



CEQA Legal/Legislative Update

Winter 2011

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Workshop Overview

- Statutory Revisions
- Legal Update
 - Definitions of Project and Approval
 - Statutory and Categorical Exemptions
 - Negative Declarations
 - Baseline Cases

Workshop Overview (continued)

- Legal Update (continued)
 - Negative Declarations & EIRs
 - EIRs and Other Statutes
 - Supplemental Reviews

Statutory Revisions

- 21089(c)(1)(2)
 - Allows collection of reasonable costs for the purchase of CEQA docs, **not to exceed the cost of reproducing the environmental document.**
 - Authorizes public agencies to provide documents in electronic format
 - Environmental documents include all CEQA and NEPA documents

Statutory Revisions

- 21094
 - Authorizes a lead agency to incorporate by reference a finding of *overriding considerations* made in a prior EIR for a later project subject to specific conditions.
 - Provides that a *cumulative effect* need not be examined in a later environmental document if “adequately addressed” in a prior EIR.

Statutory Revisions

- 21094 cont'd.
 - Defines “adequately addressed” as causing “cumulative effect” to be “mitigated or avoided” by previously adopted mitigation measures or new mitigation measures formulated from detail in prior EIR
 - Sunsets in 2016, after which it reverts to pre-2011 language

Statutory Revisions

- 21159
 - For rule or regulation pursuant to California Global Warming Solutions Act of 2006 (AB 32) that requires:
 - Installation of pollution control equipment or
 - Performance standard or
 - Treatment requirement
 - Authorizes focused EIR
 - Installation of pollution control equipment or other components that reduces GHG emissions in compliance with said rule or regulation in compliance with AB 32

Statutory Revisions

- 21159.4
 - Adds agencies that can qualify for pollution control review
 - State Energy Resources conservation and Development Commission
 - California Public Utilities Commission
- 21167.4
 - Allows AG to expedite legal review on grounds that it is within public interest. (Sunsets in 2016, after which it reverts back to pre-2011 language)

Statutory Revisions

- 21167.8
 - Mediation allowed.
 - Provides that a mediation proceeding is intended to be conducted concurrently with any judicial proceedings
 - (Sunsets in 2016, after which it reverts back to pre-2011 language)

Statutory Revisions

- 21167.10
 - Authorizes plaintiff to file mediation request within 5 business days from filing of NOD
 - Provides that notice of mediation is deemed denied if lead agency fails to respond within 5 business days
 - Statute of limitations is tolled if lead agency accepts invitation to mediate
 - (Sunsets in 2016)

Statutory Revisions

- 21167.11
 - Allows court to sanction an attorney for a frivolous lawsuit. (Sunsets in 2016)
(note this is mislabeled as 21169.11 in State's leginfo website)
- 21177
 - Where an organization formed after project approval files a CEQA lawsuit, the organization will be limited to litigating issues specifically raised by its own individual members during administrative process
 - Sunsets in 2016, after which it reverts to pre-2011 language

CEQA Litigation

- Definitions of Project and Approval

Definition of Project

What a Project is:

- Whole of an Action
- Must have potential to change physical environment (directly or indirectly)
- Must be subject to discretionary government approval
(CCR 15002(i), 15378)

Definition of Project

What a Project is NOT, or is otherwise exempt from CEQA:

- Planning/feasibility studies (example: study to narrow potential sites for future review in an EIR) (CCR 15262)
- Projects that are statutorily or categorically exempt (many locations in statute, plus Articles 18 and 19 of Guidelines)
- Projects that can be determined, with certainty, to have no significant effect on the environment (CCR 15061(b)(3))

Parchester Village Neighborhood Council v. City of Richmond (2010) 182 Cal.App.4th 305

- City of Richmond approved municipal services agreement (MSA) for a tribal casino outside the city's boundaries.
- The casino was not a “project” of the City because City had no land-use authority over the site of the proposed casino.

Parchester Village Neighborhood Council v. City of Richmond (continued)

- Approval of MSA was not a “project” under CEQA because MSA did not commit City to specific physical improvements:
 - City did not commit to construct specific improvements.
 - Agreement acknowledged CEQA review might be required before building infrastructure.
 - City did not contract away ability to consider mitigation measures or alternatives.
 - Commitment to build or upgrade nearby fire facilities conditional and non-binding.
 - Tribe’s commitment to improve roadways as set forth in EIS was not a commitment of the City; moreover, road improvements were analyzed in EIS.

City of Santee v. County of San Diego (2010) 186 Cal.App.4th 55

- County and CDCR entered into “siting agreement” for prison facilities.
- Under agreement, County committed to identify up to three sites for “re-entry” facility. Exhibits showed possible locations.
- In exchange, CDCR gave County preferential status for obtaining financing to expand County jail facilities.

City of Santee v. County of San Diego (continued)

- Approval of agreement was not a “project” under CEQA:
 - No commitment to particular site;
 - CDCR would not approve specific site for re-entry facility until after CEQA compliance;
 - Nothing in agreement affected County’s separate proposal to expand jail;
 - Financial support for County jail improvements was contingent on CDCR selection of site; and
 - Accompanying studies of particular sites were conditional and preliminary.

Practice Pointers

- A study is not a project
- Careful line between agreeing to a potential site, and approving a site
 - Any agreements related to siting should be contingent on CEQA
 - Money committed to study a site is not approval (otherwise, how would CEQA documents be prepared?)
 - Committing public funds typically used to build a project...going beyond what is needed to reasonably evaluate its impacts (examples: full design; granting public funds to a private applicant for activities related to project construction, approving demolition for purpose of building a project) are probably considered approval (must do CEQA first)

Statutory and Categorical Exemptions

Friends of the Juana Briones House v. City of Palo Alto (2010) 190 Cal.App.4th 286

- Ministerial project: “Where the law requires a government agency to act in a set way without allowing the agency to use its own judgment...CEQA does not apply” (CCR 15002(i)(1))
- Historic house in disrepair following earthquake damage.
- City issued demolition permit without performing CEQA review.
- Issue on appeal: whether issuance of permit was ministerial or discretionary under City’s ordinance .

Friends of the Juana Briones House v. City of Palo Alto (continued)

- Under Court's test, the determination is "functional": whether, under the ordinance, the agency has the power to deny or modify the application so as to ameliorate environmental impacts.
- In this case, ordinance required application of fixed standards that did not involve discretion.
- Power to delay under ordinance did not confer discretion.
- Owner's acquiescence to voluntary permit conditions did not confer discretion.

Tomlinson v. County of Alameda (2010) 188 Cal.App.4th 1406

- County approved 11-lot residential subdivision on 1.89 acre site on land surrounded by residential homes in unincorporated portion of County under the categorical exemption for in-fill development (§15332).
- Appellate Court overturned because a project in unincorporated county jurisdiction was not “within city limits” as required by the definition of the exemption (§15332(b)). Plain language of the CEQA Guidelines limits any policy argument that the statute should extend to all urban in-fill.
- Exhaustion issue dismissed even though only issue raised by plaintiffs during County administrative process focused solely on exceptions under 15300.2 (traffic, habitat and cumulative) and plaintiffs conceded in trial court that they had a duty to exhaust their administrative remedies since the County held a hearing.

Hines v. California Coastal Commission (2010) 186 Cal.App.4th 830

- Challenge to Coastal Commission and County approval of single family residence that encroached on riparian corridor.
- Coastal Commission “no substantial issue” determination is not subject to CEQA.
- County’s approval of project under exemption for new single family residence (§15303(a)) proper.

Hines v. California Coastal Commission (2010) 186
Cal.App.4th 830 (continued)

- Court applied traditional analysis – once agency determines, based on substantial evidence, that project fits an exemption, the burden shifts to petitioner to produce substantial evidence that an exception to the exemption applies.
- Petitioner's claim that the project would have cumulative impacts because other vacant lots in the area would likely seek similar encroachment was speculation, not supported by substantial evidence.

Practice Pointers

- Ministerial project: if agency has no discretion, it has no discretion and project is not subject to CEQA.
 - Involves use of fixed standards/objective measurements
 - No subjective judgment

Practice Pointers (continued)

- Categorical Exemption
 - Must meet definition within category; if not, category cannot be applied
 - Substantial evidence test: agency finding that project fits within a category exempt from CEQA is subject to substantial evidence.
 - Consider exceptions (significant impact due to unusual circumstances, cumulative impact, scenic highways, historic resources, hazardous waste site; CCR 15300.2) when determining if categorical exemption applies.

Negative Declarations

Nelson v. County of Kern (2010) 190 Cal. App. 4th 252

- County adopted mitigated negative declaration and approved reclamation plan for proposed calcite marble hard-rock mining project.
- Proposed mine was located on Federal land administered by Bureau of Land Management. BLM performed NEPA review, approved permit under federal law.

Nelson v. County of Kern (continued)

- County's negative declaration analyzed the impacts of reclamation only. Analysis did not consider impacts of mining operation.
- County was lead agency for purposes of CEQA, because BLM could not be.

Nelson v. County of Kern (continued)

- Project consisted of both mining operation and reclamation. County impermissibly “piece-mealed” its review by considering only reclamation. In fact, mining and reclamation were two phases of the same “project” under CEQA.
- Applicant sought to establish a new mine, and did not have a vested right.
- Record contained a “fair argument” mining operation would have significant environmental impacts (e.g. air quality, water, biological resources). County therefore had to prepare EIR.

Practice Point (Nelson v County of Kern)

- SMARA requires that mining projects seek local land use permits, even where a private operator intends to mine on federal land
- County got off track by assuming because site was on federal land, only the reclamation plan (separately required to comply with SMARA) required CEQA compliance

Practice Point

(Nelson v County of Kern) (continued)

- Because SMARA directs local land use agency approval of the mining activity, this action needed to be considered on a local (CEQA) level.
- Look at full extent of regulatory requirements and discretionary actions before concluding what is and is not required under CEQA

Save the Plastic Bag Coalition v. City of Manhattan Beach
(2010) 181 Cal.App.4th 521 [petition for review granted by Supreme Court]

- Negative declaration prepared for ordinance banning distribution of plastic bags at point of sale, but allowing distribution of paper bags and reusable bags.
- The Court of Appeal found that the petitioner made a fair argument that banning plastic bags may have a significant effect on the environment.
 - Five studies submitted, in support of fair argument, generally showing paper bags involve greater use of nonrenewable resources, water consumption, greenhouse gas emissions, solid waste, and acid rain.

Save the Plastic Bag Coalition v. City of Manhattan Beach (2010) 181 Cal.App.4th 521 [petition for review granted by Supreme Court] (continued)

- City did not support its own argument that the ordinance's contribution to the impacts of paper bag use would be too small to require analysis in an EIR. Moreover, the relatively small size of a project's contribution to an environmental impact is not a reason recognized by CEQA for foregoing environmental review.

Save the Plastic Bag Coalition v. City of Manhattan Beach (Continued)

The issues presented to the Supreme Court are:

- The amount and type of evidence needed to make a fair argument—do studies need to be prepared for specific project? Are lifecycle studies relevant?
- The area of concern of an EIR analysis - agency represents only a tiny part of the problem and EIR would be a large expense. Might court's ruling on this issue affect the analysis of GHG impacts as well?
- The severity of a potential effect necessary to trigger an EIR - does the evidence need to be compared to a threshold? Is there a common sense or *de minimis* amount?
- Remedy: Should the court have ordered preparation of an EIR or remanded the matter to the City to complete a revised initial study?
- Standing: Can a plastic bag manufacturers association that does not allege the interests of individual members “seek to procure the enforcement of the city’s public duty to prepare an [EIR]”?

Discussion Topic: Save the Plastic Bag Coalition

- Is this a project exempt from CEQA (actions taken to protect the environment, classes 7 and 8)?
- Did ordinance have a direct or foreseeable indirect effect on the environment? If so, was the potential effect significant given the scope of the project (eliminating plastic bag use in a small city) and the magnitude of use throughout California?

Discuss whether the common sense exemption (CCR 15061(b)(3)) applies.

Discuss whether this is a potentially significant cumulative impact (other cities are considering similar bans)

Baseline Cases Negative Declarations and EIRs

Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310

Negative declaration prepared for permit to operate new process involving new and existing equipment at ConocoPhillips refinery.

- The baseline for determining whether a fair argument of a significant impact has been made consists of the existing physical conditions, not the maximum capacity of the existing equipment under prior permits.
- Simultaneous maximum operation of equipment (i.e., “collective maximum capacity” of the existing equipment) was not a realistic description of existing conditions, and provided an “illusory basis” for finding no significant impact.

Communities for a Better Environment v. South Coast Air Quality Management Dist. (continued)

- No vested right to pollute the air.
- The project was not “merely a modification” of a previously analyzed project, but a “new refining process” involving “new equipment” and “the District treated it as a new project.”
- Calculating/measuring what constitutes “existing conditions” where an activity fluctuates is left to the discretion of the agency, but the applicant may not artificially increase operations to establish a higher baseline or take advantage of temporary spikes or lulls.

Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (2010) – Cal.App.4th – [2010 Cal. App. LEXIS 2118]

- City approved an EIR for the proposed transportation project including the construction of a bridge.
- The EIR utilized estimated pre-project traffic conditions for Year 2020 as the baseline in the traffic analysis because the project was not expected to be completed until that time.
- The City developed the Year 2020 traffic estimate based on buildout under the City general plan along with the development of numerous roadway improvements planned for completion by 2020.

Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (continued)

- The petitioner challenged the City's approach arguing that pursuant to CEQA Guidelines section 15125 the proper environmental baseline was the conditions existing at the time the notice of preparation of the EIR was published.
- The court held that by using a post-approval future baseline the city failed to proceed in a manner required by law. The court held that agencies lack the discretion to ever consider projected conditions beyond the time of project approval.

Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (continued)

- Citing the trial court opinion, the court explained that “by using future traffic conditions as its ‘baseline,’ [the City] did not adequately explain to an engaged public how the proposed project was expected to change the present conditions to which they currently lived.”

Practice Pointers: Baseline

- Existing environmental setting* is “normally” the baseline for determining project impact significance.
 - *Environmental setting defined as conditions at time NOP released or, absent NOP, when environmental analysis commenced (CCR 15125(a))
- When diverging from existing setting, need a good reason. Examples:
 - Hydrology of river changes year to year; would not be appropriate to reflect a current drought condition as the “setting” for impacts. Use of hydrologic record that shows fluctuations, which would continue absent project.

Practice Pointers: Baseline (continued)

- Renewal of a permit for continued operations. Permissible to use a higher baseline if conditions are typically fluctuating, project has operated at higher, permitted level in past, and prior CEQA compliance has addressed impacts of higher permitted levels.
- Substantial evidence that environmental conditions will be different at time of expected project approval, i.e., projects under construction will be likely be completed and operational.

Practice Pointers: Baseline (continued)

“Where a proposed project is compared with an adopted plan, the analysis shall examine the (existing setting) as well as the potential future conditions discussed in the plan.” (CCR 15125(e))

- Does not suggest...but requires consideration of existing and planned conditions in EIR (two analyses)
 - Existing condition = baseline
 - Planned condition *could* = cumulative baseline

Practice Pointer: Traffic Analysis Post-*Sunnyvale*

Evaluate the following:

- Establish existing conditions=baseline
 - If substantial evidence that other projects would be completed prior to expected project approval, may add in to baseline. With caution!
- Baseline + Project
- Cumulative + Project. Can have multiple scenarios*:
 - Short-term cumulative + project (most likely an “existing plus approved projects + project” condition)
 - Long-term cumulative + project (e.g., general plan horizon + project)
 - Adopted plan + project (could be variation of long-term or the same as long-term)
- * Must at least evaluate one cumulative + project scenario
- Project context a factor in the scenarios evaluated

Practice Pointer: Traffic Analysis Post-*Sunnyvale* (cont'd)

Problems and Challenges

1. How is mitigation established within context of a growing community? Rough proportionality requirement and need to consider future growth. (Leads to more consideration of cumulative mitigation requirements and project's share)
2. How should long-term/long-build out projects (example: specific plans) be evaluated? How is requirement of CEQA met while still providing a meaningful analysis (presuming project is in area of growth)

Discuss problems and challenges, as well as other related issues such as noise and air quality.

Other EIRs

Jones v. Regents of the University of California (2010) 183
Cal.App.4th 818

Upholds UC's Long Range Development Plan Program EIR including rejection of the 5 alternatives considered.

- Purpose of the LRDP: guide land and facility development; provide framework for implementing the Lab's (UC's specific research campus) mission and scientific goals. Among its objectives are expanding functionality and fostering collaboration and cross-disciplinary research in a campus-like environment at the "hill site" where most facilities and staff are already located.

Jones v. Regents of the University of California (continued)

- Thus, the off-site alternative and petitioner's proposed off-site location were properly rejected because they would have divided resources between locations.
- Decision supported by substantial evidence that physical proximity is key to meeting the project objectives.

Watsonville Pilots Association v. City of Watsonville (2010) 183 Cal.App.4th 1059

Overtaken approval of EIR for City's General Plan.

- 3 alternatives considered: (1) same level of development within existing city limits, (2) same level of development ½ within city limits and ½ in growth areas, and (3) no project.
- Failure to consider a reduced project alternative was improper – the point of the analysis is to allow the decision maker to determine whether there is an environmentally superior alternative that will meet most of the project objectives.

Watsonville Pilots Association v. City of Watsonville (continued)

- Here, most of the project's impacts were due to growth, thus, the EIR should have considered a reduced project alternative that could satisfy most of the objectives and reduce impacts.

Watsonville Pilots Association v. City of Watsonville (continued)

- EIR's analysis of water supply for General Plan update upheld under *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412.
 - EIR included a discussion of groundwater use in the region, described the overdraft situation, and identified programs and policies to address the problem. Discussion satisfied *Vineyard*.

Watsonville Pilots Association v. City of Watsonville (continued)

- EIR concluded that the conversion of agricultural land to urban uses would result in modest increase in net water demand. Net increase could be more than offset by conservation. General Plan therefore would not exacerbate longstanding groundwater overdraft problem.
- City also violated airport planning law.

Practice Pointers from *Jones and Watsonville*: Range of Reasonable Alternatives

- EIRs required to consider “range of reasonable alternatives” to the project
 - Focus on avoiding or reducing impacts
 - Book-ending range of project sizes can be an appropriate approach, rather than considering infinite potential scenarios
- Document thought process, especially if circumstances (such as project type) limits number of feasible alternatives
 - What unique project attributes restrict types of alternatives
 - Why were some alternatives considered and rejected

Practice Pointers from *Jones and Watsonville*: Range of Reasonable Alternatives (continued)

- Does not mean all possible alternatives should be considered...only a range that provides a meaningful choice to decision-makers
- CCR 15126.6

Center for Biological Diversity v. County of San Bernardino
(2010) 184 Cal.App.4th 1342

EIR for composting facility overturned for failure to adequately consider an enclosed facility alternative.

- Finding that such alternative was economically and technically infeasible not supported by substantial evidence because
 - County only considered costs of one other such facility, where there were many it could have looked at for capital and operational cost information, and
 - County did not address timing/cost of bringing electricity to the site, only observed that it was not currently available within a mile.

Center for Biological Diversity v. County of San Bernardino (continued)

- EIR for composting facility did not include “water supply assessment” under Water Code section 10910. Composting facility was a “project,” and thus required an assessment, because it was a “processing plant” conducted on more than 40 acres of land . (See Wat. Code, § 10912, subd. (a).)
- Given size and nature of size, magnitude of water demand was irrelevant. EIR identified trucking and groundwater as potential sources, but contained no information on the actual availability of groundwater.
- Strict read of SB 610/Water code § 10912, subd. (a) requirements

Practice Pointers from *Center for Biological Diversity*

- Economic feasibility determinations should be made by decision makers
 - Does not preclude EIR from “suggesting” that an alternative *may* be financially infeasible and explaining why
 - When presenting financial considerations, they should be relevant to project circumstances. This case relied on cost of an enclosed facility in a suburban setting to draw conclusions on costs of an enclosed facility in a rural setting.

Practice Pointers from *Center for Biological Diversity* (continued)

- Water issue (and a lesson on reading regulations): if the statutory language defines a circumstance, then it should be considered per the language, *even if it is your opinion that the statute probably was not intended to apply.*
 - Probably not the intent of SB 610 to apply to project that consumes very little water, but because the project met the size requirements included in SB 610 (“processing plant” occupying more than 40 acres), Court felt WSA should have been prepared.

Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70

EIR prepared for use permit to upgrade and replace equipment at Chevron refinery.

- The accuracy of the project description implicates the information disclosure requirements of CEQA; thus, this issue is reviewed *de novo* rather than under the substantial evidence test.

Communities for a Better Environment v. City of Richmond (continued)

- The court found that the EIR:
 - Contained conflicting statements about the type of crude oil that would be used post-project,
 - City’s expert’s advice was based on information that was not public, and
 - This issue should have been analyzed in the EIR and not after the EIR was published.

These factors meant that the issue was not simply one of a “disagreement amongst experts.”

Communities for a Better Environment v. City of Richmond (continued)

- With regard to the greenhouse gas mitigation, the court found that:
 - The City had delayed (“belatedly issued”) making a GHG determination.
 - The mitigation measures contained only a generalized goal rather than a performance standard.
 - That when the GHG reduction plan prepared by Chevron was sent to the City Council for approval, the Council would “presumably . . . make its decision outside of any public process.”
 - The court concluded that one of the prerequisites for deferred mitigation – that practical considerations prohibiting devising such measures early on – did not apply.

Communities for a Better Environment v. City of Richmond (continued)

- The decision to treat the hydrogen pipeline as a separate project, but to analyze it as part of the cumulative analysis, did not constitute segmenting. The standard of review of this issue also was de novo.

Practice Pointers from *Communities for a Better Environment*

- Further defines “deferred mitigation”
- Requires performance standard
 - Must be able to demonstrate that performance standard is feasible to attain
 - Question of feasibility spotlighted because mitigation was not sufficiently defined and there was no subsequent public process to examine feasibility

Practice Pointers from *Communities for a Better Environment* (continued)

- Decision likely influenced by City's repeated insistence that making GHG impact findings—project generated 898,000 tons of GHG/year—would be speculative. Not until late in process (required new EIR volume) did City acknowledge impact, but then set out that the mitigation plan would result in no net increase. Feasibility of mitigation questioned, no public process to review efficacy, etc.

California Oak Foundation v. Regents of the University of California (2010) 188 Cal.App.4th 227

Tiered EIR for seven projects, including Memorial Stadium upgrade.

- Stadium located on active fault. DEIR impact significant and unavoidable. Geologic conditions “merely confirmed” in FEIR. No recirculation required.
- Adequacy of project description governed by CCR 15124.
- Substantial evidence supported analyses, findings (e.g., oak trees in urban area not sensitive biological resources).

California Oak Foundation v. Regents of the University of California (continued)

- Petitioner's challenge to grouping project components in the alternatives analysis was rejected.
 - Since proposed project involved several projects, UC was not required to develop alternatives to each separate component.
 - Such grouping did not limit ability to select individual projects among the group.
 - Was sufficient to permit reasoned choice and key issue of encouraging informed decision-making was satisfied.

California Oak Foundation v. Regents of the University of California (continued)

- Agency has discretion to identify/pursue a project designed to meet a particular set of objectives.
- UC complied with Alquist-Priolo earthquake zoning law.

Cherry Valley Pass Acres and Neighbors v. City of Beaumont (2010) 190 Cal.App.4th 316

City certified EIR and approved specific plan authorizing 560 units on 200-acre site formerly used as egg farm.

- Water supply assessment assumed “baseline” water usage at site was equivalent to landowner’s adjudicated right to pump 1,484 acre-feet per year (afy) of groundwater.
 - Actual water use following closure of egg farm: 50 afy.
 - Selection of 1,484 afy baseline was within city’s discretion in light of adjudication.
 - That amount was also generally in line with historic water use prior to closure of egg farm.
 - Adjudicated amount was therefore not a “hypothetical” baseline.

Cherry Valley Pass Acres and Neighbors v. City of Beaumont (continued)

- Record showed a reasonable likelihood that available water supplies would be sufficient, as required by *Vineyard Area Citizens*, in that specific plan would require only 531 afy.

Cherry Valley Pass Acres and Neighbors v. City of Beaumont (continued)

- EIR concluded specific plan would have significant impact on agriculture. City rejected mitigation (e.g. purchase of conservation easements) as infeasible in view of conclusion that agricultural operations in area were no longer economically viable due to urban pressures.
- Record supported City's rejection of alternatives that called for preserving some agriculture on site; EIR did not need to analyze alternative with "optimal" number of residences while minimizing impacts of agriculture, since EIR analyzed a reasonable range.
- City could cite desirable characteristics of project in support of statement of overriding considerations.

Practice Pointers from *Cherry Valley*

- The date of NOP is important for establishing the baseline; in this case NOP was released when use was fully functioning egg farm with high water use, but following NOP, egg farm closed and water use substantially dropped.
- Important consideration when a site will be changed from one land use to another, especially in re-use circumstances.
- Another example, additionally, of book-ending alternatives rather than considering every possible combination of alternatives

Supplemental Review

Melom v. City of Madera (2010) 183 Cal.App.4th 41

Addendum upheld for retail project site plan refinement that increased size of largest retail space from 138,000 s.f. to 198,484 s.f.

- Neither the project's total square footage nor use changed.
- Court rejected petitioner's claim that the addition of a "super store" automatically required analysis of urban decay impacts, where it failed to point to any evidence in the record supporting the claim nor evidence or unique traffic impacts.

San Diego Navy Broadway Complex Coalition v. City of San Diego (2010) 185 Cal.App.4th 924

1992 EIR prepared when Development Agreement approved for a large office/hotel/retail/public attraction space project on SD waterfront.

- DA required redevelopment agency (CCDC) review/approve construction plans for consistency with urban design guidelines adopted for the project.
- Petitioner claimed that CCDC's 2007 approval of plans required SEIR on climate change.
- Court held no SEIR required because CCDC's review of aesthetic issues would not, even if considered discretionary, give it authority to require mitigation to address climate change impacts.

San Diego Navy Broadway Complex Coalition v. City of San Diego (continued)

Where an agency has no authority to modify a project based on an EIR's analysis, there can be no basis for that agency to require preparation of an EIR – this rule applies to an initial EIR and there is no reason to apply a different rule in the § 21166/SEIR context.

Practice Pointer from *Navy Broadway Complex*

- When conducting supplemental review, focus is on those changes in plan in the review
- Look at the nature of the approval
- Discretion in this case was limited to design review; therefore, there was no discretion that would affect greenhouse gas generation or mitigation.

EIRs and Other Statutes

Water Quality

San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board (2010) 183 Cal.App.4th 1110

Functional equivalent to EIR prepared for two amendments to Basin Plan:

- (i) establishing TMDLs and an implementation program for salt and boron,
- (ii) requiring studies leading to a TMDL for dissolved oxygen for a stretch of the San Joaquin River and the Stockton Deep Water Shipping Channel.

San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board (continued)

- Laundry list approach to challenge, and straightforward application of substantial evidence test.
- Court rejected all of the CEQA substantive challenges, mostly by identifying the pages of the record that contradicted the claims.
- Court rejected all of the CEQA procedural challenges, which likewise were rejected based on the record. Pursuant to Evidence Code § 664, court presumed official duty performed unless record shows otherwise.

Forestry

Katzeff v. California Department of Forestry and Fire Protection (2010) 181 Cal.App.4th 601

- In 1988 and 1998 the California Department of Forestry (CDF) approved now-expired Timber Harvest Plans (THPs) for a timber harvesting project.
- The THPs both included a mitigation measure prohibiting tree removal within 200 feet of a neighboring home without approval of the residential property owner.
- In 2008, the timber harvester requested a one-time conversion exemption under the Forest Practice Act (FPA) to harvest up to three acres within the 200-foot buffer of a residence.

Katzeff v. California Department of Forestry and Fire Protection (continued)

- CDF approved the exemption and concluded that the approval was exempt from CEQA because it was ministerial and because the prior THPs had long since expired.
- The court disagreed. The court found that CDF's attempt to provide a separate ministerial permit for this smaller but related harvesting project was improper holding that "where a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation—whether or not the approval is ministerial—without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence."

Practice Pointer from *Katzeff*

- If an impact is significant, mitigation cannot be subsequently removed without CEQA consideration
- If removal of mitigation will result in a significant impact, supplemental review would likely be a supplement to an EIR (CCR 15163)

Committee for Green Foothills v. Santa Clara County Board of Supervisors (2010) 48 Cal.4th 32

- Where NOD is posted, a bright-line rule applies: “For purposes of the CEQA statutes of limitations, the question is not the substance of the agency’s decision, but whether the public was notified of that decision.”

Stockton Citizens for Sensible Planning v. City of Stockton (2010) 48 Cal.4th 481

- Under statute, timeliness of lawsuit is measured from the date of posting of the notice.
- Alleged invalidity of underlying “approval” – i.e., whether approval was within scope of Planning Director’s authority – was irrelevant. A challenge to the PD’s authority was an attack on the merits, and such an attack was time-barred, regardless of its persuasiveness.
- NOE’s description of use as “commercial” was sufficient; NOE did not need to identify Wal-Mart to be valid.