
42 <i>Coastal Hills Rural Preservation v. County of Sonoma</i>		1 st		94

43	<i>Communities for a Better Environment v. South Coast Air Quality Management District</i>		2 nd		96
44	<i>Friends of the College of San Mateo Gardens v. San Mateo County Community College District</i>		1 st		99

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
45 <i>Highland Hills Homeowners Association v. City of San Bernadino</i>		4 th		102
46 <i>Woodlake Neighbors Creating Transparency v. City of Sacramento</i>		3 rd		104

Attorneys' Fees, Justiciability, and Other Procedures

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
1	<i>Martha Bridges, et al. v. Mount San Jacinto / Community College District., et al.</i>		4 th	

[Martha Bridges v. Mount San Jacinto Community College District](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E065213 (August 8, 2017).

- Petitioners have the burden of demonstrating that the administrative exhaustion requirement is excused for lack of adequate notice.
- CEQA review is not triggered if a public agency has agreed to acquire land, but has not committed itself to a definite course of action or precluded consideration of alternatives.
- School districts are exempt from the requirement to adopt local CEQA implementing guidelines if they utilize the guidelines of another public agency whose boundaries are coterminous with, or entirely encompass, the school district's boundaries.

The Court of Appeal affirmed the trial court's decision in a published opinion, dismissing in its entirety a lawsuit alleging that, in failing to prepare an environmental impact report (EIR) before executing a purchase agreement, and in failing to adopt local CEQA implementing guidelines, the Mt. San Jacinto Community College District (College) violated CEQA. The Court of Appeal ruled that petitioners failed to exhaust their administrative remedies and that their claims lacked merit.

In the spring of 2003, the College entered into a two-year option agreement with the Riverside County Regional Park & Open-Space District (District) to purchase of a plot of about 80 acres of unimproved land in Wildomar (Property) that the College had identified as a potential site for a new campus. The College completed an initial study and sent out notices of preparation of a draft EIR for the construction of a Southwest Campus.

The College paused its CEQA review during the pendency of separate litigation, *Ste. Marie v. Riverside County Regional Park & Open-Space District*, 46 Cal.4th 282 (2009), which challenged the option agreement on the ground that the District had failed to adhere to the rules governing the sale of such land. The challenge was unsuccessful, although the option agreement was allowed to lapse in 2011. In 2010, the College hired a consultant to produce a facilities master plan, which included a general overview of a possible new campus in Wildomar.

In 2014, the College and the District executed a purchase agreement for the Property, which conditioned the opening of escrow on both parties' CEQA compliance. Later that year, the College placed a bond measure on the ballot for facility upgrades and construction projects, and highlighted the Property in promotional materials as the site of new permanent facilities. On the day voters approved the measure, two residents of Wildomar (Petitioners) filed suit seeking orders directing the College to set aside the purchase agreement and to adopt local CEQA implementing guidelines. The trial court dismissed the suit, ruling on the merits and declining to address the administrative exhaustion issue raised by the District — Petitioners subsequently appealed this ruling.

The Court of Appeal ruled that Petitioners' suit was barred for having failed to exhaust their administrative remedies. The record demonstrated that the College considered and authorized the purchase agreement at a regularly scheduled board meeting of trustees. The meeting, although not a public hearing under CEQA, was open to the public and as such triggered CEQA's exhaustion requirement. Petitioners did not

avail themselves of the opportunity to raise their objections. Petitioners argued that the College failed to give notice of the meeting, thereby excusing them from the administrative exhaustion requirement. However, the Court of Appeal presumed the College posted the meeting's agenda at least three days in advance, because the record contained no evidence that the College failed to satisfy that deadline, and accordingly ruled that Petitioners did not meet their burden of demonstrating that notice was not provided.

The Court of Appeal proceeded to rule on the merits, upholding the court's dismissal of each of Petitioners' claims. According to the court, the College's duty to prepare an EIR was not triggered by entering into a purchase agreement, under the land acquisition agreement rule. The court distinguished *Save Tara v. City of West Hollywood*, 45 Cal.4th 116 (2008), on the ground that the College had not committed itself to a definite course of action or in any way precluded its consideration of alternatives. Unlike the City of West Hollywood in *Save Tara*, the College had not allocated funds to the project, no developer was yet in the picture, and there were no detailed development plans. The College had not passed any resolutions selecting a site for its future campus.



The court also rejected Petitioners' argument that the purchase agreement was itself a CEQA project. Despite finding that the College may approve plans to build campus facilities on the Property reasonably foreseeable, the court noted that nothing in the purchase agreement committed the College to a definite course of development, and there were no development plans in existence when the College signed the agreement. Additionally, the court found bordering on frivolous Petitioners' argument that Public Resources Code section 21080.09 applied, which requires a college to prepare an EIR upon "[t]he selection of a location for a particular campus and the approval of a long range development plan."

Finally, the Court of Appeal agreed with the trial court that the College was not required to adopt local CEQA implementing guidelines, due to the exemption from the requirement for school districts that utilize another public agency's guidelines whose boundaries are coterminous with, or entirely encompass, the school district's boundaries. Riverside County, where the College is located, and the Chancellor's Office, whose boundaries encompass the entire state, have both adopted the CEQA Guidelines as their local implementing guidelines. By using the CEQA Guidelines, the College is exempt from the requirement of adopting local implementing guidelines.

Affirming the trial court's judgment, the Court of Appeal awarded costs to respondents.

- Opinion by Justice Slough, with Acting Presiding Justice Miller, and Justice Fields concurring.
- Trial Court: Superior Court of Riverside County, Case No. RIC1410388, Judge Craig Riemer.

Attorneys' Fees, Justiciability, and Other Procedures

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
2	<i>Coastal Environmental Rights Foundation v. County of San Diego</i>		4 th	

[Coastal Environmental Rights Foundation v. County of San Diego](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D071544 (October 12, 2017).

- Classification of use type by a planning agency — a preliminary step which does not constitute a project under CEQA — is reviewed under the abuse of discretion standard.
- Public agency actions to implement interim enforcement mechanisms to limit activities pending discretionary review are not projects within the meaning of CEQA, if the agency has not committed itself to the project so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered.

In an unpublished opinion, the Court of Appeal affirmed the trial court's judgment denying a petition for writ of mandate. The Coastal Environmental Rights Foundation, Cleveland National Forest Foundation, and Save our Forest and Ranch Lands (Petitioners) had filed the petition, alleging the director of San Diego County's Planning & Development Services Department (Director) abused his discretion by classifying the use of private property for firearms and training activities by military and law enforcement agencies as a Law Enforcement Services use type pursuant to the San Diego County Zoning Ordinance. The court held that the classification of use was not an abuse of discretion, and was not a project approval requiring CEQA review.

Covert Canyon is a private rural property of approximately 152 acres, mostly surrounded by the Cleveland National Forest. After investigating the site in response to a 2007 complaint, San Diego County (County) discovered unpermitted structures and issued a notice to cease firearms training activities. In October 2007, Covert Canyon submitted an application for a major use permit for a tactical training facility for federal, state, and local law enforcement and military personnel. The Director classified the proposed use as Major Impact Services and Utilities. In response to ongoing, unpermitted use, Covert Canyon and the County entered into a stipulated administrative enforcement order (SAEO) in August 2011, agreeing the property could be used for discharging firearms for recreational use only.

In response to a summer 2015 request by Covert Canyon, the Director evaluated a reduced scale of use for the property and reclassified the use as Law Enforcement Services. The County and Covert Canyon entered into a new SAEO in October 2015, governing enforcement and imposing a schedule for obtaining a discretionary permit. The County provided notice to property owners regarding the SAEO, authorizing the interim use of the property for military and law enforcement firearms training, and stating that the use was classified as Law Enforcement Services. The neighbors and Petitioners appealed to the County Planning Commission and lost. Appeal to the County Board of Supervisors (Board) was refused on the basis that a determination of use type is not an environmental determination subject to Board's review.

Petitioners filed a petition for writ of mandate, alleging the County abused its discretion by undertaking the following actions:

- Entering into the SAEO and classifying the property's use type as Law Enforcement Services without conducting CEQA review
- Failing to provide an administrative appeal to the Board

- Violating the Williamson Act, related to agricultural preservation

The trial court denied the writ petition, concluding the Director did not abuse his discretion in classifying the use as Law Enforcement Services.

Responding to the same arguments on appeal, the Court of Appeal affirmed the judgment, concluding that the:

- Classification of use was not an abuse of discretion, and neither the classification nor the SAEO constituted a project approval requiring CEQA review
- The Director's classification did not constitute an environmental determination and did not warrant an appeal to the Board
- The Director's classification of use is consistent with the Williamson Act

The Court of Appeal applied the abuse of discretion standard of review for an agency's application of its governing statute to particular circumstances, and found nothing arbitrary about the Director's classification decision.

According to the Court of Appeal, the Director's classification is an application of law to his finding of facts, not a project under CEQA. The Court of Appeal also construed the SAEO's conditions as interim enforcement mechanisms to limit the activities at the property to those stipulated, while the property owner and the County undertook discretionary review for the site plan permitting process. Noting that the SAEO is a preliminary step, the Court of Appeal held that the actions of public agencies administering their enforcement powers are not projects within the meaning of CEQA.

Distinguishing *Save Tara v. City of West Hollywood*, 45 Cal.4th 116 (2008), the Court of Appeal found that the County had not committed itself to the project so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require the County to consider. The SAEO did not commit the County to a definite course of action, other than the timely submission of documents necessary to complete a discretionary evaluation. The SAEO contained provisions allowing the County to rescind the use allowed under the SAEO if any of the terms or conditions of the SAEO were not fulfilled, or if the site plan permit was not issued for any reason.



According to the Court of Appeal, neither the Director's classification of use type nor the execution of the SAEO constituted an environmental determination subject to an appeal to the Board, such as decisions to certify or approve an environmental review document, or a determination that a project is exempt from CEQA. The Director's written decision was interpreted as a classification of use, not an environmental determination, which would be issued after submission of the site plan application with supporting CEQA documents.

A contract designated a portion of the property as an agricultural preserve under the Williamson Act. Finding that the Williamson Act does not categorically prohibit commercial use of land within an agricultural preserve, and that firearm discharge and Law Enforcement Services are permitted in the County's general agricultural zone, the court held that the Director's classification was not inconsistent with agricultural use and the Williamson Act. The court also pointed out that Petitioners had not yet shown a project approval in violation of the Williamson Act.

Accordingly, the court affirmed the trial court's judgment.

- Opinion by Presiding Justice McConnell, with Justice Haller and Justice Irion concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2016-00000696-CU-WM-CTL, Judge Eddie C. Sturgeon.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
3 Creed-21 v. City of Wildomar		4 th	

[Creed-21 v. City of Wildomar](#), Fourth Appellate District, Division Two, Case No. E066367 (November 28, 2017).

- A corporation lacked standing to file CEQA lawsuit as the corporation had no assets, only a few members, and all attorneys' fees were given to the law firm representing the corporation.

In a published opinion, the Court of Appeal affirmed the dismissal of petitioner Creed-21's (Petitioner) petition for writ of mandate under CEQA. The trial court concluded Creed-21 failed to demonstrate standing to challenge the proposed project, and issued sanctions for the misuse of the discovery process.

Creed-21 filed a petition challenging a 185,682 square foot Wal-Mart retail complex (Project) in the City of Wildomar (City) for failure to prepare an adequate environmental impact report and other violations of planning and zoning laws. In its answer, the City's alleged that Creed-21 lacked standing to challenge the Project. Following the answer, real party in interest (Real Party) moved to compel Petitioner's person-most-qualified to appear for a deposition. Real Party believed that Petitioner (represented by the Briggs Law Corporation) was a shell corporation, consisting of two members and listing its place of business as the Briggs Law Corporation. Petitioner did not have any assets, and any money awarded in prior lawsuits was given to the Briggs Law Corporation. Real Party argued that discovery was proper in the administrative mandamus proceeding to challenge standing.

Briggs responded to Real Party's motion, arguing that Petitioner had standing as a public-interest organization enforcing public duties, and its membership was irrelevant. Petitioner also argued there was no discovery allowed in administrative mandamus proceedings, and the issue of standing did not require discovery because the petition properly alleged there were Petitioner members in the City. The trial court ruled in favor of Real Party, and Petitioner sought relief from the order on the motion to compel based on the mistake, inadvertence, or excusable neglect on the part of its counsel due to their unfamiliarity with the local rules of court. The trial court denied relief.

Petitioner filed a petition for writ of mandate for immediate stay in the Court of Appeal, arguing that discovery was not appropriate because a CEQA claim was involved. The Court of Appeal denied the petition. Petitioner's attorney then filed an *ex parte* application seeking to vacate the trial court's order setting the deposition, and to extend the deadline for personal reasons. Real Party opposed the motion for failure to show good cause for the extension. The trial court denied Petitioner's extension request because Petitioner's attorney failed to show why he could not take a one-day deposition.



Despite incomplete discovery due to Petitioner's delay, Real Party and the City filed opposition briefs to the original petition, alleging that the petition should be denied procedurally and on the merits because the Briggs Law Corporation was the alter ego of Petitioner. Petitioner argued it was not a sham corporation set up for attorneys' fees, testifying that there were other members of which the City and Real Party were not aware. The trial court ruled in favor of Real Party and the City, finding that Petitioner lacked standing.

The Court of Appeal reviewed the trial court's order under the abuse of discretion standard. As such, the Court of Appeal determined that the trial court's order was not arbitrary, capricious, or whimsical, as Petitioner did not demonstrate error. Petitioner did not respond to multiple notices of depositions for

several months, forcing Real Party to move to compel. Even after the trial court ordered Petitioner to comply with the deposition notice, Petitioner did not comply with the trial court's orders, claiming a family emergency. The Court of Appeal was not convinced by Petitioner's "eleventh hour attempt to avoid dismissal of the action," and concluded that the trial court did not abuse its discretion in dismissing the action.

- Opinion by Presiding Judge Miller, with Justice Codrington and Justice Slough concurring.
- Trial Court: Riverside County Superior Court, Case No. RIC1504199, Judge Sharon J. Waters.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
4 Jensen v. County of Santa Clara		6 th	

[Jensen v. County of Santa Clara](#), California Court of Appeal, Sixth Appellate District, Case No. H042834 (December 26, 2017).

- For the purposes of challenging an agency action under CEQA, the applicable statute of limitations begins to run when the challenged action is first approved; a new statute of limitations period is not initiated by continued periodic reporting requirements if the scope of the prior approval is not exceeded.

In an unpublished opinion, the Court of Appeal affirmed the trial court's decision to sustain a demurrer to a petition submitted by Cheriell Jensen and Healthy Alternatives 2 Pesticides (Petitioners) and dismissed the petition without leave to amend. Petitioners alleged that Santa Clara County's (County's) and the County Vector Control District's (District's, collectively Defendants') mosquito control operation required an environmental impact report (EIR) before Defendants conducted pesticide fogging using a chemical called Zenivex (2014 Project). The petition was filed within 180 days of Petitioners learning of the 2014 Project. However, the court held that the petition was time barred because the applicable statute of limitations under CEQA had run. The court determined that the issues raised by Petitioners in regards to the 2014 Project had already been approved in 2011 and that ongoing reporting requirements did not reset the statute of limitations if the scope of the original approval had not been exceeded.

The District is a special district that serves the County and conducts programs to control mosquitoes. In 2007, the District adopted a plan to control mosquito populations by exterminating adults, *i.e.*, adulticiding, using insecticide aerosols (2007 Plan). The District filed a notice of exemption from CEQA review and its determination went unchallenged. In 2011, the County Board of Supervisors (Board) adopted a resolution approving another District plan, which proclaimed that West Nile virus was endemic in California, asserted that if any mosquitos were found carrying West Nile, the District would undertake adulticiding, and approved a list of pesticides for use in adulticiding, including Zenivex. In 2011, the District also filed a notice of intent to join the National Pollutant Discharge Elimination System (NPDES), a blanket permit issued by the State Water Resources Control Board (State Board), under which the use of Zenivex was also approved. The NPDES permit required the District to file annual reports with the State Board. Neither the Board's resolution regarding the 2011 Plan nor the NPDES notice mentioned CEQA and neither were challenged.

On appeal, Petitioners argued that the trial court had erred in sustaining Defendants' demurrer, because the petition was filed within 180 days of Petitioners learning of the 2014 Project, and thus was filed within the applicable statute of limitations. The Court of Appeal noted that under CEQA, the statute of limitations begins to run when potential challengers are understood to have constructive, rather than actual, notice of agency action. The court then reviewed the demurrer de novo and determined that Petitioners' cause of action was time barred because the issues that Petitioners raised in regard to the 2014 Project had been approved in 2011.

The court determined that Petitioners were time barred from challenging anything approved in the 2007 Plan, the 2011 Plan, or the notice of intent to join the NPDES in 2011 because the statute of limitations had run without challenge on those approvals. Petitioners admitted that the statute of limitations had run on the 2007 Plan, but argued they were entitled to challenge the 2014 Project because two issues distinguished it from the 2007 Plan: first, Defendants had declared West Nile virus an endemic disease in



California subsequent to the approval of the 2007 Plan; and second, the District had decided to use the pesticide Zenivex for the 2014 Project subsequent to the approval of the 2007 Plan. Thus, Petitioners argued that the statute of limitation had not yet run on the 2014 Project. While the court agreed that these issues had not been approved in the 2007 Plan, it stated that Petitioners were focused on the wrong approval. The court asserted that the 2007 Plan was made largely obsolete by 2011 Plan and found that both issues raised by Petitioners had been specifically addressed and approved in the 2011 Plan and the District's notice of intent to the join the NPDES. Thus, the court held that Petitioners' cause of action was time barred because the statute of limitations applicable to their claims had begun to run in 2011.

The court also rejected Petitioners' contention that each annual report submitted by Defendants, as required by the NPDES permit, opened a new statute of limitations period to challenge CEQA compliance. The court noted that Petitioners had failed to cite any authority in support of their argument and that the court had been unable to locate any such authority. In addition, the court explained that even if the annual reports could, in some circumstances, be considered discretionary decisions outside the scope of previous approvals, Petitioners had pointed to nothing to show that any NPDES annual report or that the 2014 Project were outside of the scope of the 2011 approval. The court admitted that there might be some circumstances under which, as Petitioners had argued, a decision to change the type of pesticide used could constitute a discretionary decision triggering compliance with CEQA, but it rejected that argument as applied to the 2014 Project since the pesticide had been approved for use in 2011.

Thus, the Court of Appeal upheld the trial court's decision to sustain Defendants' demurrer and dismiss without leave to amend.

- Opinion by Justice Grover, with Presiding Justice Elia and Justice Bamattre-Manoukian concurring.
- Trial Court: Santa Clara Superior Court, No. CV266780, Judge Joseph Huber.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
5 <i>North Modesto Groundwater Alliance v. City of Modesto</i>		5 th	

[North Modesto Groundwater Alliance v. City of Modesto](#), California Court of Appeal, Fifth Appellate District, Case No. F072165 (January 13, 2017).

- There is no due process right of individual notice of a project approval such that the CEQA statute of limitations would be tolled.

In an unpublished decision, the Court of Appeal reversed the trial court's judgment, finding the City of Modesto (City) violated North Modesto Groundwater Alliance's (NMGA's) members' due process rights by not giving them individualized notice of the City Council meeting regarding certain City water system improvements.

In 2005, the City determined its water supply system for Del Rio, a community outside city limits, could not maintain sufficient water pressure and required improvements. The City agreed to construct facilities that would include two wells, a storage tank, and other improvements (Project). In 2010, the City prepared a water system engineer's report that set forth a capital improvement program for the City's water system. The report included a description of the proposed Project for Del Rio and identified potential Project locations. The City also prepared and certified a program environmental impact report (EIR) to accompany the engineer's report.

In 2011, the City sent letters to, and conducted a public meeting for, neighbors of potential sites for the Del Rio Project; NMGA members participated. The City next conducted an initial study to determine whether it could rely on the 2010 program EIR, or if the City would need to prepare a new EIR before proceeding. The City determined the program EIR covered the Project's impacts and potential mitigation measures, and a finding of conformance was prepared. The City published a public notice in the newspaper, stating the City intended to adopt these findings and approve the Project at an upcoming City Council meeting. The City did not send individualized notices to NMGA members. In March 2012, at a City Council meeting, the City adopted the finding of conformance and approved the Project. A few days later, the City filed a notice of determination (NOD) with the county clerk.

In December 2012, more than nine months after the City filed the NOD, NMGA filed a petition for writ of mandate. NMGA alleged the City's finding of conformance violated CEQA and that a project-level EIR should have been prepared. NMGA further alleged the City denied NMGA's members their constitutional right to due process by not providing individualized notice of the City Council meeting at which the Project was approved. NMGA alleged this due process violation was the reason why the action was not filed within CEQA's 30-day statute of limitations for actions alleging that an act of a public agency did not comply with CEQA. The trial court issued a preliminary injunction in February 2013, prohibiting the City from proceeding with the Project while litigation was pending. In November 2013, the City Council decided to rescind Project approval and directed staff to carry out a project-level EIR. The City thereafter filed a motion for judgment, arguing that Project rescission rendered NMGA's petition moot; the court disagreed and denied the motion in May 2014. One year later, the trial court issued a tentative ruling in which the court found the City violated NMGA's members' due process rights and that the City's finding of conformance was not supported by substantial evidence; the court declined to specify if an EIR would be necessary. The tentative became the court's ruling after neither party requested a hearing. The City appealed.

As an initial matter, the Court of Appeal explained that one of the standards of review set forth for *mandamus* petitions in Code of Civil Procedure (CCP) § 1094.5 applied to NMGA's due process claim, not the standards of review set forth in CEQA. Because of the statute of limitations, NMGA's CEQA claim could not be viable unless the due process claim was valid. The court then explained that approval of a project is a legislative act and, therefore, subject to a more deferential standard of review under CCP § 1094.5. The trial court was required to uphold the City's approval unless it was arbitrary, capricious, entirely without evidentiary support, or procedurally unfair. Under that standard, the court held that the City's action in proceeding with Project approval without individual notice to NMGA's members was not arbitrary, capricious, entirely without evidentiary support, or procedurally unfair. Individual notice to neighbors was not required when the City made its legislative decision, as no one has a due process right to individualized notice that a legislative action is pending. The court also explained that, even if the City's decision had been an adjudicative one subject to a less deferential standard of review, NMGA still would have had to prove its members' entitlement to individualized notice



Next, the court held that NMGA failed to prove its members' property interests were substantially harmed under either approach to reviewing factual findings in CCP § 1094.5. To establish a procedural due process violation, NMGA's members had to show a substantial deprivation of liberty or property and that the procedures demanded were justified in light of the administrative burdens they would impose on the City. NMGA's record citations regarding the neighbors' concerns, apprehensions, and anxiety about potential project impacts did not rise to an evidentiary showing that NMGA's members' property or property values were actually likely to be harmed. The court also rejected NMGA's claims that the City attempted to shift responsibility for CEQA analysis to NMGA. NMGA had to establish its due process claim and demonstrate that the CEQA statute of limitations did not apply before CEQA analysis would apply.

Last, the court held that NMGA's CEQA action was time-barred because NMGA's members had no right to individual notice. Absent a due process violation, the trial court lacked jurisdiction over the case. The court also determined that, had NMGA demonstrated a due process violation, there was no reason to believe that a right to revive a stale CEQA action would have been the appropriate remedy. If NMGA's members had been entitled to individualized notice of the City's action before the meeting, the remedy would be to vacate the decision, and give NMGA's members notice and a right to be heard before the City makes its decision. The court saw no reason why NMGA would be entitled to judicial review of the City's decision under CEQA. Any due process violation would not have given the members a right to agency environmental review followed by judicial review of the agency's performance. Because NMGA's CEQA claims were barred by the statute of limitations, the trial court should not have ruled on them and the Court of Appeal declined to address the merits of the claims or the trial court's ruling.

Therefore, the Court of Appeal reversed the trial court's judgment in favor of NMGA and directed the trial court to enter a defense judgment and deny writ relief on all causes of action.

- Opinion by Justice Smith, with Presiding Justice Hill and Justice Gomes concurring.
- Trial Court: Superior Court of Stanislaus County, No. 680381, Judge Roger M. Beauchesne.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
6 <i>Sierra Club v. County of Sonoma</i>		1 st	

[Sierra Club v. County of Sonoma](#), California Court of Appeal, First Appellate District, Case No. A147340 (April 21, 2017).

- Courts will apply the “functional test” to determine if an agency decision is ministerial, and therefore exempt from CEQA review.
- Under the “functional test,” CEQA only applies to a decision if the agency had discretion that gave the agency the ability and authority to mitigate environmental damage to some degree.
- The relevant question in evaluating whether an agency decision was ministerial is whether the regulations granted agency discretion regarding this particular project, not whether the regulations grant agency discretion generally.

In a published opinion, the Court of Appeal affirmed the trial court’s decision denying a petition for a writ of mandate. The writ sought to overturn a determination by the Agricultural Commissioner of Sonoma County (Commissioner) that an issued erosion-control permit for establishing a vineyard on grazing land was a ministerial decision and therefore exempt from CEQA review.

Sonoma County Ordinance No. 5216 (Ordinance) requires growers to obtain an erosion-control permit from the Commissioner before establishing or replanting a vineyard. Applicants must submit plans and specifications demonstrating compliance with certain directives and must accept certain ongoing agricultural practices. The Ordinance allows growers to prepare and submit plans for sites with a low erosion risk (Level I permit), but requires a civil engineer to prepare plans for sites having a higher erosion risk (Level II permit). The Ordinance sets out the substantive standards for proper grading, drainage improvement, and site development, including requiring the grower to comply with “Best Management Practices for Agricultural Erosion and Sediment Control” that the Ordinance itself incorporates.

In October 2013, the Ohlson brothers applied for a Level II erosion-control permit to convert 108 acres of rangeland into vineyard. The application included site maps, a drainage report prepared by an engineer, and a biological resources report. The application indicated that the property included wetland areas, which would be protected by minimum setbacks and a drainage system. The application also provided various erosion control measures including grass avenues and cover crops. Inspectors visited the property and reviewed the application, and the Commissioner approved the permit on December 2013 after minor corrections were made to the application. Several months later, the Commissioner issued a notice declaring that the permit’s issuance was ministerial and exempt from CEQA review.

Sierra Club, Friends of the Gualala River, and Center for Biological Diversity (Petitioners) challenged the Commissioner’s decision in Sonoma County Superior Court. The trial court denied the petition in December 2015. On appeal, Petitioners argued that the Ohlson brothers’ permit application was subject to CEQA because the broad and vague provisions of the Ordinance rendered any decision thereunder a discretionary act. The court disagreed because most of the provisions that potentially conferred discretion did not apply to the Ohlsons’ project. Moreover, Petitioners failed to demonstrate that the few applicable discretionary provisions “conferred on the Commissioner the ability to mitigate potential environmental impacts to any meaningful degree.”

The court explained that CEQA establishes a multi-tiered process to ensure that environmental considerations inform public decisions. In this instance, the initial step of the process, which requires the agency to “conduct a preliminary review in order to determine whether CEQA applies to a proposed activity,” was at issue. As part of this first step, the agency must determine whether the project falls under an exemption.

There are two types of exemptions:

- Statutory, which are enacted by the legislature
- Categorical, which are adopted in the CEQA Guidelines

CEQA only applies to discretionary projects, and it exempts ministerial projects. CEQA itself does not define either of these terms, but the CEQA Guidelines define a discretionary act as “one that requires the exercise of judgment or deliberation” in the approval process, and a ministerial decision as one “involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project.” In a ministerial decision, the public official “merely applies the law to the facts as presented.” The ministerial exemption is based on the understanding that for truly ministerial permits, an environmental impact report (EIR) is irrelevant no matter what the EIR might reveal about the project’s environmental consequences.

The court rejected the Commissioner’s arguments that the precedent on ministerial decisions in *People v. Department of Housing & Community Development* (1975) 45 Cal.App.3d 185 (holding that a construction permit for a mobile home park was neither wholly ministerial nor discretionary and therefore required CEQA review) was outdated and overruled by:

- *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162 (holding that actions are ministerial when the approval process is one of determining conformity with applicable ordinances and regulations, and the official has no ability to exercise discretion to mitigate environmental impacts)
- *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286 (holding that a permit is ministerial only if “the official decision of conformity or nonconformity leaves scant room for the play of personal judgment”)

The court declared that the applicable CEQA Guidelines have not changed in decades and that nothing in the case law supports the notion that the analysis has been altered for evaluating whether an action is ministerial.

The court explained that the applicable test is the “functional test” established in *Friends of Westwood, Inc. v. City of Los Angeles*. Under this test, CEQA does not apply to an agency decision simply because the agency may exercise some discretion. Rather, CEQA only applies to a decision if the discretion provides the agency with the ability and authority to mitigate environmental damage to some degree. In this instance, the Ordinance specifically establishes that erosion-control permit issuance is a ministerial act unless the applicant seeks an exception from established standards. While the court was “skeptical of this categorical declaration” the court nonetheless found that Petitioners failed to show that any of the arguably discretionary provisions applied to the Ohlsons’ application. The relevant question is only whether the regulations granted agency discretion regarding this particular project.

The three potentially discretionary provisions that did apply to the application in question related to setbacks for wetlands, stormwater diversion to the nearest practicable disposal location, and incorporating natural drainage features whenever possible. The court found that even if these provisions granted some discretion to the Commissioner, they failed the functional test. Moreover, the court could only review the Commissioner’s decision for a “prejudicial abuse of discretion.” Such an abuse is



established if “the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.”

Established precedent gives the agency judicial deference in determining whether an action is ministerial. In this instance, the wetlands setback was ministerial because the Ordinance provides that the setback should be whatever a wetlands biologist recommends. Second, the stormwater provision was not discretionary because the Ohlsons’ application would not result in any changes to stormwater runoff. Third, Petitioners failed to demonstrate any other natural drainage features on the Ohlsons’ property that gave the Commissioner discretion to require the incorporation of those features. Even if the Commission did have some discretion on natural drainage features, Petitioners did not demonstrate that such discretion allowed the Commissioner to mitigate potential environmental impacts to any meaningful degree.

Finally, the Commissioner’s ability to request additional voluntary actions did not refute the determination that issuing the Ohlsons’ permit was ministerial. Although the Commissioner required several mitigation measures as a condition of the permit, because the Ordinance did not require those measures, the Commissioner had no authority to institute them. The Ohlsons’ acceptance of the measures did not establish an exercise of discretion. Additionally, when the Commissioner asked for more information after conducting the original survey, that simple fact did not establish that the applicant had to provide that information before the applicant could compel issuance of the permit. Petitioners failed to demonstrate that the resultant corrections and clarifications were significant enough to possibly alleviate adverse environmental consequences. In sum, the court concluded that the Commissioner’s determination that issuing the Ohlsons’ erosion-control permit was a ministerial act did not constitute a prejudicial abuse of discretion.

- Opinion by Presiding Justice Humes, with Judge Bamattre-Manoukian and Judge Mihara concurring.
- Trial Court: Sonoma County Superior Court, No. SCV255465, Judge Gary Nadler.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
7 <i>Towers v. County of San Joaquin</i>		3 rd	

[*Towers v. County of San Joaquin*](#), California Court of Appeal, Third Appellate District, Case No. C073598 (August 2, 2017).

- An extension to a mining permit's expiration date with a certified EIR is not a project under CEQA and does not require additional review.

In an unpublished decision, the Court of Appeal affirmed the trial court's denial of writs of traditional and administrative *mandamus*, a complaint for declaratory and injunctive relief, and a complaint for damages by Petitioners Roger Towers, Catherine Towers, and House and Land, Inc. (Petitioners). Petitioners had filed suit alleging that the County of San Joaquin (County) had violated state planning law and CEQA by denying Petitioners' request to re-designate their property; granting extensions to various mining permits; adopting an ordinance extending all mining permits; and failing to properly implement its general plan.

Petitioners purchased approximately 19 acres of land in southern San Joaquin County (the Property) that was designated Open Space Resource Conservation (OS/RC). Real Parties in Interest, Teichert, and CEMEX (collectively, Real Parties), run mining operations in the vicinity of the Property. The Property was located within an area determined by the County to have significant mineral resources and zoned within the Mineral Resources Zone (MRZ-2). In an effort to preserve these resources, non-extractive projects, such as residences or commercial uses, were allowed only with a discretionary approval from the County.

Petitioners applied for approvals to build non-extractive projects twice, in 2002 and 2009, but were unsuccessful in receiving authorization to construct single family residences or a truck storage facility on the Property. In 2009, the County granted extensions for Real Parties' mining permits. The County had certified environmental impacts reports (EIRs) for each mining operation when the permits were originally approved. Later that year, citing concerns about the economic downturn, the County adopted Ordinance No. 4381 (Ordinance), which extended all land use and mining permit expiration dates by two years.

Petitioners then filed this lawsuit, arguing, among other things, that the County had violated CEQA because it had not analyzed the impacts associated with approving the extensions to Real Parties' mining permits. The trial court dismissed this claim on demurrer, noting that Petitioners had failed to allege any new or changed activity with significant environmental impact that would require additional environmental review of the permits. Petitioners also argued that the County's failure to properly implement its general plan resulted in the improper designation of their property, and required the invalidation of the Ordinance and mining permit extensions. Following a bench trial on the issue, the trial court could not identify the nexus between the alleged failures of implementation and the decisions Petitioners were challenging. The court dismissed the remaining causes of action.



Petitioners appealed, arguing, among other things, that the County had committed misfeasance and dereliction of duty by violating state planning law and CEQA. The Court of Appeal found that Petitioners lacked standing to challenge the County's implementation of its general plan because Petitioners failed to establish a direct and beneficial interest in the alleged violations and therefore did not have special interest standing. The Court further held that Petitioners lacked public interest standing because the litigation was clearly commenced in an effort to benefit their own interests.

Related to the CEQA claim regarding the extension of the mining permits, the Court held that CEQA did not apply to the extensions, because the activity to be undertaken did not change. The Court rejected Petitioners' arguments that the extensions were an expansion of use, noting that all the extensions did was push out the date of expiration on the permits and that the activities authorized were previously analyzed under CEQA.

The Court then reviewed each of the remaining causes of action and affirmed the trial court's decision.

- Opinion by Justice Murray, with Acting Presiding Justice Blease and Justice Duarte concurring.
- Trial Court: San Joaquin Superior Court, No. 39200900231065CUWMSTK, Judge Barbara Kronlund.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
8 <i>Watertrough Children's Alliance v. County of Sonoma</i>		1 st	

[*Watertrough Children's Alliance v. County of Sonoma*](#), California Court of Appeal, First Appellate District, Case No. A145612 (July 31, 2017).

- An agency's issuance of a permit required by local ordinance was a ministerial act for purposes of CEQA and thus the county was not required to conduct CEQA review of the project.
- The relevant inquiry in determining if discretion conferred by a regulation is ministerial or discretionary for purposes of CEQA is whether the amount of discretion conferred by the regulations was meaningful enough to give the agency the ability to mitigate potential environmental impacts.

In an unpublished opinion, the Court of Appeal affirmed the trial court's finding that the issuance of a permit by the Agricultural Commissioner of Sonoma County (Commissioner), as required by local ordinance prior to establishing or replanting a vineyard, was a ministerial act.

Chapter 11 of the Sonoma County Municipal Code requires any person proposing to establish or replant a vineyard to obtain a Vineyard Erosion and Sediment Control Ordinance permit (VESCO permit) from the Commissioner. Prior to enacting the ordinance, Sonoma County (County) allowed agriculturalists to plant or replant vineyards "as a matter of right." The ordinance declares that the issuance of a permit constitutes a ministerial action, provided that the owner does not seek an exception to the standards established by the ordinance provisions.

In March 2013, Real Party in Interest Paul Hobbs Winery, L.P. (Winery) applied for a VESCO permit, seeking approval for the planting of 37 acres of vineyard on a portion of the property occupied by an apple orchard (Project). A private engineering firm initially evaluated the application on behalf of the Commissioner to ensure compliance with the ordinance. The Winery subsequently amended the Project twice following several meetings with the Commissioner's engineers and with neighbors, and in June 2013, the Commissioner approved the VESCO permit (Winery Permit) without a public hearing.

In November 2013, Alliance, an unincorporated association of residents concerned about environmental impacts of vineyard development, filed a petition for a writ of mandate challenging the issuance of the Winery Permit. Alliance contended that the County was required to conduct a CEQA review because issuance of the Winery Permit was a discretionary, rather than ministerial, act. The trial court denied the petition. Alliance appealed, arguing that issuance of the Winery Permit was discretionary because the Commissioner exercised discretion in requiring the Winery to make various changes to the Project before issuing the Winery Permit. The Court of Appeals affirmed.

Before deciding the merits of the case, the court analyzed the recent published opinion *Sierra Club v. Sonoma County* (2017) 11 Cal.App.5th 11, which analyzed the same County ordinance, concluding that *Sonoma County* appears to govern this case. In *Sonoma County*, the court rejected an argument that "vague, subjective standards" in the language of an ordinance was enough to support a finding that issuance of a permit under the ordinance was a discretionary act. Instead, that court held that some discretion is allowed, and that the existence of discretion is irrelevant if it does not confer "the ability to mitigate any potential environmental impacts in a meaningful way." (*Id.* at 28.) Thus, *Sonoma County*

established a three-part test to determine whether the issuance of a permit was a discretionary act under CEQA. A litigant must show that:

- The language of the regulation allows the agency to exercise “personal, subjective judgment in deciding whether or how the project should be carried out” rather than fixed or objective standards.
- The regulation applied to the permit that was granted.
- The regulation conferred “meaningful discretion” on the agency, i.e., that the regulation gave the agency the ability to mitigate potential environmental impacts in a meaningful way.

Before analyzing the case under *Sonoma County*, however, the court addressed Alliance’s argument that issuance of the Winery Permit must be deemed discretionary because the Commissioner required two sets of changes to the Winery’s original application. The court rejected this argument, holding that the fact that the Commissioner required changes does not demonstrate that the Commissioner exercised discretion, because:

- The plans were changed in part to neighbor concerns.
- The changes easily could have been demanded in an exercise of ministerial judgment.
- A regulator’s requirement of changes in a project is ultimately irrelevant to a determination of the discretionary nature of a regulatory act.

The relevant inquiry is whether the act/ordinance vests the regulatory agency with the authority to exercise meaningful discretion.

Next, the court affirmed *Sonoma County* over Alliance’s objection that *Sonoma County* unfairly burdens the public to prove, in the absence of any public administrative process, discretion. The burden falls on the challenger to demonstrate an abuse of agency discretion, and the court explained that the Alliance could have submitted evidence to supplement and explain the administrative record, as the Commissioner’s decision was made without a public hearing. The court also rejected Alliance’s argument that the court should look at “the inherently discretionary nature of the permitting scheme as a whole,” reasoning that the “nature of the permitting scheme as a whole” is only the sum of the discretion each individual regulation confers. An exception to this general rule is when the agency also has final, discretionary approval authority over a project. Lastly, the court rejected Alliance’s argument that *Sonoma County* will generate excessive litigation, holding that even if that were true, “a rule of law is not rendered invalid because it might generate more litigation.”

Applying the legal framework established in *Sonoma County*, the court quickly addressed the first two parts of the *Sonoma County* framework by:



- Dismissing some of the challenged regulations as irrelevant to the permit
- Noting that one regulation and two best management practices conferred some level of discretion to the agency

The court then stated that the Alliance was required to prove that the regulations permitted the Commissioner to require that the Winery build the Project in a different way than the way that was permitted. This court indicated this would demonstrate that the Commissioner’s exercise of discretion under the regulations could have mitigated the environmental effects in a meaningful way. Because the Alliance could not meet its burden of proof, the court held that there was no evidence in the record to support a finding that the minimal amount of discretion conferred by the regulations was meaningful enough to give the Commissioner the ability to mitigate potential environmental impacts.

Accordingly, the Court of Appeal affirmed the trial court’s decision and awarded the Winery their costs on appeal.

- Opinion by Presiding Justice McGuiness, with Justice Siggins and Justice Jenkins concurring.
- Trial Court: Sonoma County Superior Court No. SCV-254679.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
9 <i>Association of Irrigated Residents v. California Department of Conservation</i>		5 th	

[Association of Irrigated Residents v. California Department of Conservation](#), California Court of Appeal, Fifth Appellate District, Case No. F073018 (May 4, 2017).

- A court's determination that a CEQA challenge is rendered moot by passage of a law is not a judgment on the merits and cannot provide the basis for a finding of *res judicata*.

In a published opinion, the Court of Appeal reversed a demurrer sustained by the trial court dismissing a petition for writ of mandate challenging the actions of the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR) under CEQA, when DOGGR issued permits for 214 new oil wells in the South Belridge Oil Field of Kern County. Real Party in Interest, Aera Energy, LLC (Aera), the recipient of the permits, filed the demurrer, arguing that *res judicata* barred the cause of action based on a final judgment entered in a prior action in Alameda County (Alameda Action). The Court of Appeal reversed the trial court's judgment sustaining the demurrer, holding that the judgment in the Alameda Action was not on the merits, but rather was based on a finding of mootness following the enactment of Senate Bill 4 (SB 4).

The plaintiffs in the Alameda Action alleged that DOGGR had a pattern and practice of issuing permits for oil and gas wells in California without complying with CEQA. Specifically, the plaintiffs alleged that:

- DOGGR issued boilerplate negative declarations, which found no significant impacts from the wells.
- These negative declarations were in contravention of the fundamental review requirements of CEQA.

While the Alameda Action was pending, SB 4 was signed into law, requiring DOGGR to prepare a comprehensive EIR to "provide the public with detailed information regarding any potential environmental impacts of well stimulation in the state," among other things. Based on the passage of SB 4, the Alameda Action defendants successfully dismissed the case on the ground of mootness.

In the present action, the Court of Appeal agreed with the Association of Irrigated Residents, the Center for Biological Diversity, and the Sierra Club (Petitioners) that the judgment in the Alameda action was not on the merits because it was grounded on findings of mootness and/or unripeness that did not determine the underlying claims relating to DOGGR's pattern and practice of failure to comply with CEQA. The Court of Appeal reasoned that, although the trial court stated that SB 4 gave "clear directions [that DOGGR could] issue permits if the requirements of [SB 4] are met," this did not mean that the court in the Alameda Action substantively addressed whether DOGGR had complied with CEQA in the past. Therefore, the decision in the Alameda Action was not "on the merits" and the claims in the present action could not be dismissed on *res judicata* grounds.

Petitioners also claimed that *res judicata* was inapplicable because the Alameda Action involved a different cause of action. Petitioners argued that the Alameda Action involved an overall pattern that did not concern DOGGR's approvals of individual oil wells, whereas the present case involved DOGGR's conduct in approving the 214 individual oil wells. The Court of Appeal declined to decide this issue given that its resolution was unnecessary in light of the conclusion that the Alameda Action was not on the merits.

Finally, the Court of Appeal denied a separate motion to dismiss the appeal filed by DOGGR on the grounds of collateral estoppel. DOGGR argued that the trial court in *Sierra Club v. California Department of Conservation* (Kern County Superior Court, Case No. BCV-15-101300-RST) already resolved the issue of whether the judgment in the Alameda Action barred subsequent CEQA challenges to DOGGR's approval of wells under the doctrine of *res judicata*. Further, DOGGR argued, since this was the first final judgment on the matter, the issue could not be raised in the present appeal. The Court of Appeal rejected this argument, holding that the issues in the two cases were not the same because the two cases had factually distinct circumstances, and that DOGGR failed to show privity of the parties.

Based on the foregoing, the Court of Appeal overturned the *res judicata* demurrer and remanded to the trial court, while denying the motion to dismiss the appeal on the ground of collateral estoppel.

- Opinion by Acting Presiding Justice Kane, with Justice Franson and Justice Smith concurring.
- Trial Court: Kern County Superior Court, No. S1500CV283418, Judge Eric Bradshaw.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
10 <i>City of Selma v. Fresno County Local Agency Formation Commission</i>	✘	5 th	✘

[*City of Selma v. Fresno County Local Agency Formation Commission*](#), California Court of Appeal, Fifth Appellate District, Case No. F072712 (July 25, 2017).

- Staff time spent reviewing documents to determine that they properly belong in the administrative record is a recoverable cost.
- Four hours spent organizing and preparing the index of the administrative record by counsel is excessive, if staff has already accounted for separate line items for index creation.

In an unpublished opinion, the Court of Appeal affirmed the trial court's decision denying the City of Selma's (Selma's) motion to strike the memorandum of costs associated with the preparation of the administrative record under Public Resources Code section 21167.6 and reversed the trial court's denial of Selma's alternative motion to tax costs. The Court of Appeal directed the trial court to enter a new order taxing costs in the amount of \$2,500 to account for a prior payment and an unreasonable line item for index preparation.

In 2013, the Fresno County Local Agency Formation Commission (LAFCo) approved the annexation of 430 acres of land sought by the City of Kingsburg (Kingsburg). Selma filed a writ of mandate challenging the approval. Along with the writ petition, Selma filed a Request for Preparation of Record of Proceedings requesting LAFCo to prepare a record of proceedings. On October 7, 2013, the parties filed a stipulation relating to the preparation of the administrative record by LAFCo and Kingsburg.

The trial court denied the writ on May 7, 2015. Thereafter, LAFCo and Kingsburg filed a memorandum of costs in the amount of \$10,159.78.

Selma filed a motion to strike costs or, alternatively, to tax costs on June 30, 2015, claiming that LAFCo did not have authority to delegate preparation of the administrative record to Kingsburg because Selma did not consent to Kingsburg's involvement. Selma also asserted that the costs requested were excessive. The trial court rejected Selma's argument regarding improper delegation, finding that the October 7, 2013 stipulation constituted Selma's agreement to Kingsburg's involvement in preparing the administrative record.



The Court of Appeal concluded that the trial court did not abuse its discretion when it relied on evidence of the October 7, 2013 stipulation as proof that Selma agreed that LAFCo and Kingsburg would prepare the record.

The court then rejected Selma's argument that various amounts requested in the cost memorandum were unreasonable, noting that staff time spent reviewing documents to determine that they properly belong in the record is a recoverable cost.

However, the Court of Appeal determined that costs should be taxed in the amount of \$2,500, resulting in a total award of costs of \$7,659.78. The \$2,500 tax accounted for a second prior \$1,500 payment that Selma argued it had already made and an unreasonable \$1,000 (four hours at \$250/hour) for index preparation by counsel, when staff had already accounted for separate line items for index creation.

- Opinion by Justice Peña with Acting Presiding Justice Levy and Justice Gomes concurring.
- Trial Court: Superior Court of Fresno County, No. 13CECG02651, Judge Jeffrey Y. Hamilton, Jr.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
11 <i>Friends of the Eel River v. North Coast Railroad Authority</i>		Supreme Court	

[Friends of the Eel River v. North Coast Railroad Authority](#), Supreme Court of California, Case No. S222472 (July 27, 2017).

- Although CEQA is generally preempted by the Interstate Commerce Commission Termination Act (ICCTA), a state actor may nonetheless choose to act through CEQA because the application of CEQA to a state actor constitutes self-governance, not regulation.

In a published decision, the California Supreme Court reversed the Court of Appeal's finding that CEQA was preempted by ICCTA as applied to state actor North Coast Railroad Authority (NCRA). The Supreme Court determined that, while ICCTA preempts a state's imposition of environmental preclearance requirements (such as CEQA) on a privately owned railroad, application of CEQA in this case is not regulation within the meaning of ICCTA, but rather the expression of the state's choice of how to proceed as an independent actor within the deregulated market.

An intrastate railroad line, operated by NCRA, runs from Lombard, in Napa County, up to Arcata, in Humboldt County. The northern part of the line runs through the sensitive Eel River habitat. From 2001 to 2006, renovations were carried out on the southern part of the outdated and unused railroad. During the course of renovations, NCRA committed to CEQA compliance. Real Party in Interest Northwest Pacific Company (NWPCo) was selected as a private operator responsible for running freight service on the line in 2006. The agreement between NRCA and NWPCo was subject to NCRA's compliance with CEQA. As a result, a final environmental impact report (EIR) for a freight rail project on the recently renovated southern part of the line was certified by NCRA's Board of Directors (Board) in June of 2011.

Two groups, Friends of Eel River and Californians for Alternatives to Toxins (Petitioners), filed lawsuits alleging various CEQA violations. NCRA took the position that any challenges to the application of CEQA were irrelevant, due to preemption by ICCTA, and removed the matters to federal court. However, the federal district court determined that issues were not subject to removal based solely on the presence of a federal defense and remanded to state court.

In April 2013, the Board issued a resolution rescinding its June 2011 resolution. The Board indicated that the EIR did not contemplate a "project" within the meaning of CEQA, and that while the EIR was a helpful decision making tool, it was not required because ICCTA preempts CEQA. When the matters returned from federal to state court, NRCA demurred on the ground that the challenge under CEQA was preempted by CEQA and was time-barred. The trial court overruled because NCRA was estopped from taking that position due to positions NCRA had taken in the litigation. Following an unsuccessful motion to dismiss, the trial court entered an order ruling in NCRA's favor and denying Petitioners' petitions for writ of mandate.

The Court of Appeal affirmed the trial court's decision, finding that ICCTA was broadly preemptive of CEQA, and concluding that CEQA is preempted when the project to be approved involves railroad operations.



In reviewing the Court of Appeal's decision, the California Supreme Court agreed that the national system of railroads is of federal, not state, concern. As to privately owned railroads, the Supreme Court noted that state environmental permitting and preclearance regulation that would effectively prevent a private railroad company from operating pending CEQA compliance would be categorically preempted. Although ICCTA preempts rail transportation regulation, the Supreme Court determined that this conclusion does not resolve the application of CEQA to NCRA. Rather, the Supreme Court determined that CEQA does not actually constitute regulation when the state is the owner of the rail line and, by state law, prescribes the process by which its own subsidiary agency will make decisions concerning rail service along a rail line.

The opinion goes on to explain why the Court of Appeal's conclusion was overbroad and incorrect. CEQA embodies a state policy adopted by the Legislature to govern how the state and the state's subdivisions will exercise their responsibilities. A private owner has the freedom to adopt guidelines to make decisions in a deregulated field, and the Supreme Court found that the ICCTA preemption clause was not intended to deny that same freedom to the state. NCRA's and NWPCo's decisions regarding how to evaluate choices about services and how to decide what methods to employ for track rehabilitation were owner decisions in a deregulated sphere.

The Supreme Court concluded that although ICCTA preempts state regulation of rail transportation, in this case, application of CEQA to NCRA would not be inconsistent with ICCTA and its preemption clauses. ICCTA leaves a relevant zone of freedom of action for owners and the state, as owner, can elect to act through CEQA. The Court considers CEQA a matter of self-governance in the current instance — the control exercised by the state over its own subdivision. The Court of Appeal decision was therefore reversed, and the matter remanded for further proceedings consistent with the Supreme Court opinion.

- Opinion by Chief Justice Cantil-Sakauye, with Justices Werdegar, Chin, Liu, Cuellar, and Krueger concurring. Concurring Opinion by Justice Krueger. Dissenting Opinion by Justice Corrigan.
- Court of Appeal: First Appellate District, Division Five, A139222.
- Trial Court: Superior Court of Marin County, No. CV1103605, No. CV1103591, Faye D. Opal and Roy O. Chernus.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
12 <i>Friends of Outlet Creek v. Mendocino County Air Quality Management District</i>		1 st	

[*Friends of Outlet Creek v. Mendocino County Air Quality Management District*](#), California Court of Appeal, First Appellate District, Case No. A148508 (March 23, 2017).

- Air quality management districts can be sued under CEQA.

In a published decision, the Court of Appeal reversed the trial court's decision to sustain a demurrer filed by the Mendocino County Air Quality Management District (District) on the ground that Friends of Outlet Creek (Friends) could not sue the District directly under CEQA. The Court of Appeal reversed the trial court's decision because established precedent allows CEQA claims against air quality management districts.

Friends filed this and other lawsuits to prevent asphalt production at the site of an aggregate operation. The site's current owner (Site Owner) applied to the District for a permit for proposed asphalt production (Authority to Construct). After assessing the proposed asphalt production's impact on air quality, the District concluded that it did not need to conduct further environmental review and issued the Authority to Construct. Friends filed this action, alleging the District failed to comply with:

- CEQA by acting without a new environmental impact analysis
- The District's own regulations requiring the District to certify that it had reviewed and considered the applicable environmental review document when approving a project without conducting its own CEQA process

The District demurred, arguing that Friends could only sue the District under Health and Safety Code section 40864, which the District contended could not be used to maintain a CEQA challenge. The trial court sustained the District's demurrer and dismissed the action.

On appeal, the Court of Appeal found "considerable" precedent for suing an air quality management district under CEQA, including challenges to individual permit decisions, like the District's approval of the Authority to Construct. On the other hand, no case suggested that *only* Health and Safety Code section 40864 could be invoked in challenging an action against an air quality management district. Also, the District's decision expressly recognized that the District had an obligation to determine whether there had been adequate compliance with CEQA.



Regarding the scope of the CEQA challenge, the Court of Appeal held that Friends could not obtain relief beyond invalidating the Authority to Construct, such as obtaining a declaration or injunction against use of the site for aggregate and asphalt production. Friends would need to seek recourse against the county rather than the District for such relief.

The Court of Appeal also rejected the Site Owner's contention that the District's action fell outside CEQA as a ministerial act. The District did not treat the Authority to Construct as a ministerial act, and the record was undeveloped for the Court of Appeal to find otherwise.

Therefore, the Court of Appeal concluded that the trial court erred in sustaining the District's demurrer and reversed the trial court's dismissal of the action.

- Opinion by Justice Banke, with Presiding Justice Humes and Justice Dondero concurring.
- Trial Court: Mendocino County Superior Court, Case No. SCUJ-CVPT-15-66445, Judge Jeanine Nadel.

Certified Regulatory Programs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
13 <i>Pesticide Action Network North America v. California Department of Pesticide Regulation</i>		1 st	

[*Pesticide Action Network North America v. California Department of Pesticide Regulation*](#), California Court of Appeal, First Appellate District, Case No. A145632 (September 19, 2017).

- Under Public Resources Code section 21080.5, a certified regulatory program is not exempt from CEQA's substantive requirements, such as the analysis of alternatives, baseline conditions, and cumulative impacts.
- The promise of more analysis following a conclusory explanation of impacts does not satisfy CEQA's mandate that relevant information on a project's impact be made available and presented in a way that is useful to the public and decisionmakers.
- Recirculation of an environmental review document is warranted when an agency refrains from explaining the rationale for its decision until it responds to public comments.

In a published opinion, the Court of Appeal reversed the trial court's denial of Petitioner Pesticide Action Network North America's (PANNA's) writ petition. The court held that the California Department of Pesticide Regulation (Department) violated CEQA by approving label amendments for two previously registered pesticides without sufficient environmental review.

The Department is responsible for regulating the distribution, sale, and use of pesticides. In June 2005, the Department first registered the pesticide Dinotefuran 20SG, and that pesticide's registration has been renewed annually since. In March 2006, the Department first registered the pesticide Venom Insecticide, which has also been renewed annually. Labels for both pesticides have carried warnings of their toxicity to honey bees since their initial registration.

In 2006, the honey bee population in the United States experienced a sudden and widespread decline. The Department received data showing a potential hazard to honey bees from pesticides containing a particular active ingredient, and in February 2009, the Department initiated a reevaluation of pesticides containing that ingredient — including Dinotefuran 20SG and Venom Insecticide (collectively, Pesticides). This reevaluation is ongoing.

In 2014, the Department released public reports for its proposed decision to approve amended labels for each of the Pesticides. The amendment sought to expand the Pesticides' uses to additional types of crops. The public reports were released for review and comment, and PANNA's counsel submitted comments during the process that expressed concern that expanded use of the Pesticides would adversely impact honey bees. The Department evaluated the environmental concerns raised during the review process and determined that all identified potential impacts have been mitigated. The Department approved the label amendments for the Pesticides.

PANNA petitioned for writ of mandate, challenging the Department's compliance with CEQA in approving the label amendments. PANNA argued the Department:

- Abused its discretion when it found the label amendments had no significant environmental impact on honey bees
- Failed to analyze the direct, indirect, and cumulative impacts of the new labels on bees
- Failed to analyze alternatives to registering the new and expanded uses of the Pesticides

The trial court denied PANNA's petition, entering judgment in the Department's favor. PANNA appealed, raising the same CEQA challenges.

As an initial matter, the Court of Appeal explained that the court must first decide the extent to which CEQA applies to the Department's decision to approve the label amendments. The Department has a certified regulatory program under Public Resources Code section 21080.5 that exempts the Department from certain CEQA requirements. For instance, instead of preparing CEQA environmental review documents for its registration decisions, the Department prepares public reports.

The court held that, although the Department's public reports may be used in lieu of the documents normally prepared under CEQA, the Department is not exempt from the substantive portions of CEQA. The plain language of Public Resources Code section 21080.5 limits the scope of a certified regulatory program's exemption from CEQA to Chapter 3, Chapter 4, and section 21167. The court also found that the CEQA Guidelines and case law suggest a limited exemption, explaining that certified regulatory programs remain subject to other provisions in CEQA; certification of a regulatory program amounts to an exemption from several of CEQA's procedural requirements. The Department's certified regulatory program does not exempt it from CEQA's substantive requirements to evaluate thoroughly specific environmental effects before the Department approves an activity.

Having determined that the Department must still comply with CEQA's substantive requirements, the Court of Appeal analyzed whether the Department's public reports adequately analyzed alternatives, baseline conditions, and cumulative impacts, and whether recirculation of the public reports was required.

First, the Court of Appeal agreed with PANNA that the public reports failed to address any feasible alternative to registering the proposed new uses for the Pesticides. The court held that the Department made no effort to analyze alternatives to the expanded use of the Pesticides, and neither public report described a "no project" alternative. The Department claimed that, under its regulations, it need only consider alternatives when it has found significant environmental impacts. However, the court was perplexed how the Department could make such an argument when the Pesticides have been subject to reevaluation, which is required when a substance may have caused or is likely to cause a significant adverse impact. The language of the Department's regulations regarding reevaluation are not meaningfully different from that of CEQA's regulations. The court also rejected the Department's contention that PANNA was required to identify feasible alternatives; under CEQA, the public agency bears that burden.

The court also held that even if the Department's finding of no significant impacts was meaningfully derived, the finding did not excuse the Department from showing how it reached its conclusions. Both public reports referred to a checklist evaluation of the label amendments and their potential to create adverse environmental impacts, but the checklists were not in the record and the public reports revealed nothing regarding the Department's evaluation.

Second, the Court of Appeal concluded that the Department failed to assess baseline conditions with respect to actual use of certain pesticides in California. Although the court found no reported decision that imposed CEQA's baseline requirements on a certified regulatory program's environmental documents, the court concluded that the public reports must nonetheless assess baseline conditions. The court rejected the Department's claim that it assessed baseline conditions in its responses to comments and in the hundreds of pages of data in the record regarding actual use of pesticides. The court found that the entirety of the Department's baseline assessment was a single statement in its response to comments,

and the general statement said nothing about the contours of the baseline relied upon by the Department. Further, simply because the Department had “mountains of data” about actual use of pesticides does not mean the Department actually used that data to define a baseline or inform its conclusions. According to the court, nothing in record reflected that the Department actually did so.



Third, the Court of Appeal held that the Department failed to consider the cumulative impacts to honey bees associated with registering new uses for the Pesticides. The court determined that case law clarifies that a cumulative impacts analysis is an integral part of a certified regulatory program’s evaluation process. Here, the Department failed to explain its analysis of the cumulative impacts of registering new uses for the Pesticides in the context of the Department’s past, present, and future decisions regarding certain pesticide use in California. Neither the public reports nor the Department’s final decision contained any cumulative impacts analysis, and the single record reference to such an analysis was a cursory response to comments by the Department that the crops added to the Pesticides’ allowable uses “will not result in new significant direct, indirect and cumulative impacts to honeybees because the uses are already present on the labels of a number of [other] currently registered” pesticides containing the same active ingredients. The Department’s single-sentence response lacked facts and failed to provide any explanation about how the Department reached its conclusion.

Moreover, although the reevaluation process will ultimately determine whether the use of pesticides containing certain ingredients, including the Pesticides, will result in adverse impacts that require mitigation, the Department now cannot avoid conducting a cumulative impacts analysis as part of its public reports. The promise of more analysis following a conclusory explanation does not satisfy CEQA’s mandate that relevant information on a project’s impact be made available and presented in a way that is useful to the public and decisionmakers. The court considered the Department’s failure to consider meaningfully the cumulative impacts at this time to be a “serious misstep.”

Last, the Court of Appeal determined that recirculating the public reports was required because, in light of the Pesticides’ reevaluation, the Department’s initial public reports were both so inadequate and conclusory that public comments on the drafts were effectively meaningless. Analysis in the public reports did not exceed a few pages, and the Department provided no explanation to support its conclusion of no significant adverse environmental impacts. The Department also made no attempt to discuss its conclusion in the context of its decision to reevaluate the Pesticides. Given that the Department refrained from explaining its decision until it responded to public comments, recirculation was required to allow meaningful public comment directed at the Department’s rationale for the decision.

Accordingly, the Court of Appeal reversed the trial court’s decision and remanded with instructions to issue a writ of mandate directing the Department to rescind its approval of the Pesticide label amendments.

- Opinion by Justice Siggins, with Presiding Justice McGuinness and Justice Pollak concurring.
- Trial Court: Alameda County Superior Court No. RG14731906, Judge George C. Hernandez, Jr.

EIRs			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
14 <i>Cleveland National Forest Foundation v. San Diego Association of Governments</i>		Supreme Court	

[*Cleveland National Forest Foundation v. San Diego Association of Governments*](#), California Supreme Court, Case No. S223603 (July 13, 2017).

- An EIR for a regional transportation plan did not need to include an analysis of the plan's consistency with greenhouse gas emission reduction goals of a 2005 executive order. The 2005 executive order aimed to reduce greenhouse gas emissions in California to 80% below 1990 levels by 2050. The 2050 goal was not required to be listed as a separate threshold of significance.

In a 6-1 published decision, the California Supreme Court reversed an appellate court decision concluding that the San Diego Association of Governments (SANDAG) abused its discretion by declining to include in its regional transportation plan an analysis of future air quality impacts as required by CEQA. In particular, the Court concluded it was acceptable for SANDAG's environmental impact review (EIR) to not analyze projected 2050 greenhouse gas (GHG) emissions with the goals in Governor Schwarzenegger's 2005 executive order. The 2005 executive order had declared a goal of reducing GHG emissions to 80% below 1990 levels by the year 2050.

On this narrow issue, the Court concluded the EIR sufficiently informed the public, based on the information available at the time, about the regional plan's GHG impacts and its potential inconsistency with state climate change goals. However, the Court did not hold that the analysis of GHG impacts in the regional plan's EIR would necessarily be sufficient going forward because CEQA requires public agencies to ensure that such analysis is in step with evolving scientific knowledge and state regulatory schemes.

Following Governor Schwarzenegger's executive order and the adoption of Assembly Bill (AB) 32 and Senate Bill (SB) 375 — establishing requirements for California to reduce GHG emissions — SANDAG sought to update its regional transportation plan (RTP), including its sustainable communities strategy (SCS) (collectively, RTP/SCS or Plan). Under SB 375, the SCS must set forth a forecasted development pattern for the region which, when integrated with the transportation network, will reduce the GHG emissions from automobiles to achieve state GHG emission reduction targets.

In 2011, SANDAG issued its RTP/SCS pursuant to Government Code section 65080(b) as a blueprint for a regional transportation system to serve San Diego until 2050. SANDAG prepared a draft EIR to analyze the RTP/SCS' environmental effects, which proposed three different measures for determining whether the region's GHG emissions under the RTP/SCS would be significant, and applied each measure to the years 2020, 2035, and 2050.

- GHG-1: Compared the projected total regional GHG emissions to conditions existing in 2010. The draft EIR concluded that regional GHG emissions in 2020 would be lower than 2010 due to the transportation and land use changes set forth in the RTP/SCS. The draft EIR found that both 2035 and 2050 GHG emissions would increase over estimated 2010 emissions, resulting in a significant impact and requiring mitigation measures.
- GHG-2: Compared projected regional emissions with the reduction targets mandated by SB 375. The draft EIR concluded that the plan would meet the California Air Resources Board's (CARB's)

mandated targets of reducing per capita emissions through a variety of measures, including denser residential development and increased use of transportation. In applying GHG-2, the draft EIR made no determination of significant environmental effects with respect to the year 2050 because CARB has not yet established 2050 reduction targets.

- GHG-3: Compared projected regional emissions with applicable emission reduction plans, specifically CARB's Scoping Plan and SANDAG's own Climate Action Strategy. Consistent with the Climate Action Strategy, the draft EIR noted the Plan's focus on transit and compact development near transit centers. The draft EIR did not analyze the 2050 impacts to CARB's Scoping Plan because CARB had not established targets beyond 2020.

Several commentators argued that SANDAG must determine whether the project as a whole has significant climate change impacts, rather than just in 2020, 2035, and 2050. The Attorney General commented that SANDAG's strategies did not deliver sustainable, long-term GHG reductions because the infrastructure and land use decisions may preclude any realistic possibilities of meeting the executive order's 80% GHG emissions reduction goal. The Attorney General also faulted the draft EIR for rejecting any need to analyze the consistency between the Plan's long-term projections and the 2050 emission reduction objectives of the executive order, which the Attorney General argued is designed to meet CEQA's climate stabilization objective.

In the final EIR, SANDAG maintained it had no obligation to analyze projected emissions against the executive order's goal, because even if it had used the executive order's 2050 emissions reduction target as a threshold of significance, the GHG-1 impact conclusions for 2035 and 2050 would not have changed. After SANDAG certified the EIR, CREED-21, Affordable Housing Coalition of San Diego County, Cleveland National Forest Foundation, and Center for Biological Diversity filed petitions and were joined by Sierra Club and the Attorney General (collectively, Cleveland) challenging the EIR's adequacy under CEQA.

The Superior Court issued a writ of mandate in Cleveland's favor, finding that the EIR failed to fulfill its role as an informational document because it did not analyze the consistency between the Plan's emission impacts and the executive order's emission reduction goals. The court also found that the EIR did not adequately address mitigation measures for significant emission impacts. In light of these findings, the court declined to decide any of the other challenges raised in the petitions. The writ of mandate directed SANDAG to set aside its certification of the EIR and to prepare and certify a revised EIR curing the identified deficiencies.

SANDAG appealed, arguing that the EIR complied with CEQA. Cleveland cross-appealed, arguing that the EIR further violated CEQA by failing to analyze a reasonable range of project alternatives, by failing to adequately analyze and mitigate the Plan's air quality impacts, and by understating the transportation plan's impacts on agricultural lands. The Attorney General separately cross-appealed, contending that the EIR further violated CEQA by failing to adequately analyze and mitigate the transportation plan's impacts from particulate matter pollution. The Court of Appeal, largely agreeing with Cleveland, affirmed the trial court's judgment setting aside the EIR certification but modified the judgment to require that a subsequent EIR fix most of the defects identified in the cross-appeals.

The Supreme Court granted review on the following question: *Must the EIR include an analysis of the Plan's consistency with the GHG emission reduction goals reflected in Executive Order No. S-3-05 to comply with CEQA?*

The Attorney General and Cleveland argued that the EIR inadequately described the Plan's emission impacts, as transportation is responsible for nearly 50% of the GHG emissions in San Diego, and one of the chief objectives of an SCS is to reduce the amount of driving in the region (measured as vehicle miles traveled (VMT)). The Attorney General argued the projected increase in total and per capita VMT drives the upward trend in projected emissions after 2035, and as such, the EIR's analysis of emission impacts was misleading because it did not supply the full context.

In analyzing these arguments, first, the Court noted an EIR's designation of a particular adverse environmental effect as "significant" does not excuse the EIR's failure to reasonably describe the nature and magnitude of the adverse effect.

Second, the Court stated that the fact that a RTP/SCS plan's contribution to reducing GHGs is likely to be small on a statewide level is not necessarily a basis for concluding that the plan's impact will be insignificant in the context of a statewide goal.

Third, the Court agreed with Cleveland that SANDAG's response in the final EIR that the executive order "is not an adopted GHG reduction plan" and that "there is no legal requirement to use it as a threshold of significance" is not dispositive of the issue, and the scientific information reflected in the executive order has important value to policymakers and citizens in considering the emission impacts of a project like SANDAG's RTP/SCS.

Nonetheless, the Court concluded the EIR adequately presented information to allow a comparison between 2050 projected emissions and the executive order's 2050 emissions reduction target. The EIR clarified that the 2050 target is part of the regulatory setting in which the RTP/SCS will operate. Further, the EIR straightforwardly mentioned the 2050 target in the course of explaining why SANDAG chose not to use the target as a measure of significance. This was addressed both in the EIR and SANDAG's response to comments.

Moreover, the Court concluded that SANDAG did not abuse its discretion in declining to adopt the 2050 goal as a measure of significance because the executive order does not specify any plan or implementation measures to achieve the 2050 goal. Thus, it was not clear what additional information SANDAG should have conveyed to the public beyond the general point that the upward trajectory of emissions under the RTP/SCS may conflict with the 2050 emissions reduction goal. Further, SANDAG was not unreasonable to use its threefold approach in the EIR, which together adequately informed readers of potential GHG emission impacts.

The Court repeatedly emphasized the narrow scope of its holding, which was not to endorse the adequacy of SANDAG's EIR or whether the EIR had adequately responded to the significant GHG impacts of the RTP/SCS. Moreover, the Court cautioned that the conclusion that SANDAG did not abuse its discretion in its analysis of GHG emission impacts in the 2011 EIR did not mean that this analysis could serve as a template for future EIRs.



In conclusion, the California Supreme Court reversed the judgment of the Court of Appeal insofar as the Supreme Court determined that the 2011 EIR's analysis of the GHG emissions impacts rendered the EIR inadequate and required revision. The Supreme Court remanded to the Court of Appeal for proceedings consistent with the opinion.

Dissent

Justice Cuellar was the lone dissent. Cuellar agreed with the lower court and environmental groups who challenged the RTP/SCS, and took issue with the fact that the draft EIR shows that GHG emissions will increase by 2050, despite the executive order's statewide goal of a substantial reduction. Cuellar argued that the 2050 target is part of the regulatory setting in which the RTP/SCS will operate. Further, Cuellar argued the EIR straightforwardly mentions the 2050 target in the course of explaining why SANDAG chose not to use the target as a measure of significance. Cuellar stated that the EIR was not clear enough about the environmental harm of the RTP/SCS, because the RTP/SCS was associated with a major projected increase in GHG emissions, diverging from emission reduction targets reflecting scientific consensus.

- Opinion by Justice Liu with Chief Justice Cantil-Sakauye and Justices Werdegar, Chin, Corrigan, and Kruger concurring. Dissenting Opinion by Justice Cuellar.

- Trial Court: Superior Court of San Diego County, Nos. 37-2011-00101593-CU-TT-CTL, 37-2011-00101660-CU-TT-CTL, Judge Timothy B. Taylor.
- Court of Appeal: Fourth Appellate District, Division One, No. D063288.

EIRs			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
15 <i>Eureka Village Homeowners Association v. City of Rancho Cordova</i>		3 rd	

[*Eureka Village Homeowners Association v. City of Rancho Cordova*](#), California Court of Appeal, Third Appellate District, Case No. C082276 (October 24, 2017).

- CEQA does not require technical studies supporting an EIR to be irrefutable, but technical studies must be sufficiently credible to be considered as part of the evidence supporting an agency's decision.

In an unpublished opinion, the Court of Appeal affirmed the trial court's decision denying a petition for writ of mandate to set aside the approval of a public works project by the City of Rancho Cordova (City).

The City approved a freeway interchange and arterial road project (Project) and certified an environmental impact report (EIR) evaluating the Project. Eureka Village Homeowner's Association (Petitioner) subsequently filed a writ of mandate alleging that the City had violated CEQA because the EIR failed to consider a reasonable range of alternatives, and failed to analyze and disclose the impacts associated with air quality and noise. The trial court denied the petition for writ of mandate, and Petitioner appealed.

First, the Court of Appeal rejected Petitioner's argument that the EIR failed to consider a reasonable range of alternatives, in particular, the expansion of an existing interchange (Expansion). The draft EIR analyzed 15 alternatives, rejecting all but the "no project" alternative and the proposed Project for further consideration in the final EIR. The Court of Appeal determined that Petitioner had failed to support its argument that the alternatives in the EIR did not represent a reasonable range.

The Court of Appeal then determined that Petitioner was actually arguing that a particular potentially feasible alternative — the Expansion — was improperly excluded from analysis. The EIR had included a discussion of the Expansion, but determined that Expansion was infeasible because it would not meet the project objectives and would not avoid significant environmental impacts. Petitioner argued that the City should have conducted a study comparing the two alternatives with cost estimates and health benefits before rejecting the Expansion, but the Court of Appeal was unpersuaded, noting that there was no authority or legal argument that would suggest such a study was required.



Next, the Court of Appeal rejected Petitioner's argument that the EIR failed to adequately disclose, analyze, or mitigate the air quality impacts associated with the Project, on the grounds that the EIR failed to address potentially significant health impacts and did not analyze the localized impacts of increased emissions. Petitioner relied on a letter from counsel for a community association to argue that the EIR should have provided additional information about the localized impacts associated with the Project, beyond what was included in an expert report. Petitioner also claimed that the EIR improperly relied upon outdated air quality data. The Court of Appeal concluded that the EIR's analysis of the Project's operational emissions was sufficient, and that Petitioner had failed to show that additional analysis was required. Petitioner's arguments associated with the need for additional information related to localized impacts were based on an unsubstantiated, non-expert opinion, while the EIR relied upon an expert report. Finally, the Court of Appeal found Petitioner's arguments about the inadequacy of the air quality data used to support the EIR's conclusions were undeveloped, conclusory, and failed to meet the burden of challenging the sufficiency of the evidence.

Last, the Court of Appeal rejected Petitioner's challenge to the noise analysis contained in the EIR. The Court of Appeal noted that technical studies did not need to be irrefutable to comply with CEQA; rather, the studies had to be sufficiently credible to be considered as part of the evidence supporting an agency's decision. The City received comments related to noise impacts and responded to those comments in the EIR, explaining that the Project's noise analysis was consistent with the California Department of Transportation's noise protocol. In addition, the Court of Appeal recognized that Petitioner had failed to address the fact that Petitioner's concerns were addressed in responses to comments in the final EIR and had not provided sufficient authority to support a finding that the noise study was inadequate or flawed.

Thus, the Court of Appeal affirmed the trial court's denial of Petitioner's writ of mandate seeking to set aside the Project.

- Opinion by Acting Presiding Judge Butz, with Judge Murray and Judge Renner concurring.
- Trial Court: Sacramento County Superior Court, No. 34201580002069CUWMGDS, Judge Christopher Krueger.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
16 <i>Highway 68 Coalition v. County of Monterey</i>		6 th	

[Highway 68 Coalition v. County of Monterey](#), California Court of Appeal, Sixth Appellate District, Case No. H042891 (July 31, 2017).

- Whether a proposed project is consistent with a county's general plan does not implicate CEQA because CEQA does not require an analysis of general plan consistency, and therefore the mandate procedures provided for CEQA violations in Section 21168.9 do not apply.

In a published opinion, the Court of Appeal affirmed the trial court's denial of a writ of mandate petition by Petitioner Highway 68 Coalition (Petitioner) challenging the approval by Defendant-Respondent County of Monterey (County) of Defendant and Real Party in Interest Omni Resources LLC's (Omni's) proposal to build a shopping center on Highway 68 (Project). The Court of Appeal affirmed the trial court's judgment denying the writ, holding that Petitioner did not meet its burden of showing why, based on all the evidence in the record, the County Board of Supervisors' determination was unreasonable.

Omni sought the County's approval for construction of the Project. In May 2010, the County circulated a draft environmental impact report (DEIR), which listed four alternatives that were considered for the Project, and stated that one of these alternatives, the "Reduced Density/Redesigned Project Alternative," was the environmentally superior option. The DEIR analyzed various environmental impacts, including impacts on water supply and traffic. Several public hearings on the Project were held in 2011 and 2012. On February 7, 2012, the Board of Supervisors adopted Resolution No. 12-039, which certified the final environmental impact report (FEIR) and included findings regarding the Project's water supply impacts, stating that "potentially significant impacts on ground water have been mitigated to a less than significant level." On this same date, the Board of Supervisors adopted Resolution No. 12-240 on the Project, which included findings that the Project was consistent with the Monterey County General Plan and "has an adequate long-term water supply and manages development in the area so as to minimize adverse effects on the aquifers and preserve them as viable sources of water for human consumption."

In March 2012, Petitioner filed a petition for writ of mandate, alleging violations of CEQA. Specifically, Petitioner alleged that the County had violated CEQA because:

- The FEIR failed to analyze the water rights for the Project.
- The Project's "recharge scheme" to "capture stormwater runoff ... and put it in underground chambers" was uncertain without measuring the amount of groundwater recharge.
- The FEIR failed to investigate the traffic impacts on the segments of the highway that were already at the lowest levels of service.
- The FEIR failed to address the Project's impact on greenhouse gases.
- The environmental review was improperly piecemealed because the adjacent gas station was not included.
- The FEIR did not adequately address the impacts on sewage capacity. In addition, Petitioner asserted that the Project was inconsistent with the 2010 General Plan, which requires projects to have a long-term sustainable water supply.

The trial court denied the petition as to the claimed violations, but issued an order of interlocutory remand to allow the County to clarify an issue of whether the Project was consistent with the County's general

plan requirement that the Project have a long-term, sustainable water supply. In remanding the water issue, the trial court noted that Resolution 12-240 approved the Project based on language (*i.e.*, “the Project has an adequate long-term water supply”) that did not include the sustainability language required by the 2010 Monterey County General Plan Policies. On remand, the Board of Supervisors clarified that the Project “has a long-term sustainable water supply, both in quality and quantity to serve the development in accordance with the 2010 Monterey County General Plan Policies.” In March 2015, after the Board of Supervisors clarified its position, the trial court denied Petitioner’s petition.

On appeal, Petitioner argued that:

- The trial court erred in issuing an interlocutory remand to allow the County to make a finding of long-term sustainable water supply use for the Project because CEQA does not allow for such a remand if an agency has abused its discretion.
- The proceedings held before the Board of Supervisors on remand violated due process.
- The County violated CEQA because the FEIR was inadequate due to a) inadequate water supply and traffic analyses, and b) improper segmentation of the environmental review of the Project.
- The FEIR failed to analyze whether the Project was consistent with the County’s General Plan.

To the improper interlocutory remand issue, Petitioner argued that the only proper procedure when an agency has abused its discretion is an order made by way of a writ of mandate compelling compliance with CEQA, as set forth in Public Resources Code Section 21168.9. The Court of Appeal stated that the interlocutory remand involved a discrete, non-CEQA issue of general plan consistency. As such, the court held that the issue of whether a proposed project is consistent with a county’s general plan is not a CEQA issue, and, thus, the mandate procedures provided for CEQA violations in Section 21168.9 do not apply.

In deciding the due process issue, the court held that there was adequate due process because:

- There was adequate hearing notice to Petitioner.
- Omni’s pre-hearing meeting with one supervisor did not establish bias.
- Petitioner had sufficient time to review and analyze the documents.



The court also rejected Petitioner’s argument that the County violated CEQA on the ground that the FEIR was inadequate, holding that Petitioner could not affirmatively show that there is no substantial evidence in the record to support the County’s findings.

Finally, in line with its previous analysis of the improper interlocutory remand issue, the court held that general plan consistency is not an issue reviewed under CEQA because CEQA does not require an analysis of general plan consistency.

Based on the foregoing, the Court of Appeal affirmed the trial court’s denial of Petitioner’s writ of mandate petition.

- Opinion by Justice Bamattre-Manoukian, with Acting Presiding Justice Elia and Justice Mihara concurring.
- Trial Court: Monterey Superior Court, No. M116436, Judge Lydia M. Villarreal.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
17 <i>Living Rivers Council v. State Water Resources Control Board</i>		1 st	

[*Living Rivers Council v. State Water Resources Control Board*](#), California Court of Appeal, First Appellate District, Division Five, Case No. A148400 (September 28, 2017).

- Disclosing actual uncertainty regarding significant impacts does not render an environmental impact report (EIR) or substitute environmental document misleading or violate the informational requirements of CEQA.
- Challenges to the amount or type of information reported in an EIR or substitute environmental document are factual questions reviewed under the substantial evidence standard.
- The severity and likelihood of potentially significant impacts may be considered in determining whether a proposed mitigation measure is “feasible” under CEQA.

In a published opinion, the Court of Appeal affirmed the trial court’s decision denying Petitioner Living Rivers Council’s (Living Rivers’) writ petition. The court held that the California State Water Resources Board (State Board) did not violate CEQA by approving a policy designed to maintain instream flows in coastal streams north of San Francisco (Policy). Contrary to Living River’s assertions, the court found the State Board adequately disclosed and analyzed significant impacts of the Policy and relied upon legally valid reasoning to determine that a proposed mitigation measure was infeasible.

The State Board’s permitting authority is limited to surface water and subterranean streams flowing through known channels. The State Board does not have permitting authority over percolating groundwater, which is instead regulated by local agencies. Pursuant to the Water Code, the State Board was required to adopt guidelines for maintaining instream flows of Northern California coastal streams for purposes of water rights administration. As such, the State Board drafted the Policy and distributed a Substitute Environmental Document (SED) for public comment. According to the SED, the State Board’s assessment of the Policy’s environmental effects was conducted at a programmatic level, which is more general than a project-specific analysis.

The SED included results of a report, prepared by Stetson Engineers, Inc. (Stetson) at the State Board’s request, detailing potential indirect impacts of the Policy, including potential increases in groundwater pumping. Stetson also prepared a set of maps delineating subterranean streams in parts of the area covered by the Policy. These maps had the potential to improve the Policy’s effectiveness and mitigate possible impacts by identifying locations where the State Board would have permitting authority over groundwater pumping, but the maps were not included in the SED. The State Board passed a resolution approving the Policy in May 2010.

In October 2010, Living Rivers petitioned for a writ of mandate requiring the State Board to vacate the Policy based on alleged CEQA violations. The trial court rejected most of the claims, but found the SED deficient in two respects:

- It failed to disclose the subterranean stream delineations as a potential mitigation measure for the anticipated increase in groundwater pumping.

- It failed to disclose that there would likely be no CEQA review of the anticipated increase in groundwater pumping.

In response to the trial court's ruling, the State Board vacated the Policy and obtained additional CEQA documentation to comply with the writ. A Revised Substitute Environmental Document (RSED) evaluated the subterranean stream delineations as a mitigation measure (Measure) and provided additional information regarding groundwater pumping. The RSED concluded the Measure would not be feasible for a number of reasons, including:

- The likelihood of affected persons switching to groundwater pumping was uncertain.
- The potential shift from surface water diversions to groundwater pumping was unlikely to cause a significant reduction in surface flows.

In October 2013, the State Board certified the RSED, made new CEQA findings, adopted a statement of overriding considerations, and readopted the Policy without significant amendments. Living Rivers again petitioned for a writ of mandate in March 2014, alleging CEQA violations relating to the environmental effects of increased groundwater pumping as a result of the Policy. In relevant part, the trial court rejected Living Rivers' claims that the RSED gave conflicting signals regarding the impacts of groundwater pumping and claims relating to the State Board's decision not to adopt the Measure.

On appeal, Living Rivers argued that the case should be remanded with instructions to grant its writ petition because:

- The RSED's conclusion that increased groundwater pumping was uncertain or unlikely conflicted with the State Board's finding that groundwater pumping could have significant environmental impacts.
- The RSED did not adequately describe or discuss the Measure, in part because the maps prepared by Stetson were not included.
- The RSED's stated reasons for finding the Measure infeasible were erroneous as a matter of law.



Applying the substantial evidence standard of review, the court first found that the RSED was not misleading with respect to groundwater pumping. The court determined that the lack of clarity regarding the number of water users likely to resort to groundwater diversion as a result of the Policy arose from the uncertainty of the situation analyzed by the RSED; it was not a result of inconsistencies or omissions in the RSED itself.

With respect to Living Rivers' second assertion, the court determined that the RSED adequately described the Measure. The RSED described the ways in which groundwater pumping could affect the flow of surface waters, and explained that the State Board's permitting jurisdiction extended to subterranean streams. The RSED provided several reasons for the State Board's decision to forgo the Measure and to exclude the subterranean stream delineation maps from the Policy, including the facts that the maps covered only a small portion of the Policy area, and that the maps were outdated and unverified. The court found the information in the RSED sufficient to enable informed public comment.

Finally, the court found the State Board's conclusion that the Measure was infeasible was not erroneous. A "feasible" mitigation measure must be "capable of being accomplished in a successful manner," and the severity and likelihood of potential impacts are relevant considerations to a determination of whether a mitigation measure will be effective. On this basis, the court rejected Living Rivers' claim that the State Board had improperly rejected the Measure simply because the significant impacts to be mitigated were judged relatively minor and unlikely to occur. Rather, the court held that the State Board had properly considered the severity and likelihood of potential impacts, along with a number of other factors, to conclude that the Measure was not likely to be effective, and was therefore not feasible under CEQA. In

addition, the court explained that, even assuming the likelihood of potential impacts is not a circumstance affecting feasibility, the State Board's consideration of that factor did not occur in a vacuum; the RSED articulated the State Board's several reasons for declining to adopt the Measure.

- Opinion by Justice Needham, with Acting Presiding Justice Simons and Justice Bruiniers concurring.
- Trial Court: Alameda County Superior Court, No. RG14717629, Judge Evelio Grillo.

EIRs			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
18 <i>Los Angeles Conservancy v. City of West Hollywood</i>		2 nd	

[Los Angeles Conservancy v. City of West Hollywood](#), Second Appellate District, Division One, Case No. B270158 (November 30, 2017).

- Responses to general comments on an EIR can be general in nature and refer back to analysis contained in the EIR.

In a published opinion, the Court of Appeal affirmed the trial court’s order denying Petitioner Los Angeles Conservancy’s (Conservancy’s) petition for writ of mandate challenging the City of West Hollywood’s (City’s) approval of the Melrose Triangle development project (Project). The court rejected the Conservancy’s arguments that the City had failed to comply with CEQA in approving the Project.

The Project is a mixed-use development that consists of three buildings to be constructed on a triangular site adjacent to the City’s western boundary (Project Site). The Project Site includes an existing building at 9080 Santa Monica Boulevard (9080 Building) that was built in 1928 and remodeled in 1938. The 9080 Building may be eligible for listing on the California Register of Historic Resources, but is not currently designated. The Project proposed to demolish the 9080 Building to allow for the construction of the new mixed-use buildings and pedestrian paseo that would connect Santa Monica Boulevard and Melrose Avenue.

In 2012, the City updated its General Plan to provide development incentives for the Project Site. Specifically, the incentives aimed to encourage the development of an iconic project that incorporated open space and pedestrian connections. In 2014, the City prepared and circulated a draft environmental impact report (EIR) for the Project. The EIR analyzed various alternatives, including a reduced-size alternative that would preserve the 9080 Building (Alternative). While the EIR noted that the Alternative was environmentally superior because of its retention of the 9080 Building, the Alternative was rejected as infeasible because it failed to achieve the project objectives to the same degree as the Project.

In June 2014, the City Planning Commission recommended approval of the Project. Before the City Council heard the Project, the applicant asked its architect to consider moving the 9080 Building or incorporating it into the Project. The architects determined that moving the 9080 Building would impact its integrity as a historic resource and that retaining it would preclude the development of subterranean parking and require a complete redesign of one of the Project’s buildings, the Gateway Building. In August 2014, the City certified the EIR and approved the Project. The City adopted mitigation measures that required documentation of the 9080 Building and required the integration of the façade of the building into the entrance to Gateway Building. The City adopted a statement of overriding considerations that noted the Alternative was infeasible, because maintaining the 9080 Building would impact the design frontage along Santa Monica Boulevard and would result in the construction of a smaller project and disjointed structures.

The Conservancy then petitioned for writ of mandate, arguing that the City’s analysis of the Alternative was inadequate, that the EIR failed to respond to public comment, and that the City’s finding that the Alternative was infeasible is not supported by substantial evidence. The trial court denied the petition, and the Conservancy appealed.

On appeal, the Conservancy contended that the analysis of the Alternative was conclusory and insufficient because the EIR did not include a conceptual design of the Alternative. However, the Conservancy failed to cite any authority that requires the discussion of alternatives in an EIR to include design plans, and the court refused to hold that such plans were required. The Conservancy also contended that the EIR was conclusory in determining that retention of the 9080 Building would preclude construction of the Gateway Building. The court rejected this argument, pointing to the fact that the 9080 Building currently sits on the location where the Gateway Building is proposed, such that the EIR's conclusion was self-explanatory.

Related to the Alternative, the Conservancy argued that the City had provided ambiguous information regarding the reduction in floor area required to retain the 9080 Building. The Conservancy cited *Preservation Action Council v. City of San Jose*, in which the court determined that the EIR's discussion of an alternative was ambiguous, because the EIR failed to specify whether the square footage cited referred to the size of a store building or its sales floor. The court here distinguished that case, noting that while the figures related to the reduced floor area under the Alternative were imprecise, there was no confusion about what was being referred to, as the Project floor area was calculated in only one way.



The Conservancy also claimed that the City had failed to respond adequately to public comment on the Draft EIR. Specifically, the Conservancy cited two comments related to the retention of the 9080 Building and contended that the City had failed to provide the requisite responses to these comments and had instead referred back to analysis contained within the EIR. The court determined that the comments the Conservancy relied upon were simply objections to the Project as proposed or general support for the Alternative and did not raise a new issue or disclose an analytical gap in the EIR's analysis. The court held that, for those comments, the City's brief, general responses referring back to analysis contained in the EIR were sufficient.

Finally, the Conservancy argued that the City's determination that the Alternative was infeasible was not supported by sufficient evidence, as the 9080 Building could be integrated into the Project, while still allowing for a modern design. The court disagreed, noting that when reviewing such determinations, an agency's finding of infeasibility is entitled to great deference and presumed correct. Here, the City determined that the Alternative was inconsistent with various project objectives, including the development of a modern project, the retention of a consistent pattern of development along Santa Monica Boulevard, and the creation of pedestrian-oriented uses. The City based these findings on evidence in the record, including testimony from the Project's architect and a representative from the City Planning Department. Further, the fact that the 9080 Building could be integrated into the Project did not negate the City's finding that the Alternative was ultimately infeasible.

Accordingly, the Court of Appeal affirmed the trial court's judgment order denying the petition for writ of mandate.

- Opinion by Presiding Justice Rothschild, with Justices Johnson and Lui concurring.
- Trial Court: Los Angeles County Superior Court, No. BS151056, Judge Richard Fruin, Jr.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
19 <i>Marin Community Alliance v. County of Marin</i>		1 st	

[Marin Community Alliance v. County of Marin](#), First Appellate District, Case No. A146168 (March 9, 2017).

- Tiering off a countywide program appropriate where the land use element remained largely unchanged, due to the overlap between the land use and housing elements, and the statutory requirement that the housing element and land use element be consistent with one another.
- If a local agency has already prepared a program EIR, it need not prepare a subsequent one in connection with later activities unless those activities would have effects the program EIR did not examine.
- Subsequent EIR not required where only marginal deterioration of traffic conditions on a single segment of road at a particular time of day would occur, where traffic conditions on other considered segments remains relatively unchanged.

In an unpublished decision, the Court of Appeal affirmed in part and reversed in part the trial court's judgment granting Petitioner Marin Community Alliance's (Petitioner) petition for writ of mandate challenging the County of Marin's (County) decision to prepare a supplemental rather than subsequent environmental impact report (EIR) in updating the countywide plan's housing element.

In 2007, the County updated all elements of its countywide plan (2007 CWP), with the exception of the plan's housing element. The County certified an EIR for the update pursuant to CEQA. In 2012, the County updated the 2007 CWP's housing element (2012 Housing Element). Rather than prepare a new or subsequent EIR for the 2012 Housing Element, the County "tiered" its environmental review to the prior EIR, which analyzed the potential effects of potential growth and development as measured by the theoretical full buildout of residential and nonresidential construction, using a supplemental EIR (HE SEIR) relying on the analysis set forth in the 2007 CWP and its EIR.

The HE SEIR analyzed the significant impacts caused by any changed conditions or new information of substantial importance as defined by CEQA Guidelines section 15162. The HE SEIR identified three new or more severe significant impacts related to air quality, sea level rise, and noise, and identified seven new mitigation measures to reduce the impacts to a less than significant impact. For most of the impact areas, the HE SIER found significant unavoidable impacts would continue to occur, but would not be substantially more severe. The HE SIER found that 19 of the 23 significant traffic impact areas identified in the 2007 CWP EIR would remain significant and unavoidable transportation impacts.

Petitioner filed a petition for a writ of mandate challenging the County's decision to prepare a supplemental EIR, as opposed to a subsequent EIR. The trial court rejected most of Petitioner's contentions, but found a narrow violation of CEQA related to the County's traffic analysis. Both parties appealed the adverse portion of the judgment. The Court of Appeal affirmed the trial court's decision, bar its finding of a CEQA violation, which it reversed.

As a threshold matter, the Court of Appeal determined that Petitioner properly exhausted administrative remedies with respect to its claims concerning tiering and the review of traffic impacts. Petitioner also argued the County failed to conduct an adequate CEQA analysis of the impacts of the 49 future developments identified in the 2012 Housing Element.

Petitioner claimed the County's decision not to prepare a subsequent EIR for the 2012 Housing Element, and instead tier its environmental review of the project to the 2007 CWP EIR, is unsupported by the evidence. Petitioner argued the 2012 Housing Element was not within the scope of the EIR approved for the 2007 CWP because the planning decisions in the 2012 Housing Element were not discussed in the 2007 CWP EIR. Additionally they do not correspond to the buildout model considered in the 2007 CWP, because only six of the sites overlapped with inventory sites in the 2012 Housing Element. Further, Petitioner argued the inventory set forth in the 2012 Housing Element would allow for development contrary to the criteria the 2007 CWP EIR adopted to avoid significant impacts.

The Court rejected these arguments, citing the *Latinos Unidos de Napa v. City of Napa*, 221 Cal.App.4th 192 (2013). In *Latinos Unidos*, the city concluded the revisions to the housing element of the city's general plan were within the scope of the EIR prepared for the general plan, and required no further environmental review as a result. The *Latinos Unidos* court also found the environmental impacts associated with the housing element were already addressed in the land use element of the general plan. The Court of Appeal concluded that this action was analogous to *Latinos Unidos*, because the County tiered its review of a housing element update to an earlier EIR certified in connection with its 2007 CWP. The 2007 CWP EIR also analyzed the impact of the approval of new housing units, along with a full analysis of the impacts of the County's land use and zoning policies, and mitigation measures intended to address those impacts. The 2012 Housing Element contained an inventory of sites that could be developed to meet the County's regional house needs allocation. Like in *Latinos Unidos*, the Court noted that the new housing element did not change the total number of housing units that could be developed. Further, the 2012 Housing Element's inventory did not exceed the maximum allowable housing numbers planned for in the 2007 CWP and analyzed in the 2007 CWP EIR.

The 2012 Housing Element established a new district for affordable housing, which amounted to a change in the CWP's land use policy. However, as in *Latinos Unidos*, the Court concluded this fell within the scope of the environmental review. Because the district only encompassed 14.5 acres, the Court could not conclude the County abused its discretion in preparing a supplemental EIR rather than new environmental review.

Petitioner argued *Latinos Unidos* was distinguishable because it did not consider the impacts of a project like the one at issue, which they characterized as an inventory of 49 sprawling new developments. However, nothing in the 2012 Housing Element changed the zoning designations set forth in the 2007 CWP's land use element, nor did the 2012 Housing Element authorize 49 new developments. It simply offered an inventory of available sites that have the potential to be developed, which did not affect the overall development figures set forth and analyzed in the 2007 CWP EIR. Given the overlap between the land use and housing elements, the statutory requirement that the housing elements set forth consistent policies, and the lack of substantial change to land use element, the County had sound reasons for tiering the HE SEIR to the prior EIR.

Petitioner also argued tiering was inappropriate because the 2012 Housing Element implements policies to identify specific locations for denser housing. Given the specifics of that direction, Petitioner argued the implementation measures required their own CEQA review. The Court rejected this argument, noting that the 2012 Housing Element did not allow any more development than the maximum allowable housing numbers planned for in the 2007 CWP and analyzed in the 2007 CWP EIR. Further, the 2012 Housing Element did not change any existing uses of any of the sites listed in the housing inventory, though it did allow for increased densities in limited cases. Petitioner also claimed the 2012 Housing Element was inconsistent with policies in the 2007 CWP. The Court was not persuaded, because Petitioner pointed to nothing in the record showing the inventory sites in the 2012 Housing Element were governed by the 2007 CWP.

Petitioner contended the HE SIER improperly compared the possible environmental impacts from the 2012 Housing Element potential construction to the theoretical buildout allowable under the 2007 CWP, rather than analyzing the environment as it existed at the time the HE SEIR was prepared. The Court rejected this argument, noting that an EIR must not always compare a project's impacts to the existing physical environment, as such an approach would run afoul of the tiering scheme authorized by CEQA. If

a local agency has already prepared a program EIR, it need not prepare a subsequent one in connection with later activities unless those activities would have effects the program EIR did not examine.

Further, Petitioner argued comparing the project's impacts to those examined in the 2007 CWP EIR was inappropriate because the buildout numbers used by the 2007 CWP EIR were inflated and thus not predictive of future conditions. Because the HE SEIR failed to make an apples-to-apples comparison, Petitioner argued the HE SEIR underestimated the impacts of the 2012 Housing Element. Petitioner pointed to the HE SEIR's traffic analysis as an example of how the 2007 CWP EIR's "inflated" buildout numbers masked the scope of the 2012 Housing Element's impacts. The County did not respond to this argument, but the Court was unconvinced. Aside from the traffic impacts, Petitioner failed to point to any particular area where the numbers were used as part of the environmental review of the 2012 Housing Element. The analysis compared estimated traffic conditions at various roadway segments in the year 2035 with the project, and without the project.

The Court concluded the HE EIR's baseline projection used up-to-date population projections, based on the same assumptions concerning buildout, and thus was an accurate reflection of the project's impacts as compared to existing conditions. Moreover, the adopted alternative reduced the number of housing units in several community areas to prevent further deterioration of traffic conditions. Thus, the Court found substantial evidence supported the manner in which the County assessed the 2012 Housing Element's impacts.

Petitioner argued the HE SEIR must also be set aside because it did not include an independent analysis of alternatives, but instead relied on the alternatives analysis in the 2007 CWP EIR. The County argued a new alternatives analysis was unnecessary because, pursuant to CEQA Guidelines section 15163, a supplement to an EIR need only contain the information necessary to make the previous EIR adequate for the project as revised. The Court rejected Petitioner's argument, because the 2007 CWP EIR considered a range of total housing units that could be built and the 2012 Housing Element does not authorize any additional development. Accordingly, it was appropriate for the HE EIR to rely on the 2007 CWP EIR's alternatives analysis. Moreover, the inventory only provides a menu of options for potential development, and by analyzing more units than necessary to meet the regional obligation, the HE SEIR necessarily considered feasible alternatives. Further, the County's consideration of alternatives was also evidenced by the fact it evaluated additional sites that were listed as potential candidates for future inventory inclusion.

Next, Petitioner argued the County failed to properly assess the cumulative impacts of the 2012 Housing Element. The trial court rejected the majority of Petitioner's arguments on the issue, but agreed the HE EIR failed to properly evaluate traffic impacts on one road, and therefore granted the petition for writ of mandate.

As an initial matter, Petitioner objected to the HE SEIR's use of a checklist to analyze whether there was a change in the significance or severity of the impacts since it was analyzed and addressed in the prior environmental review. Petitioner argued this violated the requirement that the project impacts be assessed in relation to the existing physical environment. The Court disagreed, noting that the relevant standard under CEQA Guidelines section 15162 was whether substantial changes were proposed that would require major revisions to the environmental review due to new significant environmental effects.



The HE SEIR traffic analysis assessed the impacts of the 2012 Housing Element on 19 road segments, and provided estimates of the traffic volume, volume-to-capacity ratio, and the overall level of service with the project in the year 2035 and under baseline conditions in 2035. The analysis also included the results of the 2007 CWP EIR traffic analysis, and concluded that significant cumulative impacts with the 2012 Housing Element would occur at various segments. However, the HE SEIR concluded that the segments showed similar or improved conditions compared to the 2007 analysis, and concluded that the 2012 Housing Element would have no new significant impacts or result in an increase in the severity of previously identified significant impacts.

Petitioner argued this analysis demonstrates that the 2012 Housing Element would have a significant impact because it showed the project will add to the existing significant effect. The trial court rejected Petitioner's contention that project impacts should be measured against baseline figures, as opposed to the 2007 CWP EIR projections, but ultimately adopted the significance criteria set forth in the 2007 CWP EIR and concluded that the 2012 Housing Element would have a significant impact on evening traffic on Lucas Valley Road because the level of service decreased. The Court rejected this determination, because the 2007 CWP EIR already determined the adoption of the 2007 CWP EIR would result in an unacceptable level of service on Lucas Valley Road. That the 2012 Housing Element would make this impact marginally worse did not necessitate a major revision to the 2007 CWP EIR, or require the preparation of a subsequent EIR. Further, the Court concluded that the County did not abuse its discretion in finding no significant impact when the 2012 Housing Element caused only a marginal deterioration of traffic conditions on a single segment, especially where the traffic conditions on the other segments remained relatively unchanged.

In light of the foregoing, the Court reversed in part and affirmed in part, and remanded the matter to the trial court with instructions that the petition for writ of mandate be denied.

- Opinion by Justice Margulies, with Presiding Justice Humes and Justice Dondero concurring.
- Trial Court: Marin County Super. Ct. No. CIV 1304393, Judge Roy Chernus.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
20 <i>Old Orchard Conservancy v. City of Santa Ana</i>		4 th	

[*Old Orchard Conservancy v. City of Santa Ana*](#), California Court of Appeal, Fourth Appellate District, Division Three, Case No. G053003 (May 10, 2017).

- City complied with CEQA when it conducted a second approval process to remedy an earlier process during which the City approved an EIR without appropriate CEQA findings.

In an unpublished opinion, the Court of Appeal affirmed the trial court's denial of a petition for a writ of mandate. The Court of Appeal determined that the City of Santa Ana (City) fulfilled its obligations under CEQA when it held a second approval process to remedy an earlier process, during which the City approved an environmental impact report (EIR) without appropriate CEQA findings.

This case arose from the City's decision to approve the development of a five-acre parcel of land (Property), which included the remains of an orange grove and a farmhouse. In March 2014, the City adopted a resolution (March Resolution) certifying a final EIR, and Old Orchard Conservancy (Old Orchard) filed a petition for a writ of mandate. Several months later, it was discovered that the March Resolution did not include findings as required by CEQA. The City Council voted again in September 2014 to approve the Project and adopted another resolution (September Resolution) certifying a final EIR. This time, the City Council's resolution was accompanied by more than 40 pages of CEQA findings.

Old Orchard argued that the City violated CEQA because:

- The March Resolution was adopted without CEQA findings, the City could not make retroactive findings in adopting the September Resolution, and the September Resolution was invalid because the City did not rescind the March Resolution.
- The City's CEQA findings did not comply with CEQA, had inconsistent conclusions, and were not supported by substantial evidence.

The Court of Appeal held that the City complied with CEQA when it undertook the second approval process. This is because — although the March Resolution did not comply with CEQA — the City corrected the defect when it reconsidered its approval of the Project, held another hearing, and made CEQA findings when adopting the September Resolution. The final EIR and the City's CEQA findings disclosed the City's analytic route, and showed the City made its decision with a full understanding of the Project's environmental consequences.

The court further held that the City's CEQA findings complied with CEQA, did not have inconsistent conclusions, were supported by substantial evidence, and supported the determination that the environmental impacts associated with the Project did not require mitigation. The City relied on a technical memorandum prepared by a senior architectural historian in determining that the Project would sufficiently protect historic resources, and the court noted that the historian's analysis consistently evaluated the proposed alternatives.



The court also held that the trial court did not err in considering post-EIR evidence of the condition of the orange grove for baseline purposes — deteriorating and non-fruit producing condition — because it gave a more complete and accurate picture of the baseline physical conditions of the Property. Finally, the

court held that the Property was not agricultural land under CEQA — thus requiring mitigation — because the state’s Farmland Mapping and Monitoring Program determined the entirety of the City is “urban and built up” and has no “Prime Farmland, Unique Farmland, or Farmland of Statewide Importance.”

Accordingly, the Court of Appeal affirmed the trial court’s decision denying the petition and held that the City complied with CEQA when it certified the final EIR in the September Resolution.

- Opinion by Justice Fybel, with Acting Presiding Justice Aronson, and Justice Ikola concurring.
- Trial Court: Superior Court of Orange County, No. 30-2014-00714225, Judge Robert J. Moss.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
21 <i>Pacific Shores Property Owners Association v. Superior Court of Del Norte County</i>		1 st	

[*Pacific Shores Property Owners Association v. Superior Court of Del Norte County*](#), Case No. A146576 (May 18, 2017).

- CEQA does not require a formal assessment of whether environmental review is required at every stage of implementation of a project.
- When an appellate court reviews a trial court's decision related to the scope of the administrative record, the court presumes that the trial court's decision is correct.

In an unpublished decision, the Court of Appeal affirmed the trial court's judgment denying Pacific Shores Property Owners Association's (Property Owners') petition for writ of mandate to prevent the Border Coast Regional Airport Authority (Airport Authority) from moving forward with an airport improvements project (Project). Property Owners were specifically concerned with the Project's mitigation plan, which utilized off-site wetlands located within the Pacific Shores subdivision. Property Owners contended that Airport Authority violated CEQA in approving the Project, requesting that the Court of Appeal vacate the Project's approval.

In 2009, Airport Authority prepared a planning memorandum that discussed necessary improvements to the facility to comply with the Federal Aviation Administration's runway safety design standards. Because the improvements would require filling wetlands on the airport site, the memorandum detailed mitigation options, including off-site wetland rehabilitation within the Pacific Shores subdivision. In February 2011, Airport Authority circulated a draft environmental impact report (EIR) for the Project that included a detailed discussion of impacts to wetlands and proposed mitigation measures and potential mitigation sites. In December 2011, Airport Authority certified the final EIR and approved the Project.

In March 2014, Property Owners filed a petition for writ of mandate, alleging that Airport Authority failed to comply with CEQA. Subsequently, the petition was amended twice to clarify allegations and include new claims. In December 2014, Property Owners filed a motion to stay the proceedings, alleging that the administrative record (AR) was incomplete because Airport Authority failed to include documents from after the EIR was certified in 2011. The court ordered Airport Authority to augment the AR, noting that some of Property Owners' claims sought relief based on post-2011 events.

The trial court entered a tentative ruling on two issues, declining to enter a final judgment because Airport Authority had not yet augmented the AR. First, the trial court tentatively ruled that it could not determine whether Property Owners' CEQA claims were time barred. Although Property Owners had not carried the burden of demonstrating they had exhausted their administrative remedies, that burden would be relieved if Airport Authority failed to provide adequate public notice. Thus, the trial court addressed the merits of Property Owners' CEQA claims, tentatively ruling that Property Owners failed to establish that any Airport Authority decision related to the Project was arbitrary, capricious, or entirely lacking in evidentiary support. Following the addition of documents to the AR, the trial court entered its tentative ruling as final. Property Owners appealed, arguing the Airport Authority violated CEQA by:

- Certifying the EIR

- Failing to prepare a supplemental or amended EIR that specifically addressed the adverse impacts of using Pacific Shores as a mitigation site for the Project
- Refusing to lodge a complete AR

First, the court determined Property Owners' CEQA claims were barred, because Property Owners failed to exhaust their administrative remedies and the statute of limitations had run. Regarding exhaustion, the court noted that there was no evidence that Property Owners had commented on the project prior to the certification of the EIR. In addition, the court noted that Property Owners' allegations that they were not adequately notified of the Project were unfounded, as the AR included documentation of Airport Authority's notice, which was published in a newspaper of general circulation. Regarding the statute of limitations, the court noted that Property Owners petition, filed in March 2014, was filed well outside of CEQA's 30-day limitations period, triggered by the publication of the Notice of Determination.

Property Owners argued that they were not barred from challenging the EIR because the notice provided was defective and thus did not trigger the 30-day limitation, due to a defective project description. Property Owners claimed that the project description failed to describe off-site mitigation, but the court determined that there was no legal authority requiring a project description to specify the location of off-site mitigation. Property Owners also contended that the project description was defective because acquisition of property in Pacific Shores for mitigation purposes was the underlying goal of the Project. The court rejected this argument because there was no evidentiary foundation for the characterization of the Project as a Pacific Shores acquisition project.



Next, Property Owners contended that circumstances following EIR certification changed enough to justify requiring additional environmental review. Specifically, Property Owners claimed that Airport Authority did not fully develop the mitigation program until March 2014 and, thus, could not rely on the EIR. Property Owners noted that Airport Authority had prepared a supplemental EIR when exploring an additional location for off-site mitigation, but failed to explain why that warranted additional review of the impacts of using Pacific Shores as a mitigation site for the Project. In addition, Property Owners argued that Airport Authority violated CEQA because it had not made a formal determination of whether a supplemental EIR was required to analyze the impacts of the Pacific Shores mitigation. The court disagreed because "accepting this argument would mean that every decision an agency makes during the implementation stages of a CEQA project requires a formal assessment of whether to conduct another environmental review." Property Owners failed to carry their burden related to their CEQA claims.

Last, Property Owners argued that Airport Authority violated CEQA by refusing to produce an AR that included documents post-dating the certification of the EIR, which, in turn, required the court to vacate the entire Project approval. The court noted that when reviewing trial court determinations regarding the scope of the AR, the appellate court should presume the trial court's order is correct. Because Property Owners had not clearly detailed what was missing from the AR, the court determined that Property Owners had not overcome the presumption favoring the trial court's ruling that Property Owners' contentions about an allegedly incomplete record were vague and conclusory. The court also rejected Property Owners' contention that a defect in the AR would require complete vacation of Project approval, noting that Property Owners failed to cite any supporting authority.

Therefore, the Court of Appeal affirmed the trial court's judgment in favor of Airport Authority.

- Opinion by Presiding Justice Ruvolo, with Justice Rivera and Justice Streeter concurring.
- Trial Court: Del Norte County Superior Court, No. CVPT14-1092.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
22 <i>Placerville Historic Preservation League v. Judicial Council of California</i>		1 st	

[Placerville Historic Preservation League v. Judicial Council of California](#), California Court of Appeal, First Appellate District, Case No. A149501 (September 15, 2017).

- “Urban decay” was not a reasonably foreseeable consequence of withdrawing judicial functions from a downtown district, such that the EIR for such a project did not need to address neighborhood deterioration as a significant environmental effect.

In an unpublished opinion, the Court of Appeal affirmed the trial court’s denial of a petition for writ of mandate to vacate the certification of an environmental impact report (EIR) related to the relocation of courthouse operations away from a downtown district.

The proposed project (Project) involved relocating the County of El Dorado’s (County’s) courthouse facilities from the historic Main Street Courthouse and a nearby administrative building — both located in downtown City of Placerville (City) — to a new facility to be constructed two miles away. The state agency charged with overseeing court facilities, the Judicial Council of California (Judicial Council), prepared an EIR for the Project in October 2014. The EIR addressed the potential for the Project to have an impact related to neighborhood deterioration associated with moving judicial activities from downtown Placerville. The EIR further noted that the Project would have a significant impact related to neighborhood deterioration under CEQA if it was reasonably foreseeable that the Project would cause “urban decay.” However, the EIR determined that the Project would not result in reasonably foreseeable urban decay based in part on the fact that the Judicial Council was coordinating with the County and City to identify a new use for the Main Street Courthouse. Additionally, the EIR noted that the downtown area had numerous retail, commercial, and office uses that were not fully dependent on courthouse operations as the sole source of their patronage.

The Placerville Historic Preservation League (League), a group of County citizens, filed a petition for writ of mandate challenging the adequacy of the EIR, and claiming that it failed to identify the potential for urban decay resulting from the relocation of courthouse operations from downtown Placerville as a significant impact. The League argued that the Judicial Council had ignored evidence that the closure of the Main Street Courthouse would result in severe economic impacts that could result in urban decay. In addition, the League contended that the EIR should include a mitigation measure requiring the Main Street Courthouse to be repurposed. The trial court rejected these arguments and denied the petition.

In reviewing the trial court decision, the Court of Appeal noted that while “CEQA ordinarily does not require an EIR to address the economic and social impacts of a proposed project,” when these impacts have the potential to result in a physical change to the environment they must be accounted for in the EIR. The court also noted that if a project results in business closures and physical deterioration of a neighborhood, those impacts must be analyzed in the EIR.

The court clarified that since the conclusion that the Project would not result in urban decay was a factual question, the substantial evidence standard of review was appropriate. After reviewing the evidence, the court determined that there was not sufficient evidence to suggest that the economic contribution of the activities associated with the Main Street Courthouse was critical to the economic health of the downtown area. The court noted that while there could be some dislocation resulting from the closure of the Main



Street Courthouse, it would likely be temporary as the County and City were working to repurpose the building. The court reasoned that since there was no significant impact to mitigate, there was no legal basis for requiring a mitigation measure that guaranteed reuse of the Main Street Courthouse. In sum, the court concluded that there was sufficient evidence in the record to support the Judicial Council's conclusion that urban decay was not reasonably foreseeable.

The court rejected the League's reliance on *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, noting that the case was factually distinguishable. In *Bakersfield*, the EIR did not discuss why it had determined that urban decay was not a significant impact of its project. The question presented to the *Bakersfield* court was not whether there was substantial evidence to support the conclusion that the impact was less than significant, but rather whether the lead agency erred in failing to analyze the potential risk. While the court determined that the lead agency in *Bakersfield* had erred in failing to review the potential risk associated with urban decay, that was not the inquiry in the present case.

The Court of Appeal determined that the Judicial Council had analyzed the risk and had substantial evidence supporting its conclusion that the Project would not result in a significant impact. Accordingly, the court affirmed the trial court's decision denying the League's petition for writ of mandate.

- Opinion by Justice Miller with Acting Presiding Justice Richman and Justice Stewart concurring.
- Trial court: Superior Court of San Francisco County, No. CPF-15-514387.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
23 <i>Residents Against Specific Plan 380 v. County of Riverside</i>		4 th	

[Residents Against Specific Plan 380 v. County of Riverside](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E063292 (February 14, 2017).

- Tentative approval of an EIR does not constitute its approval under CEQA.
- Substantial compliance governs whether a Notice of Determination is sufficient.
- Recirculation of an EIR is not required if changes to the initial project do not raise significant environmental impacts.

In an unpublished decision, the Court of Appeal affirmed the trial court's judgment denying a petition for writ of mandate by Petitioner Residents Against Specific Plan 380 (Petitioner). The writ of mandate challenged the decision of the County of Riverside (County) to approve development of a master-planned community put forward as Specific Plan 380 (Project) by real party in interest, Hanna Marital Trust.

In 2008, the Hanna Marital Trust started the approval process for the Project, which proposes a mixed-use master-planned community with residential, commercial, and open space components on approximately 200 acres of undeveloped land in the French Valley. In July 2011, the Riverside County Planning Department (Planning Department) released a draft environmental impact report (EIR) for the project and set a public review period.

The Planning Department received comment letters from the South Coast Air Quality Management District (SCAQMD) and the City of Temecula. Both of these entities expressed concern about the Project's air quality impacts and requested additional mitigation measures to further improve air quality. The final EIR, issued in January 2012, incorporated these comments but did not revise the mitigation measures. In April 2012, the Riverside County Planning Commission suggested additional changes. Petitioner submitted a comment letter that reiterated the issues raised by SCAQMD and City of Temecula, and introduced others. Additional changes to the EIR were recommended in December 2012, and a consultant prepared two reports finding that the changes did not necessitate recirculation of the EIR. Based on this report, the Riverside County Board of Supervisors (Board) voted to accept the Planning Department's recommendation to tentatively certify the EIR and approve the Project.

In May 2013, the final version of the Project was submitted to the County and on November 5, 2013, the EIR and Project were submitted to and approved by the Board. The same day, the Planning Department filed a Notice of Determination (Notice) with the County Clerk. This Notice used an out-of-date description of the Project. On November 18, 2013, Petitioner filed a petition for the writ of mandate at issue in this case. The writ alleged that the County failed to comply with substantive and procedural requirements under CEQA by:

- Substantially modifying the Project after approving it
- Approving the Project without concurrently adopting findings
- Issuing an erroneous Notice after approving the Project

- Failing to recirculate the EIR after modifying the Project
- Certifying the EIR despite inadequately analyzing the impacts of the changes
- Failing to adopt all feasible mitigation alternatives proposed in comments on the draft EIR

Using the deferential “abuse of discretion” standard, the court ran through each of the shortcomings alleged in the initial writ. To the first suggested shortcoming (that the Project was substantially modified after being approved), the court explained that the EIR was not approved on December 18, 2012 (as Petitioner suggested), but was approved on November 5, 2013. The court reasoned that the Board’s initial approval was only “*tentative approval*,” because the minutes of the initial 2012 hearing state that the “matter is tentatively approved as recommended, and staff is directed to prepare the necessary documents for final action.” In addition, the court stated that the final Project, which incorporated the changes discussed at the 2012 hearing, was approved by the Board in 2013 through the adoption of various resolutions and ordinances. This action, along with the simultaneous filing of the Notice, “constituted project approval.” The court rejected Petitioner’s arguments on the second issue using this reasoning as well. The agency did not approve the Project without concurrently adopting findings because the final approval did not occur until November 5, 2013.

On the third point (the argument that the Notice was inadequate), the court explained that the substantial compliance standard governed the notices, analyzed this specific Notice’s errors, and concluded that these minor errors did not justify the unwinding of the County’s approval of the Project. This Notice was deficient in that its description of the Project included eight planning areas instead of seven, and 200,000 square feet of commercial office development instead of 250,000, among other issues. The court affirmed that the Notice did in fact substantially comply with the informational requirements of CEQA by:

- Identifying the Project correctly
- Notifying the public of the Project and its location
- Stating the agency’s conclusion that the Project will have a significant impact on the environment
- Mentioning that mitigation measures were made a condition of approval
- Providing a contact person and an address where the public was able to examine the final EIR

In addition, though the description of the Project did contain errors, much of the description was correct, rendering the description “close enough to the project as approved.” Finally, the court noted that the Notice errors were not prejudicial to Petitioner, given that the remedy for a deficient notice is to “hold the 30-day statute of limitations” on CEQA challenges, and Petitioner submitted the original challenge 13 days after the Notice was filed.

In response to the challenge that the County failed to revise and recirculate the final EIR after making changes to the Project, the court held that since “the footprint of the project remains the same,” recirculation is not mandated. The court reasoned that the changes to the Project consisted of the “allocation and arrangement of uses within the project site, not the kind of uses permitted or the overall extent or density of the proposed development.” Specifically, the court noted that the primary changes between the initial and final Project were that:

- The final Project moved commercial office development to a difference area of the project site.
- One planning area, classified as medium-density residential in the initial Project, was combined with another planning area to become a mixed-use planning area in the final Project.

Since the consulting firm addressed these specific changes in evaluating whether the EIR had to be recirculated — concluding that the initial and final Project permitted exactly the same number of residential units and exactly the same amount of commercial development — the court decided that the County’s determination “was supported by enough relevant and reasonable inferences ... that a fair argument can be made to support its conclusion.” Finally, the court contrasted the changes between the initial and final Project in this case to those in both *Save Our Peninsula Committee v. Monterey County Board of Supervisors*¹ and *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cardova*.² In this case, unlike in *Save Our Peninsula*, in which the County was ordered to prepare a revised EIR to specifically analyze the feasibility of a water pumping offset, the late changes to the Project here did not involve an issue that was identified in the EIR and comments as requiring specific factual development. Additionally, unlike in *Vineyard*, the changes requested by the Board in this case addressed comments about insulating existing rural areas from denser development, which did not address or raise significant environmental impacts.

Next, the court addressed Petitioner’s allegation that the impacts of the changes were not adequately analyzed. The court looked at a specific example enumerated by Petitioner: the EIR assumed that the Project would include a Continuing Care Retirement Community (CCRC) and analyzed the traffic, noise, and air quality impact based on that assumption. However, because the Project did not *require* that the area be used for building a CCRC, substantially more traffic could be generated if developers chose to build something different. Given this, Petitioner argued that the scope of the EIR’s analysis was too narrow. The court held that it was acceptable for the EIR to limit the scope of the analysis to the development of a CCRC because, for something else to be built in its place, the EIR requires that “*no additional environmental impacts ... occur.*”

Finally, the court addressed Petitioner’s argument that the County failed to adopt, or respond adequately to, all feasible mitigation alternatives proposed in comments to the draft EIR. In its response to the SCAQMD suggestion that off road vehicles meet higher-tiered emission standards, the County noted that this mitigation measure was not feasible because the applicant determined that vehicles meeting these standards would not be available. The court determined that this answer was “sufficiently detailed” under *San Francisco Ecology Center v. City and County of San Francisco*.³ In its response to the City of Temecula’s suggestion that the Project comply with 2010 California Energy Code, the County answered that adopting this measure would not be useful because, regardless, the Project “will need to comply with the California Energy Code in effect at the time of construction.” Therefore, the court reasoned, “the measure already set an absolute standard and any legally mandated increase in the standard would control in any event.” In its response to the City of Temecula’s additional suggestion that the Project comply with the 2010 California Green Building Standards and require prescriptive mitigation measures, the County answered that “a performance standard was adopted, rather than prescriptive mitigation measures . . . [allowing] the applicant to tailor implementation to best fit the final project.” The court held that the preference for a performance standard is an adequate basis for rejecting the proposed measures. Last, Petitioner argued that their comment letter, submitted on December 10, 2012, was not addressed. The court noted that there was no requirement to respond to this letter because it was submitted 14 months after the comment period ended. Therefore, the Court of Appeal affirmed the trial court’s judgment in favor of the County and awarded costs to the Respondent.



- Opinion by Justice Slough, with Acting Presiding Justice Hollenhorst and Justice McKinster concurring.
- Trial Court: Superior Court of Riverside County, No. RIC1312923, Judge Sharon J. Waters.

¹ 87 Cal. App. 4th 99, 128-30 (2001).

² 40 Cal. 4th 412, 421, 426, 448 (2007).

³ 48 Cal. App. 3d 584 (1975).

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
24 <i>Sierra Club v. County of San Benito</i>		6 th	

[Sierra Club v. County of San Benito](#), California Court of Appeal, Sixth Appellate District, Case No. H042915 (March 22, 2017).

- Final Supplemental EIR did not require recirculation, because newly added information only served to support conclusions found in the Draft Supplemental EIR.
- CEQA argument that was not included under a separate heading and did not include citations to legal authority was forfeited.
- Disagreement among experts related to analysis contained in an SEIR does not make the SEIR inadequate, as local agencies are not bound by opposing expert opinion.

In an unpublished decision, the Court of Appeal affirmed the trial court's judgment, which found that the County of San Benito (County) had complied with CEQA in certifying a Supplemental Environmental Impact Report (SEIR) and approving a conditional use permit authorizing the construction and operation of a utility-scale solar project. Sierra Club alleged that the County had violated CEQA by not recirculating the SEIR, failing to address information regarding the drought's impact on species, adopting unenforceable mitigation measures, and underestimating groundwater impacts. The courts disagreed.

In 2010, real party in interest's predecessor in interest applied for a conditional use permit to construct and operate a solar project on 3,202 acres of land in the Panoche Valley, which was projected to take five years to construct (Original Project). The County certified an Environmental Impact Report (EIR) and approved the conditional use permit authorizing the Original Project. An environmental organization filed a petition for writ of mandate challenging the Final EIR's sufficiency. The trial court entered a judgment in favor of the County and the appellate court affirmed.

In 2014, Real Party sought to modify the Original Project by reducing its size to 2,506 acres, which also resulted in reducing the construction timeline to 18 months (Project). The County circulated a Draft SEIR in December 2014 and released the Final SEIR in April 2015. During that same month, the County Planning Commission certified the SEIR and approved the Project's conditional use permit. Sierra Club and another organization appealed the decision. The County Board of Supervisors denied the appeals and upheld the approval in May 2015. Sierra Club filed a petition for writ of mandate, alleging that the County had violated CEQA in certifying the SEIR and approving the Project. The trial court granted a motion on the peremptory writ in the County's favor. Sierra Club then appealed.

Sierra Club alleged that the County had violated CEQA by failing to recirculate the Final SEIR, because the Final SEIR contained significant new information related to the Project's impacts on local California condor populations and water resources that the Draft SEIR had not included. The court held that the Final SEIR's inclusion of a report that two California condors were observed more than 10 miles away from the Project site was not significant new information and "merely confirmed the Draft SEIR's conclusion that California condors could be present." Sierra Club also claimed that the Final SEIR failed to include a detailed analysis about the impacts to California condor populations and lacked specific mitigation measures aimed at addressing these impacts, but the court dismissed these arguments on procedural grounds. The court noted that these arguments were not included under a separate heading,

as required by the Rules of Court, and Sierra Club failed to provide supporting citations to legal authority, resulting in forfeiture. Sierra Club also argued that the Final SEIR contained significant new information related to the Project's impacts on water resources, but the court determined that these arguments were premised on a misreading of the Draft EIR.

Sierra Club argued that the Final SEIR failed to address significant new information related to the impact of the drought on the San Joaquin kit fox and giant kangaroo rat populations. Sierra Club based this claim on a 2015 report published by a professor at Humboldt State University that noted a decrease in giant kangaroo rats, which are prey for San Joaquin kit foxes. Sierra Club claimed that the County should have added this new information to the SEIR. The court was confused as to the nature of this claim, because Sierra Club argued that the County should have prepared a supplemental EIR to analyze these impacts, which was inconsistent with Sierra Club's recirculation argument. The court ultimately determined that CEQA did not require the preparation of a supplemental EIR, because the SEIR had not yet been certified when this information was made available to the County. In addition, the court held that substantial evidence supported the County's conclusion that there was no significant new information and held that there was no prejudicial abuse of discretion in the County's certification of the SEIR.



Sierra Club claimed that two of the Final SEIR's mitigation measures violated CEQA because they were unenforceable. The first measure called for the preservation of wildlife habitat using a variety of different methods. Sierra Club argued that the measure failed to ensure that mitigation lands would be permanently restricted, but the court rejected this argument, noting that the mitigation measure specifically required any legal instrument used to be perpetual. The second measure called for the development and implementation of a "Wetland Mitigation and Monitoring Plan" and a "Habitat Management Plan." The court rejected Sierra Club's first argument that the plans are the one and the same, noting that a typo in the Draft SEIR did not render the mitigation measure inadequate. Sierra Club also argued that the measure violated CEQA because it did not require the approval of the Habitat Management Plan prior to construction; however, the court rejected that argument by referencing the plain language of the measure, which clearly called for the submittal and approval of both plans prior to the issuance of construction permits.

Sierra Club argued that the SEIR overestimated groundwater recharge, underestimated drawdown rates, and included a vague mitigation measure that would be ineffective. Related to the SEIR's water analysis, Sierra Club relied on a comment letter on the Draft SEIR from a hydrological consultant who questioned the methodology and assumptions used in the groundwater report the SEIR relied upon, claiming the recharge estimates were too high and the drawdown estimates were too low. In response, the County hired a hydrogeologist who concluded that the analysis contained in the groundwater report was reasonable. Noting that there were competing expert opinions on the subject, the court held that the County "was free to reject" the hydrological consultant's analysis, instead relying on the groundwater report and the hydrogeologist's opinions. The court also noted that Sierra Club had failed to show that the report the SEIR relied upon was inadequate and unsupported. Sierra Club also argued that a mitigation measure related to monitoring groundwater wells and adjusting pumping if the water level declined beyond a baseline was inadequate. Sierra Club claimed that the measure failed to account for the ongoing drought and would be ineffective in mitigating groundwater impacts. The court rejected these arguments as lacking merit, finding Sierra Club had failed to acknowledge the measure's use of historical data and other record evidence supporting its projected effectiveness in mitigating groundwater impacts.

After dismissing each of Sierra Club's arguments, the Court of Appeal affirmed the trial court's judgment in favor of the County.

- Opinion by Acting Presiding Justice Elia, with Justices Bamattre-Manoukian and Mihara concurring.
- Trial Court: San Benito Superior Court, No. CU-15-00081, Judge Robert A. O'Farrell.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
25 <i>Association of Irrigated Residents v. Kern County Board of Supervisors</i>		5 th	

[*Association of Irrigated Residents v. Kern County Board of Supervisors*](#), Court of Appeal, Fifth Appellate District, Case No. F073892 (November 21, 2017)

- An existing conditions baseline is reviewed for substantial evidence if it measures existing physical conditions at a time other than when the notice of preparation is published.
- The CEQA Guidelines authorize a lead agency to determine that a project's greenhouse gas emissions will have a less than significant effect on the environment based on the project's compliance with California's cap-and-trade program.
- The Interstate Commerce Commission Termination Act does not categorically preempt CEQA review of the reasonably foreseeable environmental impacts that may be caused by off-site rail activities. Rather, the relevant inquiry is whether CEQA review would prevent, burden, or interfere with rail operations.

In a published opinion,⁴ the Court of Appeal reversed the trial court's judgment denying a petition for writ of mandate. The Association of Irrigated Residents, the Center for Biological Diversity, and the Sierra Club (collectively, Petitioners) had filed the petition against Kern County Planning and Community Development Department, the lead agency that conducted the environmental review, and Kern County Board of Supervisors, the decision-making body that certified the Environmental Impact Report (EIR) (collectively, the County).

Petitioners challenged the County's certification of an EIR and approval of a project to modify an oil refinery in Bakersfield, which would allow the County to unload two unit trains (104 cars or 150,000 barrels) per day of crude oil (Project). The refinery was previously authorized to process 70,000 barrels of crude oil per day and the refinery would send the balance of unloaded crude (80,000 barrels per day) to other refineries by pipeline.

On September 19, 2013, the County published a notice of preparation (NOP) of a draft EIR for the Project, and then circulated the draft EIR for public review from May 22 to July 7, 2014. Petitioners submitted extensive written comments on the draft EIR. The County's written responses were made available to Board of Supervisors in late August 2014 as part of the final EIR. At the end of a public hearing held on September 9, 2014, the County unanimously passed a resolution approving the requested zoning modifications, adopting CEQA findings, and determining that the EIR complied with CEQA. The following day, the County filed a notice of determination.

In October 2014, Petitioners petitioned for writ of mandate against the County alleging CEQA violations. The trial court denied the petition in April 2016, and Petitioners appealed. On appeal, Petitioners argued that the EIR violated CEQA by:

- Erroneously using the refinery's operational volume from 2007 as the baseline instead of the conditions existing in 2013 when the NOP was published

⁴ Parts I. (Standard of Review), IV (Rail Transport Safety), and VI. (Formulating Appellate Relief) of the discussion were omitted from publication.

- Incorrectly relying upon the refinery's participation in California's cap-and-trade program to conclude the Project's greenhouse gas (GHG) emissions would be less than significant
- Underestimating and failing to fully describe the Project's rail transport impacts

First, the court concluded that substantial evidence supported the EIR's choice of the refinery's 2007 operational volume as the baseline for refinery operations, even though the CEQA Guidelines establish the normal baseline as the time the NOP is published. Relying on *Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal.4th 310 (2010), the court approved the County's finding that existing physical conditions included an operating refinery — despite the fact that the operations ceased shortly after the previous owner's 2008 bankruptcy filing. The court based its determination of existing conditions on currently permitted operational levels, historic operational fluctuations, and prior environmental review of refinery operations.

Second, the court upheld the County's reliance on the Project's compliance with the cap-and-trade program in assessing the significance of the Project's GHG emissions impacts. Although the EIR's discussion of emission reductions and offsets included the use of allowances — such that a reader could mistakenly believe that the Project would reduce GHG emissions overall — the court concluded that an objectively reasonable person would understand the EIR as disclosing that the Project's GHG emissions would comply with the cap-and-trade program through the surrender of compliance instruments, including allowances. Responding to a question of first impression, the court interpreted the CEQA Guidelines as authorizing a lead agency to determine that a project's GHG emissions will have a less than significant effect on the environment, based on the project's compliance with the cap-and-trade program. Although Petitioners argued that the EIR's discussion of emission reduction due to displaced truck trips was speculative, the court determined that any error was not prejudicial given the Project's compliance with the cap-and-trade program and, in the alternative, that the emission reduction due to displaced truck trips was supported by substantial evidence.



Third, the court found that the EIR erroneously stated that federal law preempted CEQA review of certain environmental impacts of off-site rail activities, concluding that federal law did not prevent the EIR from disclosing and analyzing the reasonably foreseeable environmental impacts associated with off-site rail activities. Although the Interstate Commerce Commission Termination Act assigns the Surface Transportation Board exclusive jurisdiction over rail carrier transportation and the construction and operation of associated facilities, and expressly preempts state remedies with respect to regulation of rail transportation, the development of information pursuant to CEQA is not categorically preempted. Rather, this development of information is subject to scrutiny under the rules for "as-applied" preemption. The court found that the preparation and publication of an EIR that discloses and analyzes the environmental impacts of off-site rail activities would not prevent, burden, or interfere with rail operations. Therefore, the court concluded that as-applied preemption did not preclude CEQA review of the reasonably foreseeable environmental effects that may be caused by the off-site rail activities associated with the Project. Further, although federal law may preempt some mitigation measures that address the environmental impacts of mainline rail operations, the County must decide in the first instance whether a particular mitigation measure is feasible, including by analyzing preemption. The court determined that the EIR's erroneous legal conclusions regarding federal preemption must be corrected, and that the County must disclose and analyze the reasonably foreseeable environmental effects resulting from the off-site rail activities associated with the Project.

Additionally, in an unpublished portion of the discussion, the court found that the EIR contained factual errors in its description of federal railroad safety data, thereby tainting the EIR's calculations of the risk of a release of hazardous materials due to a potential mishap during rail transportation of crude oil to the refinery. Because this error caused the EIR to underestimate the risk of a release by fivefold, the court ordered that the EIR be corrected to include a disclosure and analysis of those indirect effects.

Accordingly, the court reversed the trial court's judgment and remanded for further proceedings.

- Opinion by Justice Franson, with Acting Presiding Justice Gomes and Justice Peña concurring.
- Trial Court: Superior Court of Kern County, Case No. S-1500-CV-283166, Judge Eric Bradshaw.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
26 <i>Banning Ranch Conservancy v. City of Newport Beach</i>		Supreme Court	

[*Banning Ranch Conservancy v. City of Newport Beach*](#), California Supreme Court, Case No. S227473 (March 30, 2017).

- CEQA requires an environmental impact report (EIR) to identify environmentally sensitive habitat areas and account for those areas in its analysis of project objectives and mitigation measures.

In a unanimous decision, the California Supreme Court (Supreme Court) addressed the following issues:

- Did the City of Newport Beach’s (City’s) approval of the project at issue comport with the directives in its general plan to “coordinate with” and “work with” the California Coastal Commission (Coastal Commission) to identify habitats for preservation, restoration, or development prior to project approval?
- What standard of review should apply to a city’s interpretation of its general plan?
- Was the City required to identify environmentally sensitive habitat areas (ESHA) — as defined in the California Coastal Act of 1976 — in the environmental impact report for the project?

The Supreme Court held that CEQA requires an EIR to identify areas that may qualify as environmentally sensitive habitat areas (ESHA) and account for those areas in its analysis of project alternatives and mitigation measures. While the parties briefed and argued both the general plan and CEQA questions, the Supreme Court ruled solely on the CEQA issues.

Background and Procedural History

Banning Ranch Development Plan

Banning Ranch is a privately owned tract of undeveloped property that lies in the coastal zone and falls under the City’s sphere of influence for zoning and planning purposes. The City’s general plan includes two alternative goals for the area — use the property as community open space with development limited to a park and nature education facilities, or allow construction of up to 1,375 residential units, 75,000 square feet of retail, and 75 hotel rooms. The City excluded Banning Ranch from its coastal land use plan (CLUP), and therefore the Coastal Commission exercised permitting authority over development on Banning Ranch. The City’s CLUP defined ESHA in the same terms as the Coastal Act, which requires that ESHA shall be protected against any significant disruption of habitat values, and development in areas adjacent to ESHA “shall be sited and designed to prevent impacts which would significantly degrade those areas.” Coastal Act § 30240(b)

The City could not raise the necessary funds to buy Banning Ranch for open space, and in August 2008, Newport Banning Ranch LLC (NBR) submitted a proposal for a residential and commercial village reaching the maximum development levels permitted under the general plan. The proposal included a report identifying potential ESHA, and explained that the project would avoid all areas of ESHA as defined by the CLUP, with the exception impacts to 0.02 acre of potential riparian ESHA and 0.06 acre of potential scrub ESHA. These impacts would be fully mitigated, and the report included a map identifying numerous potential ESHA throughout Banning Ranch. However, NBR revised its plan to accommodate the City’s requested road circulation network and NBR’s biological consultant pointed out that the

changes would significantly impact habitat considered ESHA pursuant to the City's CLUP and the Coastal Act.

Discovery of Potential ESHA

The City proceeded with preparation of the draft EIR for the Banning Ranch project, and numerous public comments mentioned the need to identify ESHA in the EIR and urged the City to use Coastal Commission standards to assess ESHA on the site.

In April 2009, Coastal Commission staff learned vegetation had been cleared from Banning Ranch without a coastal development permit. In September and December 2010, the City and NBR representatives visited the cleared sites with a Coastal Commission ecologist to determine the extent of unpermitted activity and its impacts. The ecologist determined that two cleared areas met the definition of ESHA. The City and NBR chose not to contest the ESHA findings, but entered into a stipulation that the Coastal Commission staff's ESHA findings would be determinative only to two areas, and the Coastal Commission would undertake a separate analysis of other areas in future proceedings. The Coastal Commission adopted the staff findings, including a determination that the unpermitted activity was inconsistent with policies in the City's CLUP and issued consent orders requiring the City to restore the damaged sites. In March 2011, NBR's representative concluded the Coastal Commission agreement would not affect the draft EIR.

In October 2011, Coastal Commission staff issued a report recommending that a coastal development permit be denied for a separately approved park project bordering Banning Ranch. The report explained that the City sought access to its park through Banning Ranch through a proposed access road that crossed ESHA occupied by the endangered California gnatcatcher. Staff identified a route that would avoid direct impacts, but the City and NBR would not agree to Coastal Commission-recommended conditions. Coastal Commission staff commented that the road proposed in the Banning Ranch draft EIR would directly affect the already identified ESHA and others that were likely to be determined. The draft EIR did not identify potential ESHA or discuss the subject in any substantive detail, but simply noted where the project would require a permit from the Coastal Commission, which would determine whether Banning Ranch contained ESHA.

Draft and Final EIR

Many comments on the draft EIR complained about the omission of an ESHA analysis, noting the omission was particularly egregious because both NBR and the City knew there were ESHA on Banning Ranch because of Coastal Commission consent orders. The Coastal Commission provided 15 pages of comments, suggesting the EIR address whether the proposed development was consistent with policies in both the CLUP and the Coastal Act, and pointed out that development must avoid impacts to ESHA under the Coastal Act. Coastal Commission staff recommended that the EIR use the CLUP to evaluate ESHA and appropriate buffer zones, and determined the proposed development was inconsistent with the ESHA requirements of the Coastal Act.

The City did not change its position on ESHA determinations in the final EIR. The City emphasized that the park and NBR development were separate projects, and disavowed any obligation to further consider ESHA. It claimed it had "fulfilled its obligation under CEQA to analyze the significant impacts of a project on the physical environment," and maintained that ESHA findings were in the discretion of the Coastal Commission or local agency as part of its local coastal plan certification process. Further, the City argued that because Banning Ranch was a deferred certification area, the City's CLUP was inapplicable, and any consideration of a Coastal Development Permit for the project would require consistency with the Coastal Act.

Further, the City extensively addressed the Coastal Commission staff's comments on the access road. It acknowledged the finding that the currently proposed road would be inconsistent with the Coastal Act, but noted that no action had been taken on the road and staff indicated the road would be approved under certain circumstances.

Project Approval and Litigation

Banning Ranch Conservancy (BRC) challenged the project approval, contending that the EIR did not adequately disclose or analyze environmental impacts and mitigation measures with respect to ESHA, instead deferring those critical functions. Further, BRC alleged that the City had violated its obligation under the general plan to work with the Coastal Commission to identify areas on Banning Ranch to be protected from development. The trial court rejected the CEQA claims, determining it was sufficient for the EIR to note potential ESHA and acknowledge that the Coastal Commission's designation of ESHA might lead it to reject proposed mitigation measures. However, the trial court granted BRC's petition, finding that the City had failed to meet its obligations under the general plan.

The Court of Appeal reversed, concluding the general plan did not require the City to work with the Coastal Commission before project approval. On the CEQA issue, the Court of Appeal sided with the trial court, and found it sufficient for the EIR to note that the project was outside the scope of the CLUP and the Coastal Commission would determine whether ESHA would be affected.

Discussion

The Supreme Court analyzed whether the Banning Ranch EIR was required to identify potential ESHA and analyze the impacts of the project on those areas. The City argued that CEQA imposes no duty to consider the Coastal Act's ESHA requirements, and it was sufficient for the Banning Ranch EIR to analyze the impacts of the NBR project without accounting for potential ESHA.

Related Regulatory Regimes

The Supreme Court found the City's position to be untenable, as it was not entitled to ignore the fact that Banning Ranch is in the coastal zone. "CEQA sets out a fundamental policy requiring local agencies to 'integrate the requirements of this division with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.'" *Banning Ranch Conservancy* at pp. 18-19; citing Pub. Res. Code § 21003(a). The lead agency should integrate CEQA review with related environmental review and consultation requirements found in federal, state, or local laws. The Supreme Court found the City ignored its obligation to integrate CEQA review with the requirements of the Coastal Act, and gave little consideration to the Coastal Commission's needs.

The Supreme Court noted that the CEQA Guidelines specifically call for consideration of related regulatory regimes such as the Coastal Act when discussing project alternatives. Specifically, when conducting the feasibility analysis, an agency should consider the regional context if a project has a regionally significant impact. By definition, projects with substantial impacts in the coastal zone are regionally significant. Thus, the Supreme Court concluded that regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR's analysis of feasible alternatives. Instead, the City's EIR omitted any analysis of the Coastal Act's ESHA requirements, and did not discuss which areas might qualify as ESHA or consider impacts on the two ESHA delineated in the Coastal Commission's consent orders. As a result, the Supreme Court concluded the EIR did not meaningfully address feasible alternatives or mitigation measures. Given the ample evidence before the City that ESHA are present on Banning Ranch, the Supreme Court noted that the decision to forego discussion of those topics could not be considered reasonable.

Deferral of ESHA Analysis

Further, the Supreme Court did not find the City's justifications for deferring the ESHA analysis persuasive. The City argued that it had no authority to designate ESHA on Banning Ranch because only the Coastal Commission could do so. The Supreme Court noted that a lead agency is not required to make a "legal" ESHA determination in an EIR, but must discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a

project site. A reviewing court would consider only the sufficiency of the discussion. The Supreme Court expressed no view as to whether ESHA impacts must be avoided as opposed to mitigated.

Application of the CLUP

The City claimed that identification of potential ESHA would be merely speculative. The Supreme Court rejected this argument because no speculation was involved with the two identified ESHA, and the City knew that NBR's biological consultant identified numerous potential ESHA in other areas. Further, the City's CLUP provided guidelines for identifying ESHA, and the Coastal Commission staff offered assistance. The City had ample bases for an informed discussion of the NBR project's potential ESHA impacts, and the City did not use its best efforts to investigate and disclose what it discovered about ESHA on Banning Ranch, as required by CEQA Guidelines section 15144.

Further, the City routinely applied its CLUP requirements in other projects, which include specific ESHA guidelines, even though ultimate ESHA determinations would be made by the Coastal Commission. The City argued Banning Ranch was not covered by the CLUP, but the EIR acknowledged that the Coastal Commission would consider the CLUP's provisions when it assessed ESHA. The Supreme Court concluded nothing prevented the City from doing the same.

Permitting Phase

The City insisted that ESHA would be fully considered during the permitting phase of the project. The Supreme Court concluded this would be inconsistent with CEQA's policy of integrated review. Pub. Res. Code § 21003(a). Further, under *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal.App.3d 433 (1988), each agency is required to comply with CEQA and meet its own responsibilities, including evaluating mitigation measures and project alternatives.



The Supreme Court rejected the supposition that the City would be required to accept the Coastal Commission staff's ESHA designations and related measures if it were required to identify potential ESHA. The Supreme Court noted that an EIR is an informational document, not a formal settlement agreement or memorandum of understanding, and the lead agency may disagree with the opinions of other agencies. However, an EIR must lay out competing views by interested agencies. CEQA Guidelines § 15123(b)(2). While the ultimate findings regarding ESHA on Banning Ranch will be made by the coastal commissioners themselves, the Supreme Court noted that both the Coastal Commissioners and interested members of the public are entitled to understand disagreements between Coastal Commission staff and the City on the subject of ESHA. "Rather than sweep disagreements under the rug," the City was required to fairly present them in its EIR, and may explain why it declined to accept Coastal Commission staff suggestions.

The Supreme Court explained that if the City's approach were generally adopted, lead agencies would be permitted to "perform truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim." Further, the Supreme Court concluded the City's handling of the Banning Ranch EIR ignored the practical reality that the project must pass muster under the Coastal Act.

The Supreme Court concluded that, in certifying an inadequate EIR, the City abused its discretion. The City's failure to account for related regulations substantially impaired the EIR's informational function, and amounted to prejudice requiring reversal of the Court of Appeal's decision.

- Opinion by Justice Corrigan, with Justices Cantil-Sakauye, Werdegar, Chin, Liu, Cuéllar, and Kruger concurring.
- Court of Appeal: Fourth Appellate District, Division Three, Case No. G049691, Opinion by Justice Ikola with Acting Presiding Justice Bedsworth and Justice Thompson concurring.
- Trial Court: Superior Court of Orange County, Case No. 30-2012-00593557, Judge Kim Dunning.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
27 <i>Center for Biological Diversity v. California Department of Fish & Wildlife</i>		2 nd	

[*Center for Biological Diversity v. California Department of Fish & Wildlife*](#), California Court of Appeal, Second Appellate District, Case No. B280815 (Dec. 4, 2017).

- A writ of mandate is not a separately appealable post-judgment order when the judgment incorporates the writ.
- CEQA permits partial decertification of an EIR, and allows project approvals to remain in place while decertifying an EIR, as long as severance findings are made with respect to the voided portions.

In a published opinion, the Court of Appeal affirmed the trial court's judgment and accompanying writ of mandate, partially decertifying the Department of Fish & Wildlife's (Department's) environmental impact report (EIR) for the Newhall Ranch development (Project) in northwest Los Angeles County.

In this case's first appeal, the Court of Appeal reversed in full a 2012 trial court judgment that enjoined the Department and the Project developer from proceeding with any Project activity while the Department set aside the final EIR. On review, however, the California Supreme Court reversed the appellate ruling, and instructed the Court of Appeal to reinstate part of the original judgment based on two identified deficiencies in the Newhall Ranch EIR.

In response, the Court of Appeal affirmed in part and reversed in part the original trial court judgment, and directed the trial court to enter two deficiency findings:

- No substantial evidence supported a finding that the Project's greenhouse gas emissions would not result in a cumulatively significant environmental impact.
- The Project's mitigation measures to protect the unarmored threespine stickleback fish species violated the Fish and Game Code.

After a hearing on remand, the trial court entered judgment in favor of petitioners Center for Biological Diversity and other organizations (Petitioners) with respect to the two deficiency findings, and thereby ordered the Department to decertify these portions of the EIR. The trial court otherwise found that the EIR complied with CEQA. As such, the accompanying peremptory writ of mandate only required the Department to suspend the Project approvals associated with the EIR deficiencies, and allowed all other approvals to remain in place.

In this appeal, Petitioners challenged the trial court's ruling, claiming that CEQA forbids partial decertification of an EIR, as well as the continued implementation of any project approvals while an EIR is decertified. The Department also brought a challenge on appeal, arguing that the Court of Appeal lacked jurisdiction to consider the writ of mandate because the appeal was taken only from the final judgment, not the writ itself.

The Court of Appeal first rejected the Department's argument that the Court of Appeal lacked jurisdiction. Though the court recognized that the writ was issued after the judgment was rendered, the Court of

Appeal held that the writ was not a separately appealable post-judgment order. Rather, the judgment “incorporated the writ,” and because the court had jurisdiction to consider the Petitioners’ challenges to the judgment, it also had jurisdiction to consider the related writ.



The Court of Appeal then rejected Petitioners’ claim that CEQA prohibits partial decertification of an EIR. The court noted that, while Petitioners were correct that an agency must initially certify an entire EIR before approving a project, more options are available once a court finds an EIR certification noncompliant. CEQA specifically provides trial courts with some flexibility in remedying these types of violations, and allows courts to void agency determinations “in whole or in part.” The only requirement for this type of remedy is that the court first make severance findings and determine whether the voided portions are severable, and whether the remainder will be in full CEQA compliance.

The Court of Appeal similarly rejected the Petitioners’ second argument that CEQA forbids any project approvals to remain in place following partial decertification of an EIR. Referring to its earlier discussion, the court noted that an agency must initially certify an entire EIR before approving a project. But once noncompliance is found, CEQA provides trial courts with the authority to void agency determinations “in whole or in part.” Accordingly, this language gives trial courts the discretion to leave some project approvals in place, so long as severance findings are made to ensure that those approvals “will not prejudice full compliance with CEQA.”

Finally, the Court of Appeal turned to the trial court’s severance determinations in the case, ultimately holding that they satisfied CEQA’s mandate. Not only did the trial court properly lay out the severability factors, but it suspended all further activity on the Newhall Ranch project until the Department obtained full CEQA compliance by correcting the EIR deficiencies. The trial court also instructed the parties that the trial court retained the authority to revisit other portions of the EIR, should “greenhouse gases and the stickleback [have] unanticipated adverse effects on other portions of the project.” And, given that CEQA empowers trial courts to retain this jurisdiction “by way of a return to the peremptory writ,” the Court of Appeal determined that the Petitioners could not show that the trial court abused its discretion.

Accordingly, the Court of Appeal affirmed the judgment and writ of mandate, partially decertifying the Newhall Ranch project EIR.

- Opinion by Justice Raphael, with Acting Presiding Justice Kriegler and Justice Baker concurring.
- Trial Court: Superior Court of Los Angeles County, Judge John A. Torribio,

EIRs			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
28 <i>Cleveland National Forest v. San Diego Association of Governments (COA)</i>		4 th	

[*Cleveland National Forest Foundation v. The San Diego Association of Governments*](#), Fourth Appellate District, Division One, Case No. D063288 (November, 16, 2017).

- An EIR that is inconsistent with state climate policy is inadequate to inform decision-making and public participation.

Following the Supreme Court’s July 13, 2017 decision, the Court of Appeal modified and confirmed its 2014 decision. The 2014 decision indicated that the San Diego Association of Governments (SANDAG) abused its discretion by declining to include an analysis of future air quality impacts in its regional transportation plan (RTP), as required by CEQA. The Supreme Court ruled that SANDAG did not abuse its discretion in the greenhouse gas (GHG) emissions analysis in its 2011 regional plan environmental impact report (EIR), as it had sufficiently demonstrated that SANDAG. However, the Supreme Court also cautioned that the analysis likely would not be sufficient for future EIRs.

Like the Supreme Court, the Court of Appeal analyzed whether SANDAG’s omission of an analysis of the RTP’s consistency with Governor Schwarzenegger’s 2005 executive order in the EIR violated CEQA for failure to provide a reasonable, good faith effort to disclose and evaluate the GHG emissions impacts. The Court of Appeal determined that SANDAG’s decision did not reflect a reasonable, good faith effort at full disclosure, and was not supported by substantial evidence, because SANDAG’s decision ignored the executive order’s role in shaping state climate policy. Because the executive order underpinned all of the state’s efforts to reduce GHG emissions, the EIR’s failure to analyze the transportation plan’s consistency with the Executive Order, or more particularly with the executive order’s overarching goal of ongoing GHG emissions reductions, was therefore a failure to analyze the RTP’s consistency with state climate policy. Further, evidence in the record indicated that the RTP would actually be inconsistent with state climate policy over the long term, and therefore the omission deprived the public and decision-makers of relevant information about the transportation plan’s environmental consequences. The omission was prejudicial because it precluded informed decision-making and public participation.

The Court of Appeal recognized that while SANDAG may not know the future emissions reductions targets the RTP/SCS is required to meet, SANDAG has knowledge of the state climate policy requiring a decrease in the state’s GHG emissions, and of the information in SANDAG’s Climate Action Strategy. Therefore, SANDAG could have reasonably analyzed whether the RTP was consistent with or would impair state climate policy. Moreover, the Court of Appeal noted the RTP’s important role in achieving state climate policy. SANDAG’s failure to inform the public and decision-makers that the RTP is inconsistent with state climate policy would potentially result in decision-makers failing to comply with post-2020 requirements, and therefore violated CEQA.

In addition, the Court of Appeal noted that by disregarding the executive order’s overarching goal of ongoing emissions reductions, the RTP’s GHG emissions analysis in the EIR falsely implied that RTP is furthering state climate policy. However, the trajectory of the RTP post-2020 emissions directly contravened it.

The Court of Appeal considered whether the EIR adequately addressed mitigation for the RTP’s GHG impacts. The Court of Appeal determined that this challenge was partially moot, as additional analysis was necessary to determine the RTP’s consistency with the executive order. The EIR considered three

easy-to-implement mitigation measures. However, the Court questioned whether they qualified as mitigation measures. At the other extreme, the EIR considered and deemed infeasible three onerous measures, which the Court of Appeal noted would be impossible to enforce, and therefore did not contribute to a useful CEQA analysis. Because none of the three onerous measures had any probability of implementation, the discussion was illusory. Additionally, the EIR did not discuss any mitigation alternatives contained in SANDAG's Climate Action Strategy. Therefore, the Court of Appeal determined there was not substantial evidence to support SANDAG's determination that the EIR adequately addressed mitigation for the RTP's GHG emissions impacts.

Unlike the Supreme Court, the Court of Appeal analyzed whether the 2011 EIR was deficient in other manners, and confirmed its prior conclusions that SANDAG failed to reduce climate pollutants, address public health effects, consider alternatives that reduce driving, and assess impacts to agricultural lands. The Court of Appeal determined that Cleveland National Forest Foundation did not exhaust administrative remedies with respect to its concerns regarding the RTP's impacts to agricultural lands.

The Court of Appeal considered the seven analyzed alternatives in the EIR. The Court of Appeal determined that the discussion of project alternatives was deficient because it did not consider an alternative to significantly reduce vehicle miles traveled (VMT). This omission was considered inexplicable given SANDAG's acknowledgment in its Climate Action Strategy that the state's efforts to reduce GHG emissions from on-road transportation will not succeed if the amount of driving, or VMT, is not significantly reduced. The EIR instead focused on congestion relief alternatives. Given the acknowledged long-term drawbacks of congestion relief alternatives, there is not substantial evidence to support the EIR's exclusion of an alternative focused primarily on significantly reducing vehicle trips.

With respect to air quality, although the EIR recognized regional growth and land use changes associated with the RTP had the potential to expose sensitive receptors to substantial localized pollutant concentrations, the level of exposure could not and would not be determined until the next tier of environmental review when facility designs of individual projects became available. The EIR contained identical statements regarding proposed transportation improvements associated with the RTP.



The Court of Appeal determined that the record showed there was available data to develop a reasonable estimate of the region's existing TAC exposures. The fact that more precise information may be available later did not excuse SANDAG from providing currently available information. Moreover, SANDAG impermissibly relied only on its own bald assertions of infeasibility. Therefore, the Court of Appeal concluded there was not substantial evidence to support SANDAG's determination that it could not reasonably provide additional baseline information in the EIR about air quality impacts. Similarly, SANDAG did not point to evidence supporting its conclusion that mitigation was not feasible at the EIR's program level for air quality impacts, resulting in improper deferral of mitigation.

Modifications from 2014 Opinion

The Court of Appeal made several minor modifications to its 2014 opinion. The Court of Appeal revised a footnote in the majority opinion, to reflect that planning agencies must "use their best efforts to investigate and disclose all impacts they reasonably can regarding a project's potential adverse impacts." In addition, the modification added clarifying language to the dissent. Justice Benke dissented from the majority's opinion to remand the case to the Superior Court to reissue a modified order, stating that the case was most likely moot from the certification of the 2015 EIR accompanying the updated 2015 RTP.

- Opinion by Presiding Judge McConnell, Justice Irion concurring, and Justice Benke dissenting.
- Trial Court: Superior Court of San Diego County, Nos. 37-2011-00101593-CU-TT-CTL, 37-2011-00101660-CU-TT-CTL, Judge Timothy B. Taylor.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
29 <i>Hills for Everyone v. Oslie Holdings LLC</i>		4 th	

[*Hills for Everyone v. Oslie Holdings LLC*](#), California Court of Appeal, Fourth Appellate District, Division Three, Case No. G053160 (October 17, 2017).

- Failure to adequately mitigate project impacts to woodlands amounted to an inconsistency with the City's General Plan; approval in light of this inconsistency constituted an abuse of discretion warranting decertification of the EIR.

In an unpublished opinion, the Court of Appeal affirmed the trial court's decision granting a petition for writ of mandate to vacate the certification of an environmental impact report (EIR) for failure to analyze whether the proposed project was in compliance with slope grading requirements in the area's specific plan.

Procedural and Factual Background

In 2014, the City of Brea's (City's) city council approved a proposed 162 home development (Project) located on a hillside above the City. The Project was located within the Carbon Canyon Specific Plan (CCSP), adopted in 1986 as part of the City's General Plan. The CCSP included grading design guidelines applicable to development on ridgelines and development in canyon and hillside areas. In 1994, the City adopted the Hillside Management Ordinance to implement guidelines and standards for development in hillside areas.

Multiple versions of the Project were submitted to the City beginning in 1999. In 2007, the City prepared and distributed for public review a Recirculated Draft EIR (2007 DEIR) to assess the impacts of the proposed development of 165 homes on the site. Hills for Everyone (HFE) submitted comments on the 2007 DEIR asserting the Hillside Management Ordinance barred the proposed 165 homes. In April 2008, the City released a Final EIR (2008 FEIR), which explained the Hillside Management Ordinance exempted projects processed under a specific plan. In June 2008, the Planning Commission certified the 2008 FEIR. However, a fire burned the Project site, and the City Council delayed consideration of the project to prepare an analysis of the fire's environmental implications. The project remained dormant until 2011, when Oslie Holdings assumed development responsibility and made changes to grading, circulation, lot layout, drainage, and open spaces.

In November 2012, the City circulated an EIR Update (2012 EIR Update) for public review and comment. The 2012 EIR Update contained the updated environmental analysis requested by the City Council after the fire, along with an assessment of the Project's environmental impacts compared to the impacts of the previous project, building and expanding upon the 2008 FEIR's analysis. In November 2013, the City resumed its consideration of the 2008 Planning Commission appeals. In June 2014, the City Council certified the final EIR (Final EIR) consisting of the 2013 Final EIR Update, the 2012 EIR Update, the 2008 FEIR, and the 2007 Draft EIR. The Project's CEQA findings concluded that the Project's impacts would remain significant after mitigation due to the removal of oak woodlands and impacts to Carbon Canyon Road.

In July 2014, HFE challenged the City's decision by bringing a petition for writ of mandate, along with the California Native Plant Society and Sierra Club. The trial court granted the petition in October 2015, concluding:

- The Hillside Ordinance applied to the Project and precluded Project approval.
- The issue of whether the Hillside Ordinance and CCSP are in conflict was not before the court, and there was no inconsistency.
- The Project was inconsistent with the CCSP, the City General Plan, and the City's woodland preservation policies.
- The Project was not exempt from CEQA review.
- The Final EIR was inadequate because it failed to analyze the Project's consistency with the CCSP's grading standards, failed to analyze climate change impacts adequately, and used an improper baseline for impacts on recreation.

Appellate Review

The Hillside Management Ordinance Did Not Amend the CCSP

On review, the Court of Appeal concluded the Hillside Management Ordinance did not amend the CCSP, and if the Ordinance was applicable to the CCSP area, the Hillside Management Ordinance and the CCSP would possibly be inconsistent. The Court of Appeal noted that the Project would violate the Hillside Management Ordinance. However, the Court of Appeal concluded that the Hillside Management Ordinance was not enacted in compliance with statutory procedures to amend a specific plan. In addition, the City Council made findings that the Hillside Management Ordinance was not intended to apply to the CCSP. Noting that an agency's interpretation of its own regulations is entitled to deference, the Court of Appeal concluded that while the Hillside Management Ordinance applied to all areas within the City limits, the City Council did not intend for the Hillside Management Ordinance to amend the CCSP, and thus did not change any zoning regulations for land subject to the CCSP. Therefore, the Court of Appeal did not analyze whether the CCSP and Hillside Management Ordinance were inconsistent, or whether the City's decision to approve the Project was based on such inconsistency.

The Project Was Inconsistent With the General Plan's Woodland Preservation Policy

The Court of Appeal concluded the Project was inconsistent with the City's General Plan Woodland Preservation Policy. The General Plan's Open Space and Conservation Element included policies aimed at protecting walnut and large oak trees, and as a "constitutional mandate" incorporated into the CCSP, which in turn provided its own policies for protecting woodlands. The Court of Appeal determined the Project would destroy woodland and oak and walnut trees, and would remain inconsistent with the General Plan after mitigation because the General Plan specified a preference for preservation in place rather than replacement.

Moreover, the Court of Appeal concluded that mere "monitoring" did not guarantee the amount of required mitigation, and therefore it was possible the mitigation measures would not actually mitigate the loss of woodlands within the Project or CCSP areas. The Court of Appeal stated that the nature of the inconsistency between the Project and General Plan was critical, as the Project did not provide a balance between reasonable development and natural resources. The City's approval of the Project in the face of this inconsistency thus constituted an abuse of discretion warranting affirmation of the trial court's decision.

The Final EIR Was Adequate Except as to Consistency With CCSP Grading Standards

The Court of Appeal concluded that the remainder of the Final EIR was adequate with the exception of its consistency with CCSP grading standards, and reversed the trial court's findings that:

- The City erred in selecting its threshold of significance for greenhouse gas (GHG) emissions.
- The City failed to determine the Project's consistency with the City's sustainability plan.
- The Final EIR's GHG emissions calculations were based on an inappropriate trip generation rate.
- The Final EIR improperly excluded unauthorized trail use to establish a baseline for impacts to recreation.

The Court of Appeal reasoned that the Project properly used one of the South Coast Air Quality Management District's (SCAQMD's) "bright line" thresholds for GHG emission rates, and that the City was not required under CEQA to use its sustainability plan to analyze the Project's GHG emissions impacts because the sustainability plan was not a regulation or requirement under Section 15064.4. Further, the Court of Appeal determined that the use of the Institute of Transportation Engineers trip generation rate was supported by substantial evidence, and the City conducted a supplemental analysis using a higher average daily traffic (ADT) average that did not produce new impacts. The Court of Appeal also concluded that the Final EIR was not required to account for unauthorized use of informal trails in setting its baseline for the Project's impact on recreational uses.



However, the Court of Appeal concluded that the Final EIR was inadequate for failure to analyze whether the Project was consistent with the CCSP's grading standards as CEQA requires a lead agency to determine whether a project conflicts with any applicable land use plan, policy, or regulation. While the 2008 FEIR included an analysis of the prior project's consistency with grading and landscaping design guidelines, the Final EIR did not provide a complete analysis of the current Project's consistency with CCSP's grading standards, and was therefore inadequate.

Conclusion

Accordingly, the Court of Appeal affirmed the judgment with respect to the writ ordering the City to decertify the Final EIR. However, the Court of Appeal modified the judgment to order the City to take no action inconsistent with the findings above.

- Opinion by Justice Fybel, with Presiding Justice O'Leary and Justice Ikola concurring.
- Trial Court: Superior Court of Orange County, No. 30-2014-00731930, Judge Robert J. Moss.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
30 <i>Poet, LLC. v. State Air Resources Board</i>		5 th	

[Poet, LLC v. State Air Resources Board](#), California Court of Appeal, Fifth Appellate District, Case No. F073340 (April 10, 2017).

- The term “project” as used in CEQA, the Guidelines, and CEQA case law includes “the whole of an activity directly undertaken by a public agency.” When an activity involves implementation of a regulation, as opposed to building a physical structure, the whole of the activity constituting a “project” includes the enactment, implementation, and enforcement of the regulation.

In a published opinion, the Court of Appeal reversed the trial court’s order discharging a 2013 writ of mandate compelling the State Air Resources Board (ARB) to take corrective action, and remanded for further proceedings under a modified writ. The modifications direct ARB to address nitrogen oxide (NOx) emissions from biodiesel in a manner that complies with CEQA, including the use of a proper baseline.

Central to the discussion are the Low Carbon Fuel Standards (LCFS). ARB originally adopted the LCFS in 2009 as part of a comprehensive effort to reduce greenhouse gas emissions to 1990 levels by 2020, pursuant to the California Global Warming Solutions Act of 2006 (AB 32). In 2013, the Court of Appeal held that ARB’s procedure for implementing the original LCFS regulations violated CEQA (*Poet I*) and, in February 2014, the trial court issued a writ of mandate (February 2014 writ) compelling ARB to set aside its approval of the LCFS regulations and complete the project’s environmental review before reapproving a modified version of the regulations. Paragraph 3 of the February 2014 writ required ARB to “address whether the project will have a significant adverse effect on the environment as a result of increased NOx emissions, make findings (supported by substantial evidence) regarding the potential adverse environmental effect of increased NOx emissions, and adopt mitigation measures in the event the environmental effects are found to be significant.” The court closely examined the language of Paragraph 3 and found that ARB’s attempt to comply with the February 2014 writ was synonymous with complying with CEQA.

After renewed process under CEQA, ARB adopted a modified version of the LCFS regulations in September 2015 (2015 LCFS regulations) and certified the final environmental analysis. In November 2015, ARB filed for discharge of the February 2014 writ, providing a response to Paragraph 3: “while use of biodiesel can increase NOx emissions in some engines, ... total NOx emissions from biodiesel will decline from the 2014 baseline level under the proposed LCFS [T]he use of biodiesel ... will not result in a significant adverse impact to air quality.” The trial court discharged the writ as ARB requested, and petitioners Poet, LLC and James M. Lyons (Petitioners) appealed.

The issue on appeal is whether ARB’s disclosures about the LCFS’ effects on biodiesel consumption satisfy Paragraph 3 of the February 2014 writ. The Court of Appeal held the disclosures were insufficient because (1) ARB wrongly construed the term “project,” (2) which resulted in the adoption of an improper baseline. These errors led to misleading disclosures that understated the amount of NOx emissions potentially attributable to the LCFS regulations, which runs contrary to CEQA’s goal of informing decision makers and the public of a project’s significant environmental effects.

The Court of Appeal found that ARB wrongly construed the term “project” in Paragraph 3 of the February 2014 writ. Paragraph 3 required ARB to “address whether *the project* will have a significant adverse effect on the environment.” ARB contended that “project” referred only to the 2015 modified regulations.

Petitioners, and ultimately the court, disagreed, defining “project” to include the LCFS regulations promulgated in 2009 and as modified in 2015. “Project” means “the whole of an activity directly undertaken by a public agency.” When an activity involves a regulation as opposed to building a physical structure, the whole of the activity constituting a “project” includes the enactment, implementation, and enforcement of the regulation. To define the “whole of [ARB’s] action,” the court asked what acts are “related to each other.” Applying this “related to each other” test, the court determined the original 2009 and modified 2015 LCFS regulations “clearly are related” because they share the overall objective of reducing greenhouse gases, were adopted by the same entity, cover activity in the same geographical area (California), address the same subject matter, and are temporally related because the regulations are sequential.

ARB’s misunderstanding of what constituted the project led the agency to employ an improper baseline. ARB analyzed the project’s impact on NOx emissions from 2014-2023, which showed NOx emissions would decrease over time. However, using 2009 as the baseline (which was when ARB prepared and adopted the original LCFS regulations) showed that NOx emissions from biodiesel actually increased. ARB attempted to justify its 2014 baseline, explaining NOx emissions in 2009 were minimal because little biodiesel was used in California. While ARB acknowledged the original LCFS regulations may have contributed to the increased use of biodiesel after 2009, ARB concluded economic incentives, such as federal tax incentives, were a more instrumental cause. ARB contended a baseline predating the 2015 administrative proceedings (1) would be misleading, (2) was not required by law, and (3) was not required by *Poet I*.



Petitioners responded that ARB’s use of the 2014 baseline was “a regulatory sleight of hand.” The Court of Appeal agreed the baseline was improper: “A proper baseline would identify the conditions that existed before any impacts of the original LCFS regulations began to accrue and, thus, would provide a solid foundation for identifying those impacts.” To establish this baseline, parties must examine the conditions existing when the environmental analysis of a project began. Here, because the project is not limited to the modified 2015 LCFS regulations but also includes the original 2009 regulations, a 2014 baseline cannot possibly capture the conditions existing when the project commenced. While not defining an exact date, the court stated the project more likely commenced in 2007 when Governor Schwarzenegger directed ARB to determine if the LCFS could be adopted and when ARB began consulting with the public.

An agency has discretion to choose to evaluate impacts on future conditions rather than existing conditions, but only if it adequately justifies omitting the existing conditions analysis. ARB contended Paragraph 3 covered only *future* emissions, but failed to justify this conclusion. ARB’s explanation — specifically, that a 2009 baseline would have been small and that sorting out the extent to which increased NOx emissions resulted from the original LCFS regulations as opposed to other federal incentives would have been difficult — was not persuasive.

To comply with Paragraph 3, and consequently CEQA, the Court of Appeal held ARB should have predicted the amount of NOx emissions for each year and subtracted the baseline to yield the total increase in NOx emissions. ARB should have made findings of fact about causation, and should have allocated the NOx emissions increases among the factors causing the increase, which might include the 2015 LCFS regulations as well as other incentives programs introduced after 2009. Finally, ARB should have determined whether the amount of any increase caused by the LCFS regulations was “significant” as the term is used in CEQA.

In sum, the Court of Appeal reversed the trial court’s order discharging the peremptory writ of mandate, and directed the superior court to vacate that order and enter a new order stating ARB did not comply with Paragraph 3 and denying ARB’s request for an order discharging the writ.

- Opinion by Justice Franson, with Acting Presiding Justice Kane and Justice Smith concurring.
- Trial Court: Fresno County Superior Court, No. 09CECG04659, Judge Jeffrey Y. Hamilton, Jr.

EIRs			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
31 <i>Protect Our Homes and Hills v. County of Orange</i>		4 th	

[*Protect Our Homes & Hills v. County of Orange*](#), California Court of Appeal, Fourth Appellate District, Division Three, Case No. G054185 (October 13, 2017).

- An unstable or inaccurate description of a project’s environmental setting in an EIR violates CEQA because it prevents proper analysis of potential impacts.
- Mitigation is improperly deferred when an EIR does not specify performance criteria that mitigation measures must meet.
- Potential impacts to special status plants can be properly mitigated by measures requiring the planting, monitoring, and maintenance of replacement plants at an offsite location.
- CEQA requires the text of an EIR to include a clear and thorough explanation of all project impacts, including both construction and operational phase impacts.
- While a final EIR invariably includes information not included in the draft EIR, recirculation is the exception rather than the general rule.

In an unpublished opinion, the Court of Appeal reversed in part the trial court’s partial denial of petitioner Protect Our Homes and Hills’ (Petitioner’s) writ petition. The court held that the environmental impact report (EIR) prepared by the County of Orange (County) regarding a 340-home residential project (Project) to be developed by a real estate developer (Developer) did not contain an accurate and stable description of the Project’s environmental setting as required by CEQA, improperly deferred mitigation of fire hazard impacts, and failed to properly analyze water supply availability.

The County prepared a draft EIR (DEIR) for the Project, which indicated that nearly all of the Project’s potential impacts would be reduced to less than significant levels after mitigation. The two impacts identified as being significant and unavoidable even after mitigation were greenhouse gas (GHG) emissions and long-term potential operational noise caused by increased traffic. After responding to thousands of comments and making a number of changes that the County believed “simply clarified, amplified, elaborated on, and made other minor modifications to” the DEIR, the County certified a final EIR (FEIR) without recirculation.

Petitioner petitioned for a writ of mandate, alleging a litany of CEQA violations. The trial court agreed with Petitioner’s argument that the FEIR failed to properly consider all feasible GHG mitigation measures, rejected Petitioner’s other arguments for lack of merit, and issued a corresponding preemptory writ of mandate.

Petitioner timely appealed, urging *de novo* review of its contentions that the County violated CEQA by (1) failing to provide an accurate and stable description of the project’s environmental setting, (2) failing to properly analyze and mitigate fire hazard impacts, (3) failing to properly analyze and mitigate impacts to two special status species, (4) omitting proper analysis of the Project’s total water demand, and (5) failing to recirculate the FEIR prior to certification.

First, the court held that the EIR's description of the Project's environmental setting violated CEQA because it prevented proper analysis of potential impacts. The Project site is located directly adjacent to Chino Hills State Park (CHSP). In the DEIR, the acreage of CHSP was understated by roughly 2,300 acres (11,770 instead of 14,100). The DEIR also included inaccurate maps of CHSP, showing the park as bordering only a portion of the northern and eastern boundaries of the Project site when in fact the park bordered the entire northern and eastern boundaries. The FEIR corrected the numerical acreage, but most of the inaccurate maps were left unchanged.

Next, the court rejected Petitioner's claim that the FEIR failed to properly analyze potential fire hazards, noting that the FEIR's conclusions were supported by substantial evidence and that an agency need not analyze every theoretical scenario in order to comply with CEQA. However, the court agreed that the FEIR improperly deferred fire hazard mitigation. The mitigation measures in the County's FEIR did not specify performance criteria, and thus had to be revised to eliminate improper deferral.

Turning to Petitioner's biological resources arguments, the court rejected the claim that the FEIR failed to properly analyze and mitigate impacts to special status species. The Project site contains two special status plants, and a County consultant conducted a biological study that determined these species would be significantly impacted by the Project. To mitigate these impacts, the DEIR included two mitigation measures requiring Developer to plant replacements of these species prior to the issuance of grading permits. The FEIR further specified a monitoring and maintenance plan for the new plants and required an 80% survival rate for the mitigation to be considered successful. The court concluded that substantial evidence supported the County's determination that these measures would adequately mitigate potential impacts.



Next, the court agreed with Petitioner's claims regarding the insufficiency of the County's water supply analysis. The DEIR estimated the Project's projected water needs by multiplying the estimated average water use of a residential dwelling unit by the number of residential lots on the Project site. The DEIR relied on documents published by the Yorba Linda Water District to conclude, without further explanation, that water supplies were sufficient to meet projected demand. Despite requests for further analysis, the FEIR's responses to comments merely reiterated the conclusions of the DEIR. The court determined that this approach was insufficient, explaining that CEQA requires an EIR to include a clear explanation of a project's environmental effects rather than merely referencing external documents, and noting that construction phase water use and water use in public spaces were improperly excluded. The court also took issue with the way the County framed the analysis because the DEIR and FEIR focused not on the sufficiency of water supplies, but on whether new entitlements would be required.

Finally, using the substantial evidence standard, the court held that the County did not err in its decision not to recirculate prior to certifying the FEIR. Petitioner argued that the FEIR's belated inclusion of the CHSP acreage, additional fire protection measures, and new information regarding the amount of open space on the Project site necessitated recirculation; however, the court disagreed because an FEIR invariably contains some amount of new information, and recirculation is the exception rather than the rule. The court left it to the County to determine whether new information rectifying the FEIR's deficient description of the environmental setting would necessitate recirculation.

Accordingly, the Court of Appeal affirmed in part and reversed in part the trial court's judgment and remanded the case for further proceedings. The Court of Appeal directed the trial court to modify its judgment to indicate the petition for writ of mandate is also granted with respect to the issues of environmental setting, fire hazard mitigation, and water demand, and explained that the writ shall require the County to revise the EIR in accordance with CEQA to correct these deficiencies.

- Opinion by Justice Thompson, with Presiding Justice O'Leary and Justice Moore concurring.
- Trial Court: Orange County Superior Court, No. 30-2015-00797300, Judge William D. Cluster.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
32 <i>SJJC Aviation Services, LLC v. City of San Jose</i>		6 th	

[*SJJC Aviation Services, LLC v. City of San Jose*](#), California Court of Appeal, Sixth Appellate District, Case No. H041946 (May 24, 2017).

- An agency must consider and prepare addendums to an EIR prior to, not after, making a decision to authorize a project.

In a published opinion, the Court of Appeal reversed the trial court’s decision denying a petition for a writ of mandate challenging the City of San Jose’s (City’s) award of a lease and operating agreement to Signature Flight Support Corporation (Signature). The Court of Appeal concluded that the San Jose City Council (City Council) abused its discretion under CEQA by not preparing and considering an addendum to its Airport Master Plan environmental impact report (EIR) before granting the City Manager unconditional authority to execute the lease and operating agreements with Signature.

In 1997, the City Council passed an Airport Master Plan and issued a corresponding EIR for phased development at the San Jose International Airport (Airport). In 2010, the City Council approved a major amendment to the Master Plan aimed at expanding Airport facilities. The City Council issued a request for proposals for the development and operation of these facilities, and in 2013, the City Council passed resolutions granting the City Manager unconditional authority to negotiate a lease and operating agreement with Signature. Petitioner SJJC Aviation Services, LLC (SJJC), also submitted a proposal, but it was rejected. The City Council ultimately prepared a tenth addendum to the Master Plan EIR addressing Signature’s planned development, but only after the City Council granted the City Manager authority to negotiate with Signature. SJJC filed a writ of mandate challenging the actions taken by the City Council approving or facilitating Signature’s proposed development, which the trial court denied.

SJJC appealed, arguing, among other things, that Signature’s proposed development was subject to CEQA’s provisions that apply to a new project that had not previously received environmental review, rather than to CEQA’s subsequent review provisions. Moreover, that a “project-level” EIR should have been prepared and considered before the City Council granted any approvals related to Signature’s proposed development. SJJC alternatively maintained that, even assuming that no EIR was required to be prepared before the City Council granted any approval of the proposed development, the tenth addendum was untimely prepared and substantively inadequate.

The Court of Appeal concluded that by not timely preparing and considering an addendum to the Master Plan EIR *before* the City Council initially decided to award the lease and operating agreement for development of general aviation facilities to Signature, the City violated CEQA Guidelines section 15164, subd. (d). This section requires that “[t]he decision-making body shall consider the addendum with the final EIR ... *prior* to making a decision on the project.” The Court cautioned that overly deferential review of an agency’s timing decisions would allow the agency to evade CEQA’s core informational purpose. Even if no additions or changes to the Master Plan EIR were necessary, the City Council was still required to adequately describe Signature’s proposal and make a fully informed decision. The Court of Appeal rejected the City Council’s argument that a previous addendum was sufficient, because the addendum provided no specifics on Signature’s planned expansion.

The Court denied SJJC's claim that the Signature development was subject to CEQA review provisions for a new project, rather than subsequent review provisions. The Court clarified that agencies are allowed to proceed under subsequent review provisions if the original environmental documents retain some informational value, and the new project does not involve substantial changes that would require major revisions of the previous EIR. The Court found substantial evidence that the previous EIR and addendum were relevant to the Signature project as the documents considered potential environmental impacts of improvements and expansions to the Airport. The Court also denied SJJC's claim that an initial study must be conducted to determine whether to proceed under subsequent review provisions.



The Court also denied SJJC's claim that the tenth addendum was substantively inadequate. SJJC argued that the addendum was based on improper baselines since it used noise pollution data from 2003, but the Court of Appeal clarified the requirement to establish a new baseline of current existing conditions only applies to EIRs, not to addenda. The Court also rejected SJJC's assertions that the tenth addendum did not adequately address curfew enforcement and sleep disturbance impacts, finding that the addendum sufficiently addressed these issues.

Finally, the Court of Appeal found the City's CEQA statute of limitations claim meritless. The City argued that the 30-day statute of limitations for CEQA claims was triggered when the City Council announced the amendment to the Master Plan in 2010. However, the Court held that SJJC was not challenging the City Council's amendment from 2010, but its subsequent actions in awarding Signature the contract in 2013.

Based on the Court of Appeal's conclusion that the City abused its discretion under CEQA by not timely preparing and considering an addendum to the Master Plan EIR *before* the City Council decided to award the lease and operating agreement to Signature, the Court of Appeal reversed the trial court's denial of SJJC's petition for writ of mandate.

- Opinion by Justice Elia, Justice Rushing and Justice Premo concurring.
- Trial Court: Santa Clara County Superior Court, Case No. CV246057, Judge Joseph Huber.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
33 <i>Washoe Meadows Community v. Department of Parks & Recreation</i>		1 st	

[Washoe Meadows Community v. Department of Parks & Recreation](#), California Court of Appeal, First Appellate District, Case No. A145576 (November 15, 2017),

- A draft EIR that failed to select a preferred alternative did not meet the CEQA requirement to provide an accurate, stable, and finite description of the project.

In a published opinion, the Court of Appeal affirmed the trial court's decision granting a petition for writ of mandate brought by respondent Washoe Meadows Community (Washoe) to compel the California Department of Parks and Recreation (Department) and the California State Park and Recreation Commission (Commission) to set aside their approval of the Upper Truckee River Restoration and Golf Course Reconfiguration Project (Project). The court held that the draft environmental impact report (EIR) failed to provide the public with an "accurate, stable, and finite description of the project" because the draft EIR did not select a preferred alternative.

The Department initiated the Project in order to restore the Upper Truckee River and prevent its continued erosion. A portion of the river that runs through the State Park and Recreation Area was identified as one of the worst contributors of sediment running into Lake Tahoe. Moreover, a golf course inside the Recreation Area was of particular concern, as it altered the course and flow of the river and contributed to the deterioration of the habit and water quality.

The Department prepared and circulated the draft EIR, which described five alternatives but did not identify a preferred alternative. Instead, the draft EIR stated that all five alternatives were being considered, and that a preferred alternative or a combination of preferred features would be chosen after public comments had been received and discussed in the final EIR. The final EIR identified a modified version of Alternative 2, which called for restoration of the river, reconfiguration of the 18-hole golf course, and an adjustment of the boundary between the state park and the state recreation area. Despite these modifications to Alternative 2, the Department concluded that recirculation of an EIR was unnecessary because none of the significance conclusions presented in the draft EIR changed. The Department then certified the adequacy of the final EIR and approved the preferred alternative.

In response, Washoe filed a petition for writ of mandate seeking to set aside the approval of the Project. The trial court granted the petition on four grounds:

- The draft EIR failed to identify a stable proposed project on which the public could comment because it set forth a range of alternatives rather than designating a preferred alternative.
- The final EIR did not sufficiently explain why the preferred alternative was substantially the same as Alternative 2 in the draft EIR.
- The differences in vegetation mapping between the draft EIR and the final EIR required recirculation of the final EIR.

- The final EIR's stated mitigation measures improperly deferred mitigation by failing to set a standard or commit to further review.

On appeal, the court stated that the dispositive issue was the draft EIR's failure to provide the public with an "accurate, stable, and finite description of the project," which prejudicially impaired the public's ability to participate in the process as required by CEQA. By presenting a range of broadly divergent alternatives without indicating the alternative that was preferred, the public's ability to engage in effective commenting was compromised. The Department and Commission argued that the draft EIR's thorough analysis of the environmental effects of Alternative 2 overcame its failure to select a preferred alternative, but the court was unconvinced. The court noted that the problem with an agency's failure to propose a stable project is not confined to the informative quality of the EIR's environmental forecasts.

While the court admitted that there could be situations in which the presentation of a limited number of similar alternatives without a designated preferred alternative might be sufficient, the differences between the alternatives presented in this draft EIR were too great. The court declined to apply the standard under NEPA, which requires that a preferred alternative be identified "only if one or more exists." The court noted that while cases interpreting NEPA may be persuasive, courts will decline to follow such precedent if the precedent is contrary to CEQA.



The court concluded that failure to comply with the requirement was prejudicial, because it precluded informed decision-making and public participation. The court noted that such prejudice could exist, even if the outcome would have been the same had the agency complied with the requirements of CEQA.

The court declined to rule on the other issues that were before the trial court, finding them moot. The court also declined to consider the challenge brought to the trial court's determination that the Department improperly deferred the formulation of mitigation measures, because this issue could be resolved in the revised EIR and might also be rendered moot.

Thus, the Court of Appeal upheld the trial court's order granting Washoe's petition for a writ of mandate and requiring the Department and Commission to set aside their approval of the Project.

- Opinion by Justice Needham, with Presiding Justice Jones and Justice Bruiniers concurring.
- Trial Court: Superior Court of Alameda County, No. RG-1261937, Judge Evelio M. Grillo.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
34 <i>Coury v. Marin County</i>		1 st	

[Coury v. Marin County](#), California Court of Appeal, First Appellate District, Division Five, Case No. A150043 (November 6, 2017).

- A reviewing court must apply the substantial evidence standard in determining if a proposed project qualifies for a “Class 1” categorical exemption for “Existing Facilities,” and in determining whether the project presents unusual circumstances such that an exception to the CEQA exemption applies.

In an unpublished opinion, the Court of Appeal affirmed the trial court’s decision that Marin County Board of Supervisor’s (Board) approval of a design review and sign review application for a grocery store with restaurant-like qualities in an existing building (Project) — which was already approved for a grocery store — was categorically exempt from CEQA. The court held that David Coury (Petitioner) failed to prove that the unusual circumstances exception to CEQA’s categorical exemptions applied. The court stated that although Petitioner’s arguments supported a “fair argument” that unusual circumstances exist, the correct standard to apply in determining whether a project presents unusual circumstances is the substantial evidence standard.

In 2014, a design review and sign review application was submitted to the Marin County Planning Division (Planning Division) to renovate a building to establish a Good Earth market. The building already had a use permit for a grocery store dating back to 1984. The application called for additional landscaping, a reconfigured parking layout (although no grading or changes to the storm drainage system), a change in parking lighting fixtures, and new signs. The Planning Division approved the application and found the Project to be categorically exempt from CEQA. The Petitioner subsequently appealed unsuccessfully to the Marin County Planning Commission (Planning Commission) and the Board.

In July 2015, Petitioner filed a petition for a writ of mandate, requesting the trial court to vacate and rescind the County’s approval of the application. The trial court denied the petition, finding substantial evidence supported the County’s decision and that the Project was exempt from CEQA because it was an “in-kind” replacement in an existing space for a permitted grocery store use that did not expand the existing use. On appeal, Petitioner contended:

- The County erred by not requiring a use permit for the restaurant in the grocery store.
- The County’s approval of the application was inconsistent with the countywide plan’s transportation policies.
- The application did not qualify for a CEQA categorical exemption.

First, the Court of Appeal found that the County did not err by not requiring a restaurant permit for the grocery store. Rather, the Court of Appeal looked at the Marin County Development Code’s definitions and the description of the Project, and determined that the Board’s conclusion that the market’s planned uses were consistent with a grocery store use was reasonable. The Court of Appeal noted that the Board was entitled to considerable deference in interpreting its own ordinances.

Second, the Court of Appeal rejected Petitioner's contention that the County's approval of the application was inconsistent with the countywide plan's transportation policies. Petitioner argued that the Project would violate the transportation policy requiring necessary transportation improvements for new developments. However, the addition of an in-store restaurant was not an expansion of use and, thus, not a new development. Instead, the Court of Appeal agreed with the Board that a traffic study was not required because the Project was proposed on a parcel that was previously approved for similar uses.


Third, the Court of Appeal found that the County's approval of the application was categorically exempt under CEQA as an "Existing Facility." Petitioner argued that the Project would include "a café and a cafeteria-like restaurant with in-store seating" unlike its predecessors, and that this was an expansion of use. However, the Court of Appeal found that substantial evidence supported the Board and Planning Commission's decision, on the basis that the Project entailed remodeling an existing structure and new signs that would not add any new floor area to the Project site.

The Court of Appeal rejected Petitioner's argument that the unusual circumstances exception to CEQA applied, because the Project's location would have a significant impact on the environment. The Court of Appeal applied the substantial evidence standard, and affirmed the Board's findings that a traffic study was not required because it "was a like-for-like use" and not an expansion of use. The Court of Appeal rejected Petitioner's argument that it should apply the fair argument standard, holding that that standard is intended to guide the determination of whether a project has a potentially significant effect, not whether it presents unusual circumstances. Likewise, the Court of Appeal rejected Petitioner's argument that the cumulative impact exception applied because that exception concerns the cumulative impact of successive projects of the same type in the same place, over time. However, in this case, the Board was not considering successive projects because this was the only grocery store in the area.

Accordingly, the Court of Appeal affirmed the trial court's decision and awarded Marin County its costs on appeal.

- Opinion by Presiding Judge Jones, with Justice Simons and Justice Needham concurring.
- Trial Court: Marin County Superior Court No. CV1502686, Judge Paul Haakenson.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
35 <i>Pleasant Valley County Water District. v. Fox Canyon Groundwater Management Agency</i>		2 nd	

[*Pleasant Valley County Water District v. Fox Canyon Groundwater Management Agency*](#), Second Appellate District, Division Six, Case No. B281425 (November 21, 2017).

- When an ordinance merely clarifies an existing policy, no CEQA review is required because no new environmental impacts occur.

In an unpublished opinion, the Court of Appeal affirmed the trial court's order denying Petitioner Pleasant Valley County Water District's (PVCWD's) petition for writ of mandate challenging Fox Canyon Groundwater Management Agency's (Fox Canyon's) approval of an ordinance clarifying rules for groundwater extraction surcharges. The court found that Ordinance No. 8.8 was categorically exempt from CEQA review because the clarifying ordinance did not create any new environmental impacts, and because record evidence demonstrated that groundwater extraction surcharges would enhance rather than degrade the existing environment.

Fox Canyon is a special water agency created by the California Legislature to manage and conserve groundwater resources in the Oxnard Plain. Severe drought and groundwater overdrafts have caused seawater intrusion into the Oxnard basin, and Fox Canyon is responsible for developing and implementing a plan to balance groundwater supply and demand. PVCWD is a special district water purveyor authorized by the County Water District Law to sell river surface water to farmers and other agricultural operators.

In response to the Governor's 2014 proclamation declaring a statewide drought emergency, Fox Canyon adopted Emergency Ordinance E, a temporary measure imposing groundwater extraction surcharges. In January 2015, the Fox Canyon Board of Directors adopted Ordinance No. 8.8 to clarify the groundwater extraction surcharge rules adopted concomitant with Emergency Ordinance E.

PVCWD argued that Fox Canyon abused its discretion in determining that Ordinance No. 8.8 was categorically exempt from CEQA review. Fox Canyon reasoned that Ordinance No. 8.8 merely clarified the existing Emergency Ordinance E and would therefore have no new impacts requiring CEQA review, and that in any event, groundwater extraction surcharges would produce net environmental benefits. On this basis, Fox Canyon applied class 7 and 8 exemptions, which apply to projects that fit entirely within existing policies and projects that enhance the environment. PVCWD countered that the groundwater extraction surcharge would incentivize groundwater pumping, leading to further groundwater depletion. PVCWD argued that because Ordinance No. 8.8 was likely to produce new, deleterious environmental impacts, CEQA review was required. On review, the Court of Appeal had to determine whether substantial evidence supported Fox Canyon's exemption determination.

Regarding the class 7 and class 8 exemptions, PVCWD argued that these exemptions did not apply because Fox Canyon did not have law-making power to adopt Ordinance No. 8.8. The court clarified that Fox Canyon has the statutory authority to adopt regulations that protect groundwater and groundwater recharge sources, and by extension has the authority to determine whether such regulations are subject to CEQA review.

The Court of Appeal also noted that when Fox Canyon adopted Emergency Ordinance E and found that ordinance to be exempt from CEQA, PVCWD did not challenge Fox Canyon's actions. Ordinance No. 8.8, adopted nine months later to clarify the rules set forth under Emergency Ordinance E, did not change the existing policy or create any new environmental impacts and was therefore properly exempted from CEQA review.



Next, the court upheld the trial court's determination that Ordinance No. 8.8 satisfies the "commonsense exemption," which applies when a project will enhance rather than degrade existing environmental conditions.

Finally, the court dismissed PVCWD's argument that the CEQA "unusual circumstances" exception trumps the applicable categorical exemptions because Ordinance No. 8.8 will lead to significant, unintended negative environmental impacts. Specifically, PVCWD asserted that groundwater surcharges would financially incentivize groundwater pumping, causing further depletion of groundwater basins. However, the court found that the administrative record did not contain any data, evidence, or expert testimony supporting PVCWD's groundwater depletion contention and dismissed the argument as speculative.

Accordingly, the Court of Appeal affirmed the trial court's judgment order denying the petition for writ of mandate.

- Opinion by Acting Presiding Justice Yegan, with Justice Perren and Justice Tangeman concurring.
- Trial Court: Superior Court of Ventura County, Case No. 56-2015-00464072-CU-WM-OXN, Judge John A. Torribio.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
36 <i>Protect Telegraph Hill v. City and County of San Francisco</i>		1 st	

[*Protect Telegraph Hill v. City and County of San Francisco*](#), California Court of Appeal, First Appellate District, Case No. A148544 (September 14, 2017).

- Categorical exemptions for a project upheld if project met plain language of statutory exemption; conditions applied to the project's conditional use authorization were not CEQA mitigation measures in disguise rendering the exemption unlawful.

In an unpublished opinion, the Court of Appeal affirmed the trial court's finding that no CEQA review was necessary because:

- The three-unit condominium project was categorically exempt from review.
- No unusual circumstances existed to warrant overriding the exemption on the basis that the project will have a significant effect on the environment.

The proposed project would construct three condominium units and restore and rehabilitate a small uninhabitable cottage. In September 2014, the San Francisco Planning Department (the Department) determined the project was exempt from CEQA because it fell within two classes of projects determined not to have significant effects on the environment:

- Renovation and restoration of deteriorated structures (CEQA Guidelines § 15301(d))
- Construction of a residential structure totaling no more than four dwelling units (*id.*, § 15303(b))

A neighborhood group (Petitioner) appealed the Department's decision to the Board of Supervisors. In November 2014, the Board upheld the Department's decision, and Petitioner challenged the approval and the conditional use authorization in a petition for writ of mandamus. Petitioner argued there was no evidence from which to conclude the project was exempt from CEQA, and unusual circumstances and the imposition of mitigation measures made the categorical exemptions improper.

The Court of Appeal rejected Petitioner's arguments regarding the CEQA exemptions, noting that Petitioner made no claim that the proposed project was not encompassed within the plain language of the exemptions.

Instead, Petitioner argued that granting the exemptions was unlawful because the Board of Supervisors imposed conditions on project approval designed to mitigate the project's construction effects, demonstrating that the project would harm the environment. The Court of Appeal noted that these conditions had no bearing on whether the project was exempt from CEQA, because the conditions related to pedestrian safety and traffic and did not constitute mitigation measures of significant environmental effects under CEQA.

Moreover, the conditions have no bearing on the Department's consideration of the project's categorical exemptions, but were instead conditions for the project's separate conditional use authorization. Evidence

in the record clarified that the conditions were not to address significant impacts of the project under CEQA. Petitioner did not argue the exemptions were unsupported by substantial evidence, and the Court of Appeal concluded there was no basis to conclude that the conditions imposed on the conditional use authorization were disguised mitigation measures required by CEQA.



Petitioner also argued the exemptions were not proper because the project description was inadequate for San Francisco City and County (City) officials to determine whether the project warranted a categorical exemption. The Court of Appeal rejected Petitioner's argument that the project description was inadequate, determining that the description satisfied the City's Administrative Code requirements and therefore allowed the City to adequately consider the project's CEQA exemptions and conditional use authorization. Further, the court concluded there was no evidence in the record warranting a conclusion that the project description was deficient for its intended purpose.

Finally, Petitioner argued the project was not exempt due to unusual circumstances. The Court of Appeal determined that Petitioner did not meet its "burden of producing evidence supporting an exception" to the exemptions. Petitioner only argued that the unusual circumstances exception applied because of the project's location in the Telegraph Hill area. However, substantial evidence supported the City's conclusion that the proposed project presented no unusual circumstances, and the record shows the City considered Telegraph Hill's stature and determined the project conformed with existing zoning and the general plan description of Telegraph Hill. Thus, the Court of Appeal rejected the notion that the project resulted in an unusual circumstance requiring CEQA review when it conformed with the area's zoning requirements. The court similarly rejected Petitioner's argument that the project's effect on views and topography were evidence of the project's significant environmental effects, and presented unusual circumstances.

The Court of Appeal concluded the project would not change Telegraph Hill's unique character, and that substantial evidence supported the City's determination that the project is exempt from CEQA. Accordingly, the Court of Appeal affirmed the trial court's decision to deny Petitioner's petition for a writ of mandamus.

- Opinion by Justice Siggins, with Presiding Justice McGuinness and Justice Pollak concurring.
- Trial Court: San Francisco City and County Superior Court, No. CPF-14-514060, Judge Teri L. Jackson.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
37 <i>Respect Life South San Francisco v. City of South San Francisco</i>		1 st	

[*Respect Life South San Francisco v. City of South San Francisco*](#), California Court of Appeal, First Appellate District, Case No. A145992 (September 18, 2017).

- A reviewing court cannot affirm an implied determination that the unusual-circumstances exception is inapplicable by simply concluding that the record contained substantial evidence that the project did not involve unusual circumstances.

In a published opinion, the Court of Appeal affirmed the trial court's finding that the City of South San Francisco's (City's) approval of a conditional-use permit allowing an office building to be converted to a medical clinic was categorically exempt from CEQA. The court held that Respect Life South San Francisco (Petitioner) failed to prove that the unusual-circumstances exception to CEQA's categorical exemptions applied by only pointing to evidence that the permit would lead to protests.

The owner of an office building in downtown South San Francisco applied for a conditional-use permit to convert the building to a Planned Parenthood medical clinic (Project). The only proposed physical alterations to the building were interior alterations, minor exterior repairs, and a new sign. The City's Planning Commission approved the application after a public hearing, determining that the Project fell within several categorical exemptions to CEQA. Petitioner appealed the Planning Commission's decision to the City Council, claiming that the City could not "ignore the inherently noxious and controversial nature of a portion of Planned Parenthood's services," which would lead to protests that would cause environmental impacts. The City Council held a hearing on appeal and rejected Petitioner's appeal because the Project was exempt from CEQA under three categorical exemptions:

- The operation of existing facilities
- The conversion of small structures
- The development of urban in-fill

Petitioner filed a petition for a writ of mandate, which the trial court rejected.

Petitioner appealed, accepting that the Project fell within a CEQA exemption, but arguing that a full environmental review was still required because the "unusual-circumstances exception" to the CEQA exemptions applied due to impending protests of the "noxious" and "controversial" nature of the services rendered by Planned Parenthood. To establish that the unusual-circumstances exception applies, a party must establish that:

- The project presents unusual circumstances.
- There is a reasonable possibility of a significant environmental effect due to those circumstances.

In reviewing the agency's second determination, whether there is a possibility of significant environmental effects, the court must "determine whether substantial evidence supports the agency's conclusion," a non-deferential standard.

Here, the City's determination that the unusual-circumstances exception was inapplicable was an implied one. The court held that it could not affirm the City's implied determination by simply concluding that the record contained substantial evidence that the project did not involve unusual circumstances. Rather, to affirm an implied determination, the court must assume that the City found unusual circumstances and then conclude that the record contains no substantial evidence to support either:

- A finding that any unusual circumstances exist
- A fair argument of a reasonable possibility that an unusual circumstance identified would have a significant effect on the environment

The court only addressed the second determination, that substantial evidence supported a fair argument that there is a reasonable possibility that the Project will have a significant effect on the environment.



Petitioner alleged that the Project would cause environmental impacts such as sidewalk obstruction, public safety, traffic congestion, parking congestion, business disruption, and an increase in noise. The court rejected this argument because the record did not contain substantial evidence to support a fair argument that these impacts would have a significant environmental effect. The evidence presented by Petitioners was "minimal, vague, and speculative." Although some opponents indicated they would protest, the overwhelming evidence indicated that the protests would be small and would not be disruptive. The court held that Petitioner was required to do more than just assert that protests would lead to environmental impacts.

In fact, the court held that the record contained evidence that there was no reasonable possibility for a significant environmental effect. This is because the protests were likely to be small, and witnesses from other Planned Parenthood facilities testified that protests of their facilities were small and non-disruptive. Additionally, the court noted that parking issues were thoroughly considered and the police testified that there was no likelihood of public safety impacts.

Accordingly, the Court of Appeal affirmed the trial court's decision and awarded Planned Parenthood its costs on appeal.

- Opinion by Presiding Justice Humes, with Justice Margulies and Justice Dondero concurring.
- Trial Court: San Mateo County Superior Court. No. 524437, Judge Marie S. Weiner.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
38 <i>Communities for a Better Environment v. San Joaquin Valley Unified Air Pollution Control District</i>		5 th	

[*Communities for a Better Environment v. San Joaquin Valley Unified Air Pollution Control District*](#), California Court of Appeal, Fifth Appellate District, Case No. F073517 (June 23, 2017).

- An agency's conditional approval of "authority to construct" permits for a sewer system is a discretionary act requiring CEQA review when the permits impose specific requirements not explicitly mandated by applicable rules and statutes.
- Policies of rounding down emissions calculations cannot be used when conducting a CEQA analysis.

In an unpublished opinion, the Court of Appeal reversed the trial court's finding that the San Joaquin Valley Air Pollution Control District's (Air District's) issuance of authority to construct permits (permits) for an oily water sewer system was a discretionary act.

In July 2012, the Air District issued permits to Bakersfield Crude Terminal LLC (BCT) to construct a rail-to-pipeline transfer terminal. The Air District calculated the terminal could emit 19,992 pounds of volatile organic compounds (VOC) per year, just below the 20,000-pound threshold for major stationary sources of VOC emissions. Because only stationary sources with the potential to emit at least 20,000 pounds of VOC per year trigger requirements to use best available control technology and to notify the public, no public notice was given. The rail-to-pipeline project was deemed ministerial, and, consequently, was exempted from CEQA.

In January 2014, BCT sought authorization to construct a sewer system at the terminal facility (Sewer Project). The proposed Sewer Project would include four sump tanks and an oil-water separator. The Air District's initial engineering evaluation concluded that the already-approved terminal and proposed Sewer Project could emit a combined 28,089 pounds of VOC per year. In August 2014, BCT cancelled the Sewer Project following a public comment period, as comments suggested an environmental impact report (EIR) was required before approving the Sewer Project since there had been no prior CEQA review.

In September 2014, BCT again sought authorization for the proposed Sewer Project, explaining that each sump tank would now include a 200-pound carbon canister for vapor control. An engineering report concluded that the combined terminal and Sewer Project could emit 20,501 pounds of VOC per year, still above the 20,000-pound threshold. However, the Air District spread out the 509 pounds of VOC emissions associated with the Sewer Project among the Sewer Project's five components, and then applied a policy of rounding down emissions when those emissions were less than or equal to 0.5 lb/day. As a result, the Air District treated the additional emissions as nonexistent. The terminal's total emissions remained at 19,992 pounds of VOC emissions per year. By rounding the additional VOC emissions down to zero, the Air District concluded that the facility was not a major stationary source of emissions and therefore did not trigger the public notice requirement. The Air District additionally concluded that the project was exempt from CEQA as a permitting action constituting ministerial approval. On September 23, 2014, the Air District issued authority to construct permits for the Sewer Project without providing public notice.

In January 2015, five California nonprofit corporations (Petitioners) filed a verified petition for writ of mandate challenging the Air District's determination that the terminal facility *with* the sewer system was a ministerial project and not a major source of emissions requiring CEQA review. A month later, Petitioners also sought to enjoin the sewer system permits and halt operation of the terminal pending CEQA review. The trial court denied the motion for preliminary injunction and the petition for writ of mandate. The Court of Appeal reversed this decision.

The Court of Appeal first rejected the Air District's argument that review of the Sewer Project could not be reopened due to the conclusive effect of prior CEQA determinations. The Court of Appeal did not believe that the terminal project's initial EIR, conducted in 2002, took account of all potential environmental impacts caused by the terminal and the proposed sewer system.

The Court of Appeal also rejected the Air District's argument that Petitioners failed to exhaust all administrative remedies and therefore could not attack the emissions determinations. If a project is considered exempt from CEQA and no hearing or opportunity to comment is made available to the public, exhaustion requirements do not apply.

The Court of Appeal agreed with Petitioners' contention that the Air District's issuance of permits to construct the Sewer Project violated CEQA because the Sewer Project was discretionary and therefore required environmental review. The Air District exercised discretion when it chose to:

- Forego requiring two carbon canisters placed in a series, as was typically required
- Forego requiring the carbon canisters to contain at least 200 pounds of carbon, as was required by the first draft permit
- Include a condition requiring VOC concentration of the carbon canisters to be measured and recorded at least once each week
- Apply the rounding policy to its review of the sewer system permit applications



The Court of Appeal further found that policies of rounding down, similar to those used by the Air District, cannot be used in an analysis under CEQA. Rounding down emissions to zero is not proper for analyzing the potential cumulative impact a project might have on the environment.

Finally, the Court of Appeal found that neither the existing facilities exemption nor the commonsense exemption applied to the proposed Sewer Project. The existing facilities exemption did not apply because the terminal had not been completed or in operation when the sewer system application was submitted. The commonsense exemption did not apply because it could not be "*seen with certainty* that there is *no possibility* that the activity in question may have a significant effect on the environment." The permit authorizing the construction of the terminal project accounted for only a portion of the VOC emissions, and a significant portion of VOC emissions were not counted in the calculations disclosed during the approval processes for the permits for the terminal project or the proposed Sewer Project.

Accordingly, the Court of Appeal reversed the trial court's finding that the issuance of authority to construct permits for the Sewer Project was ministerial and therefore exempted from CEQA. The trial court was directed to grant Petitioners' petition for writ of mandate.

- Opinion by Justice Franson, with Acting Presiding Justice Levy and Justice Detjen concurring.
- Trial Court: Kern County Superior Court No. 284013, Judge William D. Palmer.

Negative Declarations / Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
39 <i>Aptos Council v. County of Santa Cruz</i>		6 th	

[*Aptos Council v. County of Santa Cruz*](#), California Court of Appeal, Sixth Appellate District, Case No. H042976 (March 30, 2017).

- “Piecemealing” has not occurred if projects have different proponents, serve different purposes, or can be implemented independently.
- A negative declaration is appropriate if future developments are too speculative to be reasonably foreseeable.

In a published decision, the Court of Appeal affirmed the trial court’s order denying petitioner The Aptos Council’s (Petitioner’s) petition for a writ of mandate challenging the County of Santa Cruz’s (County’s) adoption of three ordinances and approval of a negative declaration for one of the ordinances. Specifically, the Court of Appeal found that the County did not erroneously engage in piecemeal environmental review when the County evaluated three ordinances and their respective environmental impacts separately, and that a negative declaration for one such ordinance was not inadequate because future developments were too speculative to be reasonably foreseeable.

In 2013, the County began reform efforts to modernize, clarify, and streamline regulations and regulatory processes. In 2014, the County adopted three separate ordinances as part of this initiative. First, the County Board of Supervisors (Board) adopted an ordinance that extended the minor exceptions to zoning site standards set forth under a previously adopted ordinance (minor zoning exceptions ordinance). In doing so, the Board accepted an addendum to the negative declaration prepared for the previous ordinance, which found the amendments would not have significant environmental impacts. Second, the Board adopted an ordinance that altered certain height, density, and parking requirements for hotels in commercial districts (hotel ordinance). In doing so, the planning department circulated a negative declaration that found the amendments would not have a significant effect on the environment. Third, the Board adopted an ordinance that established an administrative process for approving minor exceptions to the County’s sign ordinance (sign ordinance). The Board found that the amendment was exempt from review under CEQA.

On March 19, 2014, Petitioner filed a petition for a writ of mandate. The petition challenged the County’s approval of three ordinances relating to minor zoning exceptions, hotels, and signs. Petitioner argued that:

- The sign ordinance was not exempt from CEQA review.
- The County’s negative declaration prepared for the hotel ordinance should have considered future developments.
- The County had improperly engaged in unlawful piecemeal review of the environmental impacts of the three ordinances.

The trial court denied Petitioner’s petition, concluding:

- The County’s “regulatory reform efforts” were not a single project for purposes of CEQA.

- No substantial evidence in the record supported a fair argument that the hotel ordinance had a reasonably foreseeable effect on the environment.
- The sign ordinance was exempt from CEQA review.

Petitioner appealed. On appeal, Petitioner argued that the County's adoption of the three ordinances constituted a single project under CEQA — the County's effort toward reforming and modernizing zoning regulations. Therefore, Petitioner claimed the County improperly piecemealed review of environmental impacts when it independently and individually considered each ordinance.

The Court of Appeal disagreed. Citing a previous case involving residents suing a university, the Court of Appeal found that the County's consideration of the three ordinances dealing with minor exceptions, hotels, and signs did not satisfy *both* of the criteria set forth in the previous case law. Specifically, the Court of Appeal found that, although the ordinances could be considered a part of what the County characterizes as its efforts toward regulatory reform of various zoning ordinances, each of the ordinances served different purposes, operated independently of one another, and could be implemented separately. Moreover, the County's effort to modernize certain parts of the County Code was not fixed, so engaging in a single environmental review that early in the process would be meaningless.

Next, Petitioner argued that the negative declaration prepared for the amendments to the hotel ordinance was inadequate, because it failed to consider the inevitable future developments the ordinance would permit. Again, the Court of Appeal disagreed. CEQA mandates only the consideration of "reasonably foreseeable indirect physical changes in the environment which may be caused by the project." The Court of Appeal noted that the County had indeed considered the potential impacts of future development in adopting the negative declaration. However, the impacts considered in the initial study would be speculative until it was known whether any developments would be proposed and, if developments were proposed, the type of hotels that would be built. Thus, the negative declaration concluded that there would be no significant environmental impact, because any future developments would be subject to further environmental review under CEQA. Thus, the Court of Appeal concluded that Petitioner's speculative claims about potential environmental impacts could not amount to substantial evidence.



In sum, the Court of Appeal determined that:

- The County did not erroneously engage in piecemeal environmental review when it evaluated the ordinances and their respective environmental impacts separately.
- The negative declaration for the hotel ordinance was not inadequate because future developments were too speculative to be reasonably foreseeable.
- No substantial evidence supported a fair argument that the ordinance would have a significant environmental impact.

Therefore, the Court of Appeal affirmed the trial court's order denying Petitioner's petition for a writ of mandate.

- Opinion by Justice Premo, with Presiding Justice Rushing and Justice Elia concurring.
- Trial Court: Santa Cruz County Superior Court, No. CV178868, Judge Paul Marigonda.

Negative Declarations / Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
40 <i>Citizen's Voice v. City of St. Helena</i>		1 st	

[*Citizen's Voice v. City of St. Helena*](#), California Court of Appeal, First Appellate District, Division Two, Case No. A146887 (November 8, 2017).

- Courts will presume any environmental impacts identified in an MND are mitigated to an acceptable level unless a party can point to substantial evidence in the administrative record to show significant adverse effects will remain even after mitigation.

In an unpublished opinion, the Court of Appeal affirmed the trial court's finding that the City of St. Helena City Council complied with CEQA in approving a mitigated negative declaration (MND) for an amended use permit for the expanded operation of a wine production facility and event center (Event Center).

On July 15, 2014 and September 16, 2014, the City's Planning Commission approved the proposed Event Center. The City found no significant effects on the environment due to water use or traffic. The only potentially significant impact related to larger events. The MND provided that this impact would be mitigated through the development of a Parking Management Plan, which would identify specific methods of offering parking and would require approval before any special event occurred.

Petitioners filed a written appeal, which expressed ongoing concerns regarding an excessive amount of visitors, the danger of wine tasting near a high school, the insufficiency of parking for special events, the accuracy of the proposed water use, and the Project's consistency with the City's General Plan and zoning ordinances. The City Council denied the appeal, and the Planning Commission subsequently approved a final resolution for the Event Center. Susan Kenward, Geoff Ellsworth, and Citizen's Voice of St. Helena (collectively, Petitioners) filed a Verified Petition for Writ of Mandate on December 31, 2014 and alleged, among other points, that the City violated CEQA by failing to prepare an environmental impact report (EIR).

The Court of Appeal explained that typically, CEQA requires a public agency conduct an initial study of a proposed project to determine whether substantial evidence exists that the project could have significant environmental effects. If so, the agency is directed to prepare and certify an EIR prior to approving the project. However, an EIR is not always required. An agency may instead prepare an MND if revisions in the project plan would avoid or mitigate any significant environmental effects, and if the administrative record lacks substantial evidence that the project, as revised, would still significantly impact the environment.

Petitioners argued the Event Center could have significant effects on public safety, including through the risk of inebriated drivers to nearby high school students. They also argued that the City improperly deferred mitigation and failed to respond to Petitioners' comments. However, the Court of Appeal found that the City properly adopted the MND because substantial evidence supported the determination that the only potentially significant environmental effect could be mitigated. The court found that Petitioners ignored extensive evidence that the mitigation would be effective and made "no genuine attempt to demonstrate how the mitigation measures are inadequate in addressing concerns generated by the proposed project" and made no mention of the Mitigation Monitoring and Reporting Program adopted by the City.


As to the deferral of mitigation, Petitioners argued certain improvements to a crosswalk near the Event Center constituted deferred mitigation. The Court of Appeal disagreed and found that the City could not immediately approve crosswalk improvements due to pending CalTrans approval.

Finally, as to the adequacy of the City's responses to Petitioners' comments, the Court of Appeal found that the City responded to those comments in good faith. Citing *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal. App. 4th 911, 937, the court observed that "Responses to comments need not be exhaustive; they need only demonstrate a 'good faith, reasoned analysis.'"

Therefore, the Court of Appeal affirmed the trial court's finding that the City properly adopted the MND.

- Opinion by Acting Presiding Justice Richman, with Justice Stewart and Justice Miller concurring.
- Trial Court: Napa County Superior Court, No. 26-65618, Judge Rodney Stone.

Negative Declarations / Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
41 <i>Clews Land & Livestock v. City of San Diego</i>		4 th	

[*Clews Land & Livestock v. City of San Diego*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D071145 (December 20, 2017).

- For administrative appeals of project approvals, CEQA requires that the body responsible for approving a project is also responsible for ensuring compliance with CEQA’s environmental review requirements. If that body is not elected, the decision must be appealable to the agency’s elected decision-making body.
- The fact that a project may affect another business’s economic viability is not an effect covered by CEQA; the project must result in a change in the physical environment.
- A mitigated negative declaration does not need to be recirculated if the new additions are not new significant effects, or if the changes merely clarify or make insignificant modifications to the mitigated negative declaration.

In an unpublished opinion, the Court of Appeal concluded the trial court did not err in rejecting Clews Land and Livestock, Barbara Clews, and Christian Clews’ (collectively, Petitioners) appeal of the City of San Diego’s (City’s) approval of a project to build a private secondary school and the City’s adoption of a mitigated negative declaration (MND).

Real parties in interest proposed to construct a 5,340 square foot school (Project), neighboring Petitioners’ commercial ranch and equestrian facility. A farmhouse designated as a historical resource is also on the Project site, but the Project would not affect the building. City staff conducted an initial study and concluded the Project would have no significant impact on the environment except for “cultural resources,” which would be less than significant with mitigation. The City prepared a draft MND for the Project, and later revised the draft following public comment. The MND was ultimately approved following proceedings before a community planning board and a public hearing before a City hearing officer. Petitioners appealed the decision to the planning commission, but neglected to check a box on a form signaling an appeal of the environmental determination to the city council.

Petitioners then filed a petition for writ of mandate and complaint for declaratory and injunctive relief. The trial court rejected Petitioners’ claims, concluding Petitioners failed to exhaust administrative remedies by not properly appealing the environmental determination and that the City was not estopped from asserting a defense based on exhaustion. The trial court concluded Petitioners’ ultimate motive related to concerns over the economic impact to the neighboring ranch, and that to require an environmental impact report (EIR) for a project the size of a large home was “overkill.”

On appeal, the higher court examined *de novo* whether the doctrine of administrative remedies applied. Petitioners took issue with the City’s appeals process, which effectively establishes a bifurcated appeals procedure whereby a hearing officer’s decision may be appealed to the Planning Commission, but must be simultaneously appealed to the city council within the same period. The appeals court agreed the sequencing and interaction of the two appeals procedures was unclear, but held this was not inconsistent with CEQA. CEQA merely requires that the person responsible for approving a project also be responsible for complying with CEQA’s environmental review requirements. If that person is not elected,

the decision must be appealable to the public agency's elected decision-making body. Here, the City's procedure grants a hearing officer authority to approve a project, and the decision is appealable to the elected city council. Petitioners simply neglected to take advantage of this procedure. Petitioners also argued that the city council is not a "decision-making body" because the usual approval process progresses from the hearing officer to the planning commission. The appeals court disagreed, explaining that CEQA and the Guidelines require only that the environmental determination be appealable.

Petitioners also took issue with the appeals process, alleging that the public hearing notice misstated the procedure for appealing an environmental determination such that Petitioners had improper notice under CEQA. The appeals court agreed that the description was misleading, but still rejected the argument because Petitioners neglected to raise the issue on appeal. Petitioners should have invoked an administrative exhaustion defense through equitable estoppel.



Petitioners then argued the City should not have adopted the MND because the Project would cause significant environmental impacts with respect to fire hazards, traffic and transportation, noise, recreation, and historical resources, and that the final MND identified new impacts and mitigation measures not included in the draft MND. In rejecting these arguments, the court reasoned the Project was relatively modest and located on already-developed land. Petitioners' comments relating to potential traffic, recreation, and historical resources impacts were based largely on speculation and predictions, lacking factual foundation. Further, Petitioners' concerns regarding noise were insignificant in the context of the environment as a whole, given the Project's location near a busy highway and Petitioners' large ranch. With respect to alleged fire hazards, the court reiterated that existing environmental hazards unchanged by the Project are not proper for evaluation under CEQA. In addition, CEQA does not cover the possibility that a project may affect another business' economic viability, unless a project results in a change in the physical environment.

Finally, Petitioners argued the MND must be recirculated because it was substantially revised after its release, but prior to its adoption. The court disagreed, finding recirculation not required if new additions are not new significant effects or merely clarify or make insignificant modifications to the MND.

Therefore, the Court of Appeal affirmed the trial court's finding that Petitioners' challenge to the MND was barred because Petitioners did not exhaust their administrative remedies. The court also affirmed the trial court's finding that, even if not barred, Petitioners' challenge to the MND would fail on its merits.

- Opinion by Presiding Justice McConnell, with Justice Huffman and Justice Aaron concurring.
- Trial Court: San Diego County Superior Court, Judge Timothy B. Taylor.

Negative Declarations / Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
42 <i>Coastal Hills Rural Preservation v. County of Sonoma</i>		1 st	

[*Coastal Hills Rural Preservation v. County of Sonoma*](#), California Court of Appeal, First Appellate District, Case No. A145573 (May 16, 2017).

- Petitioner failed to present substantial evidence to support a fair argument that the project modification presented a significant fire danger previously unstudied in the prior mitigated negative declaration, and unmitigated in the supplemental mitigated negative declaration.

In an unpublished opinion, the Court of Appeal concluded the County of Sonoma’s (County) decision to issue a mitigated negative declaration (MND) rather than an environmental impact report (EIR) complied with the relevant CEQA regulations in light of the recent test promulgated by the Supreme Court in *Friends of the College of San Mateo Gardens v. San Mateo County Community College District*, 1 Cal.5th 937 (2016) (*San Mateo Gardens*), regarding whether project modifications require application of CEQA’s subsequent review provisions.

The County approved the third in a series of master use permits (MUPs) for the reclassification of storage tents at the Tibetan Nyingma Meditation Center (Ratna Ling) as permanent structures, and adopted a supplemental MND. The supplemental MND imposed a total of 97 conditions of approval, 16 of which related to fire safety and wildland fire risk. Petitioner Coastal Hills Rural Preservation (Petitioner) contended the County violated CEQA by approving the MUP without requiring an EIR. Specifically, Petitioner contended that reclassifying four storage tents as permanent structures creates a significant risk of wildland fires in light of the supplemental MND’s mitigation measures. Petitioner also challenged the supplemental MND’s determination that the project’s wildland fire-related impacts would not be significant due to adherence to the applicable fire regulations and permit conditions. After Petitioner appealed the trial court’s denial of its petition for writ of mandate, the Court of Appeal affirmed the trial court’s ruling in a published decision determining that the fire risks posed by the storage tents were adequately mitigated in the supplemental MND.

On November 22, 2016, the Supreme Court granted Petitioner’s petition for review, ordered the Court of Appeal’s opinion depublished, and remanded the matter to the Court of Appeal for reconsideration. The Supreme Court also specifically directed the Court of Appeal to a portion of *San Mateo Gardens* that discusses the standard of review for projects previously approved by negative declarations and CEQA Guidelines section 15384, which defines the term “substantial evidence.” *San Mateo Gardens* set forth a two-part analysis for courts to apply when reviewing an agency’s action under CEQA, with respect to modifications made to a project previously approved by a negative declaration:

- The agency must determine whether the previous environmental document retains any relevance in light of the proposed changes.
- If the previous environmental document retains relevance, the agency must determine whether major revisions to the previous environmental document are nevertheless required due to the involvement of new, previously unstudied significant environmental impacts.



On remand, Petitioner asserted there was substantial evidence to support a fair argument that the project modification presented a significant fire danger, in part due to conferring permanent status on tents with 'questionable flammability protection." The Court of Appeal rejected this argument, noting that an EIR is appropriate if a project modification introduces previously unstudied and potentially significant environmental effects that cannot be avoided or mitigated through further revisions to the project plans.

The Court of Appeal determined Petitioner did not satisfy its burden to demonstrate a fair argument that the project may have a significant impact on the environment. The County and Ratna Ling noted that state records confirmed there was a low likelihood of a structure fire starting a wildland fire, and a very low likelihood of a fire starting in the tents because they only have minor electrical service and are equipped with automatic fire sprinklers, heat detection systems, and are surrounded by 200 to 300 feet of defensible space. Petitioner argued that the sprinkler systems do not eliminate the risk of fire, but failed to cite to any evidence to support this argument. On the other hand, the County and Ranta Ling cited to evidence in the record showing that sprinklers are extremely effective, and evidence in the record refuting a number of Petitioner's other speculative arguments.

In light of the entire record and in view of the mitigation measures in the supplemental MND, the Court of Appeal concluded that Petitioner failed to meet its burden of citing to substantial evidence to support a fair argument that reclassifying the existing temporary storage structures as permanent might create potentially significant environmental effects. Petitioner did not offer substantial evidence to demonstrate that the effects were not avoided or mitigated as a result of the fire risk reduction measures imposed by the County. Thus, the County was not required to conduct an initial EIR study with respect to the modified project.

- Opinion by Justice Dondero, Presiding Justice Humes, Justice Margulies concurring.
- Trial Court: Sonoma County Superior Court. No. SCV255694, Judge Elliot Daum.
- Supreme Court: Review granted, depublished, and remanded by Coastal Hills Rural Preservation v. County of Sonoma, 2016 Cal. LEXIS 11076 (November 22, 2016).

Negative Declarations / Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
43 <i>Communities for a Better Environment v. South Coast Air Quality Management District</i>		2 nd	

[*Communities for a Better Environment v. South Coast Air Quality Management District*](#), California Court of Appeal, Second Appellate District, Case No. B269258 (February 13, 2017).

- Administrative remedies were properly exhausted under CEQA because Petitioner had raised the same concerns at issue during the public comment period.
- CEQA baseline used in initial study was appropriate, because it was based on existing physical conditions rather than hypothetical projections derived from permit limits.
- Negative Declaration was proper because oil refinery’s increase in storage capacity would not translate into an increase in refining capacity, and environmental impacts would therefore not reach significance thresholds.
- Negative Declaration was not impermissible piecemealing because increased storage capacity was not a necessary precursor to a future increase in refining capacity, and because the oil company had no immediate plans to increase refining capacity.

In an unpublished decision, the Court of Appeal affirmed the trial court’s judgment, finding the South Coast Air Quality Management District (District) complied with its CEQA obligations when it issued a negative declaration regarding an oil company’s bid to expand the company’s crude oil storage. Because the increased storage would not increase refining throughput, the District determined the project would not significantly impact environment. The courts agreed.

Real party in interest (Real Party) operates a crude oil refinery (Refinery), where it refines oil delivered by tanker ships. In late 2012 and early 2013, Real Party applied to modify its permit to increase the Refinery’s crude oil storage capacity (Project) because the supertankers delivering the crude oil carried more crude oil than could be offloaded into the existing tanks in a single visit.

The District conducted an initial study of the Project and found that, because refining throughput would not increase, the Project would not significantly affect the environment. The District issued a draft negative declaration for public comment. Communities for a Better Environment (Petitioner) objected, arguing the draft negative declaration was flawed because the description of baseline Refinery operations was legally impermissible, and the draft did not account for the fact that the Project was “part of a future expansion.” The District filed written responses to Petitioner’s comments and issued a final negative declaration (Negative Declaration), both of which further explained why the Project would not significantly affect the environment. In December 2014, the District issued a new permit to the Refinery.

Petitioner filed for a writ of mandate alleging the Negative Declaration violated CEQA because the District did not provide an accurate project description, erred in not preparing an environmental impact report (EIR), and improperly piecemealed the project by not examining the possibility of a future increase in refining throughput.

The trial court concluded that the Project would not change refining throughput because various downstream units unaffected by the Project were already operating at maximum capacity. The trial court

held that the Declaration was not impermissibly vague in noting a downstream refining unit was operating “at or near capacity,” because total crude throughput at the Refinery was at physical and permitted maximum. Further, the trial court held that the District did not impermissibly piecemeal its analysis by refusing to examine future increases in refining capacity, because the record contained no evidence of plans to expand that capacity. Petitioner appealed.

As an initial matter, the Court of Appeal explained that an agency’s CEQA obligations occur in three steps:

- First, an agency must determine whether the action qualifies as a project falling within CEQA’s ambit.
- Second, for qualifying projects, an agency must conduct an initial study assessing whether the project may have significant adverse impacts on the environment. If no such impacts are foreseen, the agency issues a Negative Declaration.
- Third, for projects likely to have significant adverse environmental effects, the agency prepares an in-depth EIR.

When, as here, an agency’s negative declaration is at issue, the Court of Appeal must determine whether the petitioner has carried its burden to show “substantial evidence supporting a fair argument of significant environmental impact.”

The Court of Appeal first examined the threshold issue of whether Petitioner had properly exhausted its administrative remedies. A party may not obtain a writ of mandate overturning an agency’s actions due to CEQA noncompliance, unless the alleged grounds of noncompliance were presented to the agency during the public comment period. Here, the Court of Appeal found Petitioner’s objections to the Negative Declaration tracked the main issues raised in Petitioner’s complaint. Therefore, Petitioner properly exhausted its administrative remedies.

Turning to Petitioner’s substantive arguments, the Court of Appeal first assessed the legal viability of the baseline selected for the initial study. Employing a *de novo* review, the Court of Appeal found the baseline was appropriate because the baseline was based on existing physical conditions and not, as Petitioner claimed, hypothetical projections derived from the permit limits. Precedent prohibits defining a baseline as the emissions that a refinery is permitted to release, rather than the refinery’s actual emissions. Here, the District described the Refinery’s actual operations and only alluded to the “permit limit” in order to describe how the Refinery was in fact operating.

Next, the Court of Appeal reviewed for substantial evidence Petitioner’s assertion that increased storage capacity would translate into increased refining capacity. The alleged connection between increased storage and increased refining capacity was the linchpin of Petitioner’s argument, because, without increased refining throughput, there would be no evidence of increased pollution. Petitioner cited language in the Negative Declaration indicating various units in the Refinery’s processing stream perform at “fluctuat[ing]” or “various” rates, or operate “near” — but nevertheless below — the permit limit. Citing other bottlenecks in the Refinery’s operations, the Court of Appeal nevertheless found that increased storage could not result in increased refining throughput.



Finally, the Court of Appeal addressed Petitioner’s assertion that the Negative Declaration was invalid because the Project was part of a larger plan to expand the Refinery, and the District wrongly opted not to study the environmental effects of this larger project. CEQA forbids piecemeal review of a project, but does not require the examination of contemplated long-range plans. To walk this line, an agency must address a future project’s potential environmental impacts if, and only if, the future project is a reasonably foreseeable consequence of the initial project, and the current project and the future project are interdependent. The trial court held that neither prerequisite was met in this case: The record held no

evidence that Phillips 66 was planning a refinery expansion, nor was there evidence that additional storage capacity was necessary for a future expansion of refining capacity.

After dismissing each of Petitioner's arguments, the Court of Appeal affirmed the trial court's judgment in favor of the District and Real Party.

- Opinion by Justice Hoffstadt, with Presiding Justice Chavez and Justice Goodman concurring.
- Trial Court: Superior Court of Los Angeles County, No. BS153472, Judge Joanne O'Donnell.

Negative Declarations / Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
44 <i>Friends of the College of San Mateo Gardens v. San Mateo County Community College District</i>		1 st	

[*Friends of the College of San Mateo Gardens v. San Mateo County Community College District*](#), California Court of Appeal, First Appellate District, Case No. A135892 (May 5, 2017).

- Changes to a proposed project amounted to a modified project, such that CEQA's subsequent review provisions apply.
- The agency's use of an addendum violated CEQA's subsequent review provisions because substantial evidence supported a fair argument that the project changes might significantly affect the environment.

On remand from the California Supreme Court, in a published opinion, the Court of Appeal affirmed the trial court's determination that the San Mateo County Community College District (the District) violated CEQA when the District responded to changes in a campus renovation project by issuing an addendum to a mitigated negative declaration (MND). Under new direction from the Supreme Court, the Court of Appeal concluded the changes amounted to a modified project, such that CEQA's subsequent review provisions apply. The District's use of an addendum violated these provisions because there was substantial evidence to support a fair argument that the project changes might significantly affect the environment.

In 2006, the District adopted a facilities master plan (Plan) proposing new construction and facilities renovations at the District's three college campuses. At the College of San Mateo (College), the Plan included a proposal to demolish certain buildings and renovate others, including the College's Building 20 complex, which includes a garden, an interior courtyard, and a classroom and lab structure. The District published an initial study and MND, which stated that the Plan would not significant affect the environment with the implementation of certain mitigation measures. In 2007, the District certified its initial study and adopted the MND. However, the District later failed to obtain funding for the Building 20 complex renovations. In May 2011, the District indicated that it would demolish, rather than renovate, the complex, which would be replaced with a parking lot and landscaping improvements. The District also proposed to renovate two other buildings previously slated for demolition. The District concluded that, because these changes would not result in a new or substantially more severe impact than previously disclosed, they did not require a subsequent or supplemental environmental impact report (EIR). Instead, the District addressed the changes in an addendum to the District's 2006 initial study and MND.

Petitioner Friends of the San Mateo Gardens (Petitioner) filed suit challenging the approval under CEQA. The District rescinded its original addendum and issued a revised addendum in August 2011, bolstering the analysis in the original addendum. After public comment, the District adopted the revised addendum and reapproved the demolition of the Building 20 complex. Petitioner dismissed its prior suit, and then challenged the revised addendum and reapproval of the demolition. The trial court found that the demolition project was inconsistent with the previously approved plan, and that its impacts were not addressed in the MND. Thus, the trial court granted Petitioner's petition for a writ of mandate, ordering full compliance with CEQA.

The Court of Appeal affirmed, relying primarily on *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, to conclude that, as a threshold matter, the proposed building demolition was a new project, not a project modification. Therefore, the Court of Appeal concluded that the District needed to conduct an initial study of the project to determine whether an EIR was required.

The California Supreme Court reversed, explaining that the Court of Appeal's approach in assessing whether the proposal amounted to a new project was incorrect and would invite arbitrary results because CEQA does not contain any standards for determining whether a project is "new." Further, the Supreme Court explained that the Court of Appeal's review of an agency's decision finding that the subsequent review provisions apply is only the first step in the analysis. Once a court determines that substantial evidence supports that decision, the next step is to determine whether the agency has properly determined how to comply with its obligations under those provisions.

On remand, the Court of Appeal applied this test, first determining that substantial evidence supported the District's decision to prepare an addendum to the MND. The revised plan in the addendum added one building complex to the demolition list and removed two others, but did not affect the plans to demolish the other 14 buildings or remove the measures adopted to mitigate those plans' environmental effects. The Court of Appeal determined the circumstances constituted substantial evidence that the MND remained relevant, thus allowing the District to proceed under CEQA's subsequent review provisions.

Next, the Court of Appeal looked to whether the District properly determined how to comply with its obligations under CEQA's subsequent review provisions. Following the Supreme Court's guidance in *San Mateo Gardens*, the Court of Appeal stated that once a court has determined that the subsequent review provisions apply to a project through a negative declaration, the standard of review becomes less deferential to the agency.

The Court of Appeal rejected the District's interpretation of the Supreme Court's decision — that *San Mateo Gardens* requires courts to apply the fair argument standard only in limited subsequent review circumstances not present here. The Court of Appeal explained that there is only one reasonable interpretation of *San Mateo Gardens*: if, as in this case, an agency originally prepares a negative declaration, a court must assess whether there is substantial evidence that the changes to a project for which a negative declaration was previously approved *might have* a significant environmental impact not previously considered in connection with the project as originally approved. Proposed changes may have a significant environmental impact when there is some competent evidence to suggest such an impact, even if other evidence suggests otherwise.


Applying this standard of review, the Court of Appeal determined that the record contained substantial evidence that the planned removal of a portion of the gardens surrounding one of the buildings might have a significant aesthetic impact on the College campus. Although the revised addendum provided additional analysis regarding measures to retain portions of the gardens, the impact on the gardens remained significant, as about 20% of the garden north of the building would be removed, and more than half of the garden south of the building would be removed. In addition, each of the 11 plant and tree species slated for removal or relocation under the original addendum remained subject to removal or relocation under the revised addendum. Likewise, the potential impact to a Dawn Redwood tree remained significant after the revised addendum. The Court of Appeal was not persuaded by the District's argument that the loss of open space was insignificant given the total size of the campus, noting that the significance of an environmental impact is measured in light of the context in which it occurs.

In sum, the Court of Appeal determined there was substantial evidence that the building demolition project might have a significant environmental effect due to its aesthetic impact on the campus, and thus the District's decision to adopt an addendum was improper under CEQA's subsequent review provisions. The Court of Appeal did not, however, order the District to prepare an EIR on remand, and instead allowed the District to choose to prepare a subsequent MND if the District determines the effects would be reduced to insignificance through mitigation measures.

Justice Dondero concurred, emphasizing that the District incorrectly relied on the addendum process to deal with the modifications of the project approved under the original negative declaration. He further clarified that he did not believe the addendum process was the appropriate method to address the District's contemplated changes, because it is limited to minor technical changes or alterations. The addendum process did not satisfy the exacting standard called for when the original review involved no EIR.

- Opinion by Presiding Justice Humes, with Justices Margulies and Dondero concurring.
- Trial Court: Superior Court of San Mateo County, Case No. CIV 508656, Judge Clifford Cretan.
- Supreme Court: Case No. S214061 (September 19, 2016).

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
45 <i>Highland Hills Homeowners Association v. City of San Bernadino</i>		4 th	

[Highland Hills Homeowners Association v. City of San Bernardino](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E064737 (December 11, 2017).

- A supplemental or subsequent EIR is not required if a petitioner fails to demonstrate that a public agency eliminated mitigation measures without due consideration, or that there is a lack of substantial evidence supporting the agency's decision that a modified plan will have equally intense or less intense environmental impacts than an unmodified plan.

In an unpublished opinion, the Court of Appeal affirmed the trial court's decision that the City of San Bernardino's (City's) approval of modifications to a proposed residential development subject to several settlement agreements and stipulated judgments did not require a supplemental or subsequent environmental impact report (EIR). The court held that the Highland Hills Homeowners Association (Petitioner) failed to prove that the City eliminated mitigation measures of an approved project without due consideration, or that the City lacked substantial evidence supporting its decision that a modified project would have equally intense or less intense environmental impacts than an unmodified plan.

In 1982, the City approved the Highland Hills Specific Plan 82-1 for a proposed residential development on a 541-acre site, which was later amended to allow for construction of low- and-moderate-income multi-family residential units in an area where single-family units had originally been planned. Petitioner challenged the change to the project, which resulted in a settlement agreement that was incorporated into a stipulated judgment in 1989. The settlement agreement noted that the developer had prepared a "North Plan" that provided for up to 1,730 residential dwelling units and a golf course. Following the settlement agreement, the City incorporated the North Plan into its updated general plan and certified a final EIR for the general plan.

In 1992, Petitioner, the City, and the former developer agreed to an "Addendum" to the settlement agreement. The Addendum which reduced the number of multi-family units permitted under the North Plan, noted that many trees would be removed as part of construction, and required the developer to plant over 1,000 new trees over the golf course.

In 2001, the City's planning commission approved a tentative tract map for the North Plan, which reduced the total number of residential units from 1,730 to 1,516. Later in 2001, Petitioner, the City, and the former developer agreed to a "Second Addendum" whereby the parties agreed that the environmental impacts of the North Plan had been adequately reviewed pursuant to CEQA, thus "no subsequent or supplemental environmental impact report is required." Additionally, the Second Addendum introduced a new application process to facilitate the approval of any "minor modifications" to the project that "the passage of time may demonstrate ... are necessary or appropriate." Under this process, a City director reviewed modification requests to determine if they constituted "minor modifications" as defined by the Second Addendum. The Second Addendum limited "minor modifications" to those that "result in development which is equal to or less intense from the standpoint of environmental impacts under CEQA than development pursuant to the North Plan." This was pursuant to a number of factors; including fewer residential dwelling units, less commercial leasable space, and more efficient mitigation measures/conditions. The Second Addendum defined this process as a ministerial act.

In 2014, real party in interest First American Title Insurance Company (First American) applied for approval of modified construction plans (Modified North Plan) pursuant to the Second Addendum. The City hired an independent environmental consultant to evaluate the Modified North Plan according to the criteria for minor modifications under the Second Addendum. The environmental report noted that the Modified North Plan would reduce the maximum total number of dwelling units, eliminate all previously contemplated commercial uses, including the golf course, and that the total area disturbed by construction and impact on wetlands would be substantially reduced compared to the North Plan. The report concluded that each of the criteria for minor modifications were met. The City's development director approved of First American's application and, in June 2015, First American and the City filed a motion requesting the trial court to confirm that the proposed changes complied with the Second Addendum and that no further CEQA review was required. The trial court granted the motion in August 2015, finding that the proposed changes constituted a "minor modification" under the Second Addendum, not requiring a supplemental or subsequent EIR. Petitioner appealed the trial court's decision.

On appeal, Petitioner contended:

- The proposed changes to the project would eliminate at least one mandatory mitigation measure and approval without further environmental review, violating *Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601 (*Katzeff*).
- The City's evaluation of the environmental impact of the proposed changes was simply wrong.

On the first point, Petitioner argued that the elimination of the golf course from the project and the environmental consultant's report — stating that mitigation measures "not in conflict" with the project as modified must still be implemented — suggested at least one unidentified mitigation measure in conflict with the modified project would be eliminated without due consideration. The Court of Appeal disagreed, first noting that *Katzeff* held that when an agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation whether or not the approval is ministerial — without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence.



The Court of Appeal held that the City met this standard. First, the City's environmental consultant's report took into consideration changes to mitigation measures and required some categories of mitigation measures to be unchanged. Other measures were reduced or eliminated as incompatible with the Modified North Plan. Second, the City reasoned that certain mitigation measures were moot because, for example, the Modified North Plan did not contemplate a golf course and thus any mitigation plans relating to pesticides and fertilizers for the previously considered golf course were not required. Lastly, the City supported its findings with substantial evidence, concluding that there would be less overall environmental impacts than the North Plan.

The Court of Appeal also rejected Petitioner's contention that the City's evaluation of environmental impacts was simply "wrong." The evidence in the record categorically supported the City's findings regarding fire hazard impacts, air quality impacts, recreation area impacts, aesthetic impacts, traffic impacts, and noise impacts.

Accordingly, the Court of Appeal affirmed the trial court's decision and awarded Respondents their costs on appeal.

- Opinion by Justice Codrington, with Acting Presiding Justice Miller and Justice Fields concurring.
- Trial Court: San Bernardino County Superior Court No. SCVSS241464, Judge Gilbert G. Ochoa.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
46 <i>Woodlake Neighbors Creating Transparency v. City of Sacramento</i>		3 rd	

[Woodlake Neighbors Creating Transparency v. City of Sacramento](#), California Court of Appeal, Third Appellate District, Case No. C078973 (August 11, 2017).

- The City was not required to prepare a new EIR when an original project was approved under CEQA and the proposed variations to the project were not likely to create any additional environmental impacts. Instead, supplying a revised addendum to the previous EIR was sufficient.

In an unpublished opinion, the Court of Appeal affirmed the trial court's finding that the record contained substantial evidence to support the determination of the City of Sacramento and its City Council (collectively, City) that further environmental analysis of a revised project was not required under CEQA.

In March 2005, the City approved Signature Healthcare Services, LLC's (Signature's) construction of an office building on two parcels of land in North Sacramento (Original Project). In connection with this approval, the City evaluated the environmental impacts of the Original Project and issued a mitigated negative declaration (MND). Despite the City's approval of the Original Project, construction was never completed.

In 2013, Signature contacted the City about changing the use of the southern parcel of the Original Project site for the construction and operation of a hospital (Hospital Project), instead of the proposed office building. The City evaluated the modifications that the Hospital Project would require, and decided that they would not result in any significant environmental impacts beyond those already considered for the Original Project. In fact, the City found that a hospital would create less traffic than an office building, in turn leading to less of an impact on traffic volume and air quality. Thus, the City determined that it was not required to prepare a supplemental environmental impact report (EIR) or a negative declaration, as the Hospital Project was merely a variation of the Original Project and posed no additional environmental impacts.

Later that year, the City released a revised addendum to the previously adopted MND. After the planning commission recommended that the City approve the Hospital Project with the revised addendum, several neighborhood groups — including petitioner Woodlake Neighbors Creating Transparency (Petitioner) — held community meetings. Petitioner commented on the Hospital Project and its environmental impacts. After the hearings, the City adopted the revised addendum and proposed mitigation monitoring plan.

Petitioner filed a petition for writ of mandate, asserting that the Hospital Project was a new project under CEQA and thus required the City to prepare an entirely new environmental analysis, rather than an addendum. Petitioner contended that the Hospital Project constituted a new project because the proposed use of a psychiatric hospital would require more security than would an office building, and because the overall changes were more than "mere technical changes or additions" to the Original Project. In denying Petitioner's petition, the trial court held that the record contained substantial evidence to support the City's determination that an addendum was sufficient under CEQA. Petitioner timely appealed.

The Court of Appeal recognized that its task was to decide whether the City's decision not to prepare a new EIR was supported by substantial evidence in the record. The Court of Appeal held that the City undertook appropriate measures to determine whether the Hospital Project would cause any additional environmental impacts. The City also acknowledged that the differences between the Original Project and the Hospital Project amounted to simple variations of the same project, including the substitution of one commercial use for another, utilization of the same parcel of land and approximately the same level of intensity of use. Despite the differences in the projects, the Court of Appeal held that a reasonable person could conclude that the Hospital Project was a modification of the Original Project and the City did not abuse its discretion in analyzing the Hospital Project under Public Resources Code section 21166.

The Court of Appeal also held that Petitioner failed to show that the record lacked evidence to support the City's decision. Instead, Petitioner provided only a cursory substantial evidence argument.

Accordingly, the Court of Appeal affirmed the trial court's decision to uphold the City's approval of the Hospital Project.

- Opinion by Presiding Justice Raye, with Justices Mauro and Hoch concurring.
- Trial Court: Sacramento County Superior Court, No. 34-80001727, Judge Timothy Frawley.



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