

**EAST SLOPE
CONFERENCE
Advanced CEQA
Workshop**

September 26, 2013





TODAY'S SPEAKERS

- Steve Noack, The Planning Center|DC&E,
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- Gene Talmage, President AEP,
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- Sean Betcha, Ascent Environmental,
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- John P. Kinsey, Wanger Jones Helsley PC,
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AEP Eastern Slope Conference Fall
2013 CEQA Basics & Refresher






TODAY'S AGENDA


- 1:00-1:30 Session I - Legislative Update
- 1:30-2:00 Session II - CEQA Administrative Record
- 2:00-3:00 Session III - Case Law: Important Trends in 2012-2013
- 3:00-3:15 Break
- 3:15-3:45 Session IV - Streamlining Toolbox
- 4:45-5:00 Wrap-Up/Q&A





CURRICULUM PREPARATION

- Gary Jakobs, AICP, Ascent Environmental, Inc. Curriculum Direction
- Terry Rivasplata, AICP, ICF International Legislative Update
- Kelley Taber, Esq., Somach Simmons & Dunn CEQA Administrative Record
- Jim Moose, Esq., Remy Moose Manley CEQA Case Law Trends
- Whit Manley, Esq., Remy Moose Manley CEQA Case Law Summary
- Sydney Coatsworth, AICP, Ascent Environmental, Inc. Streamlining Toolbox
- Christopher Calfee, Esq., Governor's Office of Planning and Research Streamlining Toolbox
- Alicia Guerra, Esq., Briscoe Ivester Bazel Streamlining Toolbox




CEQA LEGISLATION



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AB 890 - EXEMPTION FOR ROADWAY REPAIR, ETC.

- New statutory exemption for a project or activity to repair, maintain, or make minor alterations to an existing roadway
- Numerous qualifiers apply, including:
 - ▶ City/County with population under 100,000
 - ▶ The project does not cross a waterway
 - ▶ The project involves negligible or no expansion of an existing use
 - ▶ The roadway is not a state roadway
 - ▶ No wetlands or riparian areas, no significant habitat value, no harm to special status species, and no destruction or removal of any locally protected species
 - ▶ No impact on cultural resources or scenic resources

(PRC § 21080.37)



CEQA REFORM ("...TO BE, OR NOT TO BE...")

Gene Talmadge, AEP President

September 26, 2013






CEQA REFORM


- History
- Legislation
- CA Economic Summit
- ECAT
- Current Legislation (SB731, AB52, SB743)
- Wrap-up/Discussion

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 **CEQA EXEMPTIONS**
PUBLIC RESOURCES CODE 21000-21177
CALIFORNIA CODE OF REGULATIONS,
CHAPTER 3 "GUIDELINES"

- Article 18 Statutory Exemptions Sections 15260 – 15285
- Article 19 Categorical Exemptions (Sections 15300-15332)


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 **CEQA REFORM**

History


- "Streamlining"
- SB 375
- AB 900
- SB 226 (Appendix G)
- CA Economic Summit
- Senator Steinberg's Initiatives

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 **CEQA "STREAMLINING"**

Perceived Problems:


- Costs jobs
- Abuse of CEQA provisions
- Nuisance litigation
- CEQA process not timely
- Late hits/comments
- CEQA efficiency and effectiveness questioned

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CEQA STREAMLINING


- **SB 375**
 - Reduce GHG's - Integrates AB 32
 - Establishes of Sustainable Communities Strategy (SCS) and add to the Regional Transportation Plans
- Projects (residential or mixed use) consistent with SCS/APS – not required to discuss growth- inducing impacts and project specific or cumulative impacts
- "Transit Priority Projects (TPP)" – full CEQA exemption or partial based on criteria
 - 50% residential use
 - Minimum net density of 20 units/ac
 - F.A.R. of commercial use of 0.75
 - Location within ½ mile of transit stop, ferry terminal, or bus line with 15 min. headway

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CEQA STREAMLINING – SB 375


- **TPP Exemption:**
 - Full exemption if –
 - No more than 8 acres or 200 units
 - Served from existing utilities
 - No significant effect on historic entities
 - Buildings exceed energy efficiency stds.
 - Provide ANY of the following – 5 acres of open space, 20% moderate income, 10% low income, or 5% very low income
 - For TTP not meeting the above go back to square one


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CEQA STREAMLINING


- **SB 226**
 - Changes to Appendix G of CEQA Guidelines:
 - Push from Governor's office - OPR
 - Exempts solar energy projects (rooftop or parking lot coverage)
 - Eliminates repetitive studies of environmental effects already addressed in other planning documents, such as general plans and zoning codes
 - Appendix M – "Performance Standards"
 - Appendix N – SB 226 Checklist

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 **AB 900**
"JOBS AND ECONOMIC IMPROVEMENT THROUGH ENVIRONMENTAL LEADERSHIP ACT - SEP. 2011"


- "Environmental Leadership Development Projects (ELD)"
- Uses SB 292 as template for streamlining judicial review
- Certified by Governor:
 - projects that achieve a list of environmental-friendly standards (LEED silver)
 - Wind or Solar energy generation
 - Clean energy manufacturing processes


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 **AB 900 STREAMLINING**


Project Criteria:


- \$100M investment in CA
- Create skilled jobs paying prevailing wages
- No net increase in GhG emissions
- Developer has binding and enforceable agreement for mitigation measures from CEQA document
- Agree to pay court costs and costs for preparation of Admin Record.
- EIR must be certified by June 1, 2014 and Act sunsets January 1, 2015

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 **ENHANCED CEQA ACTION TEAM**


- ECAT's Genesis and Mission
- Joint effort of AEP and APA
- Key Priorities
- Legislative Activities
- Current Proposals and Involvement

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 INITIAL PRIORITY ISSUES


- 17 total issues identified
- Top 5:
 - ▶ Litigation process (late hits)
 - ▶ Infill streamlining
 - ▶ MNDs/fair argument standard
 - ▶ Ineffective tiering
 - ▶ Confusing cumulative analysis

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 2012

- Coordinated with Senate Environmental Quality Committee (Sen. Simitian)
- Focused on “late hits”
- Multi-stakeholder discussions collapsed at the end
- Detailed evaluation of SB 317 “Modernization” proposal

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 2013


- Proactively pressed full spectrum of proposals
- Known as source of “common sense” and “practical” ideas
- Offered other proposals in response to “modernization”

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CURRENT PROPOSALS

- Simple, But Effective Changes
- CEQA Document Efficiency
- Litigation Efficiency
- Exposure of People to Hazards (Response to *Ballona Wetlands*)

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PROPOSED CEQA "MODERNIZATION" LEGISLATION


- Pressure is on for CEQA "reform" or "modernization"
- Business and Builders: reform it!
- Enviro and labor: keep status quo (but we'll stand modernization)
- AEP/APA: enhance CEQA



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OVER 25 CEQA BILLS THIS SESSION


- Here are some of the topics to be debated:
 - ▶ Advanced administrative record option (AB 37, AB 756, SB 617) **No traction**
 - ▶ Reversal of *Ballona* decision (AB 953, SB 617) **Died in discussion**
 - ▶ Establish an "environmental division" for CEQA cases in superior courts (AB 515, SB 123) **DOA**
 - ▶ Require translations into non-English languages (AB 543) **Interest but Dead**



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CEQA BILLS THIS SESSION

- Wait, there's more:
 - ▶ Mandate conservation easements for ag mitigation (AB 823) **Little support**
 - ▶ Expand notice requirements (SB 436, SB 617) **Died in committee**
 - ▶ New statutory exemptions proposed for:
 - Bicycle transportation plans (AB 417)
 - Composting of organic wastes (AB 794)
 - Rail stations and parking (SB 525)
 - ▶ SB 317 is back in the form of AB 1302 and SB 737 – a forlorn hope for the "standards" approach **Little support**




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MORE CEQA BILLS THIS SESSION

- SB 617 (Evans) – Revised definitions of 'environment' and 'effects' – Legislative relief for Ballona Decision **Also DOA**
- SB 754 (Evans) Translation of certain notices into native languages **Interest limited but died**
- **Sen. Rubio's resignation!!!** (Resigned his Senate seat on February 22nd, citing a desire to spend more time with his family and announcing that he had accepted a position in state government affairs with Chevron. The resignation left CEQA reform in limbo.

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SO WHAT IS LEFT?


- AB 380 (Dickinson) CEQA Notice Requirements – **2 Year Bill**
- AB 417 (Frazier) – CEQA Environmental Quality – Bicycle transportation AEP support **Support in SF Bay**
- SB 436 (Jackson) CEQA Scoping Noticing – AEP support **2 Year?**
- SB 633 (Pavley) "New" information available after EIR certified. **2 Year**
- AB 52 (Gatto) Protection of tribal sites (similar to SB 18) **BIG Problem but 2 Yr.**


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- AB 543 (Campos) – Translation – little support **Died**
- SB 359 (Corbett) – CEQA exemptions housing projects – exempts project where 25% or less residential or comm. serving uses **May be folded into other**
- AB 116 (Bocanegra) – Subdivision map expiration and 24 month extension **Died**
- AB 667 (Hernandez, R.) “Super Store” economic analysis **Unknown**
- AB 1060 (Fox) CEQA – filing fees and exemptions **Unknown**


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- SB 1 (Steinberg) Sustainable Community Investment Fund **DOA**
- SB 40 and SB 42 (Pavley) – 2014 Water Bond \$11.14 Billion – re-focus of previous bond (to address Delta “Fix”) and other supply/storage issues **Trimmed**


And then...

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SB 731 – STEINBERG’S ROADMAP FOR CEQA REVISIONS


- Reflects discussions with “stakeholders” (but not public agencies)
- What does it say?:
 - ▶ Provide greater certainty for “smart infill development”
 - ▶ Offer streamlining for renewable energy projects, transit/bike/pedestrian projects, renewable energy and its transmission projects
 - ▶ Establish Guidelines thresholds for noise, aesthetics, parking, and traffic LOS



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SB 731 – STEINBERG’S ROADMAP FOR CEQA REVISIONS


- And, more topics:
 - ▶ Further define “new information” that triggers a subsequent EIR when a specific plan EIR has been certified
 - ▶ Clarify the authority of courts to “sever” portions of a project that do not violate CEQA
 - ▶ Establish rules to prohibit or restrict “late hits” and “document dumps” if DEIR or project has not been substantially modified



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SB 731 “CEQA MODERNIZATION ACT OF 2013”


- For residential, mixed-use residential and other uses in transit priority areas:
 - ▶ Aesthetic impacts not considered significant impacts
 - ▶ Establish thresholds of significance for noise, transportation and parking
 - ▶ Requires OPR/Resources to make changes in Guidelines
- Make Findings available to the public 15-days prior to project approval



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- Lead Agency to prepare Record of Proceedings (new PRC § 21167.6)
 - ▶ Costs of Record – Electronic and \$\$ by requestor
 - ▶ ‘Tolling’ time period for judicial action is 4 years (may be extended)
- Prepare Mitigation and Monitoring Program and an annual report on project compliance with MMP
- Defines ‘special circumstances (that do not provide new information) do not trigger new environmental document



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- If agency EIR is found deficient, requires courts to issue preemptory writ of mandate
 - ▶ Specifies actions public agency needs to take
 - ▶ Specifies time to complete action
- Authorize Legislature to appropriate \$30M in grants for SCS (remember SB 375?)
- Establish Office of Advisor on Renewable Energy Facilities (sunset on January 1, 2017)

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WHERE ARE WE NOW?

- SB 731 – some provisions in SB 743 but **pulled by Sen. Steinberg – 2 Year Bill**
- Some good ideas and some bad ideas
 - ▶ Bills being amended as they navigate the committee process
- “Spot bills” are wild cards that may show up again as amendments **SB743!!!**
- Strong business support for change + enviros against major change = a 2-year process?



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SB 743


- New Bill – “Gut and Amend”
- Special Provisions for Sports Arena at Sacramento (remember LA, etc.???) – addresses judicial review and comments
- Changes provisions of AB 900 and extends action to Jan. 1, 2017
- Discusses “Infill Opportunity Zone” and references SCS’s
- Discusses transit in-fill sites and requires OPR to make changes in CEQA Guidelines

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THE “FUTURE???”

- How willing is the Legislature to tackle CEQA?
- All politics are “Local” – witness the arena/stadium in Sacramento
- How much will Sen. Steinberg push SB 731 in 2014?
- Maybe CEQA ‘Reform/Modernization’ has ended its push for the near future...

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CEQA REFORM/MODERNIZATION “... TO BE, OR NOT TO BE...”

Discussion and Questions:




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**ADMINISTRATIVE
RECORD
CONSIDERATIONS
FOR CONSULTANTS
& LEAD AGENCIES**


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IMPORTANCE OF RECORD


- Basis for judicial determination of adequacy of agency's CEQA decision
- Agency violates CEQA if:
 - ▶ its determination is not supported by "substantial evidence" (PRC § 21080.5(h)(2).) OR
 - ▶ it has failed to proceed in a manner required by law (PRC § 21168.5)





**DEFINITION OF
"SUBSTANTIAL EVIDENCE"**


- Facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (PRC § 21082.2(c); CCR §15384.)
- "Enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CCR § 15384(b).)



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WHAT IS THE RECORD?


- Record before the agency at the time it makes its CEQA determination (e.g., certifies EIR, adopts negative declaration, approves project)
- Contents specified by statute:
PRC § 21167.6(e)



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WHAT IS THE RECORD?


- Includes, but not limited to:
 - ▶ Project application
 - ▶ Staff reports and related documents
 - ▶ Written testimony or documents submitted by public
 - ▶ Transcripts or minutes (including recordings) of public hearings
 - ▶ Public notices
 - ▶ Final CEQA document
 - ▶ All documents cited or relied on in the findings or statement of overriding considerations
 - ▶ Record of proceedings before lower bodies (e.g., planning commission)
 - ▶ "All other written materials relevant to the respondent agency's compliance with" CEQA



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RECORD CONTENTS, CONT.


- The Kitchen Sink
(PRC § 21167.6(e)(10).):
 - ▶ "Any other written materials relevant to" agency's CEQA compliance or project decision, including:
 - initial study,
 - draft documents released for public review,
 - Includes prior CEQA documents for same project (even if superseded)
 - Studies and documents relied on in CEQA document AND
 - made available during public review period; OR
 - included in agency's project files
 - all internal agency communications
 - including staff notes and memoranda re. project or CEQA compliance



EVIDENCE
"SUBMITTED" TO THE AGENCY

■ "Submitted" = "made readily available"
 ■ What if comment references a web page?
 Includes documents:
 1) named in comment letter with specific web page address (URL required)

- OK: The San Joaquin Valley Air Pollution Control District's "Guide for Assessing and Mitigating Air Quality Impacts, 2002 Revision," available at www.valleyair.org/transportation/ceqa_guidance_documents.htm.
- Not OK: www.krca.com; www.ca.water.usgs.gov/projects/centralvalley (too vague to be considered "submitted")




"SUBMITTED", CONT.

Includes documents:

2) previously submitted where current letter


- names document;
- states document was previously provided in connection with another project; and
- requests document be included in record




CONSULTANT FILES


"Public Agency's files" =


- ▶ Files owned by agency or in its custody or control
- ▶ May include consultant or subconsultant files
- ▶ Depends on wording in contract between agency and consultant




 **INTERNAL AGENCY COMMUNICATIONS**


- Must be “meaningfully relevant to the project or compliance with CEQA”
 - ▶ **Definitely included:** Documents demonstrating that an agency’s determination is supported by substantial evidence. (e.g., technical memoranda, meeting agendas and agency staff notes).
 - ▶ **Potentially included:** consultant-to-consultant or consultant-to-agency e-mail exchanges; consultant notes.
 - ▶ **Definitely not included:** administrative drafts of EIR and supporting documents (must be “released for public review”).
 - ▶ **Typically not included:** Contracts, e-mail correspondence related to scheduling meetings, etc.




 **COMMUNICATION PROTOCOLS**

- Sharing information with applicant’s counsel
 - ▶ Record does not include legally privileged documents
 - Lead agency may share documents with applicant’s counsel
- E-mail protocol: knowing when to hit “Send”



 **TRANSCRIPTS OF PUBLIC MEETINGS**


- Record includes audio recordings of meetings when no transcript of those meetings has been prepared. (PRC § 21167.6(e)(4))



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CONSIDERATIONS IN PREPARING EIR

- Identifying Key Record Evidence
 - ▶ Provide citations with page numbers
 - Good:
 - Delta algal production is believed to be primarily limited by light penetration (not nutrient levels) because of the turbidity of Delta waters. (Sources and Magnitude of Water Quality Constituents of Concern in Drinking Water Supplies Taken from the Sacramento San-Joaquin Delta, prepared for the CALFED Bay Delta Program by Rick Woodard, September 22, 2000, at pp. 446-448.)
 - Bad:
 - The lower Sacramento River and Delta are not currently known to develop adverse ambient conditions that are indicative of excessive nutrient levels. (CALFED 2001.)




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ORGANIZATION AND PRESERVATION OF RECORD EVIDENCE

- Why it is important to be organized while preparing EIR:
 - ▶ All documents cited in an EIR or negative declaration must be made available for public review.
 - ▶ Short time for record preparation once litigation filed.

Good practice: preserve relevant documents for at least 90 days after approval





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PREPARATION OF THE RECORD

Form of Record Documents


- Organization of Record
 - ▶ Must be accurate, well organized and indexed
 - ▶ Check local court rules.
- Getting Paid for Your Work Preparing The Record
 - ▶ Maintain detailed records of time devoted to preparation of administrative record





TAKE HOME MESSAGES


- Discuss record retention policies and procedures at the outset
- Provide complete citations to key conclusions and evidentiary statements in environmental documents
- Use e-mail judiciously – know when to pick up the phone!
- Preserve relevant documents at least 90 days after approval




RECENT DEVELOPMENTS IN CEQA APPELLATE CASE LAW

SEPTEMBER 2012 – AUGUST 2013


JIM MOOSE
REMY MOOSE MANLEY LLP





WHAT CONSTITUTES A “PROJECT”?


- *California Building Industry v. Bay Area Air Quality Management District* (2013) 2013 LEXIS 644



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CBIA V. CARB


- Court (i) holds that BAAQMD advisory CEQA thresholds of significance for toxic air contaminants, particulates, and greenhouse gases are not "projects" subject to CEQA and (ii) rejects claim that the thresholds improperly protect "the project" against the impacts of the "environment"
 - ▶ Court finds that the process for adopting thresholds pursuant to CEQA Guidelines section 15064.7 does not require CEQA compliance and provides public input equivalent to what would be obtained through EIR
 - ▶ Court rejects claim that local agencies' use of stringent thresholds for TACs and PM_{2.5} will cause reasonably foreseeable impacts by discouraging infill and indirectly encouraging sprawl
 - ▶ Court avoids directly addressing the correctness of the line of cases holding that CEQA does not protect projects against the environment



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CBIA V. CARB (CONT.)


- Section 15064.7 does not require CEQA compliance prior to the adoption of thresholds:
 - ▶ the section was upheld in *CBE v. Resources Agency* (2002) 103 Cal.App.4th 98 as being consistent with CEQA and the CEQA Guidelines and "reasonably necessary to effectuate their purpose"
 - ▶ "the preparation of an EIR or other CEQA document would largely duplicate the public review process and the substantial evidence standard set forth in section 15064.7"
 - ▶ "[r]equiring an EIR in addition to the process already in place would result in duplication of effort, at taxpayer expense and to little if any purpose"



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CBIA V. CARB (CONT.)


- Environmental effects posited by CBIA are too speculative to be reasonably foreseeable
 - ▶ Posited chain of causation is too attenuated; for impacts to result, all of the following would have to occur:
 - Lead agency uses BAAQMD thresholds
 - Agency finds a project exceeds thresholds
 - Agency prepares EIR based on thresholds
 - Absent the threshold, no EIR would have been required
 - Agency disapproves project due to significant effects
 - Disappointed developer decides to move project elsewhere
 - New location is outside urban center where original site was located
 - Project is approved in new location
 - People who would have lived at original site move to new site instead
 - This sequence gets repeated frequently enough that the increase traffic from trips to the more distant location physically changes the environment
 - ▶ Administrative record lacked evidence that all of this would occur



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CBIA V. CARB (CONT.)


- Court rejects challenge to thresholds based on line of cases (*Baird*, *South Orange County Wastewater Authority*, *Ballona Wetlands*, etc.) holding that CEQA only protects the environment against projects and does not protect projects against the environment
 - ▶ BAAQMD attorneys pointed out numerous statutes within CEQA that require consideration of impacts on project residents from existing environmental risks and hazards such as airport noise and on-site toxic contamination
 - ▶ Court states that a "new project located in an area that will expose its occupants to preexisting dangerous pollutants can be said to have a *substantial adverse effect on human beings*" within the meaning of Public Resources Code section 21083(c)
 - ▶ Court rejects facial attack on thresholds and avoids need to opine on correctness of disputed line of cases, citing situations in which each challenged threshold could be applied without "the project" being protected against "the environment"
 - For example, pollutants that could affect project residents could also contribute to cumulative air quality effects affecting people beyond project site



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WHAT CONSTITUTES AN "APPROVAL"?


- *POET v. California Air Resources Board*
(2013) 217 Cal.App.4th 1214



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POET V. CARB


- Court finds that CARB violated CEQA by (i) prematurely *de facto* approving AB 32 regulations addressing low carbon fuel standards (LCFS) prior to completion of CEQA process and (ii) failing to make any commitment to mitigate for increases in NOx emissions; but court leaves regulations in effect during remand period while CARB comes into compliance with CEQA



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POET V. CARB (CONT.)


- CARB's regulatory program has been certified by the Natural Resources Agency as requiring the functional equivalents of negative declarations and EIRs (see Pub. Resources Code, § 21080.5)
 - ▶ State agencies with such certifications need not prepare formal negative declarations and EIRs, but are "subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible"
 - ▶ Such agencies are subject to rules governing the timing of approvals, as set forth in CEQA Guidelines section 15004 and addressed by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116



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POET V. CARB (CONT.)


- How to calculate "*carbon intensity values*" was source of controversy during the public process
 - ▶ CARB staff's calculations accounted for greenhouse gas emissions from expected land use changes indirectly caused by increased demand for crop-based biofuels (i.e., conversion of grasslands and forest to agriculture)
 - ▶ This approach tended to make ethanol less attractive than other biofuels, and ethanol producers complained




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POET V. CARB (CONT.)


- Shortly after close of comment period of "Initial Statement of Reasons" (ISOR) (the functional equivalent of a draft EIR), the CARB Board:
 - ▶ "approved for adoption" the proposed LCFS regulations
 - ▶ designated the Executive Officer as the decisionmaker for purposes of responding to environmental issues and making further nonsubstantive modifications
 - After discussion, Board specifically precluded Executive Officer from altering carbon intensity values based on land use changes and other indirect effects
- Immediately afterward, the Board issued a press release stating it had "adopted a regulation" that would implement Governor Schwarzenegger's LCFS standard
- Seven months later, the Executive Officer issued executive order adopting the regulations and passed them on to the Office of Administrative Law (OAL)




 **POET V. CARB (CONT.)**


- This process violated the rules set forth in *Save Tara*, as the CARB Board effectively committed itself to the proposed LCFS regulations without substantive change prior to completion of CEQA process
 - ▶ Statements in press release were unqualified and “increased the political stakes” going forward
 - ▶ The Board’s resolution “effectively precluded the Executive Officer from adopting alternatives to the [proposed] carbon intensity values based on land use or other indirect effects”




 **POET V. CARB (CONT.)**


- The Executive Officer did not qualify as the “decision-making body” with the responsibility for completing the CEQA process
 - ▶ CEQA Guidelines section 151025 allows decision-making bodies to delegate to staff the preparation of responses to comments, but not the consideration of a final EIR or the adoption of CEQA Findings (or their functional equivalents, according to the court)
 - ▶ Here, the CARB Board did not delegate the Executive Officer the authority to approve or disapprove the project or to address the controversy over the carbon intensity values




 **POET V. CARB (CONT.)**


- “[T]he separation of the approval function from the review and consideration of the environmental assessment is inconsistent with the purpose served by an environmental assessment as it insulates the person or group approving the project ‘from public awareness and the possible reaction to the individual members’ environmental and economic values.’”




 **POET V. CARB (CONT.)**


- CARB violated CEQA by proceeding with the LCFS regulations without attempting to formulate mitigation measures for expected increases in NOx emissions
 - ▶ CARB recognized that biodiesel fuels and biodiesel blends emit more NOx than the diesel fuels they will replace, but denied any increase in NOx emissions from the regulations
 - ▶ Instead of requiring reductions in NOx contents of biodiesel fuels and blends as part of LCFS regulations, CARB staff stated in responses to comments that, in the future, CARB would ensure the avoidance of any increase in NOx emissions by promulgating "a new motor vehicle fuel specification for biodiesel"




 **POET V. CARB (CONT.)**

- CARB's approach violated principles governing the deferral of mitigation measures
 - ▶ CARB did not commit to any *performance standard* for ensuring no increase in NOx emissions as part of approval of regulations
 - ▶ CARB did not make implementation of the regulations conditional on the satisfaction of a "no increase" performance standard
 - ▶ "No increase in NOx" is not a specific performance criterion anyway; CARB "established no objective performance criteria for *measuring whether the stated goal would be achieved*"
 - "[I]t is unclear what tests will be performed and what measurements will be taken to determine that biodiesel use is not increasing NOx emissions"



 **POET V. CARB (CONT.)**

- Court orders that regulations be voided but that they remain in effect, and not be suspended, during the period needed to achieve CEQA compliance
 - ▶ Under the remedy section of CEQA (Pub. Resources Code, § 21168.9), a court's decision to void an approval does not always require that operation of a project be suspended during the remand period
 - ▶ Rather, suspension must be supported by two findings:
 - a specific project activity or activities will prejudice the consideration or implementation of mitigation measures or alternatives
 - the suspended activity "could result in an adverse change or alteration to the physical environment"



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POET V. CARB (CONT.)

- In this case, allowing the regulations to remain in effect during the remand period would not prejudice consideration of mitigation measures or alternatives
 - ▶ "Written standards, unlike projects involving the construction of facilities, do not become part of the physical environment"
 - ▶ In exercising its equitable discretion, the court should consider the environmental effect of suspension
 - Here, the environment will be better off without suspension as the regulations help to achieve AB 32 targets

CEQA Series

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EXEMPTION CASES

- *Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1096
- *Central Basin Municipal Water District v. Water Replenishment District of Southern California* (2012) 211 Cal.App.4th 943
- *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301
- *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209

CEQA Series

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VOICES FOR RURAL LIVING V. EL DORADO IRRIGATION DISTRICT


- Court sets aside approval of Memorandum of Understanding (MOU) by which El Dorado Irrigation District (EID) agreed to provide water to Shingle Springs Band of Miwok Tribe for operating casino
 - ▶ EID erred in relying on "Class 3" Categorical Exemption for New Construction or Conversion of Small Structures
 - ▶ Provision of additional amounts of water through existing pipeline was "unusual circumstance" creating reasonable possibility that project will have significant impacts

CEQA Series

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VOICES OF RURAL LIVING (CONT.)


- El Dorado County LAFCO had previously limited water delivery to a tribal area to residential uses
- Federal Government argued that LAFCO's limitation was preempted by Federal Law, as casino was an approved federal use; and EID ultimately agreed
- At time of MOU, casino was already operating using water imported by up to 25 truck trips per day
- Expanded supply under MOU would use existing pipes with very minor physical modifications
- EID staff found no significant impacts because the pipeline was already in place and the casino could be supplied from existing EID water rights



AEP CONFERENCE EAST SLOPE

VOICES OF RURAL LIVING (CONT.)


- Court agreed that Class 3 Exemption would apply to small construction project and the utility and electrical work necessary to service such project
- Even so, the "sheer amount of water to be conveyed under the MOU" (216 equivalent dwelling units) created "unusual circumstances" defeating use of exemption
 - ▶ In water supply context, "unusual circumstances" exist where (a) supplier lacks adequate water or (b) providing water needed might create impacts to physical environment
 - ▶ Substantial evidence in record indicated that new supply to casino could exacerbate existing problems under drought conditions, particularly under climate change scenario



AEP CONFERENCE EAST SLOPE

VOICES OF RURAL LIVING (CONT.)


- Trial court exceeded its jurisdiction in ordering EID to prepare an EIR; EID should get to decide on remand whether to prepare ND, MND, or EIR
- EID had exceeded its authority in ignoring prior, duly adopted LAFCO condition limiting water deliveries to tribal land to those required for residential uses
 - ▶ Only a court, not an administrative agency, can determine the constitutionality of LAFCO conditions; the opinions of Federal attorneys was not enough



AEPC
EAST SLOPE CONFERENCE

CENTRAL BASIN MUNICIPAL WATER DIST. V. WATER REPLENISHMENT DIST. OF SOUTHERN CALIFORNIA


- *CEQA does not apply to action of Water Replenishment District (WRD) declaring a "water emergency" under authority granted to it by court in groundwater adjudication:*
 - ▶ Adjudication had imposed a "physical solution" to address a prior groundwater overdraft problem in Central Basin
 - ▶ Petitioner argued (accurately) that the declaration of a water emergency adversely affects short-term withdrawals for certain entities with rights to groundwater in basin
 - ▶ Court holds that the WRD's determination of facts underlying state of emergency is not the exercise of discretion under CEQA
 - ▶ Because physical solution is judge-made construct, CEQA may not interfere with its operation



AEPC
EAST SLOPE CONFERENCE

CONCERNED DUBLIN CITIZENS V. CITY OF DUBLIN


- *Court upholds City's finding that a 7.2-acre high-density mixed-use, transit and pedestrian-oriented development project was exempt from CEQA under Government Code section 65457*
 - ▶ Project was "residential project" consistent with a specific plan for which an EIR was certified
 - ▶ "Mixed use" zoning designation did not defeat use of exemption:
 - Project as proposed was predominantly residential (despite including "fitness center")
 - Additional discretionary approvals would be needed to switch gears and build up to 25,000 square feet of retail uses allowed under the zoning designation



AEPC
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CONCERNED DUBLIN CITIZENS (CONT.)

- There were no circumstances requiring a supplemental EIR for the underlying specific plan (an impediment to use of exemption under section 65457)
 - Shift in residential unit allocations within specific plan area was allowed under specific plan and anticipated in earlier EIR
 - There was no "significant new information" regarding greenhouse gas emissions since 2002 when EIR was certified
 - New BAAQMD threshold for GHGs did not trigger SEIR, especially since Alameda County Superior Court set aside BAAQMD Board action approving recommended threshold for lack of CEQA compliance
 - Potential environmental effects of GHGs were known before 2002
 - United Nations created its *Framework Convention on Climate Change* in 1992
 - *Kyoto Protocol* was adopted in 1997
 - California established *Climate Action Registry* in 2000



AEP CONFERENCE EAST SLOPE

SAVE THE PLASTIC BAG COALITION V. COUNTY OF MARIN

- Court upholds Marin County's reliance on Class 7 and Class 8 categorical exemptions for adoption of ordinance banning plastic bags and imposing fee on paper bags for most retailers in unincorporated area
 - ▶ Class 7 and 8 exemptions apply to actions taken by "regulatory agencies" as authorized by state law or local ordinance to assure the maintenance, restoration, enhancement, or protection of (i) "a natural resource" (15307) and (ii) "the environment" (15308)

CEQA Series

AEP CONFERENCE EAST SLOPE

SAVE THE PLASTIC BAG COALITION (CONT.)

- California Supreme Court decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 does not mandate an EIR for County of Marin ordinance
 - ▶ In upholding the negative declaration for Manhattan Beach's plastic bag ban in part because the lead agency was a "small" city, the Supreme Court did not intend to prejudice future cases involving different administrative records
 - Each CEQA case must be judged on its own administrative record
 - ▶ The Supreme Court did caution against an overreliance on "life cycle studies" and directed agencies to focus on "actual impacts attributable to the project at hand"


CEQA Series

AEP CONFERENCE EAST SLOPE


SAVE THE PLASTIC BAG COALITION (CONT.)


- A county can be a "regulatory agency" for purposes of the Class 7 and Class 8 exemptions
 - ▶ Section 7 of Article 11 of the California Constitution gives counties (and cities) the power to "make or enforce within [their] limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws"
 - Although ordinances are always "legislative," they may also constitute "regulations"

CEQA Series


 **NEGATIVE DECLARATIONS**


- *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th1013
- *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167




 **TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING V. SAN DIEGO UNIFIED SCHOOL DISTRICT**

- *Court sets aside Mitigated Negative Declaration for project involving installation of new field lighting and related improvements for high school stadium*
 - ▶ Project would improve existing conditions by
 - replacing existing bleachers with fewer new bleachers
 - constructing a new masonry wall to screen facilities from nearby neighborhood
 - increasing the number of on-campus parking spaces
 - ▶ *But* the project would add football field lighting for first time, permitting night games
 - ▶ Court finds fair argument for traffic and parking effects



 **TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING (CONT.)**


- Initial Study was not unlawfully vague in describing the number of anticipated evening events
 - ▶ Approximately 15 to 19 events per year were assumed
 - ▶ Nothing in law requires a fixed limit on number of events, though further CEQA review might be required if school district later pursues a number "substantially greater" than the 15-to-19 range



AEP EAST SLOPE CONFERENCE

TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING (CONT.)


- Court found no substantial evidence of significant effects due to lighting
 - ▶ Lights would be focused on field, turned off at 10:00 p.m.
 - ▶ Illumination would not exceed significance threshold or cause sleep deprivation
- Court found no substantial evidence of significant effects on historical resources
 - ▶ Project opponents did not make showing that adjacent neighborhood was "historical" in nature



AEP EAST SLOPE CONFERENCE

TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING (CONT.)


- Project may cause significant "traffic and parking effects"
 - ▶ The Initial Study **lacked sufficient information regarding both**
 - **baseline attendance levels at existing afternoon games**
 - **projected attendance levels at anticipated evening games**
 - ▶ Local residents' personal observations about parking problems could constitute substantial evidence that the project may have a significant impact on traffic and parking



AEP EAST SLOPE CONFERENCE

TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING (CONT.)


- Project may cause significant "parking effects"
 - ▶ Parking shortfalls are not merely a "social inconvenience" and not an adverse effect on the environment
 - *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656 involved "special circumstances" in which a local ordinance embodied "strong public policy" encouraging transit usage
 - Lack of reference to parking in *current* Appendix G checklist is not dispositive, as *former* checklist did mention parking impacts
 - Vehicles are "physical objects that occupy space when driven and when parked," so they "naturally must have some impact on the physical environment"



AEPC CONFERENCE EAST SLOPE

TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING (CONT.)


- Action of School District Board supermajority exempting its decision from local zoning did not constitute an “approval” of “project” triggering a separate CEQA obligation



AEPC CONFERENCE EAST SLOPE

SAN JOAQUIN RAPTOR RESCUE CENTER V. COUNTY OF MERCED

- *Planning Commission violated Brown Act by taking action on Mitigated Negative Declaration (MND) for subdivision where meeting agenda made no mention of MND*
 - ▶ Brown Act (Gov. Code §54954.2(a)) requires agenda, published 72 hours prior to meeting, to include “*brief general description of each item of business*” and disallows action or discussion of any item not on agenda
 - Adoption of MND was “distinct item of business”
 - Because agency actions under CEQA are of at least potential public interest, purpose of Brown Act is served by requiring disclosure of proposed CEQA action



AEPC CONFERENCE EAST SLOPE

ENVIRONMENTAL IMPACT REPORTS

- *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184
- *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260
- *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209
- *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059
- *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277
- *North Coast Rivers Alliance v. Marin Municipal Water District* (2013) 216 Cal.App.4th 614



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EAST SLOPE

ENVIRONMENTAL IMPACT REPORTS (CONT.)


- *Neighbors for Fair Planning v. City and County of San Francisco*
(2013) 217 Cal.App.4th 540
- *Save Panoche Valley v. San Benito County*
(2013) 217 Cal.App.4th 503
- *Masonite Corporation v. County of Mendocino*
(2013) 218 Cal.App.4th 230
- *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*
(2013) 2013 Cal. LEXIS 6645
- *Friends of Oroville v. City of Oroville*
(2013) 2013 Cal.App. LEXIS 661



AEP CONFERENCE
EAST SLOPE

MOUNT SHASTA BIOREGIONAL ECOLOGY CENTER V. COUNTY OF SISKIYOU


- *Court upholds EIR for expansion of existing wood veneer manufacturing plant to include biomass cogeneration power plant*
 - ▶ Fuel would come from wood waste from manufacture process and from wood harvested through forest management activities (e.g., fuel breaks and fire-safe thinning) in surrounding areas
 - ▶ Stated project objective was to generate and sell electricity from sustainably harvested renewable resources, offsetting need for fossil fuels




AEP CONFERENCE
EAST SLOPE


MOUNT SHASTA (CONT.)


- Range of alternatives was adequate despite consisting of only No Project Alternative
 - ▶ All other possible alternatives were screened out
 - *Reduced Capacity Alternative*: failed to meet objectives of economic viability, putting green power into electricity grid, and helping state meet its 2010 green portfolio goals
 - *Alternative Boiler Location Onsite*: created no economic, operational, or environmental benefits and would increase air emissions
 - *Alternative Location Offsite*: use of applicant's existing facility in Oregon would require new infrastructure, more transportation, and greater levels of air impacts




 **MOUNT SHASTA (CONT.)**


- Although alternatives rejected during scoping cannot be counted towards the required “reasonable range of alternatives,” only “potentially feasible” alternatives need be carried forward for detailed analysis
 - ▶ Examination of alternatives analysis must begin with project objectives
 - ▶ There is no rule in CEQA specifying a minimum number of alternatives; each case is judged on its own
 - ▶ Plaintiffs could not identify any missed potentially feasible alternatives in light of project objectives:
 - “An appellant may not simply claim the agency failed to present an adequate range of alternatives and then sit back and force the agency to prove it wrong”




 **MOUNT SHASTA (CONT.)**

- Court did not address merits of issues raised for first time in 16-page, single spaced letter (with 101 pages of supporting materials) delivered by Plaintiffs to Board of Supervisors one day prior to hearing
 - ▶ Board was acting in appellate capacity, reviewing decision of Planning Commission to approve conditional use permit needed for project
 - ▶ County appeal process rules required submission of documentary evidence into record at least five days prior to Board hearing



 **MOUNT SHASTA (CONT.)**


- ▶ Court rejects Plaintiffs' argument that they can rely on any information and legal theories raised any time prior to *Board's approval of project*
 - Planning Commission, not Board, approved project
 - Board sat on appeal, and County administrative rules on appeals governed the timing of submissions to Board
- Relevance to “late hit” issue under CEQA:
 - ▶ Court did not explicitly mention Pub. Resources Code § 21177(a), which allows exhaustion of administrative remedies up until “close of the public hearing on the project”



AEP CONFERENCE
EAST SLOPE

MOUNT SHASTA (CONT.)


- Relevance to "late hit" issue under CEQA:
 - ▶ Did Court implicitly hold that relevant hearing for purposes of this statutory language is Siskiyou County Planning Commission?
 - If so, note generally that Planning Commissions lack legislative power and act in purely advisory capacity for CEQA projects requiring legislative actions (general plan amendments, specific plans, rezones, etc.)
 - For quasi-judicatory actions (tentative maps, use permits, variances, etc.) that are legally final absent an appeal to Board of Supervisors or City Council, *Mount Shasta* decision could force would-be plaintiffs to appeal all arguments they want to preserve for court and make them subject to deadlines found in local administrative appeal procedures
 - *Mount Shasta* decision would still allow "late hits" in CEQA proceedings for projects requiring legislative actions



AEP CONFERENCE
EAST SLOPE

MOUNT SHASTA (CONT.)


- Court rejects attack on air quality analysis based on assertion that it used a "permitted emissions" baseline rather than an "actual emissions" baseline
 - ▶ Court rejected premise of the argument: County explained that emissions assumed in analysis were far below permitted levels and reflected "approximations" of actual impacts
 - Court upholds County's approach, even if approximations resulted in understating impacts, as the "small discrepancy" (a 7 percent difference) between approximations and actual emissions "can hardly be considered significant"
 - Plaintiffs did not show that discrepancy resulted in prejudice (i.e., the inaccuracy did not preclude informed decisionmaking or informed public participation)



AEP CONFERENCE
EAST SLOPE

MOUNT SHASTA (CONT.)


- Court rejects numerous attacks on noise analyses and mitigation measures
 - ▶ Most of the discussion has little value as precedent, but some points are worth noting
 - Court upholds county's use of significance threshold requiring both an overall noise level exceeding a 24-hour standard and an increase of at least 3.0 dBA
 - Court accepts county's method of calculating 24 hour average based on periodic noise samples rather than continuous measurements
 - Court upholds mitigation measures requiring county to respond to any future noise complaints by ordering cessation of deliveries during certain hours or requiring additional identified physical noise control measures to limit increases to 1dB or less
 - Recirculation of Draft EIR was not required by inclusion in Final EIR of two noise studies summarized but not included in Draft EIR (though they were available to the public during Draft EIR review period)



AEP CONFERENCE EAST SLOPE

MOUNT SHASTA (CONT.)


- Court upholds conclusion that impacts to water supply were less than significant
 - ▶ Historic average annual water use in 1990s was 123,000 gallons per day
 - ▶ At time of CEQA review, usage had dropped to 64,000 gpd
 - ▶ With project, 56,000 gpd of additional water would be consumed, for an overall total of 120,000 gpd
 - ▶ This amount is "significantly below maximum available under Shasta River Adjudication"
 - ▶ Plaintiffs could not prove any shift from non-consumptive use to consumptive use



AEP CONFERENCE EAST SLOPE

MOUNT SHASTA (CONT.)


- ▶ Even if, as one consultant for the applicant seemed to indicate, actual usage would be 230,400 gpd due to cooling tower demands (compared with 120,000 gpd assumed in EIR), plaintiffs could cite no evidence that such an increased level of consumption would cause significant impacts
 - Plaintiffs had not shown that any understatement of water impacts was prejudicial



AEP CONFERENCE EAST SLOPE


PRESERVE WILD SANTEE V. CITY OF SANTEE

- Court strikes down EIR for Fanita Ranch project: 1,380 homes, village center, and 15 live/work units on 970 acres and 1,400 acres of open space
 - ▶ Project sought vesting tentative map, use permits, and development agreement
 - ▶ Court upholds some aspects of EIR, but finds fault with
 - mitigation for impacts to endangered Quino checkerspot butterfly
 - water supply analysis
 - ▶ Court observes that CEQA remedies can sometimes require only "limited writ," but leaves in place trial court decision requiring invalidation of EIR certification and project approvals




AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)

- Court upholds analysis of cumulative impacts on biological resources
 - ▶ Project site is within area subject to Multiple Species Conservation Program (MSCP), a Habitat Conservation Plan/Natural Community Conservation Plan covering 900 square miles in San Diego County
 - ▶ Pursuant to MSCP, Santee had prepared *draft* Subarea Plan to implement standards of MSCP
 - ▶ Santee General Plan committed City to applying MSCP's Guiding Principles and Subarea Plan when adopted
 - ▶ Santee found that project's contributions to cumulative biological resource impacts were less than cumulatively considerable, except for impacts to grasshopper sparrow




AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)

- ▶ Guidelines section 15130(a)(3): project's contribution to cumulative impact may be less than cumulatively considerable if project is required to implement its *fair share* of a mitigation measure or measures designed to alleviate the cumulative impact
- ▶ EIR assumed that project would comply with MSCP requirements (i.e., preservation and management of mitigation lands)
- ▶ Similar development in City and County of San Diego contributing to cumulative impacts would be subject to similarly protective MSCP mitigation requirements under their approved Subarea Plans




AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)

- Court finds that substantial evidence supports feasibility of acquiring off-site mitigation property
 - ▶ Developer had identified 88 acres of suitable property
 - ▶ Developer was actively negotiating with property owners in area and "was confident it could acquire all the necessary acreage"
 - ▶ Although developer might not find "one contiguous block" for Quino butterfly mitigation, EIR did not require such a block if infeasible



AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)

- Court finds impermissible deferred mitigation for impacts to Quino butterfly
 - ▶ Mitigation includes 1,235-acre on-site habitat preserve subject to *habitat management plan* requiring approval by City and Federal and State wildlife agencies after City's approval of development entitlements
 - ▶ EIR did not specify "actions anticipated for active management of the Quino within the preserve"
 - ▶ "EIR does not specify performance standards or provide other guidelines for the active management requirement"
 - ▶ The timing and specific details for implementing management activities are subject to discretion of preserve manager based on prevailing environmental conditions, and are not guaranteed to occur at any particular time or in any particular manner



AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)

- ▶ Performance standards are necessary because "vegetation management" is key consideration
 - City will not permit prescribed burns or grazing in preserve
 - But those are the only two vegetation management methods mentioned in the draft habitat management plan
- ▶ Success or failure of mitigation will depend on final contents of habitat management plan, but such plan has not been subject to review and analysis within the EIR
- ▶ EIR never explained why specifying performance standards or providing guidelines for active management was impractical or infeasible at time of EIR certification
- ▶ The "fact that the City and wildlife agencies must approve the habitat plan does not cure these informational defects"




AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)

- ▶ Court attempts to distinguish situation from one at issue in *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, in which
 - Measure requiring transplantation of plant species included performance criteria (80 percent success in establishing plants in three years)
 - Measures requiring wildlife agency approvals involved "formal consultations and permitting"
 - Measures "were sufficiently definite to support a finding that the project's impacts to certain biological resources would be reduced to below significant"


Query: is Court persuasive in distinguishing *Rialto Citizens*?

Response: it's debatable: *Rialto Citizens* upheld mitigation measures without performance standards as being sufficient to mitigate impacts to less than significant levels




AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)

- Court finds water supply analysis to be defective
 - ▶ Project was at subdivision map stage, and thus was subject to Senate Bill 221 requirements, including showing of "firm assurances of future water supplies" (see Gov. Code § 66473.7)
 - ▶ Project also required Water Supply Assessment (WSA) under Senate Bill 610 (see Wat. Code § 10910 et seq.)
 - ▶ But "ultimate question" was whether EIR adequately addresses the reasonably foreseeable impacts of supplying water to the project
 - ▶ *Vineyard Area Citizens* case (2007) requires analysis of potential water supply alternatives where "the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources"




AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)


- ▶ Project site was within Padre Dam Municipal Water District (PDWD)
 - PWD gets its water from San Diego County Water Authority (SDCWA)
 - SDCWA gets most of its water from Metropolitan Water District (MWD)
 - MWD gets its water primarily from State Water Project (SWP) and Colorado River Aqueduct
- ▶ WSA estimated water demand at 881 acre feet per year (afy)
- ▶ EIR estimated water demand at 1,446 afy




AEP CONFERENCE EAST SLOPE PRESERVE WILD SANTEE (CONT.)


- ▶ EIR did not adequately explain conclusion that water supply impacts would be less than significant
 - EIR nowhere explained the discrepancy between the EIR water demand number (1,448 afy) and the WSA number (881 afy)
 - City argued that discrepancy resulted from EIR's use of more general categorical water demand numbers, while WSA used more precise project specific demand numbers
 - This justification is offered for first time in court briefs, and cannot excuse absence of discussion in EIR
 - Even if this is City's justification is correct, court still has no basis for assuming the WSA numbers are more accurate than EIR numbers
 - Although Mayor, at public hearing on project, estimated water demand to be 900 afy, nothing in record showed that he or other Council members knew of discrepancy between that number and EIR number
 - WSA addresses only about 61 % of water demand stated in EIR




 **PRESERVE WILD SANTEE (CONT.)**

- EIR failed to satisfy requirements of *Vineyard Area Citizens* case
 - ▶ Water supply projections in addendum to WSA depend on supply projections in reliability plans of SDCWA and MWD
 - ▶ MWD's projections and reliability plans "depend heavily" on reliability of SWP supplies
 - MWD's Urban Water Management Plan (UWMP) stated that reliability goals could be met only if SWP yielded
 - 1.5 Million Acre Feet (MAF) per year on average
 - Increased yield in critically dry years to 650,000 afy
 - Access to "full contract amounts" in wet years to replenish surface and groundwater storage



 **PRESERVE WILD SANTEE (CONT.)**


- ▶ August 2007 court decision involving SWP operations created at least short-term uncertainty in MWD's SWP supplies
 - WSA Addendum acknowledged that PDWD could not predict whether the court decision would lead to cutbacks and if so by how much
- ▶ EIR did not discuss uncertainties caused by court case or uncertainties relating to successful implementation of planned water development, water delivery, and water conservation projects




 **PRESERVE WILD SANTEE (CONT.)**


- ▶ City's CEQA findings, unlike EIR, did address the subject of supply uncertainty, but lacked sufficient evidence to support conclusion that court decision would not affect availability of water supplies projected by MWD
 - Court decision "undermined" MWD UWMP's assumptions regarding yields needed from SWP to support water reliability goals




 **PRESERVE WILD SANTEE (CONT.)**


- New EIR is therefore required to
 - Evaluate the “pros and cons of fulfilling the project’s water needs”
 - Address the impacts of likely future water sources
 - Provide “a reasoned analysis of the circumstances affecting the likelihood of the water’s availability”
 - (if City cannot confidently determine the availability of a reliable supply) Discuss possible replacement sources or alternatives to the use of anticipated water source and the environmental consequences of those contingencies




 **PRESERVE WILD SANTEE (CONT.)**

- ▶ EIR and WSA failed to address potential impacts of providing potable water to 10-acre lake portion of project
 - Project included lake for treatment of stormwater
 - Potable source was needed to fill lake
 - Groundwater was available to recharge lake, but only if monitoring showed that water table drop of one meter did not damage riparian areas relying on water table
 - Evidence showed difficulty of using groundwater for recharge without adversely affecting riparian areas
 - Neither WSA nor EIR addressed potential effects of having to obtain recharge water from PDWD



 **PRESERVE WILD SANTEE (CONT.)**

- Public Resources Code § 21168.9 does not *always* require courts, for *any* CEQA violation, to void *all* project approvals
 - ▶ Statute allows court to direct its mandates to “parts of findings, or parts of decisions”
 - ▶ Statute also allows “suspension” of project activities as alternative to voiding project approvals
 - ▶ Court disagrees with any suggestion in *Land Value 77, LLC v. Board of Trustees of CSU* (2011) 193 Cal.App.4th 675 that project approvals must always be voided



AEP CONFERENCE EAST SLOPE

PRESERVE WILD SANTEE (CONT.)

- Here, trial court originally issued "limited writ"
- But trial court subsequently ordered City to decertify EIR and set aside project approvals
- Court of Appeal questions whether trial court's original approach was correct, but need not address issue in light of later trial court action
 - Original limited writ was issued before Court of Appeal found problems with biological mitigation and water supply analysis in EIR
 - Biological resource issues of concern to Court of Appeal relate closely to fire safety concerns identified by trial court

CEQA Series

AEP CONFERENCE EAST SLOPE

BANNING RANCH CONSERVANCY V. CITY OF NEWPORT BEACH

- Court upholds EIR for 19-acre Sunset Ridge Park project across access road from proposed 401-acre Newport Banning Ranch (NBR) mixed use development project
 - Court rejects argument that City engaged in piecemealing the park project by processing it separately from nearby planned NBR project
 - Court concludes that EIR adequately addresses impacts of park, including
 - Cumulative traffic impacts
 - Growth-inducing impacts
 - Cumulative biological impacts
 - Impacts to California gnatcatcher habitat
 - Potential impacts on possible future Environmentally Sensitive Habitat Areas (ESHAs)

CEQA Series

AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)


- Piecemealing occurs when a CEQA document excludes from its definition of the "project" under review
 - "Future expansion or other action" that (1) is a "reasonably foreseeable consequence of initial project" and (2) will "likely change the scope or nature of the initial project or its environmental effects"
 - Future development for which the reviewed project is the first step (e.g., CEQA documents for "paper" annexations or rezones should address the impacts of reasonably foreseeable development despite the need for additional, later approvals prior to groundbreaking)
 - Another action that is legally compelled or presumed to be completed by the reviewed project (e.g., offsite road improvements required as condition of approval for shopping center)

CEQA Series

AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)


- Piecemealing does *not* occur when
 - ▶ Different projects have different proponents, serve different purposes, or can be implemented independently (e.g., a refinery upgrade and pipeline exporting excess hydrogen can proceed separately if both are "independently justified")
 - ▶ Proposed project has "significant independent or local utility" (e.g., local or regional water transfers may have utility independent from the larger state and federal water systems in which they function)



AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)


- Sunset Ridge Park and NBR are separate projects, so City was not guilty of piecemealing
 - Approval of park would not *cause* approval of development project
 - Both projects are in City's General Plan and require same access road
 - It does not matter that the park will benefit NBR by including transportation improvements anticipating NBR (access road improvements and traffic signal)
 - Improvements installed in connection with park will be only "baby steps" towards accommodating NBR
 - NBR will still require additional major additional road improvements
 - NBR is major project of its own serving different purposes, with a different proponent
 - ▶ In theory, there could be "some tipping point" at which the park project would do so much of the work required for NBR "that the two projects would become one" – but that didn't happen here



AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)

- ▶ Park EIR adequately addressed cumulative traffic impacts, including those from NBR project
 - *Draft* EIR listed NBR as cumulative project, but did not actually analyze any traffic from NBR
 - Court assessed adequacy of *Final* EIR, finding analysis to be "reasonable and practical"
 - Response to comment explained that park access road was consistent with General Plan
 - General Plan EIR "assumed worst case conditions, including alternate residential and commercial development on the Banning Ranch property" and analyzed traffic impacts from access road
 - EIR could have set forth cumulative impact analysis more fully, but an EIR "need not achieve 'perfection'"



AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)


- Court upholds EIR conclusion that park project will not have growth-inducing effects
 - ▶ NBR was proposed before park
 - ▶ NBR is not a consequence of the park
 - ▶ Park has independent purpose of providing recreational facilities to meet *existing* demand in City
 - ▶ Park's access road is consistent with General Plan
 - ▶ Any effect on growth is indirect because the access road removes "only one of potentially numerous obstacles and approval requirements for developing" NBR property
 - ▶ NBR is undergoing its own environmental review



AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)


- Cumulative impact analysis of biological resources in Final EIR was reasonable and practical
 - ▶ Draft EIR did not mention NBR in its discussion of cumulative biological impacts
 - ▶ Draft EIR did discuss Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP) for Central/Coastal Subregion
 - HCP preserved and managed open space and habitat on a regional scale
 - ▶ Final EIR explained that NCCP/HCP protections covered NBR site
 - ▶ With this clarification, the EIR satisfied its dual roles as an "informational document" and a "document of accountability"



AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)

- Court upholds conclusion that project would not cause significant effect on California gnatcatcher habitat
 - ▶ Project would impact 0.68 acres of habitat
 - ▶ Mitigation included
 - prohibition of scrub removal during breeding and nesting season
 - Flushing gnatcatchers before scrub removal or earth moving
 - 2 to 1 mitigation on Project site or suitable off-site locations



AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)

- ▶ Court rejects argument that entire project site must be considered "per se significant" under CEQA because site is within "critical habitat" designated under federal Endangered Species Act (ESA)
- City's biologist observed that all but 0.68 acres of site was "so degraded its loss would not be substantial"
- Plaintiffs cited no legal authority that ESA "critical habitat" determination covering a project site changes the normal approach to CEQA analysis focused on changes to existing physical conditions
- "Any illegal activities affecting the baseline environmental conditions are best addressed by enforcement agencies"

CEQA Series

AEP CONFERENCE EAST SLOPE

BANNING RANCH (CONT.)

- ▶ Substantial evidence supports effectiveness of mitigation measures
- Case law recognizes validity of "compensating for the impact by replacing or providing substitute resources or environments"
- "[M]itigation need not account for every square foot of impacted habitat to be adequate"
- City need not acquiesce to different mitigation measures proposed by the United States Army Corps of Engineers or anyone else"
- "The fact that mitigation will be implemented over time does not mean the City has improperly deferred mitigation"
- Measures adopted by City, including the 2 to 1 mitigation requirement, were consistent with these standards


CEQA Series

AEP CONFERENCE EAST SLOPE


BANNING RANCH (CONT.)


- Court rejects Plaintiff's contention that EIR should have disclosed that the project was inconsistent with the Coastal Act
 - ▶ Coastal Act protects ESHAs; and loss of habitat values of ESHAs cannot be mitigated by re-creating habitat somewhere else
 - ▶ EIR explained that project site includes no recognized ESHAs but includes two areas that could be identified as ESHAs in the future
 - ▶ EIR concluded that the project's impacts on those areas would be mitigated through habitat restoration occurring either on-site or in the immediate vicinity of project

CEQA Series

 **BANNING RANCH (CONT.)**


- ▶ Even if Coastal Commission ultimately identifies the potential ESHA sites as actual ESHAs, the park project does not *presently* conflict with the Coastal Act
 - EIR was not required to find inconsistency with Coastal Act based on future possibility of conflict
- ▶ Wetlands analysis was adequate, and accounted for the Coastal Act definition of wetlands




 **SAVE CUYAMA VALLEY V. COUNTY OF SANTA BARBARA**


Court upholds EIR for 30-year conditional use permit for 84-acre "Diamond Rock" riverbed sand and gravel mine:

- Court rejects attacks on adequacy of
 - ▶ analysis and mitigation for hydrological impacts
 - ▶ analysis of water usage impacts
- Problem with water quality analysis was not prejudicial due to effectiveness of condition of approval



 **SAVE CUYAMA VALLEY (CONT.)**


- Cuyama River replenishes only 229,000 tons of sediment per year
- Mine would:
 - ▶ operate outside flow in dry riverbed, taking both (i) replenished sediment from river flows and (ii) sediments already in place outside active stream
 - ▶ excavate an average of 500,000 tons of sediment per year
 - ▶ be located 1,500 feet downstream from existing mine already averaging 160,000 tons per year but authorized to take 500,000 tons



AEP
EAST SLOPE CONFERENCE

SAVE CUYAMA VALLEY (CONT.)


- EIR explained why inundation of mined pits and overflow during "substantial rain events" would not cause significant downstream impacts from scour, headcutting, or erosion
- Even though hydrological impact was less than significant, EIR recommended mitigation measure requiring
 - surveys in mined areas
 - (if "adverse hydraulic conditions" found) changes to mining pit layout, width, or depth



AEP
EAST SLOPE CONFERENCE

SAVE CUYAMA VALLEY (CONT.)


- Court upholds County's thresholds of significance for hydrological impacts attributed to "CEQA" but not based on Appendix G language:
 - ▶ Court rejects argument that threshold language must always exactly track the questions in Appendix G or document and justify any deviation from such language
 - ▶ "CEQA grants agencies discretion to develop their own thresholds of significance"
 - ▶ Thresholds need not be "formally adopted" under CEQA Guidelines section 15064.7 unless they are adopted for "general use"




AEP
EAST SLOPE CONFERENCE


SAVE CUYAMA VALLEY (CONT.)


- Substantial evidence supports conclusion that hydrological impacts would be less than significant
 - ▶ Impacts were not necessarily significant simply because Diamond Rock and other mine together could create a sediment deficit of 771,000 tons per year
 - EIR explained why sediment deficiency does not automatically translate into adverse hydrological impacts
 - Existing upstream mine has not resulted in any headcutting or downstream channel degradation
 - After upstream pits are filled, the riverbed will be replenished with surplus sediment from flows passing over previously scoured areas




 **SAVE CUYAMA VALLEY (CONT.)**


- Court had no problem with County conservatively proposing a mitigation measure after calling the impact less than significant
- Court upholds the adequacy of the mitigation measure:
 - ▶ Requirement for compliance with Surface Mining and Reclamation Act (SMARA) standards was reasonable
 - ▶ Requirement to "avoid" "adverse hydraulic conditions" was "sufficiently definite" to qualify as a "performance standard" akin to SMARA standard




 **SAVE CUYAMA VALLEY (CONT.)**

- EIR's discussion of cumulative water usage was sufficient and EIR did not need a separate project-specific analysis
 - ▶ It was proper to use same threshold – 31 acre feet per year – as a significance threshold for both project-specific and cumulative impacts
 - 31 afy threshold was formulated with cumulative impacts in mind, based on basinwide water availability
 - Because project's consumption would be less than 31 afy, there was no need for EIR to separately address project-specific impacts
 - Though formulated in 1992, threshold remained valid



 **SAVE CUYAMA VALLEY (CONT.)**


- Court agreed with petitioner that no substantial evidence supported conclusion that water quality impacts would be less than significant
 - ▶ EIR said that "groundwater would be exposed infrequently and briefly"
 - ▶ But the statement that groundwater would only be located below the maximum mining depth of 90 feet was in conflict with other evidence indicating groundwater could be found from 40 to 110 feet below the ground surface



AEP CONFERENCE
EAST SLOPE

SAVE CUYAMA VALLEY (CONT.)


- Even so, petitioner failed to show prejudice from this lack of substantial evidence
 - ▶ Condition of approval # 64 required applicant to fill in any water encountered during mining and at all times to keep the bottom of the mine pits at least six feet above any water
 - This obligation applies regardless of depth of groundwater
 - ▶ Erroneous conclusion drawn from accurately portrayed data was not prejudicial



AEP CONFERENCE
EAST SLOPE

HABITAT AND WATERSHED CARETAKERS V. CITY OF SANTA CRUZ

Court finds only one problem with EIR for a proposed sphere of influence (SOI) amendment that, if approved by LAFCO, would allow City of Santa Cruz to provide water and sewer service to "North Campus" area of University of California Santa Cruz, consistent with 2005 UCSC Long Range Development Plan (LRDP)



AEP CONFERENCE
EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)

- Court upholds
 - ▶ EIR discussions of:
 - Water supply
 - Watershed resources and wetlands
 - Biological resources
 - Indirect Growth Inducement
 - Project Objectives
 - Mitigation measures
 - ▶ Statement of Overriding Considerations
- Court sets aside EIR's alternatives analysis for lack of "limited water alternative"




AEP CONFERENCE EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)

BACKGROUND

- City sued UCSC over EIR for 2005 Long Range Development Plan (LRDP), resulting in comprehensive settlement agreement addressing off-site housing and traffic concerns
- LRDP contemplated the development of "North Campus," an area outside the City's territorial boundaries and SOI
- Agreement contemplated that City and UCSC jointly request LAFCO to grant SOI amendment allowing City to provide extraterritorial water and sewer service to North Campus
 - City was not required to file SOI application, but had to do so in order to trigger UCSC's commitment relating to provision of off-site housing
- Consistent with agreement, City as lead agency prepared an EIR to support its application to LAFCO for the SOI amendment




AEP CONFERENCE EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)

CITY'S WATER SUPPLY SITUATION


- City has long suffered from a water supply deficit in dry years, requiring significant cutbacks
- Only viable long-term solution is proposed desalination plant, as described in 2006 Integrated Water Plan
- Without desalination plant, the situation will grow even more challenging in future years due to:
 - possible cutbacks in the City's use of certain surface water sources due to impacts on listed fish species
 - the threat of salt water intrusion from overuse of groundwater
 - possible impacts from climate change




AEP CONFERENCE EAST SLOPE


HABITAT AND WATERSHED CARETAKERS (CONT.)


- EIR concluded that desalination plant was not "reasonably likely" water supply within meaning of California Supreme Court decision in *Vineyard Area Citizens et al. v. City of Rancho Cordova* (2007) 40 Cal.4th 412:
 - Although plant was "the most likely future water source," its future was "uncertain until design, environmental review and regulatory approvals are completed"
 - Although 2006 EIR for City's Integrated Water Plan included program-level review for plant, project level review was still to be completed
 - Proposed plant would be shared with Soquel Creek Water District
- Because service to expanded UCSC would exacerbate existing problem unless and until desalination plant came on line, EIR called water supply impact significant and unavoidable




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- Under *Vineyard*, an EIR is not required to establish a likely source of water, but may satisfy CEQA by
 - ▶ addressing the reasonably foreseeable impacts of supplying water to project
 - ▶ acknowledging the degree of uncertainty involved
 - ▶ discussing reasonably foreseeable alternatives to preferred (though uncertain) supply
 - ▶ disclosing significant foreseeable environmental effects of each alternative source, as well as mitigation measures to minimize significant effects




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- City's EIR met these standards by
 - ▶ discussing the impact of the project on the City's water supply
 - ▶ acknowledging the City's inadequate supplies
 - ▶ noting that the construction of a desalination facility was uncertain
- EIR acknowledged the "harsh reality" that, absent construction of desalination plant, the project would
 - ▶ increase the ongoing imbalance between supply and demand
 - ▶ require additional conservation by existing customers during droughts and in future normal years




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- EIR adequately addressed potential for North Campus development to cause erosion in the Cave Gulch watershed:
 - ▶ Final EIR was not invalid for citing UCSC's 2008 Stormwater Management Plan (SWMP) for LRDP without also including the document as an appendix:
 - Draft EIR described, referenced, and incorporated relevant analysis and mitigation measures from LRDP EIR
 - Final EIR, responding to comments, described, and referenced relevant portions of SWMP in explaining how its provisions would assist in avoiding erosion




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- EIR was not invalid due to absence of formal, Corps-approved wetland delineations within project area:
 - ▶ The EIR recognized the existence of wetlands and contained protective mitigation measures
 - ▶ The EIR explained that
 - the LRDP EIR's mitigation measures required predevelopment delineation of wetlands
 - delineation was not initially required because wetland resources are dynamic and their precise boundaries are likely to change over the 15-year term of the 2005 LRDP
 - Corps-approved delineations are valid only for three to five years
 - ▶ Under the circumstances, the court found wetland delineation was appropriately deferred to project-level environmental review for future individual projects in the North Campus




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- EIR was not inadequate for failing to address alleged changes to City's water supply system that could adversely affect biological resources:
 - ▶ EIR was not required to assume the expanded use of City's existing water sources, because:
 - City was not proposing such expanded use
 - City instead proposed to meet the North Campus needs through conservation, curtailment, and possible construction of a desalination facility
 - ▶ EIR was not required to study impacts of existing conditions because they are not impacts of the project and would occur even without the project
 - ▶ EIR did not ignore, but plainly acknowledged, possibility of cutbacks to City's existing surface water sources




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- EIR adequately dealt with off-campus population growth indirectly induced by project:
 - ▶ EIR assessed new housing demand created by increased student and faculty population
 - 2,300 new City residents would need 525 to 860 new housing units
 - City had already approved 610 units and was expecting to approve another 325 units by 2015
 - ▶ Because (i) these numbers were within City's existing projections, and (ii) new or anticipated housing units would satisfy demand, EIR properly found impact to be less than significant




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- Court rejects challenge to EIR “project objectives”
 - ▶ Project objectives must reflect “whole of action”
 - Project includes actions not just by City and UCSC, but also by LAFCO as responsible agency
 - LAFCO was not a party to the comprehensive settlement agreement
 - LAFCO must meet its obligations under Cortese-Knox-Hertzberg Act (CKH), regardless of terms of agreement between City and UCSC
 - LAFCO has options of approving, denying, or conditionally approving SOI amendment




 **HABITAT AND WATERSHED CARETAKERS (CONT.)**

- ▶ Project objectives in Final EIR, unlike those in Draft EIR, recognized the “whole of the action”
 - Draft EIR had focused on City’s objective of meeting its obligations under settlement agreement with UCSC by submitting SOI amendment to LAFCO
 - Draft EIR’s identification of SOI amendment as objective did not “illuminate the *underlying purpose* of the project”
 - Final EIR refined project objectives to recognize a purpose of providing water and sewer service to North Campus in order to trigger UCSC housing commitments under agreement
 - Final EIR corrected deficiency of Draft EIR



 **HABITAT AND WATERSHED CARETAKERS (CONT.)**


- Court: EIR should have included a “limited water alternative”
 - ▶ Draft EIR addressed two alternatives:
 - No Project
 - Modified SOI alternative excluding undeveloped land from SOI
 - ▶ Draft EIR rejected possible alternatives that would
 - Relocate proposed growth from North Campus to Main Campus
 - Redirect new student enrollment to other UC campuses
 - ▶ Final EIR added “annexation alternative”



AEP CONFERENCE
EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)


- ▶ City was *not* required to consider "reduced-development" alternative
 - Under CKH, LAFCO cannot "impose any conditions that would directly regulate land use density or intensity, property development, or subdivision requirements" (Gov. Code, § 56375(a)(6))



AEP CONFERENCE
EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)


- ▶ In contrast, LAFCO would not be precluded from approving a "limited water" alternative allowing some, but not all, proposed development in North Campus
 - This would partially meet project objectives
 - This would secure UCSC housing commitments under settlement agreement
 - CKH would allow LAFCO to condition the provision of water service on water supply availability
 - Options include conditioning development on "supply ceiling" by requiring City to decrease off-site demand before meeting new demand on campus



AEP CONFERENCE
EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)


- ▶ Court rejects argument of City and UCSC that EIR need not address limited water supply alternative because it would not avoid the significant water supply impact of project
- ▶ Court was not persuaded by argument that, absent approval of SOI as requested, UCSC would just build the same amount of development elsewhere on campus in an area already served by City
 - Such an outcome is speculative
 - Decisionmakers should have access to analysis of such an alternative before deciding on its merits
- ▶ By failing to include any *feasible* alternatives, EIR failed to meet CEQA's informational purposes



AEP CONFERENCE EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)


- Court rejects claim that EIR did not include adequate mitigation for significant, unavoidable water supply impacts:
 - ▶ Draft EIR incorporated numerous mitigation measures from the LRDP EIR requiring various water conservation actions
 - ▶ Settlement agreement required UCSC to implement a group of high priority conservation measures
 - ▶ These mitigation measures were "specific" and "certain," contrary to Petitioner's claims
 - ▶ These measures will reduce the Project's impacts on the City's water supply, even if not to a less than significant level
 - ▶ The mitigation measures were not required "to resolve the City's longstanding water supply deficit"



AEP CONFERENCE EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)


- Petitioner's attack on City's CEQA Findings adds nothing to attacks on EIR
 - ▶ Findings are inadequate as to project alternatives, but the flaws are attributable to EIR
 - ▶ The attack on the findings "has no independent merit"



AEP CONFERENCE EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)


- Substantial evidence supports City's Statement of Overriding Considerations:
 - ▶ Statement referred to six independent project benefits, any one of which would be sufficient by itself to justify project approval
 - ▶ Court finds substantial evidence supporting three out of six reasons, enough to uphold Statement
 - ▶ Court should defer to City's weighing of policy considerations



AEP CONFERENCE
EAST SLOPE

HABITAT AND WATERSHED CARETAKERS (CONT.)


- ▶ Court upholds following benefits cited in Statement:
 - Project triggers UCSC commitments under settlement agreement to conserve water and mitigate traffic impacts
 - UCSC might develop elsewhere on campus if SOI amendment were not pursued and approved
- ▶ Court finds no support for the following purported benefits cited in City's Statement:
 - That project would "fulfill" the City's obligations under the settlement agreement
 - City was not absolutely required to pursue SOI amendment (but only as a means of seeking housing benefits from UCSC)
 - That project would allow UCSC to implement the LRDP
 - No explanation as to how this outcome would benefit City



AEP CONFERENCE
EAST SLOPE

NORTH COAST RIVERS ALLIANCE ET AL., V. MARIN MUNICIPAL WATER DISTRICT BOARD OF DIRECTORS


- *Court of Appeal upholds EIR for proposed 5 mgd desalination plant on San Rafael Bay in Marin County*
 - ▶ Court rejects attacks on EIR's treatment of impacts relating to
 - Aesthetics
 - Land Use and Planning
 - Seismology
 - Hydrology and Water Quality
 - Biological Resources
 - Energy and Greenhouse Gases
 - ▶ Court rejects demand for recirculation over new alternative




AEP CONFERENCE
EAST SLOPE


NORTH COAST RIVERS ALLIANCE (CONT.)


- ▶ *Aesthetic Impacts: Substantial evidence supports analysis of aesthetic impacts caused by three proposed water tanks*
 - Lead Agency, in preparing EIR, has discretion to define significant aesthetic effects to exclude consideration of private views
 - The visual impacts of one tank, "within a saddle" on Tiburon Ridge, were less than significant
 - Tank would be visible but not "visually imposing" from a distance of 2,000 feet
 - Tank was "not very visible" from nearby residences
 - It was "slightly visible" but "would not degrade the visual character" of the project site itself




 **NORTH COAST RIVERS ALLIANCE (CONT.)**


- Two other tanks, on San Quentin Ridge, would be visually significant without mitigation but less-than-significant with mitigation requiring the development of a landscaping plan
 - ▶ The measure did not represent impermissible deferral because it committed the District to mitigation and established metrics for measuring success of the landscaping plan
 - Standard requiring screening trees to "soften the visual intrusion" was a sufficient performance standard




 **NORTH COAST RIVERS ALLIANCE (CONT.)**

- **Land Use and Planning:** the EIR was not required to address local general plan policies with which it was *consistent*
 - ▶ Although EIRs should address a project's *inconsistency* with an applicable plan (see CEQA Guidelines § 15125(d)), EIRs need not include detailed discussions of the project's *consistency* with such plans
 - ▶ Here, substantial evidence supported the EIR's conclusions of consistency with plans of Larkspur, San Rafael, Tiburon, and Marin County
 - ▶ No one exhausted administrative remedies regarding this issue anyway



 **NORTH COAST RIVERS ALLIANCE (CONT.)**


- **Seismology:** the EIR's conclusion that impacts would be less-than-significant was supported by substantial evidence, including information on
 - ▶ Geologic conditions in the area
 - ▶ Seismic hazards in the area, including ground shaking and liquefaction
 - ▶ Project features and components to be built in compliance with applicable Building Code standards



AEP CONFERENCE EAST SLOPE

NORTH COAST RIVERS ALLIANCE (CONT.)


- **Hydrology and Water Quality:** Substantial evidence supported the conclusion that these impacts would be less-than-significant, as the EIR
 - ▶ Described the shock-chlorination process, its frequency, and wastewater disposal
 - ▶ Evaluated whether wastewater produced by the project could impact water quality
 - ▶ Explained that testing conducted for the project supported the conclusion that shock-chlorinating chemicals would not cause water quality impacts



AEP CONFERENCE EAST SLOPE

NORTH COAST RIVERS ALLIANCE (CONT.)


- **Biological Resources:** Substantial evidence supports the conclusion that impacts would be less-than-significant
 - ▶ A difference of opinion between the lead agency and state and federal regulatory agencies on technical methods is not fatal
 - The National Oceanic and Atmospheric Administration (NOAA) and Department of Fish and Wildlife (DFW) recommended monthly source water sampling to address entrainment impacts, while the District adopted peak abundance period monitoring instead
 - ▶ The EIR's baseline description of biological resources was sufficient, as it incorporated two months of sampling, a year-long project-specific study, and decades of DFW data



AEP CONFERENCE EAST SLOPE

NORTH COAST RIVERS ALLIANCE (CONT.)


- ▶ The mitigation for impacts from the pile-driving required for pier reconstruction was adequate
 - The measure required the District, through the Corps of Engineers, to consult with NOAA under the Endangered Species Act (ESA)
 - Such consultation *must* occur anyway as part of the Clean Water Act permitting process
 - Conditions requiring compliance with other environmental laws are a common and reasonable form of mitigation under CEQA
 - The measure included performance standards such as
 - Avoid "take" (i.e., kill, harm, or harass) under ESA
 - Do not "cause a fish or wildlife population to drop below self-sustaining levels" (compare CEQA Guidelines § 15065(a)(1))
 - Avoid sound levels of 180 dB (peak) (underwater), determined by NOAA to cause harm to fish



AEP CONFERENCE EAST SLOPE

NORTH COAST RIVERS ALLIANCE (CONT.)


- **Energy:** The EIR was not required to address an alternative focused on "green energy credits," because energy impacts were less-than-significant, and alternatives should address significant effects
- **Greenhouse Gas Emissions:** Substantial evidence supported the EIR's conclusions that GHG impacts would be less than significant
 - ▶ EIR used significance threshold of interference with Marin County's goal of reducing GHG impacts by 2020 to levels 15 percent below those of 1990
 - ▶ PG&E would serve plant, and likely would not need to increase production at any fossil fuel plants in order to serve project
 - ▶ In any event, the District voluntarily committed to purchase only renewable energy for the project, and the EIR contained substantial evidence showing the feasibility of committing to this voluntary mitigation



AEP CONFERENCE EAST SLOPE

NORTH COAST RIVERS ALLIANCE (CONT.)

- **Recirculation:** District did not trigger recirculation simply because it discussed a new alternative in the Final EIR
 - ▶ This "Sonoma-Marin Transmission Line with Conservation" alternative would include a pipeline from the Russian River to the District
 - ▶ To trigger recirculation, alternative must be (i) "considerably different" from others, (ii) feasible, (iii) able to "clearly lessen the significant environmental impacts of the project," and (iv) unacceptable to project proponent and must "(CEQA Guidelines § 15088.5(a)(3))
 - ▶ This alternative is "neither a considerably different nor a feasible alternative"
 - The Draft EIR already looked at a "conservation alternative"
 - Substantial evidence supported conclusion that link to Russian River was infeasible
 - Russian River water was likely to be unavailable due to environmental restrictions
 - Alternative would meet the District's needs only in non-drought years, contrary to project objective



AEP CONFERENCE EAST SLOPE

NEIGHBORS FOR FAIR PLANNING V. CITY AND COUNTY OF SAN FRANCISCO

- **Court upholds and findings EIR for 68,206 sf mixed-use project consisting of 48 affordable housing units, community center, gymnasium, and program space for serving at-risk teens**
 - ▶ City did not "preapprove" project prior to certifying Final EIR
 - ▶ The EIR was legally adequate with respect to discussion of baseline conditions and scope of alternatives
 - ▶ Findings rejecting "Code Compliant Alternative" were supported by substantial evidence



 **NEIGHBORS FOR FAIR PLANNING (CONT.)**

- City did not violate California Supreme Court's principles from 2008 *Save Tara* decision regarding "preapproval" when:
 - ▶ City loaned project applicant \$788,484 to cover "predevelopment activities"
 - ▶ One supervisor *proposed* an ordinance to allow increased height in zoning district and to increase size of density bonus
 - ▶ Staff worked with applicant to shape project design
 - ▶ One supervisor publicly advocated project



 **NEIGHBORS FOR FAIR PLANNING (CONT.)**

- Predevelopment loan for applicant was not like the predevelopment agreement that was problematic in *Save Tara*
 - ▶ In *Save Tara*, tenants from existing structures were evicted and relocated prior to CEQA review, and City of West Hollywood would have been out \$475,000 if project was not completed
 - ▶ Here, San Francisco Mayor's Office of Housing verified credit-worthiness of applicant and required repayment over 55 years if project was approved or immediately if project was denied




 **NEIGHBORS FOR FAIR PLANNING (CONT.)**

- Introduction of proposed Special Use District (SUD) Ordinance did not trigger need to comply with CEQA
 - ▶ State law (Gov. Code, § 65915) requires 35% density bonus for housing projects consisting solely of low-income units
 - ▶ San Francisco allows developers to pursue additional density through ordinances creating SUDs
 - ▶ Here, SUD ordinance was *introduced* by one supervisor prior to Final EIR certification, but *approved* by majority vote after certification




AEP CONFERENCE EAST SLOPE **NEIGHBORS FOR FAIR PLANNING (CONT.)**

- City and County of San Francisco did not “preapprove” project just because
 - ▶ Staff worked with applicant in shaping project
 - Such cooperation is “not unusual, suspicious, or demonstrative of preapproval” for “public-private partnerships”
 - ▶ One Supervisor publicly advocated project
 - Staff and individual agency officials may have “high esteem for a project” without nullifying EIR process; “it is inevitable that an agency proposing a project will be favorably disposed towards it”
 - ▶ Executive Director of supportive Non-Profit sent out email advocating project from sfgov.org email address
 - This mistake was acknowledged and corrected
 - ED from outside entity could not commit City to project



AEP CONFERENCE EAST SLOPE **NEIGHBORS FOR FAIR PLANNING (CONT.)**

- One factual error in description of buildings near project site was not fatal to discussion of baseline conditions
 - ▶ Graphic in Draft EIR erroneously depicted two-story buildings in immediate vicinity of project as having three stories
 - ▶ Abundant other information in Draft EIR was accurate and City readily admitted its error in Final EIR
 - ▶ The error in graphic did not preclude informed decisionmaking and informed public participation



AEP CONFERENCE EAST SLOPE **NEIGHBORS FOR FAIR PLANNING (CONT.)**

- EIR discussion of alternatives was not deficient for not including an alternative that would have relocated the applicant’s existing center to an unspecified new site
 - ▶ City legitimately rejected a relocation alternative as contrary to the “fundamental objective of continuing and expanding the services the Center offers on site to its local community”
 - ▶ Applicant is NGO that is “fortunate to own” the existing site and that “lacks the “fiscal means to reasonably acquire or control an alternative site”



AEP CONFERENCE EAST SLOPE

NEIGHBORS FOR FAIR PLANNING (CONT.)

- Substantial evidence supported Board of Supervisors' findings rejecting Code Compliant Alternative as economically infeasible
 - ▶ EIR examined a Code Compliant Alternative that reduced housing units from 48 to 32, eliminating specialized housing for transitional-age youth
 - ▶ Board rejected alternative as infeasible because it would generate an annual operating deficit of somewhere between \$11,937 (for a 41-unit scenario) and \$77,569 (for a 25-unit scenario)
 - ▶ A City subsidy to cover shortfall (\$500,000) would only come at expense of other affordable housing projects

CEQA Series

AEP CONFERENCE EAST SLOPE

SAVE PANOCHE VALLEY V. SAN BENITO COUNTY

- *Court upholds EIR for large solar photovoltaic power plant in rural area near Fresno County currently used for low-density grazing*
 - ▶ Applicant originally proposed a 420 MW plant on 4,885 acres, but project as approved was downsized to 339 MW on 3,927 acres
 - ▶ Court also upheld County's cancellation of Williamson Act contracts in "public interest" due to statewide need for alternative energy development


CEQA Series

AEP CONFERENCE EAST SLOPE

SAVE PANOCHE VALLEY (CONT.)


- EIR's impact assessment for blunt-nosed leopard lizard was adequate
 - ▶ Draft EIR was not supported by protocol surveys regarding precise locations of individual members of species
 - ▶ County responded to concern from DFG about possible "take" by requiring protocol surveys prior to construction and a 22-acre buffer zone around each location where a lizard is found

CEQA Series


 **SAVE PANOCHE VALLEY (CONT.)**


- Biological resource mitigation measures for blunt-nose leopard lizard, nesting birds, and certain other species did *not* rely on “loose or open-ended” performance standards by including preconstruction survey requirements
 - ▶ No improper deferral occurs where measures require that, where preconstruction protocol surveys identify target species, (i) buffer areas of minimum sizes must be created, (ii) construction hours must be modified, or (iii) relocation of individuals must occur
 - ▶ Preconstruction surveys facilitated the completion of these mitigation goals




 **SAVE PANOCHE VALLEY (CONT.)**

- Substantial evidence supported mitigation for giant kangaroo rat, San Joaquin kit fox, and blunt-nosed leopard lizards
 - ▶ One off-site mitigation property, Silver Creek Ranch, had high habitat value for these species
 - It supports 95 percent of the remaining giant kangaroo rat population
 - It was specifically identified in the USFWS 1998 ESA *Recovery Plan for Upland Species of the San Joaquin Valley* as having high habitat values
 - USFWS identified Silver Creek Ranch as “critical component” of recovery of affected species
 - Applicant agreed to preserve the area in perpetuity through conservation easements



 **SAVE PANOCHE VALLEY (CONT.)**

- ▶ Other measures for the giant kangaroo rat created a 389-acre habitat corridor and required conservation at a 3 to 1 ratio
 - “[M]itigation need not account for every square foot of impacted habitat to be adequate. What matters is that the unmitigated impact is no longer significant.”
- ▶ Construction mitigation required buffer zones for occupied natal dens for kit foxes and included specific guidelines for avoiding disturbance to occupied dens during construction




AEP CONFERENCE EAST SLOPE **SAVE PANOCHE VALLEY (CONT.)**

- Mitigation for impacts to agricultural lands was proper
 - ▶ Conservation easements constitute "mitigation" as defined by CEQA
 - ▶ Mitigation here called for the creation of conservation easements and the ultimate dismantling of the project upon completion of its useful life and then restoration to agricultural conditions
 - ▶ Court rejects notion that adequate CEQA mitigation for impacts to agricultural lands must create *additional* agricultural lands to make up for lost lands
 - the "goal of mitigation" is not to "net out the impact" but to reduce it to less than significant levels
 - Mitigation also called for sheep grazing within the project site, which had some value in reducing impact even if it did not fully replace lost cattle grazing




AEP CONFERENCE EAST SLOPE **SAVE PANOCHE VALLEY (CONT.)**

- Substantial evidence supported rejection of alternative site in Kings and Fresno Counties ("Westlands CREZ" site)
 - ▶ EIR considered alternative of using site already being leased by Westlands Water District from Westside Holdings for purpose of developing a 30,000-acre, 5,000 MW solar power plant
 - ▶ In CEQA Findings, County rejected this alternative as infeasible because
 - It could not be completed in a reasonable period of time: the applicant would have to relocate, take part in due diligence, negotiate for the land, properly design a project, and undertake another EIR
 - San Benito County could not be sure that Kings and Fresno Counties would consider approving such a project
 - Development of other site would deprive San Benito County of the tax and employment benefits of a project in San Benito County
 - Construction on the other site might be legally infeasible due to need for cooperation of Westside Holdings



AEP CONFERENCE EAST SLOPE **SAVE PANOCHE VALLEY (CONT.)**

- In assessing feasibility, County decisionmakers had discretion to give weight to the facts that the alternative site is located in other jurisdictions and is predominantly controlled by a private party
- Substantial evidence supported the County's conclusion that the project would bring jobs and taxes to San Benito County
 - An economic impact study estimated that the project would create 771 jobs and generate \$81 million in additional retail impact in the County
 - Substantial evidence supported the County's conclusion that the project "would further the state's interest in renewable energy"



AEP CONFERENCE EAST SLOPE

MASONITE CORPORATION V. COUNTY OF MENDOCINO

- Court invalidates EIR for quarry project that would mine 3.37 million tons of aggregate from 30.3 acres over 25 years on a 65-acre site with 45 acres of prime agricultural land
 - ▶ Loss of prime agricultural land was significant, unavoidable impact
 - ▶ County erroneously assumed that off-site conservation easements did not qualify as legitimate mitigation for direct impact of loss of agricultural land

CEQA Series

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MASONITE CORPORATION (CONT.)

- County reasoned that "agricultural conservation easements" addressed only indirect and cumulative effects, and did not mitigate the direct loss of agricultural land
 - ▶ Project would cause significant unavoidable direct effects, but County (wrongly) believed it was legally infeasible to try to mitigate for them through off-site easements
 - ▶ The EIR concluded that there were no significant indirect or cumulative impacts to mitigate due to nature of surrounding properties

CEQA Series

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MASONITE CORPORATION (CONT.)


- Court concludes that off-site easements are a legitimate for of *compensatory* mitigation for the direct loss of agricultural land
 - ▶ Earlier cases have upheld the use of off-site preservation as a legitimate form of mitigation for biological resources
 - ▶ Cases upholding the rejection of easements as infeasible turned on case-specific facts regarding factors such as land costs and the economic infeasibility of agriculture in the regions surrounding projects
 - ▶ California statutes other than CEQA (e.g., the Williamson Act) include policies favoring the preservation of agricultural land

CEQA Series

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MASONITE CORPORATION (CONT.)


- On remand, the County should also address comment from the Department of Conservation urging that in-lieu fees are also a valid form of mitigation for the direct loss of agricultural land



AEP CONFERENCE EAST SLOPE

NEIGHBORS FOR SMART RAIL V. EXPOSITION METRO LINE CONSTRUCTION AUTHORITY


- *Court announces a new legal test for the use of a future baseline while letting stand a challenged EIR for a light rail line from Culver City to Santa Monica; EIR had used a 2030 baseline despite project beginning operations in 2015*
 - ▶ Three justices agreed with the new legal test and that the EIR was inadequate, but found that the errors were not prejudicial
 - ▶ One justice also agreed with the new test but would have ordered the EIR set aside
 - ▶ Three justices would have upheld the EIR under a more lenient legal test and did not address the issue of prejudice under the majority's legal test
 - ▶ Outcome:
 - EIR stands
 - new legal test for use of future baseline is precedent
 - discussion of prejudice is not precedent
 - majority of the court also upholds adequacy of mitigation measure for parking impacts at stations




AEP CONFERENCE EAST SLOPE


NEIGHBORS FOR SMART RAIL (CONT.)


- Although light rail project would commence operation in 2015, the EIR used a 2030 baseline in order to be consistent with
 - ▶ the planning horizon of the Regional Transportation Plan (RTP) of the Southern California Council of Government (SCAG)
 - ▶ approaches taken under federal transportation planning and funding statutes
- The EIR did *not* include an "existing conditions" baseline




 **NEIGHBORS FOR SMART RAIL (CONT.)**


- General background principles governing baseline:
 - ▶ Focus should be on *actually existing* physical conditions rather than *hypothetical* conditions under applicable permits or regulations
 - ▶ A *realistic* baseline gives the public and decisionmakers the *most accurate* picture practically possible of the project's likely impacts
 - ▶ CEQA imposes no "uniform, inflexible rule" for determining existing conditions; rather, agencies generally have discretion to decide how to measure existing conditions, subject to judicial review under a substantial evidence standard
- In this case, the Court only addressed circumstance in which lead agency has wholly omitted an existing conditions baseline in favor of a future conditions baseline




 **NEIGHBORS FOR SMART RAIL (CONT.)**


- Projected future conditions may be the sole baseline for impact analysis if "justified by *unusual* aspects of the project or the surrounding conditions"
- Agency has discretion to omit existing conditions analysis where its inclusion would detract from EIR's effectiveness as an informational document because such analysis would be either:
 - ▶ Uninformative ("without information value" or providing "little or no relevant information") or
 - ▶ Misleading
- These determinations are reviewed under a substantial evidence standard of judicial review




 **NEIGHBORS FOR SMART RAIL (CONT.)**


- Court disapproves *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) "insofar as they hold an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts"




 **NEIGHBORS FOR SMART RAIL
(CONT.)**


- “[I]n appropriate circumstances an existing conditions analysis may take account of *environmental conditions that will exist when the project begins operations*,” such as a “major change in environmental conditions that is expected to occur before project implementation”
 - ▶ An EIR for an office building could take account of a larger tower already under construction on an adjacent site
 - ▶ An EIR for a large-scale transportation project may adjust baseline to reflect “changing background conditions during the project’s lengthy approval and construction period” that “are expected to affect the project’s likely impacts”




 **NEIGHBORS FOR SMART RAIL
(CONT.)**

- EIRs normally account for impacts on *future conditions* through consideration of
 - ▶ The No Project Alternative
 - ▶ Cumulative Impacts
- Nothing in CEQA precludes an agency from considering *both* existing conditions and future conditions in its primary analysis of significant impacts



 **NEIGHBORS FOR SMART RAIL
(CONT.)**

- Exclusive reliance on future baseline raises the danger of failing to give adequate consideration to short-term impacts as well as long-term impacts (see CEQA Guidelines, § 15126.2(a))
- The mere fact that a project is intended to alleviate long-term adverse environmental conditions does not by itself justify dispensing with an existing conditions analysis
 - ▶ “Decision makers and members of the public are entitled under CEQA to know the short- and medium-term environmental costs of achieving that desirable improvement”



AEP CONFERENCE EAST SLOPE

NEIGHBORS FOR SMART RAIL (CONT.)

- Existing conditions can be directly measured and need not be projected through a predictive model
 - ▶ No matter how well designed models are, their product "carries the inherent uncertainty of every long-term prediction, uncertainty that tends to increase with the period of projection"
 - ▶ Existing conditions are more accessible to decision-makers and members of the public, who may not be "technically equipped to assess a projection into the distant future"

CEQA Series

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NEIGHBORS FOR SMART RAIL (CONT.)

- This EIR did not adequately justify its reliance on a 2030 baseline, representing conditions 15 years after commencement of the project
 - ▶ The EIR neglected any consideration of impacts that might occur during the first 15 years of operation
 - ▶ The fact that population, traffic, and air emissions are expect to keep increasing through 2030 was not enough by itself to justify foregoing a shorter-term analysis
 - ▶ Nor were projected ridership increases between 2015 and 2030 a sufficient basis for omitting an analysis of earlier conditions
- Even so, the EIR stands because three justices thought these errors were not prejudicial and three other justices thought the EIR was adequate under a different legal test they would have applied

CEQA Series

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NEIGHBORS FOR SMART RAIL (CONT.)

- Court upholds EIR's finding that parking impacts around rail stations would be mitigated to less than significant levels by a combination of actions by the lead agency and responsible agencies
 - ▶ Mitigation at issue committed the Los Angeles County Metropolitan Transportation Authority (MTA), in the event of a parking shortage, to assist responsible local jurisdictions to establish a permit parking program with signs for which MTA would pay
 - ▶ In approving project, the Expo Authority found both (i) that it would adopt mitigation for this impact and (ii) that other agencies can and should adopt mitigation (see CEQA Guidelines, § 15091, subds. (a)(1) & (a)(2))

CEQA Series

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NEIGHBORS FOR SMART RAIL (CONT.)

- Both of these findings were supported by substantial evidence and were proper under CEQA
 - ▶ "While the Expo Authority and MTA cannot guarantee local governments will cooperate to implement permit parking programs or other parking restrictions, the record supports the conclusion that these municipalities 'can and should' . . . do so"
 - ▶ Opponents' "speculation a municipality might not agree to a permit parking program – which MTA would pay for and which benefit the municipality's own residents – is not sufficient to show the agency violated CEQA by adopting this mitigation measure"

CEQA Series

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FRIENDS OF OROVILLE V. CITY OF OROVILLE

- *Court sets aside EIR for Walmart replacement and relocation project because of inadequate analysis of greenhouse gas (GHG) emissions*
 - ▶ Project included the shutdown of an existing Wal-Mart about half the size of the proposed new 200,000 square foot store
 - ▶ Court found that the City did not properly apply a threshold of significance premised on consistency with statewide GHG emission reduction efforts under AB 32

CEQA Series

AEP CONFERENCE EAST SLOPE

FRIENDS OF OROVILLE (CONT.)


- EIR used a GHG significance threshold of significantly hindering or delaying California's ability to meet AB 32 reduction targets
- EIR concluded that GHG impacts were less than significant because
 - ▶ project features and mitigation measures required energy conservation, air pollution reduction, landscaping measures, and the like
 - ▶ the project's percentage contribution to statewide GHG emissions was miniscule (0.003 percent) and thus not cumulatively considerable

CEQA Series

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FRIENDS OF OROVILLE (CONT.)

- The use of a GHG significance threshold based on consistency with AB 32 efforts was upheld in *Citizens for Responsible and Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327
- That case demonstrates how the City of Oroville misapplied the proper approach in this case; the City erred here by
 - ▶ "applying a meaningless, relative number to determine insignificant impact" (contrary to the rejection of a "de minimis" approach to impact assessment in *CBE v. Resources Agency* (2002))
 - ▶ failing to ascertain the existing Wal-Mart's GHG emissions
 - ▶ failing to ascertain the impact on GHG emissions from mitigation measures applied to the new Wal-Mart



AEP CONFERENCE EAST SLOPE

FRIENDS OF OROVILLE (CONT.)


- Proper approach would be as follows:
 - ▶ Calculate the statewide GHG percentage reductions required from under AB 32 (e.g., about a 30% reduction from projected 2020 "Business as Usual" (BAU) emissions levels or about a 10% reduction from actual 2010 emissions)
 - ▶ Calculate the BAU emissions of the proposed new store
 - ▶ Calculate the BAU emissions of the existing Wal-Mart to be closed
 - ▶ Subtract the BAU emissions from the store being closed from the BAU emissions from the proposed new store, to get a total net BAU number for the proposed project
 - ▶ Calculate the GHG emissions that would avoided by the proposed mitigation measures or energy conservation or GHG-reducing features not assumed in BAU scenario
 - ▶ Subtract from the "net" BAU number for the proposed project the GHG emissions reductions expected from mitigation measures and other energy saving or GHG-reducing measures
 - ▶ Determine whether percentage of emissions reduced by these measures and features is at least as great as the statewide percentage reduction required under AB 32 (e.g., 30% from projected 2020 BAU levels or 10% from actual



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FRIENDS OF OROVILLE (CONT.)


- Court rejects Wal-Mart's argument for why City properly applied the threshold
 - ▶ Wal-Mart placed undue emphasis on the project's consistency with CARB's AB 32 *Scoping Plan*
 - Although the Scoping Plan lays out a roadmap for the State as a whole to comply with AB 32, the only measures applicable to the proposed project would not address the 68% of the project's GHG emissions coming from transportation sources
 - ▶ Wal-Mart's claim that the EIR shows that a superstore "may reduce multiple and out-of-town trips by the City's residents" is contradicted by other statements in the EIR indicating that the project will not result in significant changes in vehicle miles traveled (VMT)



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CEQA LITIGATION

- *Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist.* (2012) 206 Cal.App.4th 1036
- *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408
- *Alliance for the Protection of the Auburn Community Environment et al. v. County of Placer* (2013) 215 Cal.App.4th 25
- *Golden Gate Land Holdings, LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353
- *Citizens for Ceres v. Superior Court of Stanislaus County* (2013) 217 Cal.App.4th 889
- *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307




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VAN DE KAMPS COALITION V. BOARD OF TRUSTEES OF LOS ANGELES COMMUNITY COLLEGE DIST.

Second Lawsuit against LACCD over lease and related agreements regarding use of buildings was barred by the 180-day statute of limitations:


- In 2001, LACCD acquired a two-acre site with the aim of rehabilitating it as part of college campus, but later concluded it lacked funding to proceed
- In late 2009, LACCD approved interim use of the property, authorizing a five-year lease, approved a contract for design work, and acquired an adjacent property
- In 2010, after Coalition sued, District approved amendments to the acquisition agreement and the design contract, triggering second lawsuit




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VAN DE KAMPS COALITION (CONT.)


- The 2010 actions implemented the 2009 project and did not trigger a new statute of limitations period
 - ▶ "Project" means the whole of the action, even if that action is subject to numerous approvals that occur over a period of time
 - ▶ The 2009 resolutions approving interim use of the property, directing LACCD to make the property available for lease, and authorizing a lease – not the 2010 decisions – constituted project approval
 - ▶ Subsequent actions did not substantially change the project




 **COALITION FOR CLEAN AIR V. CITY OF VISALIA**


- *Court allows CEQA lawsuit over large distribution facility to proceed: lawsuit was not untimely, as City of Visalia wrongly filed a Notice of Exemption (NOE) prior to approving project*




 **COALITION FOR CLEAN AIR (CONT.)**

- Plaintiffs alleged that City had filed NOE five days prior to approving 500,499 square foot industrial building on 31 acres
 - ▶ NOE sets 35-day statute of limitations (Pub. Resources Code, § 21167(d); Guidelines § 15112(c)(2))
 - ▶ To be valid, NOE must be both
 - facially valid
 - properly filed
 - ▶ NOE is not “properly filed” if filed prior to project approval (Guidelines § 15062(a),(b))



 **COALITION FOR CLEAN AIR (CONT.)**


- ▶ On demurrer, court must accept as true the Plaintiffs' allegations that NOE was filed five days prior to project approval
- ▶ Case may therefore proceed beyond pleading stage



AEP CONFERENCE EAST SLOPE

ALLIANCE FOR THE PROTECTION OF THE AUBURN COMMUNITY ENVIRONMENT V. COUNTY OF PLACER


- *Court rejects petitioner's attempt to get relief from missing the 30-day statute of limitations under CEQA due to "mistake, inadvertence, surprise, or excusable neglect"*
 - ▶ Petitioner claimed it missed filing deadline because "attorney service" hired to file document at courthouse misestimated time of day for receipt sufficient to ensure timely filing
 - ▶ Code of Civil Procedure section 473, subdivision (b), only provides relief from the consequences of procedural errors committed during the course of a proceeding, not for a party's failure to comply with statute of limitations



AEP CONFERENCE EAST SLOPE

GOLDEN GATE LAND HOLDINGS, LLC, V. EAST BAY REGIONAL PARK DIST.


- *Court of Appeal affirms trial court decision under CEQA remedy statute (§ 21168.9) directing respondent agency to vacate its CEQA exemption while letting stand the agency's related action approving a "resolution of necessity" for a purchase of land for a shoreline trail segment*
 - ▶ East Bay Regional Park District (EBRPD) has statutory duty to develop and operate parks in Alameda and Contra Costa Counties
 - ▶ State law directs the development of a "continuous shoreline park and bay trail along the east shore of the San Francisco Bay from the Bay Bridge to the Marina Bay Trail in Richmond" (Pub. Resources Code § 5003.03)
 - ▶ Consistent with the Eastshore State Park General Plan, EBRPD sought to condemn eight acres of along the shoreline owned by Golden Gate Land Holdings



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GOLDEN GATE LAND HOLDINGS (CONT.)


- The district determined that the project was subject to the Class 28 categorical exemption (transfers of ownership of interests in land in order to preserve open space, habitat, or historical resources)
- Based on this exemption, the district adopted resolution of necessity initiating eminent domain proceedings
- The trial court found the exemption inapplicable, due to physical consequences of planned walls, fences, drains, road modifications, and elimination of parking spots, but court let the resolution of necessity stand
- The trial court ordered that district not "actually acquire the property without first completing compliance with CEQA"



AEP CONFERENCE EAST SLOPE

GOLDEN GATE LAND HOLDINGS (CONT.)


- Court of Appeal rejected argument that this remedy was improper and that CEQA required the park district to vacate all project-related approvals, including the resolution of necessity
 - ▶ The resolution of necessity could properly be "severed" from the other project approvals under section 21168.9
 - Statute allows severance of some "project activities" from others if (i) the activities are severable, (ii) severance "will not prejudice complete and full compliance" with CEQA, and (iii) the remainder of the project is in compliance with CEQA
 - Court treats successive project approvals as "project activities" for purposes of this analysis, impliedly rejecting notion that the term "project activities" is limited to physical activities associated with project construction and implementation



AEP CONFERENCE EAST SLOPE

GOLDEN GATE LAND HOLDINGS (CONT.)


- CEQA Guidelines section 15004(b)(2)(A) would have allowed agency to purchase property without CEQA compliance, as long as *use* would be subject to CEQA compliance
- Here, there was no evidence that by continuing the eminent domain proceedings, the park district would prejudice its future consideration or implementation of alternatives or mitigation measures




AEP CONFERENCE EAST SLOPE


CITIZENS FOR CERES V. SUPERIOR COURT OF STANISLAUS COUNTY


- *In case involving challenge to EIR for Wal-Mart anchored shopping center, Court of Appeal grants writ overturning trial court order excluding documents from administrative record; appellate court holds that "common-interest doctrine" does not protect communications between lead agency and applicant occurring prior to project approval*




 **CITIZENS FOR CERES (CONT.)**


- Citing the controversial nature of the project and the “relatively high risk of litigation,” City set up process by which all communications between City and applicant went through City’s outside counsel and counsel for the applicant
- City cited “common interest doctrine” to support withholding of documents from record, along with the fact that many documents were “administrative draft documents or documents not otherwise released to the public”




 **CITIZENS FOR CERES (CONT.)**


- Court rejects grounds for withholding documents
 - ▶ Public Resources Code section 21167.6(e)(7) requires CEQA records to include “all written evidence or correspondence submitted to or transferred from the respondent agency with respect to compliance with [CEQA] or with respect to the project”
 - ▶ CEQA does not abrogate the attorney-client privilege or other evidentiary privileges in the Evidence Code, but the “common interest doctrine” does not extend the attorney-client privilege to pre-approval communications between agencies and applicants




 **CITIZENS FOR CERES (CONT.)**


- Prior to project approval, there is no common interest between agencies and applicants
 - ▶ The lead agency is supposed to be neutral and objective, and its interest in is complying with CEQA
 - CEQA documents must be unbiased
 - Agencies cannot commit to approve project before completion of any required environmental analysis
 - ▶ In contrast, the applicant’s primary interest is in obtaining project approval and a *favorable* CEQA document
 - ▶ Although both agencies and applicants want documents to survive judicial review, the parties may have different interests with respect to impact conclusions that could go either way (significant or less than significant)




 **CITIZENS FOR CERES (CONT.)**


- To the extent that the Third District Court of Appeal's decision in *California Oak Foundation v. County of Tehama* (2009) supports the conclusion that the common-interest doctrine may apply to agency-applicant communications during the administrative process prior to project approval, the Fifth District Court of Appeal disagrees
 - ▶ The facts in *California Oak Foundation* are unclear on this point – the *Citizens for Ceres* case may create a conflict between the two appellate districts




 **MAY V. CITY OF MILPITAS**


- *In case involving a CEQA challenge to 732-unit condominium project consistent with an approved specific plan, Court of Appeal upholds trial court order sustaining demurrer based on 30-day statute of limitations under Government Code section 65457 rather than 35-day statute of limitations normally commenced by the filing of a Notice of Exemption (NOE) under CEQA*




 **MAY V. MILPITAS (CONT.)**


- Government Code section 65457 exempts from CEQA residential projects consistent with specific plans for which EIRs were prepared, except where there are grounds for a supplemental EIR for the specific plan under Public Resources Code section 21166
- Even so, in concluding that the condo project required no further CEQA review, the City cited two provisions of the CEQA Guidelines and not section 65457:
 - ▶ Pursuant to CEQA Guidelines section 15168 (program EIRs), the project's impacts were within the scope of the program EIR for the specific plan
 - ▶ It could be seen with certainty that the project had no possibility of having a significant effect on the environment within the meaning of CEQA Guidelines section 15061(b)(3)




 **MAY V. MILPITAS (CONT.)**


- Government Code section 65457 contains its own 30-day statute of limitations for any challenge to an agency approval of a project pursuant to a specific plan without the agency first preparing a supplemental EIR for the specific plan
- This is the proper statute of limitations for any "residential project within the purview of . . . section 65457's exemption"
- To the extent there is a conflict between this provision and the authority in CEQA to file a NOE starting a 35-day limitations period, section 65457 governs as being more narrow and addressed to specific circumstances




 **MAY V. MILPITAS (CONT.)**

- Even though the City invoked Guidelines sections 15063(b)(3) and 15168 in finding no need for further CEQA review for the project, the Court found that the City's resolutions "in essence factually invoked" the exemption under section 65457
 - ▶ "Resolution expressly stated that the project was exempt and it was "consistent with the certified EIR" for the specific plan
 - ▶ The resolution cited section 15168, which includes its own reference to section 15162, which is the Guidelines section parallel to Public Resources Code section 21166, which is specifically mentioned in Government Code section 65457
 - The conclusion that the project's impacts were "within the scope" of the analysis of the program EIR was akin to a finding that there was no need for a supplemental EIR pursuant to section 65457



 **CALIFORNIA SUPREME COURT REVIEW GRANTED (CASES PENDING)**

- *City of San Diego v. Trustees of the California State University*, S199557. (201 Cal.App.4th 1134)
Does a state agency, which may have the obligation to make "fair-share" payments for mitigation of off-site impacts, satisfy its duty by stating that it sought funding from the Legislature to pay for such mitigation and further stating that, if the requested funds are not appropriated, it may proceed with the project without the mitigation on the ground that mitigation is infeasible?



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**CALIFORNIA SUPREME COURT
REVIEW GRANTED (CASES PENDING)**

- *Berkeley Hillside Preservation v. City of Berkeley*, S201116. (203 Cal.App.4th 656)
Did City properly conclude that the proposed project (a very large house) was categorically exempt under the Classes 3 (new construction of small structures) and 32 (infill), and that the "unusual circumstances" exception under Section 15300.2(c) did not remove the project from the scope of those categorical exemptions?

CEQA Series

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**CALIFORNIA SUPREME COURT
REVIEW GRANTED (CASES PENDING)**

- *Tuolumne Jobs & Small Business Alliance v. Superior Court of Tuolumne County*, S207173. (210 Cal.App.4th 1006)
 - Must a city comply with the California Environmental Quality Act [CEQA] (Pub. Resources Code, ? 21000 et seq.) before adopting an ordinance enacting a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a)?
 - Is the adoption of an ordinance enacting a voter-sponsored initiative under Elections Code section 9214, subdivision (a), a "ministerial project" exempt from CEQA pursuant to Public Resources Code section 21080, subdivision (b)(1)?

CEQA Series

**CEQA STREAMLINING
AEP ADVANCED CEQA
WORKSHOP**


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CEQA Series


 **PURPOSE OF THE SESSION**


- Overview of the streamlining tools in CEQA
- Statutory, regulatory, and judicial framework
- Practice pointers that can be put right to use
- Zero in on the important issues and decisions
- Case studies to exercise your thinking




 **TOPICS AND TOOLS**


- Is it a "project" under CEQA?
- Exemptions, NDs, and MNDs
- Tiering with an EIR, with an ND/MND
- Program EIRs, Master EIRs, Staged EIRs
- Partial Exemption
- Streamlining for Infill
- Facing Changed Circumstances
- Special Project Situations



 **TAKE HOME MESSAGES**


- Numerous streamlining tools exist in CEQA
- Many are seldom used
- Strategic use of existing CEQA provisions can save substantial time and money
- CEQA includes a strong presumption against requiring further environmental review once an EIR has been prepared (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 CA 4th 924.)





CEQA POLICIES ABOUT EFFICIENCY


- Focus on potentially significant effects; limit other effects to brief explanations (PRC § 21002.1[e])
- Integrate CEQA with other laws (PRC § 21003[a])
- Develop database of information to reduce delay and duplication (PRC § 21003[d,e])
- Carry out CEQA in the most efficient and expeditious manner (PRC § 21003[f]) – added in 1993 during reform attempts
- Avoid duplication; one EIR often is enough



IS MY PROJECT REALLY A “PROJECT”?


PROJECTS UNDER CEQA

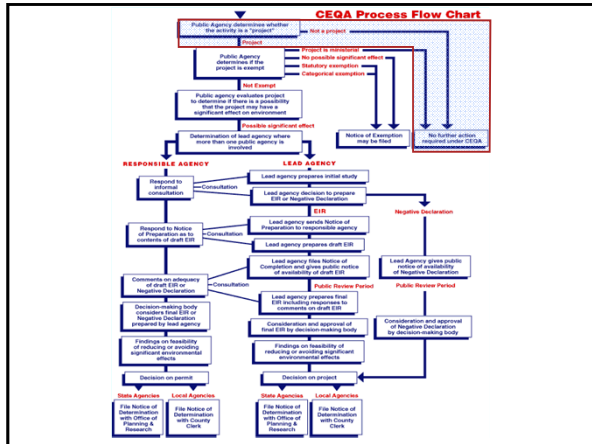




DEFINITION OF A PROJECT

- CCR § 15378: Defines what is and is not a project
- Project: An action with the potential to result in a physical change in the environment
 - ▶ Public agency activities (developments, entitlements, etc.)
 - ▶ Activities by individuals and funded in whole or part by a public agency.
- Not a Project:
 - ▶ State legislative proposals
 - ▶ General policy making (except as above).
 - ▶ Submittal (not sponsored by public agency) of proposals for vote. (*Friends of Sierra Madre v. City of Sierra Madre*)
 - ▶ Organizational/administrative activities of government that will not result in direct/indirect physical impact





DO I REALLY NEED TO PREPARE AN ND OR EIR?

EXEMPTIONS

EXEMPTIONS

- **Statutory**
 - ▶ Legislature declared that no CEQA review for specific projects or types of projects is needed
 - PRC § 21080: Specific projects excluded (and included)
 - PRC § 21155.1: Transit Priority Projects (SB 375; we will address TPP comprehensively today)
 - CCR, Article 18 (§ 15260-15285): Types of projects
- **Categorical**
 - ▶ CEQA review can be avoided for classes of projects that do not have a significant impact under usual circumstances
 - PRC § 21084 authorizes a list of classes of exempt projects
 - CCR Article 19 (§ 15300-15333): Lists classes of projects




PITFALLS AND POSSIBILITIES: EXEMPTIONS


- Pitfalls
 - ▶ Exception to categorical exemptions
 - ▶ No "mitigated" exemptions
- Possibilities
 - ▶ Home free with statutory exemptions
 - ▶ Some categorical exemptions can be very useful (Classes 1 – 4)
 - ▶ Very quick process (less than 30 days)



OK, ...SO THE PROJECT IS NOT EXEMPT FROM CEQA, BUT I WOULD LIKE TO AVOID AN EIR


NEGATIVE
DECLARATIO
NS AND
MITIGATED
NEGATIVE
DECLARATIO
NS

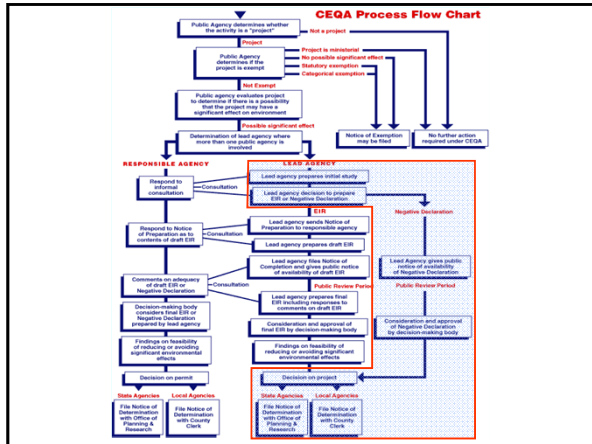




USES OF NDS

- When there is no substantial evidence that a project may have a significant effect on the environment (CCR § 15070[a])
- As one choice for a subsequent document after a Master EIR (PRC § 21157.5)
- As a second tier document after a first tier EIR, "when provisions of § 15070 are met" (15152[f]), but the CBE case affected use of NDs for tiering





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FAIR ARGUMENT STANDARD WHEN DECIDING ND OR EIR (CCR § 15064)

- Legal standard for the initial decision to prepare an EIR or ND – EIR is required if fair argument exists that a project may have a significant effect on the environment
- Fair argument must be backed by substantial evidence
- Generally does not matter how much evidence supports the MND, when a "fair argument" exists

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SUBSTITUTING MITIGATION AFTER MND CIRCULATION

- New mitigation must be equivalent or more effective (PRC § 21080[F], CCR § 15074.1)
- Must be public hearing for the change
- Changed mitigation must be adopted as condition of approval but it does not necessarily trigger recirculation of the entire MND
- Written finding required
- Otherwise MND must be recirculated
- Offer alternative mitigation at outset to avoid recirculation


CEQA Series

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CONSIDERING CUMULATIVE IMPACT WHEN DECIDING TO DO AN MND

Definition (CCR § 15355):


- “Cumulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.”
- “...incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects.



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CUMULATIVELY CONSIDERABLE?

- Guidelines definition not much help (CCR § 15064[i]):
 - ▶ “‘Cumulatively considerable’ means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” (15064(i)(1))
 - ▶ (same as statute - PRC § 21083[b])
- Conditions when cumulative effect is less than significant:
 - ▶ Mitigation may render a project’s contribution less than considerable, as set forth in an MND
 - ▶ May determine a contribution is less than considerable, if project complies with a previously approved plan or mitigation program that includes specific requirement to resolve the cumulative problem



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COMPLIANCE WITH APPROVED PLAN OR MITIGATION PROGRAM (CCR 15064[H][3])


- Plan/program must apply to geographic area of project
- Plan/program must be specified in law or adopted by agency with jurisdiction over resource through a public review process to implement the law administered by that agency
- Examples of plans: water quality control plan, air quality control plan, integrated waste management plan
- Fair argument still prevails over plan compliance (“agency ‘may’ determine”)



SO, I MUST PREPARE AN EIR...HOW CAN IT BE STREAMLINED?


Tips for Streamlining EIR Preparation






THE BASIC TOOLBOX


- Focusing EIRs
- Use of regulatory standards
- Tiered documents and their “parents”
- Partial exemption, SCS, and infill streamlining
- Other special instances





TOOLS FOR FOCUSING EIRS

- Lay issues to rest using an Initial Study. One of the uses of an IS in the guidelines (CCR § 15063[c][3])
- Include a separate chapter or section in EIR to describe effects found not to be significant. Use in lieu of IS. (CCR § 15128)
- Incorporate by reference (CCR § 15150)





USING REGULATORY STANDARDS


- Standards as thresholds of significance
- Compliance with plans as evidence of not cumulatively considerable
- Compliance with standards as mitigation


Caution: the Fair Argument Standard Applies



I WROTE ONE HUGE, BLOATED EIR. CAN'T I RELY ON THAT FROM NOW ON?


TIERING






TIERING TOOLS AND PROCESSES


- Tiering
(PRC § 21068.5, 21093, 21094; CCR § 15152, 15385)
- Program EIRs
(CCR § 15165, § 15168)
- Master EIRs
(PRC § 21156-21158; CCR § 15175-15179)
- Staged EIRs
(CCR § 15167)
- Using an EIR from earlier project
(CCR § 15153)
- "Partial Exemption"
(PRC § 21083.3; CCR § 15183)
- Infill Streamlining
(PRC § 21094.5; CCR § 15183.3)






APPROACHES TO STREAMLINING


- CCR § 15152: tiering policy, overall procedures. Applies to all potential tiering situations.
- CCR § 15175: Master EIRs. Special situation with prescribed rules
- CCR § 15183: Partial Exemption. Applies when prior EIR prepared on zoning, community plan, or general plan, as defined. Does not apply when prior EIR was prepared only for a program or large project.
- Other sections address tiering on a narrower basis






TIERING: DEFINITION AND POLICY


- Coverage of "general matters" and effects in EIR for policy, plan, program or ordinance, followed by narrower or site-specific EIRs (PRC § 21068.5; CCR § 15385)
- Use "whenever feasible" to increase efficiency of CEQA process, avoid duplication and promote construction of public interest projects (PRC § 21093; CCR § 15385)





FIRST TIER EIR


- Use: General Plan updates, adoption of community and specific plans, large scale projects and programs
- Focus: "big picture" issues affecting entire land area addressed by policy, plan, program or ordinance. Can also "focus on issues which are ripe for discussion"
- "Performance Standards" and policies are often adopted as mitigation
- Note: CCR § 15152(a) expands second tiered documents to include NDs



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SECOND TIER


- Qualifying Projects must be:
 - ▶ Consistent with program, plan, policy or ordinance for which first tier EIR prepared
 - ▶ Consistent with local land use plans and zoning, but "a project requiring a rezone to achieve conformity with a general plan may be subject to tiering"
 - ▶ (PRC § 21094(b); CCR § 15152(c), (e))



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SCOPE OF SECOND-TIER ANALYSIS


- The "lead agency for a later project...should limit the EIR or Negative Declaration on the later project to effects which:
 - ▶ Were not examined as significant effects on the environment in prior EIR;
 - ▶ Are susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition of conditions or other means." (CCR § 15152(d))



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SCOPE OF SECOND-TIER ANALYSIS (CONT.)


- "Fair Argument" trigger:
 - ▶ applies to second tier decision (*Sierra Club v. County of Sonoma* (1992) 6 Cal. App. 4th 1307, 1316-1321). Document reasons (i.e., the substantial evidence) for relying on prior EIR
- Subsequent Negative Declarations must "adequately address" potential impacts
- When tiering, refer to prior EIR, state where it can be reviewed, explicitly state lead agency is using tiering concept and that it is being tiered with the earlier EIR. (CCR § 15152(g))



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SCOPE OF SECOND-TIER ANALYSIS (CONT.)


- Second Tier Analysis need NOT examine:
 - ▶ Effects "mitigated or avoided" based on findings connected to first tier EIR (CCR § 15152(f)(3)), or
 - ▶ Effects examined in sufficient detail to be substantially reduced or avoided by specific revisions in the project, imposition of conditions, or other means (CCR § 15152(d))
- An Initial Study is used to determine whether the "later project may cause significant effects that were not adequately addressed in the prior" EIR. (CCR § 15152(f))



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ADEQUATELY ADDRESSED IMPACTS


- Significant environmental effects have been adequately addressed, if Lead Agency determines (one of two choices):
 - ▶ Use of Previously Formulated Mitigation: Effects have been mitigated or avoided as a result of the prior EIR and findings are adopted in connection with that prior EIR; or
 - ▶ Application of Newly Formulated Mitigation: Effects have been examined to a sufficient level in the prior EIR to enable effects to be mitigated or avoided by site-specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project (merely "considering" prior significant impacts is not enough) (CCR § 15152(3); *Benton v. Board of Supervisors* (1991) 226 CA 3rd 1467)



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SECOND-TIER DILEMMA

- If impact not "adequately addressed", inference is that it was identified as significant and unavoidable, requiring Findings and Overriding Considerations for project approval
- Under what CEQA document are Statements of Overriding Considerations adopted?
 - ▶ PRC § 21081 and CCR § 15091-15093 (guidelines interpretation of PRC § 21081) refer only to EIR



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CASE STUDY: TIERING UNDER CCR § 15152

- Staged EIR prepared for 4-phase, water conveyance system, wells and treatment plant. All impacts mitigated but air quality. First phase proposed for development 3 years later (water tank, 2 wells, 10 miles of pipeline). Initial study identifies all impacts would occur as described in program EIR, including significant and unavoidable air quality impact. What kind of CEQA document would you prepare?

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TWO SCHOOLS OF THOUGHT: TIERING UNDER CCR § 15152 WITH SIGNIFICANT IMPACTS

- Find that the impacts were not "adequately addressed" and prepare an EIR focused on air quality. Adopt overriding considerations.
- Find that the impacts were not "adequately addressed". Prepare a negative declaration and incorporate by reference the EIR discussion of air quality impacts. Re-adopt overriding considerations.
- The first approach is time consuming and conservative, the second may be risky. Courts may ultimately decide.

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PITFALLS AND POSSIBILITIES: TIERING UNDER CCR § 15152


- Pitfalls
 - ▶ If first-tier EIR identifies significant unavoidable impacts, it may not "exempt" the same issue in the second-tier CEQA document
 - ▶ CEQA is unclear if EIR is required under these circumstances
 - ▶ At a minimum, consider preparing a Subsequent MND
- Possibilities
 - ▶ If all impacts are adequately addressed, tiering can be very efficient
 - ▶ Even with uncertainty regarding tiered treatment of unavoidable effects, tiering can streamline subsequent CEQA documents

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SO, WHICH FIRST-TIER DOCUMENT IS BETTER FOR STREAMLINING LATER?


PROGRAM EIR






**PROGRAM EIRS
WHY USE PROGRAM EIRS FOR STREAMLINING?**


- Provide effective consideration of cumulative impacts that need not be repeated
- Avoid duplicative reconsideration of basic policy considerations
- Allow agency to consider program alternatives and program-wide mitigation at earlier time
- Avoid duplication of environmental documents with tiering of later decisions
- No time limits in their use







WHAT PROJECTS QUALIFY FOR PROGRAM EIR?


- Actions that are one large project and are related:
 - ▶ Geographically;
 - ▶ As logical parts in the chain of contemplated actions;
 - ▶ In connection with issuance of rules, regulations, plans, or criteria governing a continuing program; or
 - ▶ As individual activities carried out under same authority and having similar environmental effects and mitigation measures.




 **LATER ACTIVITY WITHIN THE SCOPE OF THE PROGRAM**


- Consistent with the earlier program?
- Did the program EIR include information to assess impacts of later activity?
- Use a checklist to document evaluation
- "Scope" is reviewed under the substantial evidence standard
- Incorporate feasible mitigation measures and alternatives into later activity
- If later activity is within scope, then no new environmental document is required




 **USE OF PROGRAM EIR WITH LATER EIRS AND NEGATIVE DECLARATIONS**


- Program EIR provides **framework** for determining whether later activity may have **new or substantially greater** significant effects **under PRC 21166**
- Prepare initial study if activity is beyond scope of approved program
- New EIR or **Subsequent Mitigated** Negative Declaration can incorporate program EIR by reference for regional influences, cumulative impacts, and program-wide effects
- Program EIRs can be used to focus subsequent project environmental review on site-specific effects



 **CREED V. CITY OF SAN DIEGO (2005)**


- Program EIR prepared on Centre City Community Plan in 1992
- EIR updated in 1999 (for new stadium project)
- 30-story, 450-room hotel proposed in 2002.
- City prepared initial study; found project within scope of program EIR





CREED V. CITY OF SAN DIEGO (2005)


- CREED challenged:
 - ▶ Fair argument that project not within scope and would cause significant impact
 - ▶ "Secondary document" (initial study) should have been circulated for public review
- Court found:
 - ▶ Substantial evidence is appropriate standard when determining project within scope of Program EIR
 - ▶ Program EIR rules (§ 15168) do not require public circulation of 'secondary study'
 - ▶ City acted properly



WEREN'T MASTER EIRS SUPPOSED TO BE THE BIG FIX FOR STREAMLINING?


MASTER
EIRs





MASTER EIRS QUALIFYING PROJECTS (CCR § 15175)


- General Plans, general updates, general plan elements and amendments, specific plans
- Phased smaller individual projects
- Rules or regulations
- Development agreements
- Redevelopment plan
- Multi-stage transit or highway projects
- Regional transportation plans or congestion management plans
- Base reuse plans
- Hunting and fishing regulations



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MASTER EIRS
MANDATORY CONTENTS (CCR § 15176)


- Normal contents of an EIR
- Description of anticipated subsequent projects:
 - ▶ Project type
 - ▶ Intensity
 - ▶ Location
 - ▶ **Capital outlay/improvement program**
 - ▶ Description of potential impacts of anticipated projects
 - ▶ Description of later approvals consistent with overall planning decision



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MASTER EIRS
ENVIRONMENTAL REVIEW OF SUBSEQUENT PROJECTS
WITHIN SCOPE OF MASTER EIR (CCR § 15177)


- To qualify for limited review:
 - ▶ Describe project in master EIR
 - ▶ Identify lead/responsible agency in master EIR
 - ▶ Prepare initial study consistent with master EIR
 - ▶ Determine if project will cause any significant effect not examined in the master EIR
 - ▶ Make finding that project is within scope of master EIR
 - ▶ File notice of determination incorporating all feasible mitigation measures from master EIR



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MASTER EIRS
ENVIRONMENTAL REVIEW OF SUBSEQUENT PROJECTS
IDENTIFIED IN MASTER EIR (CCR § 15178)

- Substantial Evidence Standard applies to determine if project is within scope of master EIR
- If Project is beyond the scope, agency must prepare a mitigated negative declaration, an EIR or focused EIR
- Fair Argument Standard applies to determination to prepare a mitigated negative declaration or a focused EIR




 **MASTER EIRS**
ENVIRONMENTAL REVIEW OF SUBSEQUENT PROJECTS:
MITIGATED NEGATIVE DECLARATIONS (CCR § 15178)

- Agency cannot make a “within the scope” finding
- Agency determines cumulative impacts, growth inducing impacts and irreversible significant effects analysis in master EIR is adequate
- Initial study identifies potentially significant environmental effects not analyzed in master EIR, but feasible mitigation reduces effects to a level of insignificance



 **MASTER EIRS**
ENVIRONMENTAL REVIEW OF SUBSEQUENT PROJECTS: FOCUSED EIRS (CONT.)

- Incorporate by reference to master EIR
- Assess in new, focused EIR:
 - ▶ Additional significant environmental effects
 - ▶ Any new/additional mitigating measures
 - ▶ Alternatives not analyzed by master EIR



 **MASTER EIRS**
ENVIRONMENTAL REVIEW OF SUBSEQUENT PROJECTS: FOCUSED EIRS (CONT.)

- Need not examine:
 - ▶ Mitigation measures identified in master EIR
 - ▶ Conditions of approval identified as **mitigation measures** in master EIR
 - ▶ Mitigation responsibility of another public agency



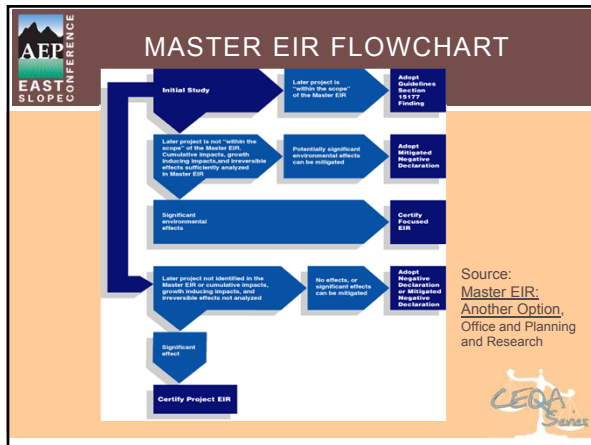
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MASTER EIRS

TIME LIMITS FOR USING A MASTER EIR (CCR § 15179)

- Master EIRs do not automatically expire
- Reconsider adequacy of master EIR and certify supplemental/subsequent EIR if:
 - ▶ Application for project is filed five years after master EIR is certified; or
 - ▶ Another project, not described in master EIR, is approved affecting adequacy of master EIR
 - ▶ Unless:
 - No changed circumstances; or
 - No new information

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PITFALLS AND POSSIBILITIES: MASTER EIRS


- Pitfalls
 - ▶ Can be expensive to prepare
 - ▶ Fair argument standard may apply to second CEQA document
 - ▶ Project descriptions are specifically prescribed
 - ▶ Change in circumstances (e.g., cumulative conditions) can scuttle Master EIRs
- Possibilities
 - ▶ May be flexible when considering future projects, especially when Master EIR identifies significant unavoidable impacts (unlike CCR § 15152)
 - ▶ Particularly useful for longer term, multiple phase projects

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WHAT IS A STAGED EIR? IS IT USEFUL, TOO?

STAGED EIR






WHY USE STAGED EIRS FOR STREAMLINING?


- Rarely used type of EIR
- Large capital projects requiring multiple discretionary approvals
- First approval will occur more than two years before final implementation approvals
- Examples:
 - ▶ Right-of-way approval first, then construction
 - ▶ Property acquisition program first, then construction






APPROACH TO PREPARE STAGED EIRS

- "Staged EIR" covers:
 - ▶ Entire project in a general form
 - ▶ Evaluates the proposal in light of current plans
 - ▶ Produces an informed estimate of environmental consequences for entire project
- Subsequent review is necessary when:
 - ▶ Later approval is required for the project
 - ▶ Information available at the time of later approval allows consideration of additional environmental impacts, mitigation measures, or reasonable alternatives




WHAT ABOUT THE
PARTIAL EXEMPTION,
SUSTAINABLE
COMMUNITIES
STRATEGIES AND INFILL
STREAMLINING? THESE
SOUND INTRIGUING...






PRC § 21083.3/ CCR § 15183
COMMUNITY PLAN AND ZONING
CONSISTENCY


- Restricted CEQA review applies to projects that:
 - ▶ are consistent with general plans, community plans adopted as part of the general plan, zoning actions for which the parcel would accommodate the density of development; and
 - ▶ EIR must have been certified for general plan, community plan, or prior zoning action.
- Application of CEQA is limited to:
 - ▶ Impacts that are "peculiar to the parcel or the project and which were not addressed as significant effects in the prior EIR;" or
 - ▶ Impacts which "substantial new information shows will be more significant than described in prior EIR."







PRC § 21083.3/ CCR § 15183
IDENTIFYING IMPACTS EXEMPT FROM CEQA

- "Effects are not peculiar" to the parcel/project if:
 - ▶ previously-adopted, "uniformly-applied development policies or standards" will "substantially mitigate the environmental effects in question." (CCR § 15183(f))




 **PRC § 21083.3/CCR § 15183**
IDENTIFYING IMPACTS
EXEMPT FROM CEQA (CONT.)


- When Previous Policies/Standards Apply
- Examples of uniform policies/standards:
 - ▶ Parking ordinances
 - ▶ Public access requirements
 - ▶ Grading ordinances
 - ▶ Hillside development ordinances
 - ▶ Flood plain ordinances
 - ▶ Habitat protection or conservation ordinances
 - ▶ View protection ordinances
 - ▶ Requirements for reducing GHG emissions, as set forth in adopted land use plans, policies, or regulations
 - ▶ (see CCR § 15183(g))
- However, absence of uniformly applied development standard does not make automatically effect "peculiar" (CCR § 15183(h))




 **SPECIFIC PLAN EIR EXEMPTION**
CCR § 15182


- Restricted CEQA review applies to residential projects that:
 - ▶ are consistent with specific plans; and
 - ▶ EIR must have been certified for the specific plan.
- Per CCR § 15182, residential projects may include subdivisions, zoning changes, and PUDs.
- Difficult to claim exemption applies when you are processing a specific plan amendment.



 **PITFALLS AND POSSIBILITIES:**
PRC § 21083.3/CCR § 15083
EXEMPTIONS


- Pitfalls
 - ▶ Can't use when first-tier EIR did not cover zoning or was not for a general plan or community plan
 - ▶ Need to be clear whether impact is "peculiar" to the parcel or project
- Possibilities
 - ▶ Efficient approach to addressing subsequent projects when significant unavoidable impacts identified, **provided that subsequent project was covered in original EIR**




 **SB 375 (STEINBERG)**


- Land use and environmental law intended to address greenhouse gases
- Integrates and ties land use, housing, transportation and GHG reduction
- Establishes concepts of sustainable community strategies (SCS), alternative planning strategies (APS), and transit priority projects (TPP)




 **SB 375: SUSTAINABLE COMMUNITIES STRATEGY (SCS) STREAMLINING (PRC § 21155)**


- Streamlining embedded in SB 375
- Goal: Use all CEQA tools to streamline GHG-efficient and sustainable projects
- Opportunities to combine city/county actions with SCS/APS to use CEQA's normal rules
- Streamlining provisions in SB 97 CEQA guideline amendments



 **SETTING UP FOR SB 375 STREAMLINING**


- Regional Transportation Plan (RTP) EIR addresses SCS. If an APS is prepared simultaneously, RTP EIR can also cover it.
- SB 375 not explicit in CEQA approach to an APS
- After the SCS/APS and EIR, two streamlining provisions:
 - Residential/mixed use projects consistent with SCS/APS
 - Transit priority projects, SCEA or CEQA exemption






PROJECTS CONSISTENT WITH SCS/APS


- Qualifications:
 - ▶ Residential project or mixed-use with no more than 25% non-residential
 - ▶ Consistent with SCS/APS with EIR (land use designation, density, building intensity, applicable policies)
- CEQA Benefit: Need not repeat growth-inducing and GHG effects from cars and light trucks, nor include a less dense alternative to reduce GHG






TRANSIT-PRIORITY PROJECTS BASIC QUALIFICATIONS

- At least 50% residential use, with a minimum net density of 20 units per acre
- If commercial use is included, it must have an FAR of at least 0.75
- Located within ½ mile of major transit stop or high-quality transit corridor in the RTP






TRANSIT-PRIORITY PROJECTS USE OF THE SCEA

Qualify for Sustainable Communities EA:

- Incorporate all feasible mitigation, performance standards, or criteria in EIR

SCEA is like an ND/MND, except:

- Cumulative effects mitigated in prior EIR are not cumulative considerable
- Need not repeat growth-inducing effects
- Need not repeat car and light truck effects on GHG or the regional transportation network
- Substantial evidence, not fair argument, applies




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TRANSIT-PRIORITY PROJECTS CEQA EXEMPTION

Complete CEQA exemption, if meets basic qualifications, plus:


- Maximum of 8 acres or 200 dwelling units served by existing utilities
- No significant historic resources effect
- 15% more energy efficient and 25% improved water conservation, and
- Either:
 - ▶ 5 acres per 1,000 residents open space, OR
 - ▶ 20% moderate, 10% low, or 5% very low income houses (or an in-lieu fee)



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TIERING AND STREAMLINING GHG ANALYSIS


- 2010 CEQA Guidelines Amendments, CCR § 15183.5
- Allows tiering from programmatic GHG analysis as already provided in § 15152 (tiering), § 15168 (program EIRs), §§ 15175-79.5 (master EIRs), § 15182 (SPEIRs) and § 15183 (general/community plan and zoning EIRs)
- Allows preparation and specifies contents of Greenhouse Gas Reduction Plans. If project complies, lead agency may determine project's incremental contribution of GHG is not considerable. GHG Reduction Plans must be adopted in a public process following environmental review



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TIERING AND STREAMLING GHG ANALYSIS


- 2010 CEQA Guidelines Amendments (14 CCR § 15183.5) provides that:
 - ▶ Lead agencies may analyze and mitigate significant GHG impacts at a programmatic level (e.g., a general plan), and later project specific environmental documents may tier from and/or incorporate by reference the programmatic analysis.
 - ▶ Public agencies may analyze and mitigate significant GHG emissions in a plan for the reduction of GHG emissions and that plan may be used for the cumulative impact analysis.
 - The Plan should include specific elements: e.g., quantify GHG emissions, establish a baseline significance level, analyze categories of activities, include performance standards and measures to mitigate and monitor compliance.
 - Plan must be adopted in a public process.



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USE WITH LATER ACTIVITIES

- Under CCR § 15183.5(b)(2), once the plan for reduction of GHG emissions is adopted following certification of an EIR or adoption of an environmental document, it can be used in the cumulative impact analysis for later projects.
- Special situations may apply for certain residential and mixed use projects and transit priority projects – and the project may be exempt from the requirement to evaluate global warming impacts resulting from cars and light duty trucks.



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FINALLY, SOME RELIEF FOR INFILL




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INFILL STREAMLINING (SB 226)


- CEQA does not apply to effects that either:
 - ▶ Were previously analyzed in a programmatic EIR for a planning level decision; or
 - ▶ Are substantially mitigated by uniformly applicable development policies
- Quicker Process Plus Development Certainty
 - No New Review if:
 - All effects previously analyzed or addressed by development policies
 - New review required only for new or more significant effects
 - *Determinations reviewed under the substantial evidence standard*
 - Limited Scope EIR where new effects are significant
 - No growth inducing analysis
 - Limited alternatives analysis



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SB 375, SB 226: WHAT'S DIFFERENT, WHAT'S SIMILAR?


- SB 375: Tied to Regional Transportation Plans
 - ▶ Statutory Exemption
 - ▶ SCEA is similar to an MND under "tiering"
 - ▶ Specifically defined project-types
- SB 226: Tied to Local Planning
 - ▶ Partial to full exemption, similar to § 21083.3
 - ▶ Flexible eligibility criteria
- Common to Both?
 - ▶ Provide relief for environmentally beneficial projects
 - ▶ Transit and consistency with regional plans are key
 - ▶ Can be used together



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PROJECT-TYPE


SCEA (§ 21155.2)	Infill Streamlining (§ 21094.5)
High Density Residential (20du/acre)	Residential
High Density Residential/commercial (0.75 FAR if more than 25% commercial)	Commercial (parking on no more than ½ of site)
	Office Building
	Transit Station
	School
	Mixed-Use (any combination of above)
	*Pre-SCS/APS
	*small walkable community project



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SUMMARY OF MAIN ELIGIBILITY CRITERIA

Project Type	SCEA (§ 21155.2)	Infill Streamlining (§ 21094.5)
All projects	Consistent with SCS	Consistent with SCS, <u>and</u> infill parcel, <u>and</u> (generally) in a city, plus clean up
Residential	½ Mile to Transit, <u>and</u> 20 du/acre	½ mile to transit, OR low VMT area, OR all affordable, health in some areas
Commercial	n/a	½ mile to 1800 du, OR low VMT area, <u>and</u> < 50,000sf floor plate, plus renewable component
Office	n/a	½ mile to rail OR ¼ mile to bus, OR low VMT area, plus renewable component
Transit Station	n/a	Renewable component if feasible
Schools	n/a	Close to students OR ½ mile to transit, plus renewable component
Mixed Use	½ mile to transit, 20 du/acre, 0.75 FAR	Comply with predominant use




AEP CONFERENCE EAST SLOPE		STREAMLINING BENEFIT	
SCEA (§ 21155.2)		Infill Streamlining (§ 21094.5)	
Initial Study		App N Checklist	
Excluded from analysis: (1) growth inducing impacts, (2) global warming impacts from cars, or (3) impacts on the regional transportation network		Excluded from analysis: (1) Any previously analyzed effects (2) Any effects mitigated by local standards (3) If EIR is required for new effects (a) Growth inducing impacts (b) Alternative densities, intensities and locations	
Streamlined Procedure		Streamlined Procedure	
substantial evidence standard of review		substantial evidence standard of review	

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LOCAL STANDARDS?

- Example:
 - "Flood openings. All new construction and substantial improvements of structures with fully enclosed areas below the lowest floor (excluding basements) that are usable solely for parking of vehicles, building access or storage, and which are subject to flooding, shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwater."



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SCEA (§ 21155.2)		Infill Streamlining (§ 21094.5)	
Prepare Initial Study • Project is consistent with SCS/APS • All mitigation measures from prior EIRs are incorporated • All impacts are LTS		Prepare App N Checklist • Project is consistent with SCS/APS • Project satisfies performance standards • Note where project effects were previously analyzed • Explain how local standards substantially mitigate project effects	
Circulate for 30-day review period		Review only required for new effects • EIR if significant • App N Checklist if LTS	
Conduct public hearing			
Make findings: • Consider all public comments • Make EIR-type finding for each mitigated impact		Make findings: • standards mitigate effects	
File NOD		File NOD	

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WHICH TO USE?		
Project Features	SCEA (SB 375)	Infill Streamlining (SB 226)
Has significant and unavoidable impacts		✓
Is located in an unincorporated county area (not an unincorporated island)	✓	
Is <u>not</u> predominantly residential		✓
Is located on a greenfield site	✓	
Is <u>not</u> near transit		✓

I SURVIVED MY EIR EXPERIENCE, BUT NOW SOME THINGS HAVE CHANGED

ADDRESSING CHANGED CIRCUMSTANCES


FACING CHANGED CIRCUMSTANCES

- If an EIR certified or ND approved for a project, no new EIR or ND needed unless a change occurs that could add new significant impacts or increase the severity of previously identified significant impacts and the project requires a discretionary approval.
- If no new discretionary approvals required by lead or responsible agencies and conditions above occur, no need to conduct additional CEQA. (CCR 15162(a) and (c))

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STREAMLINING SUBSEQUENT CEQA DOCUMENTS

- Agencies are encouraged to rely on previously-certified EIRs and negative declarations where appropriate, and avoid redundant CEQA review. (PRC § 21166; CCR §§ 15162, 15163, 15182.)
- CEQA prohibits agencies from requiring a subsequent or supplemental EIR unless "substantial changes" are proposed in the previously-studied project, or in its circumstances, which will require major revisions in the EIR, or unless certain significant "new information" becomes available which was not known at the time the previous environmental analyses were conducted. (*Friends of Mammoth v. Town of Mammoth Lakes* (2000) 82 Cal.App.4th 511.)
- PRC § 21083.3 specifies that CEQA review should be limited for housing projects proposed for parcels of land which have previously been zoned or designated in a community plan for a particular density and an EIR was certified in the course of that planning or zoning decision. (See also, CCR § 15183.)
- CEQA is limited for qualifying infill projects that are consistent with regional growth plans. (PRC § 21094.5, CCR § 15183.3.)



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IS FURTHER CEQA REVIEW TRIGGERED?

Are discretionary or ministerial approvals required?

- Are City or County staff and decision makers supportive of resumption of the project?
- How much political risk are you taking on?
- What financial risks for potential additional conditions?

Can the existing approvals be revived or extended? What is the process? (See e.g., *Moss v. County of Humboldt* (2008) 162 CA4th 1041, 1049)

Do existing approvals provide any built-in flexibility to minimize further CEQA review?


- Is the project phased? Or is there a potential for phasing? (Govt. Code § 66456.1).
- Can project elements be eliminated without reopening agency approvals?
- Can the project be reshaped without reopening agency approvals? Minor adjustments may be possible at design review or the building permit stage.




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WHAT ARE "CHANGED CIRCUMSTANCES" AFTER EIR CERTIFIED OR ND APPROVED?


- Substantial changes are proposed in the project and the changes will result in new significant impacts or change the severity of previously identified significant impacts (CCR § 15162(a)(1))




 **EXAMPLE #1**


Elementary school proposed on 5-acre site adjacent to a wetland. Proposal changes to a middle school on 10 acres, and wetland needs to be filled.




 **WHAT ARE "CHANGED CIRCUMSTANCES" AFTER EIR CERTIFIED OR ND APPROVED?**

2. Substantial changes occur with respect to the circumstances under which the project is undertaken and the changes will result in new significant impacts or change the severity of previously identified significant impacts (CCR § 15162(a)(2))



 **EXAMPLE #2**

Elementary school proposed on 5-acre site adjacent to residentially zoned property. Caltrans approves a new freeway on residential site.




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WHAT ARE "CHANGED CIRCUMSTANCES" AFTER EIR CERTIFIED OR ND APPROVED?

3. New information of substantial importance "which was not known or could not have been known with the exercise of reasonable diligence" when prior EIR or ND prepared shows:

- ▶ Project will result in new significant impacts or change the severity of previously identified significant impacts
- ▶ Mitigation or alternatives found not to be feasible or considerably different than previously analyzed would substantially reduce one or more significant impacts, are found to be feasible, and project proponents decline to adopt them.


(CCR § 15162(a)(3))



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EXAMPLE #3

Landslide occurs next to approved elementary school site exposing potential for the same at the edge of the school site and the school district declines to move school buildings out of harms way, although sufficient land is available on the site to do so.



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PROJECT NEEDS NEW APPROVAL AND CHANGED CIRCUMSTANCE OCCURS. WHAT DO WE DO?


- If new impacts can be clearly mitigated, prepare a subsequent mitigated negative declaration. Follow ND procedures.
 - ▶ Incorporate prior EIR or ND by reference and make it available for review
 - ▶ Remember that all the rules of tiering apply (CCR § 15152, 15175, 15183 and associated PRC)
- If impacts can not be clearly mitigated or tiering rules require new EIR, prepare either a "subsequent EIR" or a "supplement to an EIR"



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STANDARD FOR THE SUBSEQUENT CEQA DOCUMENT


- Legal standard for the next decision regarding the CEQA document is based on the substantial evidence standard [EIR – *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 CA 4th 1062; MND – *Benton v. Board of Supervisors* (1991) 226 CA 3rd 1467]
- The burden shifts to the petitioner to prove another EIR was required



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SUBSEQUENT V. SUPPLEMENT TO EIR


- General rule of thumb: if changes are sufficient such that public should see a “new” EIR, prepare a subsequent EIR
 - ▶ Example: Elementary school changes to middle school. Site increases, or several new impacts occur
- Supplement: “Only minor additions or changes” in documentation needed
 - ▶ Example: Elementary school site expands to fill a 1 acre wetland. New documentation needed to address only this impact.




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PROCESS DIFFERENCES

- Subsequent (CCR § 15162)
 - ▶ Include all sections of EIR (including cumulative, alternatives, etc.)
 - ▶ Relevant information can be incorporated by reference to prior EIR (including cumulative, alternatives, etc.)
- Supplement (CCR § 15163)
 - ▶ Include only information needed to make previous EIR adequate
 - ▶ Need not circulate prior EIR, but prior EIR is part of record, including when making findings
- Applies to both
 - ▶ Same public review as Draft EIR
 - ▶ Guidelines “silent” on need for NOP. Recommendation: circulate NOP, especially for subsequent EIR (CCR § 15082: after decision to prepare an EIR, “lead agency shall send” an NOP)
 - ▶ Make previous EIR available





ADDENDUM

- Addendum is for minor changes or additions to the prior CEQA document after certification of EIR or approval of ND, and new discretionary action needed.
 - ▶ No new significant impacts or substantial increase in impact severity
- Include brief explanation why an EIR or subsequent ND is not needed, supported by substantial evidence (CCR § 15164(e))
- No public review required
- Agency considers addendum together with EIR or ND before acting

