I. CEQA TIMING

A. *California Building Industry Association v. Bay Area Air Quality Management District* (2013) 218 Cal.App.4th 1171.

The First Appellate District considered whether the promulgation of thresholds of significance by the Bay Area Air Quality Management District (BAAQMD) was a "project" subject to CEQA review. The appellate court held that the promulgation of thresholds was (and is) not a project under CEQA, and reversed the trial court's writ invalidating the thresholds adopted in 2010. The appellate court reasoned that (1) CEQA Guidelines section 15064.7 encourages public agencies to develop and publish thresholds of significance for use in determining the significance of environmental impacts, and CEQA review of the thresholds is not a part of the procedure; and (2) the potential environmental impacts suggested by the BIA (e.g., new thresholds would discourage infill development and thus, result in more urban sprawl) were speculative and not reasonably foreseeable.

More specifically, with respect to section 15064.7, the appellate court noted that the preparation of an EIR or other CEQA document to promulgate thresholds would duplicate the public review process and substantial evidence standard set forth in that section. Furthermore, the court considered the purpose of environmental review, which is to provide public agencies and the public in general with detailed information about the effect of a proposed project, to provide mitigation for those effects and/or provide alternatives for those effects, was essentially the process undertaken by the BAAQMD in promulgating its thresholds. Additionally, with respect to the CBIA's assertion that the thresholds would have an environmental impact, while the promulgation and adoption of the thresholds was an activity directly undertaken by BAAQMD (the first prong of the test defining what constitutes a project), the CBIA did not show that the promulgation and adoption of thresholds met the second prong of the project test (i.e., that the thresholds would have a reasonably foreseeable effect on the environment) because no evidence was submitted indicating that urban, infill developers would move their projects to suburban fringes or rural areas.

The First Appellate District also considered the merits of and upheld the thresholds set for Toxic Air Contaminants (TACs) and $PM_{2.5}$ caused by new sources as well as for new receptors, and for single-source and cumulative TACs on the grounds that they were not arbitrary and capricious or invalid on their face.

B. *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540.

At what point in time and under what circumstances does agency entanglement with an application jeopardize the later CEQA document? According to a new decision, CEQA does not preclude all agency involvement or that of elected officials.

The facts arise out of the Washington Community Service Center, a neighborhood center in the Western Addition in San Francisco. The Center proposed to demolish its existing 13,745 square foot single story building with a 68,206 square foot mixed use five story project, including 50 residential units. The Planning Department released a draft EIR which included a no project and smaller version of the project. Following a public hearing, the project design was modified to address community comments. Ultimately, the Commission certified the EIR and approved the project. Neighbors appealed. The Board made additional changes, but it too approved the project. The neighbors appealed to the superior court, which ruled in favor of the City. The opponents appealed the adverse trial court decision, and the court of appeal affirmed. The appellate court certified for publication a portion of its decision addressing the argument that the City's pre-approval application related activities violated CEQA.

CEQA practitioners are well aware of the risks associated with agency commitment to a project in advance of proper CEQA documentation. These risks are highlighted by the California Supreme Court decision in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 (discussed in our earlier blogs; For CEQA, Project Commitment Is Still A Question Of Fact and Too Early or Too Late for CEQA Review: Two Appellate Decisions Bracket the Fundamental Question of Timing) but tempered by later decisions such as *Cedar Fair L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150 which upheld the practice of negotiating a term sheet at the outset of project processing. In this particular case, the Mayor's Office of Housing loaned the center approximately $800,000 (approximately 4% of the project development costs) for completing studies necessary for the application and CEQA process. If the city approved the project, the loan would be paid back over time. If the city denied the project, the loan would be due immediately. The documentation provided that there was no commitment to project approval. The court found that there were a number of distinguishing facts from *Save Tara*, which reflected careful actions by the Mayor's Office as it provided funds. The opponents also argued that the action of one supervisor to introduce the ordinance necessary to effectuate a project approval was an approval (for CEQA purposes) in and of itself. As the court noted, this was at most the position of one official, not the board of supervisors which as a body, is given the authority to approve ordinances. Finally, the opponents pointed to internal city emails as reflecting improper agency commitment to the project. The court against distinguished the content of these emails from the various affirmative statements highlighted by the California Supreme Court in *Save Tara.*

Commentary: This case is a worthy reminder to agency staff that "best practices" dictate that what agency staff states publicly and in writing, including emails, needs to be carefully considered for its CEQA implications. We recommend that agencies spend time on internal training about communication protocols. We all tend to take these practices for granted, but you can't. As an agency staffer or consultant to a public entity, if you don't want your statements quoted in an opposition brief, best to keep those thoughts to yourself.

The other issue not addressed by the court is the question of timing. Pre-commitment cases are brought early in the process, before the EIR is prepared. In this case, the correct

timing for litigation purposes would have been immediately following discovery of the loan. By the time the EIR was certified and the project approved, arguably the pre-commitment argument was "too little, too late." After all, if the court agreed with the opponent's argument, what kind of relief could the court grant?

II. EXEMPTIONS

A. *Michael May v. City of Milpitas* (2013) 217 Cal.App.4th 1307.

A similar result to that in *Concerned Dublin Citizens* was reached in the *Michael May v. City of Milpitas* decision. *May* involved a transit area specific plan originally approved in 2008. The companion programmatic EIR disclosed significant unmitigated impacts. In November 2011, the city council approved amendments to the previously issued site development permit and conditional use permit. The city council determined that the project, as modified, was exempt from further CEQA review, and the city filed a notice of exception ("NOE"). Michael May and a labor union filed suit 35 days later, alleging that the city failed to perform required additional CEQA review. The city and real party in interest demurred, arguing that a special 30-day statute of limitation applies. The trial court and appellate court agreed. The appellate court concluded that the special 30-day statute of limitations authorized by Government Code section 65457 runs from the date the city council approved the amendments. The city's decision to file a NOE, which ordinarily triggers a 35 day statute of limitations, was unnecessary and not determinative. Further, the city was not estopped from asserting the shorter statute of limitations after filing the NOE.

B. *Golden Gate Land Holding, LLC v. East Bay Regional Park District* (2013) 215 Cal.App.4th 353.

The Court of Appeals, First District, affirmed a trial court's grant of a writ of mandate striking down a notice of exemption pursuant to CEQA Guidelines section 15325, ordering the East Bay Regional Park District (Park District) to prepare an environmental impact report (EIR) for the District's park project, but declined to order the District to set aside its approval of a resolution of necessity allowing the condemnation of eight acres of Golden Gate's shoreline property in the East Bay.

Background: Public Resources Code section 5003.03 was enacted in 1992 to require the Park District to provide for a shoreline park and bay trail along the east shore of the San Francisco Bay from the Bay ridge to the Marina Bay Trail in Richmond. Pursuant to this direction, the Park District proceeded to plan the Bay Trail (a 400-mile recreational corridor along the east shore of the San Francisco and San Pablo Bays) as well as the Eastshore Park. The state and the Park District jointly prepared the Eastshore State Park General Plan.

Golden Gate Fields is a former horse racing track, which sits on a portion of 140 acres of land owned by the plaintiff/appellant Golden Gate and located within the cities of Albany and Berkeley, on the east shore of the San Francisco Bay. In 2003, the then-owners of

Golden Gate Fields entered into a license agreement with the Park District to allow public use of the property for recreational purposes. The license agreement expired, but Golden Gate refused to enter into another license agreement, although it did permit continued public use of the property. In 2006, the Park District attempted to negotiate a voluntary acquisition of eight acres of Golden Gate's property. In this vein, the Park District contracted with an engineering firm to prepared plans to identify alternatives to construct a trail and the Eastshore Park on a portion of Golden Gate's property. The Park District offered Golden Gate approximately $1,686,000 to acquire upwards of eight acres of Golden Gate's property, but Golden Gate declined the offer.

In 2011, the Park District noticed a public hearing to consider a resolution of necessity to authorize condemnation of the almost eight acres for purposes of acquiring the land and constructing a segment of the Bay Trail and completing the Eastshore Park. The District staff indicated that the adoption of the resolution was exempt from CEQA. Golden Gate objected, arguing an EIR was required. Despite Golden Gate's objections, the Park District Board adopted the resolution of necessity and directed staff to file and post a notice of exemption pursuant to Section 15325 of the CEQA Guidelines.

Golden Gate challenged the Park District's notice of exemption and resolution of necessity. (This article addresses only the CEQA challenges presented by the Park District as the court's discussion of the resolution of necessity is unpublished.) The trial court agreed with Golden Gate that the notice of exemption was improper, and ordered that the portion of the District's resolution of necessity relating to the notice of exemption be vacated. It also ordered the District to prepare an EIR for the project. Then the trial court held that the Park District could proceed with its eminent domain action based on the resolution of necessity, but that the Park District could not actually acquire the property until it had prepared the EIR.

Golden Gate appealed contending that the trial court should have set the entire resolution of necessity aside and that the prerequisites for eminent domain were not satisfied.

CEQA Exemption Under Section 15325: CEQA Guidelines section 15325 is entitled, "Transfers of ownership of interest in land to preserve *existing* natural conditions and historical resources." [Emphasis added.] Subsection (f) of section 15325 allows a CEQA exemption for "acquisition, sale, or other transfer to preserve open space or lands for park purposes."

In its notice of exemption, the District indicated that the project was exempt because it consisted of the acquisition of land in order to protect open space and future public access to the Eastshore Park and Bay Trail. It further noted that any improvements on the property would be subject to future CEQA review. In its legal briefing, the District argued the notice pertained to only to the acquisition of the property, not the construction of the Bay Trail because the District had not committed itself to a definite course of action to build the Bay Trail.

Both the trial and appellate courts disagreed with the Park District on the grounds that the project entailed not only the acquisition but the improvements to the park and trail. The trial court held that the Park District had committed itself to a definite course of action because it had selected a trail location, designed and obtained cost estimates for the trail, and initiated the condemnation proceedings to accomplish the site acquisition and proceed with improvements.

Court-Ordered Remedies Under CEQA: Court-ordered remedies for CEQA violations are outlined in section 21168.9 of the Public Resources Code. In reviewing whether the trial court properly ordered the Park District to vacate only a portion of the resolution of necessity, the appellate court looked at subsection (a)(1) of section 21168.9, which provides that a trial court may void a determination, finding, or decision by a public agency, in whole or in part. The trial court specifically found that the initiation of the eminent domain proceedings would not prejudice the consideration or implementation of any mitigation measures or alternatives, and further that any eminent domain action was severable from the purchase of the property and design/construction of the park and trail. The appellate court reviewed the trial court's determination de novo.

Mootness: Notably, by the time this case reached the appellate court, the District had certified an EIR for the project, and adopted a subsequent resolution of necessity for the project. The Park District filed its return to the writ and asked the appellate court to take judicial notice of the EIR and new resolution for purposes of illustrating the CEQA lawsuit was moot. The court of appeal held the CEQA appeal was not moot because the challenge was to the validity of the limited remedy ordered by the trial court, and the appellate court determined it still had the authority to set aside the resolution of necessity if it deemed such action appropriate.

Discussion: According to the appellate court, the issue on appeal was whether an EIR has to be prepared in a case where CEQA and eminent domain law intersect. In upholding the trial court's remedy in the matter, the appellate court found that the trial court properly concluded there were three different activities which comprised the project, and only the third activity – the park improvements – had not been properly reviewed in accordance with CEQA. The court of appeal also upheld the trial court's determination that the initiation of the eminent domain action was a severable project activity that would not result in an adverse change to the physical environment and would not prejudice CEQA compliance, so long as the District did not actually acquire the site prior to completing CEQA review. In doing so, the appellate court reasoned that (1) Section 21168.9 does not require that CEQA review be completed prior to consideration of the severance remedy, (2) the project at issue is one for open space preservation and recreational improvements; thus, the equities weigh in favor of allowing the condemnation proceedings to go forward pending preparation of an EIR for the acquisition of the land and the actual park improvements, and (3) the court saw no danger that construction of improvements would begin without the EIR being completed because the trial court specifically ordered that no acquisition be completed prior to CEQA compliance.

Ultimately, the court of appeal held that the trial court properly interpreted Section 21168.9, and did not abuse its discretion in exercising its equitable powers to scope a remedy that allowed the condemnation proceedings to continue while environmental review of the acquisition and improvements to the proposed site was completed pursuant to CEQA.

*Petition for review denied by California Supreme Court on June 26, 2013 (2013, Cal. LEXIS 5484.)

C. *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2013) 210 Cal.App.4th 1006.

The California Supreme Court granted review in *Tuolumne Jobs & Small Business Alliance v. Superior Court*, (2013 Cal. LEXIS 1082) 210 Cal.App.4th 1006; Tuolumne County Superior Court; CV56309.) Likely issues to be addressed include (1) Must a city comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) before adopting an ordinance enacting a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a)? (2) 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)?

D. *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301.

Long range, detailed planning got a boost from a decision by the appellate court which held that a residential project found by the City to be consistent with a 2002 specific plan was exempt from a later round of CEQA review, as provided for by Government Code section 65457. In 2002, the City of Dublin approved the Eastern Dublin Specific Plan, a plan calling for a high-density mixed use, transit and pedestrian-oriented development. Among other features, the plan allowed up to 2,000,000 square feet in office development, 70,000 square feet of retail and up to 1,500 dwelling units in higher density development. The City certified a program EIR (Guidelines section 15168) at the time of the specific plan approval. The EIR examined a full build out scenario.

Site C within the specific plan called for a maximum of 405 residential units and up to 25,000 square feet of ancillary retail. Developer Avalon Bay submitted proposals in 2007, 2010 and 2011, the final one which included 505 apartment units and eliminated the retail space due to existing unleased commercial space within the overall development. The ground floor residential units were designed to permit conversion to commercial uses at a later date. Avalon Bay's request included a transfer of 100 residential units from elsewhere within the specific plan area. The planning commission approved the site approvals and recommended approval of a development agreement. Opponents, an unincorporated association and individual within the association and the Carpenters Local Union No. 713, filed an appeal. The city council concurred with the planning commission action, including the determination that no further CEQA required was required. The appellants filed a petition for writ of mandate. The trial court found

that there was substantial evidence in the record to support the council's determination that no further CEQA review was required. On appeal, the appellate court concurred, ruling as follows:

Standard of review: The appellate court ruled that the substantial evidence test, not the fair argument test, would apply to judicial review of a claim of exemption under section 65457.

The project qualified as a residential project: The benefits of section 65457 apply to residential projects. The evidence was that the project was all residential in character, even with the ability of the ground floor residential units to convert in the future. Pursuant to the terms and conditions, conversion later on would necessitate later approvals. Thus, the disputed approval was residential in character and satisfied the residential use test.

Consistency with specific plan: The project met the consistency requirement as well. Despite the appellant's argument to the contrary, there was nothing that required Site C itself to be a mixed use project: the concept of mixed used applied to the specific plan as a whole, not to each specific parcel. Appellants also argued that the City could not now rely on the previously certified program EIR, and was obligated to provide an updated CEQA assessment. The appellate court rejected this argument as well, saying nothing in the program EIR requirements compelled later environmental review and stated that the requirement for later environmental review would be a function of the thoroughness of the initial program document. The program EIR at issue discharged the CEQA assessment as it applied to Site C.

No changed circumstances: A section 65457 exemption is subject to the changed circumstances limitation embodied in Public Resources Code section 21166. Appellants presented several arguments in support of a changed circumstances finding, all of which were rejected by the appellate court. First, the appellate court found that the density transfer was not a significant change in circumstances as it was allowed by the terms of the specific plan. The second claim of changed circumstances involved greenhouse gases. Appellant's reliance upon the BAAQMD thresholds of significance adopted in 2010 was "highly questionable" given that a trial court had set them aside pending proper environmental review and that BAAQMD currently advised others not to rely upon those thresholds. However, the fact pattern before the court also fit within that of *Citizens of Responsible Equitable Development v. City of San Diego* (2011) 196 Cal.App.4th 515, wherein the appellate court concluded that greenhouse gases were not a new issue, and could have raised and litigated when the program EIR was certified. This court reached a similar conclusion. Greenhouse gases were known as potential environmental issues in 2002 and the sufficiency of the CEQA analysis as it applied to greenhouse gases could have been litigated at that time. Thus, this issue did not trigger additional CEQA review under the authority of Public Resources Code section 21166.

III. NEGATIVE DECLARATIONS

A. *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209.

In January 2011, the Board of Supervisors for the County of Marin enacted an ordinance generally banning the use of single use plastic bags and adopting a fee for paper bags. The ordinance also required retailers covered by the ordinance to offer reusable bags for purchase. This ordinance came about after some period of County study. A trade group, Save the Plastic Bag Coalition, submitted comments in opposition to the proposed ordinance, including a demand for an EIR. Initially, the Board continued the hearing. At the continued hearing, the Board considered, among other items, a letter from the County Counsel's office suggesting that the Board should complete the hearing and could act based upon a categorical exemption (classes 7 and 8; maintenance and restoration of a natural resource and maintenance, restoration, enhancement or protection of the environment, respectively.) Relying upon the two exemptions, the Board approved the use of the two exemptions and approved the ordinance. The Coalition sued. The trial court upheld the Board's decision and the Coalition appealed.

Appellant's initial argument was the holding in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 was controlling and that due to various factors including the size of the County, that an EIR was required. The appellate court disagreed, indicating that nothing in the holding in *Manhattan Beach* decision (which involved a negative declaration) or the facts, legally precluded Marin County from utilizing a categorical exemption.

Appellant also argued that the exemptions in question could not be relied upon by the County, but were intended to be used on by certain "regulatory" agencies. The County's initial response was that the Appellant had failed to exhaust its administrative remedies on this issue. The court rejected this argument on the basis that the specific basis for a claimed exemption (the letter from the County Counsel's office) was not shared with the public until the final hearing. This late disclosure relieved the public from having to exhaust administrative remedies. Turning to the merits of the Appellant's argument, the court rejected the Appellant's suggested limitation on the uses of Class 7 and 8, concluding that the County was not legally barred from using those exemptions.

Perhaps the decision's most interesting discussion pertained to the argument that the use of the exemptions for this purpose would allow agencies to categorize certain actions as "green" or "environmentally protective" thereby escaping any obligation to conduct CEQA review. The appellate court rejected this argument, noting that a public agency must "marshal substantial evidence to support the conclusion that the project fell within the exemption." Having previously acknowledged that there was a split in the courts as to what judicial standard of review applied when reviewing disputed exemptions, the court said it did not have to address this threshold question as the County's decision met the more rigorous of the two types of review.

While the appellate decision addresses other related CEQA issues on appeal, the court ordered those portions to be "not published", and therefore, are not included in this summary.

B. *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013.

The voters within the San Diego Unified School District passed a school bond measure to school facilities upgrades. The school board voted to use bond proceeds to install field lighting at Hoover High School. Neighbors, concerned with the increased traffic and parking conflicts resulting from nighttime events filed suit challenging the approval as an unauthorized use of bond proceeds and for improper reliance upon a negative declaration, among other claims. The trial court ruled for the District, and the neighbors ("Taxpayers") appealed. The court of appeal reversed on the bond authorization claim, and reversed in part on the CEQA claim.

IV. ENVIRONMENTAL IMPACT REPORTS

A. ***San Diego Citizenry Group v. County of San Diego*** **(2013) 219 Cal.App.4th 1.**

In *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, the Court of Appeal, Fourth District, upheld San Diego County's (County) certification of an EIR and approval of a Tiered Winery Ordinance Amendment (Winery Ordinance) which permits boutique wineries in agriculturally designated and zoned land in the unincorporated area of the County by right. In ruling on a dispute regarding the cost of transcripts in the administrative record, the Fourth Appellate District reversed the trial court and held appellant was not required to reimburse the County for the costs of transcribing transcripts of the planning commission meetings pursuant to Public Resources Code section 21167.6(e)(4).

Background Facts

Starting in 2006, San Diego County began investigating options on whether and how to allow boutique wineries by right in unincorporated areas zoned for limited agriculture and general agriculture. After approving a negative declaration and adopting an ordinance permitting boutique wineries on public roads in the unincorporated area by right, the County rescinded the ordinance and directed staff to draft a Winery Ordinance and analyze such ordinance pursuant to an EIR. The total unincorporated area to be affected by the proposed ordinance was about 441,000 acres.

In July 2009, the draft EIR (DEIR) for the Winery Ordinance was circulated for public review and comment. The DEIR identified 22 significant and unavoidable impacts relating to air quality, biological resources, cultural resources, hydrology and water quality, noise, traffic, and water supply. It also identified three project alternatives, including: (1) enhanced enforcement requiring a compliance checklist; (2) a limited five-year by-right ordinance; and (3) the no project alternative.

After receiving comments on the DEIR, the County revised and recirculated the impacts analysis regarding water supplies. After consideration by the Planning Commission, the County Board of Supervisors certified the EIR, adopted findings and a statement of overriding considerations, and approved the Winery Ordinance, along with the necessary General Plan amendments.

Petitioner/Appellant San Diego Citizenry Group timely challenged the County's certification of the EIR and approval of the Winery Ordinance.

The Administrative Record

The Citizenry Group requested that the County prepare the administrative record. Accordingly, the County prepared and certified the record, which consisted of 5,648 pages. The Citizenry Group refused to pay for the County's cost of preparing the transcripts for the planning commission meetings. The County moved for an order determining and directing payment of costs, which petitioner opposed.

The trial court issued an order denying the writ petition and ordered Petitioner/Appellant to reimburse the County of the costs of the record preparation.

Appellate Court Decision

The Citizenry Group based its appeal on the following issues: (1) the County Board failed to make a "preliminary policy determination" regarding the project objectives; (2) the project objectives were too narrowly constructed to allow for feasible mitigation measures; (3) the FEIR failed to discuss all potentially feasible mitigation measures in meaningful detail; (4) the mitigation measures proposed in the FEIR were not supported by substantial evidence; (5) the FEIR failed to adequately discuss and mitigate traffic impacts of the Winery Ordinance to private roads; (6) the FEIR did not includes sufficient information regarding each of the project's significant environmental impacts; (7) the discussion of water supply impacts was lacking; (8) the EIR's discussion of the grading permit requirements was misleading; (9) the statement of overriding considerations was not supported by the EIR; (10) the Winery Ordinance is inconsistent with the County's General Plan; and finally, (11) the trial court erred in requiring them to pay for the Planning Commission transcript as part of the administrative record costs.

The appellate court dismissed all of the Citizenry Group's claims save one: the payment of the transcripts for the planning commission hearing. Apparently, the transcripts of the planning commission meetings were not transcribed until December 2010, well after the Board's August 4, 2010 hearing on the project. In reversing the trial court's order directing the Citizenry Group to pay $6,067.94 for the cost of the hearing transcripts for the planning commission meetings, the Court of Appeal reasoned that the transcripts did not need to be included in the administrative record because the transcripts were not before the Board of Supervisors when it certified the FEIR and approved the project. In support of its ruling, the appellate court highlighted Public Resources Code section 21167.6(e)(4), which requires the party preparing the administrative record to include

"any transcript or minutes of the proceedings before any advisory body to the respondent public agency *that were presented to the decisionmaking body prior to action on the environmental documents on or the project.*" The appellate court also noted that section 21167.6(f) requires a party preparing the record to do so at a "reasonable cost."

As might be expected, the County argued that pursuant to the Citizenry Group's request for preparation of the record and *dictum* in the *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1 (*County of Orange*) decision (e.g., "Section 21167.6(e) contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to the development." (*Id.* at p. 8.), it would have risked certifying an incomplete record and thus, losing the case, if it had *not* included the transcripts from the planning commission hearings in the administrative record. The Fourth District dismissed the County's concerns by indicating the Citizenry Group's request for the County to prepare the record was simply a recitation of the language in section 21167.6(a) and further, by distinguishing the *County of Orange* case on the grounds that "the planning commission transcripts were not part of the history of approval of the FEIR because they did not come into existing until *after* the County's approve of the FEIR in August 2010."

Comment

The reversal of the trial court's order that the Citizenry Group pay the cost of the preparation of the planning commission transcripts is the most noteworthy aspect of this decision and has potentially broad CEQA application.

Perhaps most importantly, neither the parties nor the appellate court so much as mentioned the *Consolidated Irrigation District v. Superior Court of Fresno County (Selma II*) case out of the Fifth Appellate District filed on April 26, 2012. In *Selma II*, the certified and lodged record of proceedings included only two transcripts; it omitted transcripts from one planning commission meeting and two city council meetings. Petitioner CID requested that the transcripts of the three public hearings be included in the record. The City of Selma replied that the audio tapes of those three meetings had not been transcribed, but that CID was welcome to transcribe the tapes at its cost and move to augment the record after transcription occurred. The Fifth District addressed augmentation of the administrative record issues. First, it looked Section 21167.6(e)(4) and determined that the section did not require the transcription of the audio tapes and inclusion of those transcripts in the record. Then, the Court looked at whether the tape recordings of public agency hearings qualified as "other written materials relevant to the [City's]… decision on the merits of the project" under Section 21167.6(e)(10), as urged by CID. It held that "the purposes of CEQA are best served by interpreting the phrase 'other written materials' to include audio recordings of meetings when no transcript of those meetings has been prepared." Thus, the appellate court held that an audio recording could be considered a "writing" for purposes of Section 21167.6(e)(10).

The Fourth Appellate District never addresses this conspicuous disparity in its opinion. The reasoning used by the Fourth Appellate District for ordering the County to bear the

cost of the planning commission transcript was that the transcript had not been prepared prior to the Board's decision on the Project and thus, was not "presented to the decisionmaking body prior to action on the environmental documents or on the project" under Section 21167.6(e)(4). In other words, only an audio recording existed at the time the Board considered the project took action. Herein lies the rub. How can this similar factual pattern but disparate holding be reconciled with the *Selma II* case? At best, these two opinions create and odd conundrum for lead public agency staff having to certify and lodge administrative records. Read together, it appears one must assume the audio file would come in under the *Selma II* case, but the transcript would be excluded from the record under the *Citizenry Group* case. Of course this is not ideal given there is no practical way to cite to a transcript in a brief. Until the California Supreme Court weighs in on this issue, we suggest the following course of action when an agency prepares the administrative record of proceedings:

If there is any indication that litigation of a project could ensue, the lead agency should have any advisory agency or commission (i.e., planning commission) transcript(s) transcribed prior to the board or council's first hearing on the project. Proceeding in this manner would ensure the administrative record is complete with all relevant transcripts and would allow the agency to recover costs of those transcripts should it prevails on the merits.

B. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.

In *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 (*Neighbors*), the California Supreme Court held that a lead agency has discretion to omit existing conditions analyses by substituting a baseline consisting of environmental conditions projected to exist solely in the future, but to do so the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value.

Background Facts

The project in question was phase two of a light-rail transit project which would connect Santa Monica (on the westside of Los Angeles) to Culver City ("Expo Phase 2"). Phase one of the rail project was previously constructed; it operates to connect Culver City to downtown Los Angeles. The purpose of Expo Phase 2 was to provide high-capacity transit service between Santa Monica and downtown LA in order to alleviate extensive traffic congestion along the Interstate 10 freeway. Expo Phase 2 would be constructed and operated at street level in most areas. Thus, the rail trains could potentially temporarily impede vehicular and pedestrian traffic throughout the day at various intersections along the corridor.

Beginning in February 2007, the Expo Authority started studying Expo Phase 2 (a light-rail line running from a station in Culver City through the Westside area of Los Angeles to Santa Monica). The Authority released a Draft EIR in January 2009, published the

Final EIR in December 2009, and certified the EIR and approved the Expo Phase 2 project in January 2010. Notably, the Expo Authority used a 2030 baseline in the EIR to analyze traffic and air since the project would not be complete until then. No existing conditions baseline or analysis was completed. The Neighbors challenged the Expo Authority's future-only baseline, contending the agency should study the potential traffic impacts prior to 2030 that would need mitigating.

Traffic Impacts Analysis on Level of Service

The Exposition Authority studied the existing congestion in 2007-2008 along the various street intersections that would be impacted by the project. The Authority measured the delay or congestion in terms of the level of service (LOS). Then, the Authority looked at the Metropolitan Transit Authority's traffic projections model, which included regional growth projections for the Southern California Association of Governments, to predict the LOS for each intersection in 2030 if the Expo Phase 2 project was not built and assuming no other transit improvements along the project corridor were built. The Authority also predicted the LOS in 2030 if the Expo Phase 2 project was built and operated. The projections included reductions of vehicle trips which were expected to result from the project, along with the impact of stoppages at grade crossings as each train would pass. The 2030 year with project was compared to the predicted year 2030 LOS without the project and the level of impacts were assessed.

Supreme Court Decision

The Supreme Court accepted the case for review in light of varying appellate court decisions on the baseline matter over the years. Interestingly, even the Supreme Court was divided in finally determining the baseline issue.

The majority of the Supreme Court held that the Expo Authority had not justified its decision to prepare only a future baseline analysis with any substantial evidence. The Court noted that even though many projects will have on operational lives, the CEQA Guidelines establish a default of existing conditions baseline because such a baseline serves CEQA's goals – mainly to inform decision makers and members of the public about the short- and medium-term environmental costs of achieving the project. Furthermore, the Court noted that the use of existing conditions as a baseline make the impact analysis more understandable for the public. Notably, the majority held that the baseline error was not prejudicial.

In light of its holding, the high court disapproved the *Sunnyvale West* and *Madera Oversight* cases insofar as those cases hold that an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts.

Justice Baxter wrote a fervent dissent on this issue (joined by Justice Liu), arguing that requiring an existing conditions analysis when a future conditions analysis would provide a realistic assessment of a project's impacts is wasteful, and further, that "the majority's restrictions on agency discretion find no support in CEQA or in the [Guidelines]." The

majority of the Court dismissed Baxter's dissent and proposed future-only baselines as sanctioning "the unwarranted omission of information on years or decades of a project's environmental impacts and open[ing] the door to gamesmanship in the choice of baselines." Justice Liu wrote his own dissent indicating he believed the baseline error in the EIR was in fact prejudicial.

Comment

The take away from this case is that a lead agency has discretion to omit existing conditions analyses by substituting a baseline consisting of environmental conditions projected to exist solely in the future, ***but*** to do so the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value. Meeting this test will be nearly impossible. For one thing, it is unclear what substantial evidence could show an existing conditions analysis would be "misleading or without informational value."

Accordingly, as CEQA attorneys have been advising their agency clients since the *Sunnyvale West* case, lead agencies should analyze both existing and future condition baselines in their environmental documents.

C. ***Friends of Oroville v. City of Orovill*****e (2013) 219 Cal.App.4th 832.**

Wal-mart moved several steps closer to a new store as a result of the most recent appellate court decision over a new retail center proposed to be constructed in Oroville, suffering a setback however on greenhouse gas emissions. Friends of Oroville appealed a planning commission approval of a proposed supercenter, intended to replace an existing store. Following the appeal hearing, the City Council approved the new store, and the Friends of Oroville filed a petition for writ of mandate to set aside the approval. The trial court denied the petition, and Friends of Oroville appealed. On appeal, the appellate court affirmed the legal sufficiency of the EIR save one issue (greenhouse gases) and one clarification (payment of traffic fees.) The published portion of the decision pertains to greenhouse gas analysis, and the court ruled as follows.

The DEIR utilized Guidelines section 15064.4, which deals specifically with greenhouse gas emissions. The DEIR also examined AB 32, the Early Action Measures identified by the Air Resources Board, the California Attorney General's website list of "CEQA Mitigations for Global Warming Impacts" and the 2008 "white paper" from the California Air Pollution Control Officers Association, a comprehensive approach to analyzing the topic. The lead agency used the AB 32 reduction targets for GHG as the threshold-of-significance, an approach favorably reviewed in *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 ("*Citizens*"). Although the lead agency in Oroville operated from an appropriate legal foundation, the appellate court found two errors. First, the lead agency focused on the relative percentage of project emissions against the statewide numbers for 2004, determining that the project would contribute .003%. As the appellate court observed, the project numbers would always pale when compared to the "world's eighth largest

economy." The appellate court stated that the correct analysis, as reflected in *Citizens*, would have involved an evaluation of the project as compared to a business-as-usual reference point.

The second error involved the failure to analyze GHG generation from the existing Walmart and failure to include a quantitative or qualitative analysis of air mitigation measures 8a through 8e, a step called for in Guidelines section 15064.4. The flaws in the evidence in support of the conclusion that the impacts would be less than significant was also compounded by the fact that a majority of the project generated impacts came from transportation sources, and those were subject to state implementation. In the absence of evaluation (again quantitative or qualitative), the court concluded that the less-than-significant impact was not adequately supported by substantial evidence.

The court remanded the matter to the trial court for clarification on a traffic impact fee requirement as well as a re-evaluation of GHG emissions.

D. *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230.

In *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230, the Court of Appeal, First Appellate District, reversed a trial court's decision denying a petition for writ of mandate, and directed Mendocino County (County) to decertify its EIR, set aside its project approvals (a conditional use permit and reclamation plan), and prepare and circulate a supplemental EIR to address concerns related to an endangered frog, mitigation of impacts to prime agricultural farmland, and mitigation measures related to cumulative traffic impacts, for an aggregate mining project.

Background Facts

Granite Construction Company owns approximately 65 acres of industrial-zoned land just north of Ukiah in Mendocino County. Despite the industrial zoning, more than half of the site, 45 acres, is classified as prime farmland. The site is improved with vineyards, open space and a truck maintenance shop in the northwest corner. The Russian River borders the eastern edge of the site and Ackerman Creek on the north edge. The appellant, Masonite Corporation, owns vacant industrial property to the south of the Granite site. Kunzler Ranch Road is located on the western boundary of the site and there are commercial and industrial properties located further to the west.

In 2008, Granite applied to the County for a conditional use permit and reclamation plan to extract 3.37 million tons of aggregate from 30.3 acres over a period of 25 years. As originally proposed, the mine would operate year round, six days per week, 14 hours per day. In subsequent discussions with the North Coast Regional Water Quality Control Board, Granite agreed to suspend mining between each November and March to avoid water quality impacts. After the site is fully reclaimed, it will be available for industrial uses in the northwestern portion, and open space ponds on the remainder of the site.

The County required that an EIR be prepared, and a draft EIR was circulated for public review in September 2009. The final EIR was issued in May 2010 and identified two significant and unavoidable impacts: (1) permanent loss of prime farmland; and (2) traffic impacts in 2030. The Mendocino County Planning Commission certified the EIR and approved the CUP and reclamation plan on May 20, 2010. Masonite and Russian Riverkeeper appealed the decision to the Board of Supervisors. The Board heard and denied the appeals on July 7, 2010.

Masonite and Russian Riverkeeper timely filed petitions for writs of mandate challenging the County's certification of the EIR and approval of the project. The trial court denied the writ petitions, and both parties appealed. Russian Riverkeeper dismissed its appeal pursuant to a settlement agreement with Granite Construction and the County.

CEQA Contentions

Masonite first argued that the County should have recirculated the EIR because the project as approved had significantly greater impacts than the project as originally proposed, and because the final EIR disclosed a new significant impact on the Foothill Yellow-Legged Frog that was not sufficiently mitigated. Second, Masonite contended that the County erred in finding that conservation easements and in-lieu fees were not feasible ways to mitigate the loss of prime farmland due to the project. Third, Masonite alleged the EIR did not adequately mitigate cumulative traffic impacts on Kunzler Ranch Road.

The appellate court's discussions regarding recirculation and mitigation for cumulative traffic impacts were not published, and thus, are not analyzed further in this article.

Conservation Easements as Mitigation for Loss of Prime Farmland

The Department of Conservation Farmland Mapping and Monitoring Program identified 45 of the 65 project acres as prime farmland. The EIR indicated that the loss of the 45 acres would be a significant and unavoidable impact that could not be feasibly mitigated. During the public review process, the Department of Conservation commented that the County could minimize the 45-acre loss by requiring the acquisition of an agricultural conservation easement on comparable land of at least equal size since the loss of prime agricultural land can have at least regional – if not statewide - significance. The County responded by incorporating the draft EIR language into the final EIR. The County made a finding that mitigation of the loss of the 45 acres would be infeasible because "an [agricultural conservation easement] does not replace the on-site resources, but rather, it addresses the indirect and cumulative effects of farmland conversion…. Because the project site is surrounded by existing and vacant industrial uses, with the exception of the west side, it is unlikely that this project would affect neighboring agricultural uses." In so finding, the County addressed only the *indirect cumulative* effects of the conversion of 45 acres of prime farmland, and it never addressed the *direct* effects of such loss. This was a legal error on the part of the County, and as a result, the Court of Appeal applied the less

deferential *de novo* standard of review, instead of the usual substantial evidence standard used to review the County's finding of infeasibility.

The appellate court held as follows: "We conclude that [agricultural conservation easements] may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. Our conclusion is reinforced by the CEQA Guidelines, case law on offsite mitigation for loss of biological resources, case law on ACEs, prevailing practice, and the public policy of this state."

The Court of Appeal ordered the County to explore the economic feasibility of off-site agricultural conservation easements to mitigate the project's impact on the loss of 45 acres of prime farmland.

In-Lieu Fees as Mitigation for Loss of Prime Farmland

The County did not respond to the Department's suggestion during the public comment on the draft EIR that as an alternative to the purchase of an agricultural conservation easement, the County could mitigate the impact via in lieu fees, which could be used to purchase one or more conservation easements. In court, the County argued that it could not accept in-lieu fees because it did not have a comprehensive farmland mitigation program; thus, mitigation requiring the payment of an in-lieu fee was infeasible.

The appellate court agreed with Masonite that under CEQA Guidelines section 15088, the County was required to provide a response with a reasoned analysis. The Court of Appeal further explained that the County's arguments regarding infeasibility were unpersuasive because the Department's suggestion had not advocated payment of in-lieu fees to a County program, but rather through third parties that would acquire and manage the conservation easements.

The Court ordered the County to analyze the use of in-lieu fees to mitigate the loss of prime farm land.

Comment

The *Masonite* decision confirms previous court of appeals decisions out of the Third, Fourth and Fifth Appellate Districts on the feasibility of conservation easements in mitigating the loss of prime agricultural land. See *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296; *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316; and *Building Industry Association of Central California v. County of Stanislaus, et al.* (2010) 190 Cal.App.4th 582. However, there are two additional points of interest to this case: first, the standard of review used by the Court of Appeal to review the County's finding of infeasibility regarding agricultural conservation easements to mitigate the permanent loss of farmland; and second, the Court's analogy between the loss of prime land and the loss of habitat.

With respect to the standard of review, as noted above, the Court of Appeal employed the *de novo* standard which applies to questions of law (versus the substantial evidence standard, which applies to the review of questions of fact, like infeasibility findings). It appears the Court used the *de novo* standard because the County made a *legal* determination that conservation easements were not feasible means by which to mitigate the loss of farmland, and thus, the administrative record contained no factual evidence for the Court to review regarding economic or any other infeasibility argument.

The second point of interest is a more esoteric one. Initially, I preface my comment with the fact that as I understand the *Masonite* decision, the Court of Appeal simply held that conservation easements can serve as feasible mitigation for the loss of prime farmland. But, the Court did not say conservation easements mitigate the loss of prime farmland *to a less than significant impact*. And, in fact, the *Masonite* case, as the cases cited within it, all conclude that the loss of prime farmland is significant and unavoidable because it is irreplaceable. With that backdrop, the *Masonite* court's analogy between the loss of prime land and the loss of habitat was interesting and the first such analogy I've seen in a published court decision. I myself have thought of that analogy a number of times, but have always hesitated to use it. To me, the analogy begs the following question: how does the mitigation of loss of habit through conservation easements reduce the impact to less than significant, but the mitigation of loss of agricultural land through conservation easements does not? There seems to be a fundamental disconnect there. (Presumably the rationale is that one can recreate a wetland where one never existed, but cannot similarly recreate prime farmland.) Whatever the reason, the *Masonite* court does not answer the question.

E. *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503.

Famous for its bird sitings (http://www.audublog.org/?p=4155), Panoche Valley sits nestled between Interstate 5 and Highway 101 (http://www.cosb.us/Solargen/). Few Californians have passed through this quiet terrain, and but for this court decision, would not know that this valley exists. Besides its limited number of residents and great diversity in bird species, Panoche Valley is also notable in that (1) it is exposed to high levels of solar radiation, and (2) it is bisected by a 230 kV transmission line. Just as no-good-deed-goes-unpunished, neither do conflicting environmental values resolve themselves without a CEQA lawsuit.

The Panoche Valley solar panel project involves approximately 5,000 acres, much of it covered by Williamson Act contracts. The project consists of panels necessary for a 420 megawatt facility, along with related improvements necessary to tie into California's transmission grid. Originally, the developer sought a finding that the solar facility was consistent with the Williamson Act contracts, but later dropped that strategy to seek contract cancellation. As one would anticipate for a large project in an environmentally sensitive area, agencies and the public commented on the species impact analysis. After certification of the EIR, the Board of Supervisors cancelled the Williamson Act contracts and approved the project. Opponents sued, and the trial court ruled for the county and

applicant. The opponents appealed. Addressing both EIR and Williamson Act issues, the court of appeal affirmed the lower court decision.

CEQA Alternatives. Opponents challenged the County's determination that the Westlands CREZ, a potential solar site located nearby in Fresno and Kings counties to be an infeasible alternative. The county found the CREZ to be infeasible on multiple grounds including that fact that it was located outside of San Benito County, a relevant consideration in the assessment of the court of appeal. As the Board found that each basis for infeasibility stood on its own and operated independently from the others (as it also did for the statement of overriding considerations,) the opponents had to demonstrate that there was a lack of substantial evidence on each stated ground, a burden that they failed to overcome.

Species Impacts. With respect to the Blunt-nosed Leopard Lizard, the appellate court upheld the EIR's requirement of a later protocol level survey to be conducted prior to commencement of construction, and where discovered, a minimum 22 acre buffer zone for each lizard. In response to claims of deferred mitigation, the appellate court found the EIR contained the requisite performance standards (blunt nosed leopard lizard, nest birds, San Joaquin coachwhip, coast horned lizard, kangaroo rat, San Joaquin pocket mouse and Tulare grasshopper mouse) necessary to satisfy CEQA's standards for deferred mitigation. The opponents also challenged the mitigation ratios, but the appellate court held that CEQA did not require acre-for acre mitigation, only mitigation to a less than significant level. Substantial evidence in the record supported the Board of Supervisors' findings in that regard.

Agricultural Lands Mitigation. The EIR required conservation easements and restoration of the site to its original condition at the conclusion of the project was sufficient to reduce impacts to lands. Notwithstanding the opponents' claim, CEQA did not require the applicant to create additional agricultural lands such that there would be a net-zero effect.

Findings and Statement of Overriding Considerations. The opponents challenged the timing of the statement of overriding considerations, which occurred on the same date as the contract cancellation but in advance of final approval. The appellate court found no error as the cancellation of the contracts constituted a form of project approval. As against a general attack there was a lack of substantial evidence in support of the project findings, the court found sufficient substantial evidence in the record. The fact that there was conflicting evidence in the record did not negate the substantial evidence in support of the Board's conclusions.

Williamson Act: Although cancellation of Williamson Act contracts is disfavored, contracts can be cancelled if the approving agency makes certain findings, which include that "other public concerns substantially outweigh the objectives of this chapter, (and) there is no proximate non contracted land which is both available and suitable for the use to which it is proposed the contracted land be put….". Government Code section 51282. The administrative record included relevant discussions of the legislative push to expand

renewable energy sources making up California's energy portfolio, as well as an analysis of the relative role of the contracted land as a percentage of San Benito County and statewide Williamson Act lands. This satisfied the first prong of the test for cancellation. The record also contained substantial evidence as to the availability (in actuality, the lack of availability) of the Westlands CREZ site. This evidence supported the second prong of the test necessary for a contract cancellation that there was no proximate non contracted land available for the proposed use. As the appellate court observed, it was not tasked "with weighing the pros and cons of cancelling the Williamson Act contracts". That responsibility belonged to the Board of Supervisors. Having found substantial evidence to support the required findings, the appellate court was satisfied.

Comment: The solar project in Panoche Valley is an outgrowth of the legislative mandate to increase the mix of renewable energy sources in California's generation portfolio. As with other renewable energy projects proposed in recent years, this is a positive step towards achieving California's objective of reducing impacts to climate change, unless apparently the proposed project is to be located within the boundaries of California. When that happens, the state strategy defaults to "let's do the right thing, but let's hang our dirty laundry elsewhere" philosophy in environmental policy advancement. The blame lies not with the various interest groups who participate in the debate, but with the State Capitol. California lacks an institutional mechanism by which conflicting policy objectives can be resolved. Right now, every regulator and every interest group is out to defend their own turf without regard for any other policy considerations and the state only makes progress through the default of what is the least objectionable, not what is best. The war of policy attrition will continue until the Legislature and the Governor step up, provide leadership, and make hard choices. Good luck with that.

F. *North Coast Rivers Alliance et al. v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614.

The Marin Municipal Water District (District) proposed to construct a desalination plant in Marin County, and certified an environmental impact report (EIR) for the project. The North Coast Rivers Alliance (Alliance) challenged the EIR on the grounds that the EIR failed to properly analyze various impact categories, including aesthetics, land use and planning, seismology, hydrology and water quality, biological resources, and greenhouse gases. The Alliance further claimed that a number of mitigation measures were improperly deferred, and that a feasible green energy alternative was not considered in violation of CEQA. The trial court granted the writ, but on appeal, the Court of Appeal, First Appellate District, reversed and ordered the trial court to issue a new judgment denying the writ petition.

Background

The District provides potable water to residents in Marin County. In 1989, the District declared a water shortage emergency, having determined that water demand will exceed water supply by 2025, even with aggressive conservation measures.

In August 2003, the District considered the construction of a five million gallon-per-day desalination plant to extract seawater from San Rafael Bay and remove the salt, other solids and constituents from the water by reverse osmosis. The resultant potable water would be supplied to the District's customers; the saline brine would be blended with treated wastewater effluent and discharged back into San Rafael Bay via the sanitary sewer system. In addition to the actual desalination plant, the District would need to construct two pipelines, two pumping stations, and three storage tanks (two on San Quentin Ridge and one on Tiburon Ridge).

The draft EIR for the project was circulated in November 2007, the Final EIR was released in December 2008, and the District Board certified the EIR in February 2009, and then, following two more public hearings, approved the project in August 2009.

Aesthetics

The EIR concluded that there would be no significant visual impact on scenic vistas from the construction of a water tank on Tiburon Ridge although the tank would be "slightly visible" from various vantage points. The trial court held that substantial evidence did not support such a conclusion, but the appellate court reversed on the grounds that lead agencies are entitled to (and in fact, must) make policy decisions regarding what constitutes substantial versus insubstantial adverse environmental impacts based in part on the setting of the project. Where an agency finds that an impact is insignificant, the EIR is only required to contain a brief statement addressing the reasons for the conclusion. The appellate court held that the District did that. The EIR in question laid out the applicable thresholds of significance and determined there would be no significant impact on "scenic vistas" based on analysis of the location of the tank versus from where and by whom it would be seen. The appellate court then reminded readers that there is a different standard of review that applies to EIRs (versus negative declarations) and under the more deferential standard of review for EIRs, the only issue is "whether substantial evidence supports the agency's conclusions, not whether others might disagree with those conclusions."

To the contrary, the EIR concluded there would be an unavoidable significant impact with respect to the two water tanks proposed to be constructed on San Quentin Ridge. As required by CEQA, the EIR still included a mitigation measure, which required the District to work with the cities of San Rafael and Larkspur to prepare and implement a landscaping plan to shield the tank site on San Quentin Ridge from view. The Alliance argued the mitigation measure failed to comply with CEQA because it did not indicate what type of plants should be used or dictate the location of plantings. The trial court agreed that failure to include these "criteria" rendered the mitigation measure "indefinite" and thus, inadequate under CEQA. The District argued the Alliance failed to exhaust the issue, but in any event, the District's mitigation measure complied with CEQA. Although the appellate court agreed the Alliance properly exhausted the issue, it again reversed the trial court on substantive grounds, holding that the District properly committed itself to working with the cities to reduce the visual impacts by implementing whatever plan was decided upon during project construction. The District also required itself to identify

success metrics such as survival and growth rates for the plantings. All this was sufficient under CEQA.

Land Use and Planning

The Alliance argued that the EIR violated CEQA because it did not address whether the Tiburon Ridge tank would be consistent with the Countywide Plan. The District countered that the Alliance failed to exhaust its administrative remedies on the issue, but in any event, the EIR contained substantial evidence to the contrary. The trial court sided with the Alliance, but was again, reversed by the appellate court on the grounds that the Alliance failed to exhaust its administrative remedies, but also that the EIR contained substantial evidence in support of the District's conclusion that the project was consistent with the county's general plan.

Seismology

The Alliance contended that the EIR failed to analyze the project's seismic impacts. Specifically, it argued that the EIR failed to explain the impacts of soil liquefaction or structural damage due to an earthquake. In its defense, the District asserted that the issues of soil liquefaction and structural damage were never raised so it could never address them. The trial disagreed, but was yet again, reversed by the appellate court. In holding for the District, the appellate court noted that oral testimony of a very general character was presented during a hearing about the impacts of an earthquake, but neither soil liquefaction nor structural damage of the tanks was specifically raised; thus, the issues were not properly exhausted. The appellate court also held that the EIR contained substantial evidence to support the District's conclusion that the project would not have significant seismic impacts. In particular, the EIR outlined the geologic conditions in the area, considered the potential for seismic hazards (including ground shaking and liquefaction), and analyzed seven potential impacts associated with geologic risks. All this, the appellate court said, was more than adequate to respond to the public's generalized comments regarding seismic impacts.

Hydrology and Water Quality

In analyzing whether the project would violate any water quality standards or waste discharge requirements, the EIR concluded that the project's impacts would be less than significant since the wastewater would be treated to comply with applicable discharge permit limits. The EIR disclosed that periodic "shock chlorination" of the intake pipe would be necessary to control barnacles and mussels that would grow within the pipe, but that no chlorinated water would be discharged to the Bay without first being treated and dechlorinated to meet discharge permit requirements. The Alliance argued that the EIR failed to analyze the potential adverse impact on the Bay from the "shock chlorination." The California Department of Fish and Game (now Fish and Wildlife) asserted that chlorine is toxic to aquatic life and cannot be discharged into the Bay. The trial court ruled for the Alliance, stating that the EIR failed to properly disclose the frequency of the shock chlorination treatments, and thus, it lacked substantial evidence to support the

District's conclusions on water quality. Reversing the trial court again, the court of appeals held that the EIRs discussion and explanation of the shock chlorination process, frequency and disposal was adequate.

Biological Resources

The desalination plant would pump seawater directly from the San Rafael Bay through the intake pipe to the plant. This could lead to entrainment of aquatic organisms, including fish. To study the impacts of entrainment, the District sampled source water from the project vicinity for one year. During the year, the District collected information on various fish and macroinvertebrates. None of the species collected from the project area were special status species. The District also proceeded with a one year pilot desalination plant, which was developed in coordination with NOAA and the CDFG. Part of the pilot study included source water sampling, which the District limited to February and March 2006 given biologic and cost considerations. The EIR analyzed the information from their studies, as well as decades of CDFG data, and the potential impact of the pumping on special status fish and aquatic life, and concluded that the project would not have a significant impact on due to entrainment. NOAA and CDFG commented on the Draft EIR and stated that the source water sampling between February and March 2006 was insufficient and should have been carried out over an entire year. The Final EIR addressed NOAA and CDFG's comments and responded that February and March were chosen for the source water sampling due to the peak abundance periods for key species and thus, the data represented the "worst case scenarios" regarding entrainment. Additionally, the District's FEIR noted that source water sampling is disproportionately costs given the laboratory research requirements in comparison to the cost of the pilot program as a whole. The EIR concluded that because the analysis annualized peak entrainment data and assumed maximum plant operation, the results regarding impacts to aquatic life were conservative.

The Alliance claimed the EIR was inadequate because the District refused to follow NOAA's and CDFG's recommendations to perform a year-long source water sampling. Although the trial court agreed, the appellate court reversed. The court reasoned that the substantial evidence standard allows a lead agency to utilize methodologies different than another agency might like to study an impact. Citing the *Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33 case, the appellate court said, "[t]he only issue is whether the lead agency relied on evidence that a 'reasonable mind might accept as sufficient to support the conclusion reached' in the EIR." In sum, a difference of opinion among experts does not invalidate an EIR – even where the experts are responsible agency staff.

The Alliance also alleged that the EIR's description of the environmental setting was inadequate because it should have included the age and types of species likely to be found in the project vicinity. The trial court agreed, but was reversed by the appellate court. The court of appeals held that the EIR sufficiently described the intake site, the species and habitat that could potential be impacted, and the life cycle information for the species at issue.

As part of the project, pile driving for the reconstruction of the Marin Rod & Gun Club pier would be required. The Alliance argued the pile driving would result in increased underwater noise and acoustic pressure waves which could have lethal effects on sensitive species. The District adopted a mitigation measure to reduce the potential impacts of the pile driving. Specifically, the mitigation measure required the District to consult with NOAA regarding appropriate measures, which could include specifying allowed seasonal work windows, and that the pile-driving activities be monitored for signs that fish are being injured. The District contended that the Alliance failed to exhaust its administrative remedies, but even if it did not, the mitigation measure is adequate under CEQA. The trial court held that the EIR was not sufficiently specific as to how the District would reduce sound pressure levels to less than significant. In reviewing the record, the appellate court noted that the while the adequacy of the mitigation measure was raised briefly, nothing in the letter suggested that the mitigation measures did not comply with CEQA or that the consultation with NOAA amounted to improper deferral. However, assuming the issues were exhausted, the court of appeal held that consultation under Section 7 of the Endangered Species Act, in conjunction with the District's commitment to avoid the take of protected species was adequate mitigation under CEQA.

Alternatives: The Use of Green Energy Credits

Reverse osmosis, a major component of the project, is a highly energy-intensive process. The Alliance asserted that the District failed to consider a reasonable alternative to the project that would reduce the project's energy impacts. The District conducted an alternative energy survey that reviewed six alternative energy scenarios for powering the project. While one of the alternatives considered by the survey was purchasing green energy credits, in the end, the EIR incorporated the alternative of replacing the existing power lines, not the purchase of green energy credits. Notably, the EIR concluded that the project would not have a significant energy impact. Here, the court of appeal noted that the green energy credits alternative was not required to be considered since the energy impacts of the project were not significant to begin with.

Cumulative Greenhouse Gases

The EIR set a threshold of reducing GHG emissions to 15 percent below the 1990 levels by 2020 in accordance with a locally adopted plan to reduce GHGs to the same level. The analysis assumed that the project would generate between 4,000 tons per year (5 MGD) and 30,000 tons per year (15 MGD) of GHG emissions; it then concluded that the project would not have significant impacts on GHG emissions. Notwithstanding this conclusion, the District Board required offsets for any project-related GHG emissions, and committed to purchasing only electricity that could be supplied from renewable sources. The Alliance disagreed with the EIR's analysis of whether the project would have cumulatively considerable impact on GHG emissions; it also argued that the District's commitment to purchase renewable energy was unenforceable and thus, improper under CEQA. The trial court agreed, and the court of appeal reversed. The appellate court noted that disagreement with an EIR's analysis is not a reason to discard the analysis so long as

the analysis is supported by substantial evidence in the record, which it was in this case. Additionally, the appellate court rejected the Alliance's argument that the commitment to purchase only renewable energy was vague and unenforceable. Such a commitment was not considered a mitigation measure given the project had no significant impacts on energy, but even if it was being used as a mitigation measure, it would have been adequate under CEQA since the Board made a commitment to proceed with the project only if electricity could be supplied from renewable sources, and the record contained evidence that such a commitment was feasible.

Recirculation

The District added an eighth alternative to the EIR in a response to comments, but did not recirculate the alternatives chapter of the Draft EIR for public review and comment. The additional alternative proposed construction of a pipeline to deliver water from the Russian River to the District. The District found Alternative 8 to be infeasible given the evidence in the record indicated that the amount of water to be delivered from the Russian River may not be available in normal years, and would likely not be available drought years. The trial court undertook its own calculations of water supply and weighing of the evidence in the record to determine that the alternative could have been feasible and that the District should have recirculated the Draft EIR. The court of appeal reversed reasoning that Alternative 8 did not add any "new significant information" that had not already been considered by the District in Alternative 2, and thus, recirculation was not required. It also agreed that substantial evidence in the record supported the District's finding of infeasibility.

Comment

This newest CEQA case was a stellar win for the Marin Municipal Water District. The case exemplifies the benefits of an agency going the distance to support of all its determinations with expert evidence in the administrative record. However, this case also reemphasizes the general premise that agencies have the discretion as to what studies they will conduct, even if one or more responsible agencies want to require more, and that courts will grant lead agencies great deference on such issues.

G. *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059.

Troesh Materials, Inc. submitted an application to the County of Santa Barbara ("County") to operate a new mine within the dry bed of the Cuyama River. The mine would be positioned away from the active streambed, and roughly 1500 feet upstream from an existing, active mine. Potential excavation could proceed to a maximum depth of 90 feet, with an average production of 500,000 cubic yards per year. Petitioner filed a CEQA petition for writ of mandate which was denied by the trial court. The ensuing appeal involved two topical areas: hydrological and water resource (supply/quality) impacts.

Threshold of Significance: The appellate court upheld the County's use of a threshold of significance specific to this proposed project. The County was not compelled to use CEQA's Appendix G thresholds, nor was it obligated to explain why it elected to not use Appendix G thresholds, or to formally adopt the alternative threshold.

Impact Analysis: Addressing appellant's challenge to the impact conclusions, the appellate court applied the substantial evidence test and concluded that ample evidence (based in part on the evidence and experience acquired from the existing mine located 1500 feet away), that there would be insignificant impacts resulting from headcutting or scouring. Appellants also criticized the EIR's suggestion of no impacts, then the addition of a proposed mitigation measure, arguing internal inconsistency. The EIR acknowledged that there was some uncertainty in the impact analysis, thus, the appellate court found no inconsistency in the use of backstopping mitigation, but simply a conservative CEQA assessment.

The appellate court then assessed the challenge to one of the mitigation measures. The dispute centered on a mitigation measure responsive to potential hydrology impacts. Despite the EIR's analysis that the impacts would be not be significant, the EIR also recognized the potential for uncertainty, and on that basis, included a mitigation measure, and with that measure, concluded that there would be a less than significant impact. This measure required semi-annual surveys up and downstream be submitted to the State's Office of Mine Reclamation ("OMR"), the County's Planning and Development Department, and the County's Flood Control District as part of OMR's SMARA compliance review. The purpose of this review would be to "confer with the County agencies to modify the mining pit layout, width and/or depth to avoid these impacts" should those be detected as part of the review. Although this requirement lacked the detail typically sought in performance based mitigation, the appellate court concluded that as this mitigation requirement was part of the EIR's discussion of hydrologic impacts, the court could rely upon that analysis to establish a context for understanding the mitigation requirement. In other words, the discussion within the EIR provided the missing framework and context to shore up the mitigation requirement. Accordingly, the appellate court rejected appellant's arguments that mitigation lacked the required performance standards to avoid a challenge of deferred mitigation.

The CEQA Error Was Not Prejudicial: The final matters of concern involved water supply and water quality. Appellant claimed that it was error for the lead agency to use the same threshold of significance for both direct and cumulative water supply impact, further arguing that the cumulative effects had been ignored. The appellate court disagreed, concluding that the standard that was used satisfied the required cumulative analysis, and despite the failure to look at non-cumulative effects, the error was rectified by the more rigorous cumulative impact analysis. The appellate court did agree with the appellant that insufficient evidence supported the conclusion of no impact to groundwater, given that the EIR contained potentially conflicting data as to groundwater levels. The County had required compliance with a mitigation measure designed to protect groundwater contamination by requiring a six foot separation between depth of excavation and groundwater, the effectiveness of this strategy which was uncontested.

However, in this particular situation, the appellant could not show that the EIR's unsubstantiated conclusion regarding no impact resulted in prejudicial error. Accordingly, the petition for writ of mandate was properly denied.

V. FUNCTIONALLY EQUIVALENT CEQA PROCEEDINGS

A. *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th. 681.

In *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th. 681, the California Air Resources Board ("CARB") adopted low carbon fuel standards ("LCFS"). An industrial producer of biofuels filed suit, and the appellate court agreed that the Board has violated both the State Administrative Procedures Act and CEQA. Although CARB operates under CEQA's "functionally equivalent" CEQA procedures, many of CEQA's key requirements apply with equal vigor. With respect to the CEQA claims, the court found that the Board had approved key elements of the LCFS regulations **before** it had concluded its environmental evaluation. This early commitment also resulted in an improper splitting of the environmental determination (performed by the executive officer) from the approval steps performed by the Board itself. CARB also violated CEQA by approving mitigation measures calling for later studies in circumstances in which the mitigation measures lacked performances standards. This resulted in improper deferred mitigation.

Finally, with respect to fashioning an appropriate CEQA remedy once a CEQA violation has been found the appellate court noted that trial courts are vested with significant discretion in crafting a suitable remedy. The appellate court noted that the adoption of regulations was distinguishable from physical construction projects in which once constructed options for alternatives or mitigation measures may be practicably foreclosed. Since the LCFS regulations were adopted for the purpose of environmental protection, the appellate court concluded that leaving the regulations in effect would not be prejudicial even though the agency was required to go back through the CEQA process.

VI. LITIGATION

A. *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889.

In *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 (*Citizens for Ceres*), the Fifth Appellate District considered a writ from the trial court's order denying the Citizens' motion to augment the administrative record with various communications and documents excluded by the City. In overruling the trial court's order, the Court of Appeal held that while Public Resources Code section 21167.6(e)(10) does not abrogate the attorney-client and attorney work-product privileges, "the common interest privilege does not protect otherwise privileged communications disclosed by the developer to the city or by the city to the developer prior to project approval." Such a ruling conflicts with the implied holding of the *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217 (*California Oak*) ruling on this issue.

Background Facts

The *Citizens for Ceres* case arose out of the City of Ceres' (City) approval of a 300,000 square foot shopping center, including a 200,000 square foot Wal-Mart store. The City certified an environmental impact report (EIR) and approved the project in September 2011. Petitioners, the Citizens for Ceres (Citizens), challenged the City's certification and approval of the project under the California Environmental Quality Act (CEQA).

The City prepared the administrative record, and in the course of reviewing the index for the proposed administrative record, the Citizens discovered the proposed record contained *no* emails or internal memoranda between the agency and its consultants or the applicant. Despite Citizens' concerns regarding the dearth of emails and internal memoranda in the proposed administrative record, the City certified and lodged the record. The Citizens filed a motion to augment the record with emails and internal memoranda, which motion the City opposed on the grounds that such documents were attorney-client, work product privileged subject to the common interest doctrine. The City also prepared a privilege log of the withheld communications, along with four declarations supporting the confidentiality of the documents. The trial court denied the Citizens' motion to augment the record, which the Citizens now appeal.

In overruling the trial court's order denying the Citizens' motion to augment the administrative record, the appellate court noted that the privilege log prepared by the City was unclear as to who the parties listed on the documents were (i.e., whether they were attorneys) and what privileges or protections applied to keep each of the documents from being disclosed. The court of appeal also noted that with the exception of four documents, the declarations did not state the declarants' personal knowledge that any of the documents were communications made in the course of the attorney-client relationship or were the work product of an attorney.

Discussion

The first issue addressed by the appellate court was whether CEQA abrogates all privileges generally. The court concluded CEQA does not abrogate all privileges generally because the phrase "notwithstanding any other law" at the beginning of section 21167.6 does not apply to subsection (e) thereof. The court of appeal reasoned that if the Legislature intended to abolish the attorney-client and work product privileges for purposes of compiling CEQA records, it would have stated that intention clearly, which it did not.

Next, the court addressed whether the common-interest doctrine protected communications between the City, its consultants, and the developer pre-project approval. In holding that the common interest doctrine does not protect such communications prior to project approval, the court of appeal stated that the doctrine extends to communications protected by the attorney-client privilege or the work product doctrine only where the disclosure is necessary to accomplish the purpose for which the legal advice was sought" and that the "doctrine is not an independent privilege but a

doctrine specifying circumstances under which disclosure to a third party does not waive privileges." In citing OXY Resources California LLC v. Superior Court (2004) 115 Cal.App.4th 874, the Fifth Appellate District noted that "for the common interest doctrine to attach, most courts seem to insist that the two parties have in common an interest in securing legal advice related to the same matter –and the communications be made to advanced their shared interest in securing legal advice on that common matter." (*Id.* at p. 891.) The appellate court reasoned that the city and the applicant/developer had no common interest because "the developer ha[d] no interest in the development of an environmental document that does not support the developer's proposal." Additionally, the appellate court reasoned that "the agency cannot have an interest, prior to project approval, in producing a legally defensible EIR or other environmental document that supports the applicant's proposal. At the same time, of course, the applicant's primarily interest in the environmental review process is in having the agency produce a *favorable* EIR that will pass legal muster. These interests are fundamentally at odds."

Citing the *California Oak* case, the City and applicant argued that the communications between them pre-project approval were privileged because they had a common interest in not only defending, but producing, a legally defensible EIR. The Fifth Appellate District disagreed and declined to follow *California Oak*.

Comments

Despite the ruling issued by the Third Appellate District in the *California Oak* case, public agency lawyers have remained skeptical about the protection afforded by the common interest doctrine and have taken the conservative approach, advising their clients that anything written in an email and/or memorandum (other than attorney client or attorney work product materials) is potentially subject to inclusion in the administrative record.

Because the Fifth Appellate District has explicitly disagreed with and declined to follow the Third Appellate District's ruling on the issue of common interest doctrine as outlined in the *California Oak* case, there is now a very clear split among the appellate districts. Counsel on behalf of cities and/or counties will likely file a request for depublication. If the request is denied, hopefully, the City and/or Walmart will petition the California Supreme Court for review of this issue so lead agencies can obtain clear guidance on whether the common interest doctrine truly only attaches post-project approval as the Fifth Appellate District now suggests.

In the meantime, as I have always cautioned both my lead agency and developer clients alike, if you don't want to see an email in the administrative record … DON'T WRITE IT! Instead, as Bill Abbott has always advised, "Pick up the damn phone."

B. *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167.

Approval of a negative declaration requires separate and distinct determinations from those involving action on the project entitlements. Accordingly, the CEQA document

must be included on the agency agenda as specified by the Brown Act (Government Code § 54950 et seq.).A petitioner may legally challenge an agenda error of the Planning Commission, even when later cured by the Board of Supervisors. The trial court is authorized to award reasonable attorneys fees and costs to plaintiffs in successful Brown Act litigation.

C. *Comunidad En Accion v. L.A. City Council* (2013) ___ Cal.App.4th ___.

Comunidad timely filed a CEQA petition to challenge the City of Los Angeles' approval of expanded solid waste facilities at the Bradley Landfill in Sun Valley, California. However, Comunidad failed to timely file its request for hearing on the petition (i.e., 90 days from the filing of the petition). Real Party in interest Waste Management filed a motion to dismiss the CEQA petition on the same grounds, pursuant to Public Resources Code (PRC) section 21167.4(a). Upon receipt of the motion to dismiss, Comunidad filed its request for a hearing along with a Code of Civil Procedure (CCP) section 473 motion to grant relief and oppose the motion to dismiss on the grounds of excusable neglect (i.e., counsel inadvertently omitted the 90-day hearing request from his personal calendaring system, which mistake was compounded by a family illness requiring counsel to leave the state for two weeks). The trial court denied Comunidad's motion for relief and Comunidad appealed. The Second Appellate District reversed and held that the trial court abused its discretion in denying petitioner's motion for relief from dismissal pursuant to CCP section 473. The appellate court relied on its previous ruling in *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136, wherein it held that "[t]he language of CEQA does not shield *Public Resources Code section 21167.4* dismissals from the amelioratory provisions of *section 473 of the Code of Civil Procedure*." (Citations omitted; italics in original.). In *Miller*, the plaintiff (in *pro per*) sought relief from default on the ground of mistake of law. In granting her relief from the 90-day time frame in Section 21167.4(a), the court noted that she had already filed noticed motions for three hearings (i.e., one for a TRO, another for an OTC, and an opposition to demurrers filed by respondents). Further, the record indicated that Miller's actions were not "dilatory" and she was attempting to diligently prosecute her case. Thus, the court concluded "her mistake of law was both justifiable and reasonable." (*Id.* at p. 1137.) (But see, *Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596 [holding, in an unpublished part of the opinion, that the trial court did not abuse its discretion in denying relief for the late filing a request for hearing on the 91st day, even before a motion to dismiss is filed, under CCP 473.) The *Comunidad* court undoubtedly felt somewhat restricted by the ruling in *Miller*.

Comment: The lesson to be learned is that it the Second Appellate District is willing to apply CCP section 473 to provide relief for the late filing of a *request for hearing* under Section 21167.4 where there is any evidence of excusable neglect so long as the case is being diligently prosecuted and there is no prejudice to the other parties. Note, however, that no such relief is available with respect to the filing of a CEQA petition. See *Alliance for Protection of Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25 [holding that CCP 473 will not excuse the late filing of a CEQA *petition*] (Item D., below).

D. *Alliance for the Protection of the Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25.

The Third District Appellate Court held that California Code of Civil Procedure section 473 does not provide relief from a petitioner's mistake that resulted in the late filing of a CEQA petition. While the provisions of section 473 are to be liberally construed, the statute cannot be construed to offer relief from mandatory deadlines deemed jurisdictional in nature such as Public Resources Code section 21167.

In 2008, Bohemia Properties, LLC submitted an application to the County of Placer (County) for the development of a 155,000-square foot building. The County required that an environmental impact report (EIR) be prepared for the project. After the requisite hearings, the Planning Commission certified the EIR and approved the project in July 2010. Alliance filed an appeal to the Board of Supervisors, which was heard on September 28, 2010. The Board denied the appeal and again certified the EIR and approved the project. The County timely filed and posted a notice of determination on September 29, 2010.

Pursuant to Public Resources Code section 21167(c), an action to set aside an EIR must be filed within 30 days from the date of the filing of the notice of determination. In this case, the Alliance was required to file its CEQA petition on or before October 29, 2010. However, Alliance did not file its petition until three days later on November 1, 2010.

Bohemia filed a demurrer to the petition, alleging the petition was not timely filed. Alliance filed a motion for relief under CCP section 473, as well as an opposition to the demurrer, on the grounds that the late filing resulted from a "miscommunication with the attorney service as to the deadline for receipt of the Writ." The trial court sustained Bohemia's demurrer without leave to amend and denied Alliance's motion for relief on the grounds of mistake and excusable neglect on the grounds that the 30-day statute of limitations contained in Public Resources Code section 21167 is mandatory and does not provide for an extension of time to file a petition based on a showing of good cause.

In interpreting CCP section 473, the appellate court looked to the California Supreme Court case of *Maynard v. Brandon* (2005) 36 Cal.4th 364 (*Maynard*). In *Maynard*, the Supreme Court considered whether relief under section 473 was available for a party who failed to comply with the 30-day statute of limitations in the Mandatory Free Arbitration Act. The Court held that it did not, noting that section 473 provides relief only for procedural errors (i.e., untimely demands for expert witness disclosures, etc.). The appellate court also looked to *Kupka v. Board of Administration* (1981) 122 Cal.App.3d 791, wherein the court held that section 473 could not operate to provide relief for the late filing of a petition for writ of mandate to review an administrative decision on the basis that statute of limitations are not flexible in nature, but are firmly fixed, unless the legislature expressly provides for an extension based on a showing of good cause.

The court of appeal in this case noted that while the provisions of section 473 are to be liberally construed generally, and further, that CEQA should be broadly interpreted to

protect the environment, CEQA also clearly requires prompt resolution of lawsuits claiming violations of it. Alliance argued that other courts have required relief to CEQA's 30-day statute of limitations, but the court distinguished each case Alliance offered in support of its argument and specifically noted that none of the cases proffered by Alliance related to section 21167.

Moral: If you are a petitioner and you are going to file a petition for writ of mandate to challenge an agency's actions under CEQA – whether that challenge is procedural or substantive in nature – compliance with the statutes of limitations under Public Resources Code section 21167 are mandatory. CEQA provides three distinct statutes of limitations - a 30-day, 35-day, and 180-day statute of limitations - depending on the specifics of the CEQA challenge and whether a notice of exemption or notice of determination was properly filed and posted. Strict compliance is required as failure to timely file a petition for writ of mandate pursuant to CEQA will not be excused.

If you have any questions about these court decisions, contact William Abbott or Katherine Hart. The information presented in this article should not be construed to be formal legal advice by Abbott & Kindermann, LLP, nor the formation of a lawyer/client relationship. Because of the changing nature of this area of the law and the importance of individual facts, readers are encouraged to seek independent counsel for advice regarding their individual legal issues.