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THE 2014 ENVIRONMENTAL LEGISLATIVE RECAP: AN ELECTION YEAR DROUGHT

By

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The 2014-2015 Legislative Session yielded 930 new laws amid the back drop of an extended three-year drought and a low key, off-year election. Governor Jerry Brown sailed to an unprecedented fourth term. He staked his low-key reelection strategy backing a statewide water bond and an expanded rainy day fund, both of which were approved overwhelmingly. The rainy day funding formula was reconfigured to earmark revenues from the state's general fund to strengthen the reserve and pay down state debt.

Water supply and water quality policies dominated the legislative session with the Legislature crafting a first-ever comprehensive groundwater management program for the state. Governor Brown was less willing to sign legislation crafting other new programs. Rather, the Governor was more apt to approve adjustments to existing programs that are designed to optimize program performance. Nonetheless, Governor Brown approved a balanced and wide-ranging collection of new environmental, health, and safety laws addressing public safety at manufacturing facilities, pipelines on the rail lines. He also championed a controversial law banning single-use plastic bags while also eliminating a hazardous waste exemption for auto shredder waste.

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Special thanks to Tina Cannon-Leahy JD for her invaluable legislative insights regarding water quality policy.

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Other notable legislation includes policies to expand affordable housing, a mandate for businesses to compost, and another set of significant reforms affecting Certified Unified Program Agencies (CUPAs) and Hazardous Materials Business plans (HMBPs). Additional new laws were enacted to modify the Underground Storage Tank (UST) program, increase regulatory controls on pesticide, strengthen Bottle Bill enforcement, add a new category of short-lived climate pollutants (SLCPs), facilitate solar energy, and modify forest practices. Most of these laws took effect on January 1, 2015, except for urgency laws which took effect upon the Governor's signature.

Water Quality and Water Supply

This Legislative session was dominated by the unrelenting three year drought and capped by the approval of a refashioned $7.545 billion water bond for water supply and quality infrastructure programs and other water-related programs. The Legislature made two previous attempts to deliver an $11.14 billion water bond to the voters. These measures were originally passed during the Extraordinary Session called by then-Governor Schwarzenegger to address water-related issues in 2009. Voting on that bond was delayed in 2010 and again in 2012 over fears that the sluggish economy made approval unlikely. The viability of the water bond changed when the state's fiscal picture improved and California entered its third year of drought. In order to garner the 2/3rds majority of both houses necessary to send the revised water bond to the Governor and garner his signature in time for the November 2014 ballot, Democrats trimmed the bond ceiling but left in the $2.7 billion for surface water and groundwater storage projects Central Valley Democrats and Republicans demanded.

The final and ultimately successful version of the water bond earned broad support from a divergent collection of often hostile interest groups by reducing the overall debt load, achieving "neutrality" with regard to any Sacramento-San Joaquin Delta issues, including deleting any references to the controversial Bay Delta Conservation Plan, and maintaining strong sideboards for accountability and transparency, such as prohibiting legislative appropriations for specific projects.

The Legislature approved, and the Governor signed AB 1471 (Rendon, Atkins, Gatto, Perea, Salas, and Gomez) which placed the water bond on the November 2014 ballot. This urgency law repealed the 2009 Water Bond and replaced it with the Water Quality, Supply, and Infrastructure Improvement Act of 2014. This new bond shaved the funding for eligible water projects and programs down to $7.12 billion and then swept up and repurposed $425,000,000 of the unissued bond funding from Propositions 1E, 13, 44, 50, 84, and 204 to achieve a total of $7.545 billion.

The final version of the water bond added funding to support statewide flood management projects and set aside funds for safe drinking water for communities, integrated regional water management, storm water capture projects, water recycling and groundwater sustainability initiatives, agricultural and urban conservation, and investment in Delta levees.

The 2014 bond earmarks $1.495 billion for grants to fund ecosystem and watershed protection and restoration projects. The bond provides $200 million to fund in-stream flow and $100 million for urban creeks, and urban watersheds, particularly the Los Angeles River and its tributaries. It also allocates $50 million to the Sacramento-San Joaquin Delta Conservancy and $285 million for projects outside the Delta. The bond additionally directs the Delta Conservancy to implement voluntary projects on private land to meet conservation objectives

on public lands. The bond also requires that augmented water flows must support fishery or ecosystem in addition to and not in lieu of preexisting commitments to environmental mitigation. Lastly, $475 million is allocated to fund State obligations including the Klamath settlements; the Salton Sea restoration; the San Joaquin River Settlement Agreement; the Tahoe Regional Planning Compact; and, the State's share of Central Valley Project Improvement Act refuge water supplies.

SB 103 and SB 104 (Committee on Budget and Fiscal Review) were urgency laws aimed at providing immediate relief to the impacts of the California drought. The new laws allocated a combined total of $482.5 million to fund, among other projects, emergency drinking water supplies for disadvantaged communities and communities without water supplies, and rental assistance and rapid housing for displaced workers. Of that total, the largest portion\s was $472.5 million of Integrated Regional Water Management funds from Proposition 84 (*the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006*) including $200 million specified for a special solicitation of drought relief projects.

SB 104 also included several important policy provisions. It allows funds for job retraining to be available if a state of emergency is issued by the Governor under the California Emergency Services Act and it provides increased enforcement authority to the State Water Resources Control Board in "critically dry years." The law then defines "critically dry years" to include "critically dry years immediately preceded by two or more consecutive below normal, dry, or critically dry years, or during a period for which the Governor has issued a proclamation of a state of emergency based on drought conditions."

This new law raises penalties connected to unauthorized water diversions from $500 to $1,000 for each day in which the trespass occurs. It also expands the penalty for exceeding water in critically dry years to $2,500 per acre-foot of water diverted or used. This new law also imposes a $500 per day fine for violations of RWQCB-issued permits, licenses, certificates, or registrations. This new law additionally increases the penalty for violation of a cease and desist order from a maximum of $1,000 to $10,000 in a critically dry years. Finally, this new law specifies the circumstances governing when the SWRCB can adopt emergency regulations during critically dry years and additionally authorizes the SWRCB to issue a cease and desist orders. Finally, this new law requires the State Department of Public Health (DPH), to adopt emergency regulations designed to replenish with recycled ground water.

AB 2636 (Gatto) is another law that provides funding for water projects. It establishes the CalConserve Water Use Efficiency Revolving Fund (CalConserve). This fund will support grants and loans program for public entities to finance high water-use efficiency retrofits and to support

private homeowner retrofits. This new law additionally authorizes DWR to award loans and grants to local government to fund projects supporting agricultural water conservation.

Responding to the extended drought and extensive groundwater pumping, Governor Brown signed a package of three new laws establishing the Sustainable Groundwater Management Act (SGMA). This new framework creates a first ever comprehensive, statewide groundwater management program which is designed to increase groundwater storage and remove impediments to ground water recharge. Together SB 1168 (Pavley), SB 1319 (Pavley), and AB 1739 (Dickinson) address the growing groundwater deficit. The SGMA is premised on managing groundwater at the local level taking into account the regional variability of geography, geology, and hydrology but sets standards and deadlines for ''sustainable groundwater management'' that can be enforced by state action if not achieved.

The SGMA directed the Department of Water Resources to make an initial determination by January 31, 2015 of which groundwater basins are high, medium, low and very low priority based on criteria including, but not limited to, level of groundwater dependence for municipal drinking water and agricultural irrigation. Currently this includes 127 out of 515 basins. SGMA requires local agencies in high- and medium-priority basins to form local Groundwater Sustainability Agencies (GSAs) by June 30, 2017. The GSAs must develop groundwater sustainability basin plans to reflect regional economic and environmental conditions. Governor Brown stated that with the SGMA, ''local agencies will now have the power to assess the conditions of their local groundwater basins and take the necessary steps to bring those basins in a state of chronic long-term overdraft into balance.'' GSAs are empowered to raise revenues, develop regulations, require reporting, and build water projects.

The GSAs must develop measurable performance objectives and interim targets to achieve ground water sustainability in 20 years. All over drafted basins must be subject to a GSP by 2020. Those high and medium priority basins that are not over drafted must develop GSPs two years later. Ultimately, high and medium priority basin must achieve sustainability by 2040. DWR has two years to evaluate GSPs after submission. DWR will provide technical assistance to GSAs and must, by January 1, 2017. The DWR is authorized to intervene on those instances where local agencies are unable or unwilling to manage their groundwater ''to ensure protection of the basin and its users from overdraft, subsidence, and other serious problems.''

The SGMA exempts GSP development and adoption from the California Environmental Quality Act (CEQA); however, projects implementing a GSP are not relieved from CEQA compliance. Local planning agencies must consider the relevant GSP before adopting a general plan or approving a substantial amendment to a general plan. In addition, local agencies must also consider the GSP before approving or substantially amending a groundwater management plan, groundwater management court ruling water right adjudication including orders and interim plans issued by the SWRCB. Finally, the SGMA explicitly preserves surface and groundwater rights pursuant to common law.

AB 2259 (Ridley-Thomas) is another new law governing groundwater management. This new law modifies procedures governing the only water replenishment district in California which is located in Los Angeles County. This water replenishment district recharges groundwater for later use. Assembly member Ridley-Thomas introduced this new law to close address a gap in the Water Replenishment District Act which does not establish a time period to challenge a replenishment assessment. This new law provides that challenges to replenishment assessments must commence within 180 days of the district's approval of to levy the replenishment assessment.

SB 4 (Pavley, Chapter 313, Statutes of 2013) established a comprehensive set of rules governing hydraulic fracturing and acid well stimulation. SB 1281 (Pavley) expands this framework and requires the Division of Oil, Gas and Geothermal Resources (DOGGR) to compile data on unlined oil and gas field sumps. This new law requires well owners to additionally collect and report the amount of water consumed as a result of oil and gas field activities. They must provide, on a quarterly basis, information on the source of the water and volume of water used as well as water used in conjunction with injected fluid or gas. Oil and gas well owners must also report on ''the treatment of water and the use of treated or recycled water.'' Finally, this new law requires Department of Oil, Gas and Geothermal Resources (DOGGR) to annually provide an inventory of unlined oil and gas field sumps to the SWRCB and the RWQCBs.

Several new laws were enacted to advance former Governor Schwarzenegger's directive to reduce per capital urban water use by 20 percent by 2020 (known as the 20x2020 Water Conservation Plan). AB 2282 (Gatto) is designed to clear infrastructural barriers to increasing the use of recycled water in commercial, public, and residential buildings. This new law creates the first statewide building standards requiring ''purple pipes'' to convey recycled water in new and existing buildings. This new law requires the California Department of Housing and

Community Development (HCD) and California Building Standards Commission (CBSC) to develop mandatory green building standards for adoption in mid-2017. AB 2071 (Levine) is another new law addressing recycled water. It requires, by December 31, 2016, the SWRCB to develop recycling criteria for using disinfected tertiary treated recycled water for dairy animals.

AB 2443 (Rendon) is another law that removes barriers to using recycled water by allowing public agencies within the territory of a mutual water company to provide recycled water without compensation as long as that agency complies with the Water Recycling Act of 1991. The Act requires retail water suppliers to identify potential uses and potential customers for recycled water within their service areas. Under the Act, these water suppliers must identify potential sources of recycled water.

Pursuant to the Urban Water Management Planning Act, urban public and private water suppliers are required to adopt urban water management plans (UWMPs) designed to achieve the state's 20% per capita reduction goal of water use by December 31, 2020. SB 1420 (Wolk) requires urban water suppliers to include in their UWMPs the amount of water lost via the water distribution system. This new law additionally requires urban water suppliers to electronically file UWMPs with the California Department of Water Resources (DWR). AB 2067 (Weber) is another new law pertaining to UWMPs. It was introduced to implement a series of recommendations that grew out of an independent technical panel convened in response to earlier legislation. This new law restructures the UWMP data and format for describing demand management measures designed to achieve specified targets. Water suppliers must submit their 2015 plans to the DWR by July 1, 2016.

The American Council for an Energy-Efficient Economy has determined that water utilities in California are significant consumers of energy and that the energy intensity of California's water supply is at least twice that of the national average. SB 1036 authorizes urban water suppliers to estimate the amount of energy consumed in order to extract or divert water supplies and to include this data in their UWMP. This new law requires DWR to develop a methodology to assist urban water suppliers in determining the energy intensity of its water system.

SB 1120 (Galgiani) was introduced to synthesize readily available information on regional water supply projects already under development. SB 1120 (Galgiani) requires the DWR to voluntarily survey local regional water supply projects including reservoirs, conjunctive management and groundwater storage, water transfers, groundwater recharge, emergency wells, desalination, and reuse. The DWR must publish the survey results on its internet website by July 1, 2015.

It is often said that "what you measure you manage." Where a landlord pays the master water meter and then bills its tenant for their share, tenants are not in a position to conserve because it is typically not feasible to measure their proportional usage. AB 2451 (Daly) assists tenants and subtenants in measuring their pro rata water consumption. This new law requires county sealers to inspect and certify the accuracy of water submeters when requested by owners, users or submeter operators.

SB 985 (Pavley) is premised on the notion that storm water and dry weather runoff represent opportunities to more efficiently capture water for beneficial uses. This new law builds upon the Storm water Resource Planning Act of 2009 (SRPA), and authorizes cities, counties, and special districts to implement storm water resource plans (SRPs) that identify and prioritize stormwater and dry weather runoff capture initiatives. This new law also requires that local governments prioritize storm water and dry weather runoff capture projects as well as to prioritize the use of lands or easements in public ownership to capture, clean, store and use storm water runoff either onsite or offsite. This new law expands the SRP standards to include dry weather runoff projects. This new law requires that the SRP be submitted to an applicable "regional water management group."

AB 1905 (Alejo) modifies the activities for which one can obtain the right to appropriate water. This new law allows small domestic uses and a livestock stock pond uses for the same water storage facility. In addition, this new law permits water from livestock stock ponds to be used for fire protection.

The Legislature generated several other laws to improve water quality in California. Section 303 (d) of the federal Clean Water Act requires states to inventory "impaired" water bodies that fail to achieve water quality standards designed to serve specified beneficial uses. States must establish total maximum daily loads (TMDLs) for the impaired water bodies. The SWRCB must integrate TMDLs into the State Water Quality Management Plan. AB 1707 (Wilk) is designed to improve the scientific peer review process governing the establishment of TMDLs. This new law requires the SWRCB and RWQCBs post copies of the external peer review of TMDLs on its Internet Web site.

The SWRCB and local health officers (LHOs) are obligated to warn the public when there are elevated levels of indicator bacteria in beach waters which suggest the presence of pathogens. SB 1395 authorizes the DPH to permit local health officer (LHOs) to employ polymerase

chain reaction testing methods to assess enterococci bacteria levels. Through executive action, the Governor recently shifted implementation of the State Drinking Water Program (DWP) from the DPH to the SWRCB's Division of Drinking Water. This jurisdictional move was triggered by frustration of DPH's perceived inability to fund disadvantaged communities in a timely manner. Assembly member Perea was unsuccessful in codifying this change in AB 145.

AB 2759 (Committee on Water, Parks and Wildlife) repeals a California statute that does not recognize water rights involving interstate waters flowing from Nevada into California. The United States Supreme Court (Sporhase v. Nebraska 458 U.S. 941 [1982]) held that a similar Nebraska statute was unconstitutional concluding it violated the Commerce Clause. AB 2759 was introduced to reconcile this California statute with this Supreme Court ruling. This new law specifically provides that the water rights decisions involving the Truckee and Walker Rivers—which flow in California and Nevada—must be consistent with the federal compact.

Clean Up

The SWRCB sponsored AB 2442 (Gordon) to address the reluctance of the SWRCB and the RWQCBs to investigate and clean up water pollution in order to avoid potential Superfund and common law trespass liability. AB 2442 immunizes the SWRCB and the regional water quality control boards (RWQCBs) from civil liability connected to the investigation and cleanup of contaminated waters. This new law protects the SWRCB and RWQCBs and its employees from civil trespass "or any other act that is necessary to carry out an investigation, cleanup, abatement, and remedial work." These protections apply to claims made on or after January 1, 2015.

The Polanco Redevelopment Act was enacted to encourage redevelopment agencies to develop brown fields by authorizing them to manage cleanup of contaminated properties. The Polanco Act provided agencies, developers, and future property owners limited immunity for cleanup activities. AB 471 (Atkins) is an urgency law designed to generate tax revenues to support redevelopment projects. This new law authorizes cities to establish Infrastructure Financing Districts (IFD) to fund the management of "stranded housing assets" and clarifies how to complete projects that were already in the pipeline before the redevelopment agencies (RDAs) were dissolved. An IFD is a financing a mechanism involving a bond that is repaid with property tax revenues.

In order to help revitalize communities impacted by closed military bases, AB 229 (John A. Pérez) was introduced to use infrastructure and revitalization financing districts (IRFDs) as a funding mechanism to, among other purposes, fund brownfield clean-ups. This new law permits cities, counties and joint powers agreements to establish military base reuse authorities by forming IRFDs to finance projects at former military bases. In order to qualify, these projects must be of "community-wide significance" and can include watershed lands, flood management, habitat restoration, and brownfields restoration and other environmental mitigation.

The DWR issues grants from Proposition 84 and requires applicants for grants to develop Integrated Regional Water Management Plans (IRWMPs). AB 1043 (Chau) requires that costs recovered from parties responsible for cleaning up contamination be repaid to the Groundwater Contamination Cleanup Project Fund.

AB 1249 (Salas) is another law involving IRWMPs. This new law establishes guidelines directing the DWR to remedy nitrate, arsenic, perchlorate, or hexavalent chromium contamination. Applicants seeking funding must develop an IRWMP, describing how it plans to address contamination by describing the nature and extent of the contamination, the impacts of the contamination, and a description of efforts to manage the impacts. Under this new law, DWR is obligated to evaluate whether regional water management groups propos cleanup strategies to ensure that safe drinking water is provided to small disadvantaged communities.

Tanks

The Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 reimburses small business expenses connected with the cleanup of leaking petroleum underground storage tanks (USTs). Under this Act, homeowners are given the highest priority for cleanup funds over major corporations and larger local agencies. SB 445(Hill) is an urgency law that extends this program for another ten years. This new law additionally makes adjustments to the small business loan program and authorizes the SWRCB to issue grants of up to $140,000 to remove, replace, and upgrade single-walled USTs at public fueling stations. This new law additionally increases the maximum loan amount from $50,000 to $70,000 to permanently close USTs.

The federal Resource Conservation and Recovery Act (RCRA) Subtitle I (42 U.S.C. § 6991 *et seq*.) and California Health and Safety Code 25280 *et seq*. which required USTs to be replaced with state-of-the-art technology or be retrofitted under specified conditions. Approximately 2,000 single-walled USTs and UST systems remain in service decades after these laws were enacted. SB 445 requires

owners or operators of these USTs to close them by December 31, 2025. Notwithstanding, the SWRCB is authorized to require closure of single-walled USTs prior to 2025 if the UST "poses a high threat to water quality or public health." SB 445 also requires the SWRCB to implement an Expedited Claim Pilot Project to explore strategies to improve claim processing procedures. SB 445 also adjusts funding requirements governing the UST Cleanup Fund (known as Underground Storage Tank Petroleum Contamination Orphan Site Cleanup Fund) to support response actions necessary to cleanup petroleum contamination from USTs. Sites eligible for funding no longer need to qualify as a brownfield. In addition, beginning January 1, 2015, this new law lowers the maximum grant for corrective action from $1,500,000 per occurrence to $1,000,000 while increasing the limit for regulatory technical assistance from $3,000 to $5,000. This new law also requires that the SWRCB pay corrective action costs to property owners who discover a release from a previously removed petroleum UST. This new law also authorizes the SWRCB to reimburse corrective action costs for claims received more than two years after costs were incurred. Lastly, this new law allows claimants to use the UST Cleanup fund to demonstrate evidence of financial responsibility for taking corrective action.

Hazardous Waste

The Legislature tackled several policy matters involving hazardous waste exemptions and initiated reforms to the Medical Waste Management Act (MWMA). Utility fleets carrying hazardous waste loads have enjoyed an exemption from hazardous waste transportation requirements for single shipments of up to 1,600 gallons of "California-only/non-RCRA" hazardous wastewater. This exemption was limited to dewatering activities at one or more utility vaults involving emergency responses. AB 1190 (Bloom) relaxes the exemption further and now exempts utilities that transport up to 5,000 gallons of (non-RCRA) hazardous wastewater and is limited to a single shipment. This new exemption is limited to collecting wastes from one utility vault and prohibits consolidating hazardous waste generated from more than one site. This exemption is only available to public utilities, local publicly owned utilities, and municipal utility district hazardous waste transportation requirements.

Auto shredder waste (ASW) generated from shredding automobiles and household appliances, and other scrap metal and includes a collection of hazardous chemicals including metals, chlorine and PCBs, plastics. Prior to SB 1249 (Hill), ASW was exempt from California hazardous waste laws. This new law responds to a 2002 DTSC study that concluded that treated and untreated shredder waste exceeded toxicity threshold for lead, zinc and cadmium and thus would otherwise be a hazardous waste. That study recommended that the DTSC rescind its metal shredder waste policy that exempts ASW from the Hazardous Waste Control Law. SB 1249 (Hill) directs California Department of Toxic Substances Control (DTSC) to develop alternative management regulations governing metal shredding facilities in lieu of hazardous waste management standards.

AB 333 (Wieckowski) is the first significant law modifying the Medical Waste Management Act (MWMA) since its enactment a quarter century ago. The MWMA comprehensively regulates the cradle-to-grave management of medical wastes including transportation and treatment. When the MWMA was enacted in 1991 the Department of Transportation (DOT) and the United States Postal Service (USPS) did not regulate medical wastes. The DOT and USPS have since evolved programs governing the mail back of medical waste that likely preempt the MWMA. This new law acknowledges the US DOT and USPS's medical waste requirements that govern medical waste transportation. This new law authorizes CDPH to temporarily waive transportation requirements under the MWMA during which time CDPHA determines whether and to what extent federal law preempts its provisions. This new law additionally includes within the MWMA jurisdiction "chemotherapeutic agent" and "shipping document" and now embraces all subsets of waste for purposes of "treatment." Lastly, this new law authorizes the color coding of biohazard bags and establishes red for most bags, yellow bags for trace chemotherapy waste, and white bags pathology waste. Finally, this new law establishes procedures governing medical waste generators that generate medical wastes at temporary events such as vaccination clinics.

Hazardous Materials

For the second year in a row, the Legislature took aim at revamping and reforming aspects of the State's HMBP program. Another new law establishes a program designed to manage the risk of moving chemicals and crude oil by rail. The Legislature also produced several new laws governing pesticide safety including reevaluation of a family of pesticides and restricting the use of a rodenticide, promoting integrated pest management (IPM), safety precautions for pest control devices, and protecting groundwater from pesticides. . . .

SB 1261 (Jackson) is the second year in a row where Senator Jackson delivered a package of CUPA reforms. SB 1261 (Jackson) exempts "consumer products" from HMBP requirements and specifies that retail pesticide

supply companies are subject to HMBP requirements. In addition, this new law provides an exemption from the definition of ''hazardous materials'' for non-flammable refrigerants used for comfort cooling; however, HMBP requirements still apply to ammonia in closed systems used in comfort or space cooling for computer rooms. In addition, SB 1261 now requires handlers to annually submit HMBPs to the California environmental reporting system (CERS) by March 1 or by a date established by the CUPA. The business must review and certify that the information in SERS is complete and accurate. In addition, the HMBP reported in the SERS must be made available to the public.

SB 1261 also addresses the challenges faced by businesses that operate in more than one CUPA jurisdiction and must comply with more stringent local HMBP requirements. This new law raises the bar for approving more rigorous local requirements by essentially requiring local governing bodies to approve ordinances establishing more rigorous standards.

This new law modifies the applicability of HMBP requirements to businesses located in remote areas. Unstaffed remote facilities located at least one-half mile from the nearest occupied structure are conditionally exempt from HMBP requirements. These remote businesses must initially submit an abbreviated HMBP. Finally, this law requires the Office of Emergency Services (OES), no later than January 1, 2016 to adopt regulations modifying the duty to report chemical releases. This forthcoming set of regulations is intended to resolve the controversial narrative – as opposed to numeric reportable quantity—release reporting obligations.

AB 2748 (Committee on Environmental Safety and Toxic Materials) is another law that modifies HMBP requirements. This new law responds to low participation in the California Paint Stewardship Law (AB 1343 (Huffman) Chapter 420, Statutes of 2010). The Paint Stewardship Law established a postconsumer ''take back program that requires businesses that collect used paint to submit an HMBP to the local unified program agency. However, because many of the smaller paint stores were not previously required to submit an HMBP, many of them have been reluctant to submit an HMBP in order participate in the program. AB 2748 establishes an HMBP exemption for these smaller product take-back sites by raising the threshold for an HMBP for paint drop-off sites to 1,000 gallons of paint from 550 gallons and 10,000 pounds from 5,000 pounds.

The Department of Fish and Wildlife (DFW) believes that rodenticides are responsible for elevated fatalities of non-target species including golden eagle, great-horned owl, barn owl, red-tailed hawk, red-shouldered hawk, black bear, fisher, red fox, San Joaquin kit fox, mountain lion, bobcat, and kangaroo rat. DFW contends that these animals eat rodents which bioaccumulate the anti-rodenticides in the food chain. AB 2657 (Bloom) bans commercial use of anti-coagulant rodenticides (including brodifacoum and bromadiolone). According to Assembly member Williams, bee colony losses have doubled since 2006, due in part to the widespread use of a class of chemicals (neonicotinoid pesticides) that are acutely toxic to bees. AB 1789 requires the Department of Pesticide Regulation (DPR) to reevaluate neonicotinoid pesticides by July 1, 2018 in order to assist with the prioritization and expedited review. No later than two years after the review, DPR must adopt control measures to protect pollinators.

AB 634 (Huber), Chapter 704, Statues of 2011 authorized carbon monoxide as a method of controlling rodents as a more benign alternative to traditional pest control methods. However, if used improperly, carbon monoxide can be deadly. Because carbon monoxide pest control devices are being more readily used in schools, park districts and by local governments, DPR sponsored SB 1332 (Wolk) to authorize regulations to manage the safe and effective use.

Pursuant to the Healthy Schools Act of 2000 (HSA), SB 1405 (DeSaulnier) requires DPR to ''promote and facilitate'' integrated pest management (IPM) for schools and child day care facilities. This new law also requires DPR to provide information and resources to schools regarding relevant information on IPM practices. No later than July 1, 2016, each school must designate a pest control applicator or school employee to annually complete a training course provided by the DPR.

SB 1117 (Monning) requires the DPR to develop a peer-review methodology to determine which pesticides appear on the Groundwater Protection List which have the potential to migrate to and contaminate soil and groundwater. Pesticides appearing on the list are candidates for potential regulatory control. This new law also requires the DPR to regulate each active ingredient and degradation products of a pesticide on the Groundwater Protection List. Finally, this new law requires DPR to continuously review new scientific data to determine whether previously reviewed pesticides should remain on the Groundwater Protection list.

AB 2738 (Committee on Environmental Safety and Toxic Materials) provides ''clean up'' language addressing recent changes to Proposition 65 (Safe Drinking Water and Toxic Enforcement Act of1986). Last year, AB 227 (Gatto), Chapter 581, attempted to discourage frivolous law suits by relaxing Proposition 65 enforcement provisions. That law limits private citizen suits involving alleged violations by retail businesses that fail to

conspicuously post warnings at bars, restaurants, and coffee shops where the failure is an "honest oversight." The alleged violation must be remedied within 14 days from receiving a notice to correct from a petitioner and a $500 penalty has been paid. AB 2738 clarifies that the noticing party cannot wait until after sending the 60-day notice and thus makes clear that the petitioner must immediately inform the business of its right to cure the alleged violation.

SB 1019 (Leno) is another ''clean up: measure to recently enacted law This new law requires manufacturers of upholstered furniture sold in California to display whether the furniture flame retardant chemicals have been added and requires that displaying a specified product label regarding the presence or absence of the flame retardant."

AB 380 (Dickinson) responds to a national increase in rail-related oil spills including a tragic accident involving a derailment in Lac-Mégantic, Quebec in 2013 where several tank cars exploded killing 47 people and released 26,000 gallons of crude oil into the Chaudiére River. This new law is intended to help manage the risk posed by a number oil industry infrastructure projects in California that are expected to increase rail shipments of oil. This new law was introduced to help manage the risk of chemical spills connected with anticipated crude by rail shipments of oil to California refineries. This new law is intended to help state and local emergency response agencies prepare and respond to rail-related accidents and spills involving hazardous materials including crude oil.

This new law requires rail carriers to estimate prospective weekly train movements within a county and submit to the OES. The estimate must be updated every six months and include the planned track route and the volumes of shipments of Bakken oil of at least one million gallons per train. This new law also requires rail carriers to submit Hazardous Materials Emergency Response Plans (HMER) on a quarterly basis to OES beginning January 31, 2015. In the event that the rail carrier determines there will be a material change in the volume of crude, it must notify the OES within 30 days. Additionally rai2l carriers must maintain a Response Management and Communication Center capable of live 24 hour communications with local emergency response dispatchers. Lastly, OES must provide copies of the HMERs to unified program agencies that could be impacted by a rail-related spill.

Health and Safety

Responding to concerns about chemical fires and employee chemical exposures, the Legislature produced new laws designed to manage preventive maintenance operations at refineries and chemical disclosures. Other laws impose duties on employers to remedy unsafe conditions in the work place and require the CPUC to take into consideration recommendations from the National Transportation Safety Board (NTSB).

SB 1300 (Hancock) appears to be a response to the significant refinery fire that occurred at the Richmond refinery in August 2012. This new law seeks to help manage public safety and risks by requiring petroleum refineries to notify Cal/OSHA (by September 15 annually) of their scheduled plant shutdowns (known as ''turnarounds'') to perform maintenance and repairs. The notice must provide planned work for ''all affected units,'' including information describing refinery safety and infrastructure. At the request of Cal/OSHA, petroleum refineries must allow Cal/OSHA to arrive on site to review turnaround documentation at least 60 days before the plant shutdown.

SB 900 (Hill) which is discussed further below requires that the CPUC must evaluate and manage safety impacts of its decisions. According Senator Hill the CPUC largely ignored safety recommendations of the NNTSB which could have prevented a 2013 dangerous rescue of passengers of derailment. Senator Hill responded by introducing SB 1064. This new law replicates a 2012 law (AB 578 (Hill), Chapter 462, Statutes of 2012) and requires the CPUC to respond to NTSB safety recommendations and the Federal Transit Administration (FTA) safety advisories. Specifically, this new law requires that the full CPUC vote on whether to adopt recommendations and advisory bulletins involving CPUC-regulated rail facilities. This new law also requires the CPUC to provide a written response, within 90 days, regarding NTSB rail safety recommendations. The response must detail whether the CPUC intends to implement the recommendation in full along with a proposed implementation schedule. In the event that the CPUC intends to partially implement the recommendation, it must also provide an implementation time-table and provide reasons for not fully adopting the recommendation. Should the CPUC decide against implementing safety recommendations, it must detail reasons for its refusal. Further, this new law requires, as soon as practicable, that the CPUC issue orders and adopt rules to implement the NTSB recommendations and FTA actions it deems appropriate. In addition, the CPUC is required to consider ''more effective, or equally effective and less costly,'' safety alternatives.

SB 193 (Monning) expands the chemical disclosure duties of hazardous chemical manufacturers, formulators, suppliers, distributors, and importers with respect to the Hazard Evaluation System and Information Service (HESIS). HESIS houses data on ''toxic materials and

harmful physical agents" used in the work place. SB 193 was introduced to improve the process of alerting employees who may have been exposed to hazards posed by the chemical product. According to the author, "that database is of limited use in directed hazard alert mailings since a search for potential users of toxic materials is based upon the likely relevance of the businesses, contractors, unions, and advocacy groups to the toxic material." This new law requires manufacturers, formulators, suppliers, distributors, importers to provide new scientific or medial information concerning hazardous chemicals to facilitate timely receipt of Occupational Health Branch (OHB) alerts to employers to manage employee health.

AB 1634 (Skinner) addresses concerns raised by worker advocates regarding an employer's obligation to fix a health and safety violation during the pendency of an appeal. Prior to this new law, an employer was not obligated to remedy an alleged unsafe condition while the matter was being appealed. AB 1634 requires an employer to abate alleged health and safety violations pending appeal to the Occupational Safety and Health Appeals Board. The scope of this obligation is limited to serious violations, repeat serious violations, or willful serious violations. AB 1634 provides employers an opportunity to request a stay of abatement if DOSH determines, based on a preponderance of evidence, that the stay will not cause adverse health and safety risk to employees.

Solid Waste

Perhaps one of the more dramatic symbols of managing solid waste is reflected in the plastic patches in the world's oceans which collect plastic carried as storm runoff. This plastic waste that does not end up in landfills or recycled collects as marine debris in the Ocean. Most of the plastic marine debris originating from California, which is twice the size of Texas, ends up in the North Pacific Central Gyre. SB 270 (Padilla) is a controversial new law that tackles this problem by banning the sale or distribution of single-use carryout plastic bags in grocery stores and pharmacies with annual gross sales of $2 million or 10,000 square feet of retail space.

Beginning July 1, 2015, these stores are prohibited from selling reusable bags and recycled paper bags unless the store offers bags for purchase for at least ten cents each. These bags must be made by a "certified reusable grocery bag producer" and meet, among other things, specified standards of durability and labeling and heavy metal content. Beginning July 1, 2015, these stores may sell compostable bags for at least ten cents. Beginning July 1, 2016, the provisions of this law expand to convenience food stores and food marts. In addition, this law authorizes cities and counties to enforce this law. Lastly, this new law preempts local ordinances governing reusable grocery bags, single-use carryout bags, and recycled paper bags that are adopted after September 1, 2014.

This year, the Legislature entertained a broad range of other legislative strategies to manage non-hazardous solid waste and to promote waste minimization. These approaches include tools to combat metal theft, facilitating recycled pavement, strengthening unlawful Bottle Bill redemptions, promoting business composting, and modifying those materials that can be used for daily cover at landfills.

CalRecycle is leading the state's effort to achieve a 75% of solid waste statewide by 2020. In addition, the California Integrated Waste Management Act of 1989 deputizes cities and counties to divert 50% of its non-hazardous, solid waste against a 1990 baseline. They are authorized to achieve this goal via source reduction, recycling, and composting of which no more than 10% can be achieved by transformation technology or "biomass conversion." SB 498 (Lara) expands the definition of "Biomass conversion" to include "the production of heat, fuels, or electricity by the controlled combustion of, or the use of other noncombustion thermal technologies."

A significant portion of the solid waste stream is composed of organic green waste which comprises one-third of the waste stream; food ranks as the highest single category. AB 1826 (Chesbro) "will help California achieve the state's air quality, GHG, and waste reduction goals by diverting organic materials from landfills" which release seven millions tons of CO2 equivalent annually. This new law requires businesses generating four cubic yards or more of commercial solid waste weekly, beginning January 1, 2016, to arrange for organic waste recycling services. This law additionally requires non-rural jurisdictions to establish organic waste recycling programs by January 1, 2016.

According to Assembly member Bustamante, California is the only state that permits green material to be used as alternative daily cover (ADC) for landfills to count toward the solid waste diversion goals of the Integrated Waste Management Act of 1989 or the IWMA (see AB 1647 (Bustamante), Chapter 978, Statutes of 1996). ADC is typically used to manage landfill odors, vectors, and fires. This practice was invalidated in Natural Resources Defense Council vs. the California Integrated Waste Management Board. In that case, the court held that "no recycling activity at a landfill, including material recovery and composting could be counted as diversion." AB 1594 (Williams) provides that green material (such as yard trimmings and untreated wood wastes) used as ADC does not constitute "diversion" for purposes of the IWMA and will be to be considered "disposal" beginning in 2020.

The tire derived products (TDP) grant program helps CalRecycle to divert from landfills 90% of the 40 million waste tires generated annually. The grant program supports a wide range of recycled tire products including playground surfacing, sport field surfacing, and sidewalks. AB 1179 (Bocanegra) clarifies that "parklets" and "greenways" are also eligible to receive grant funding too.

The California State Auditor predicts diminishing availability of virgin aggregate to meet the demand for building and maintaining roads over the next 50 years. AB 2355 (Levine) responds to this projected shortage of virgin aggregate. This new law is designed pave the way for local agencies to adopt Department of Transportation (Caltrans) specifications for recycled base, sub base and pervious backfill. Under this new law contractors can use up to 100% recycled aggregate, up to 25% reclaimed asphalt pavement (RAP), and recycled aggregates in concrete as long as they meet performance standards. This new law, by January 1, 2017, requires local agencies to either adopt these Caltrans recycling standards or provide an explanation for not doing so.

CalRecycle reports that the Bottle Bill is experiencing a $100 million annual structural deficit which is due in part to fraudulent reimbursement involving California Redemption Value (CRV) claims. This involves the illegal importation of beverage containers into California and illegally seeking the CRV. AB 2251 (Yamada) is designed to boost enforcement against the fraudulent behavior. This new law authorizes the California Department of Food and Agriculture (CDFA) and county sealers to report enforcement actions involving the CRV collection for beverage containers. Assembly member Yamada explains that the agricultural commissioners and sealers are well suited for this role due to their enforcement experience with retailers who overcharge for their goods and services. AB 1846 (Gordon) further strengthens CalRecycle's CRV enforcement ability by clarifying that it is illegal to redeem out-of-state bottles for CRV and further prohibits certified recycling centers or processors who knew, or should have known it, was receiving ineligible CRV. This new law additionally authorizes CalRecycle to discipline supermarkets and other regulated sites by revoking their eligibility to collect handling fees at for their certified recycling centers. Finally, this new law expands the DRRR's enforcement tools and authorizes it to collect civil penalties of up to $10,000 per transaction or treble damages for those who redeem or assist in redeeming ineligible beverage containers.

AB 2312 (Nestande) responds to an increasingly sophisticated network of metal thieves who sell stolen scrap metal to recycling centers miles away from where the metal was stolen. This new law was introduced to increase transparency among regional recycling centers by requiring that they subscribe to ISRI (Institute of Scrap Recycling Industries, Inc.) metal theft alert notification system. By informing scrap metal recycling centers of recently stolen items, this law will help prevent them from unwittingly providing a market for these metal thieves. This system will, at no cost to the recycling center, issue alerts of metal theft that occurred within 100 miles of their location.

SB 254 (Hancock and Correa, Chapter 388, Statutes of 2013) created the Used Mattress Recovery and Recycling Act (UMRRA) which required mattress manufacturers and retailers to develop and implement a stewardship program designed to recover scrap value from used mattresses. SB 1274 (Hancock) responds to concerns raised by Governor Jerry Brown when he signed this bill in 2013. This new law incorporates non-substantive changes to the UMRRA which, among other things, permits solid waste operators to participate in the mattress recycling program. This new law additionally allows the public to drop off a mattress at recyclers, renovators, authorized solid waste operations, or other municipal facilities that accepts mattresses. It also authorizes CalRecycle to civilly enforce the law against distributors and recyclers.

Land Use

Several new laws promote low-income housing while others manage housing assets left in limbo in the wake of the dissolution of the state redevelopment agencies. Other new laws modify the California Land Conservation Act (otherwise known as the "Williamson Act") provisions to promote solar power while others restrict home owner's associations (HOAs) terms provisions that impose burdens on water conservation. Another law prohibits landlords from imposing barriers to electric vehicle charging stations. Finally, another set of laws eases the process for establishing bikeways and another makes it easier to finance housing cooperatives in California.

The Department of Housing and Community Development (HCD) is responsible for forecasting the regional housing needs assessment (RHNA). The RHNA projection includes an assessment projecting the number of new regional housing units necessary to accommodate all income levels during the next housing element planning period. Cities and counties within the region are then assigned a proportional share of the RHNA and must rezone if their local housing element does not identify sufficient sites to meet the RHNA for all household income levels. The rezoning must, among other things, allow for at least 50% of the very low- and low-income housing need "including where nonresidential uses or mixed-uses are not allowed." AB 1690 (Gordon) is

intended to promote mixed-use development. It authorizes municipalities to accommodate very low- and low-income housing units on sites zoned for mixed uses. These sites must provide for 100% residential use. Additionally cities and counties must require that at least 50% of a mixed-use project accommodate residential use.

The Planning and Zoning law allows developers to enjoy a 20% density bonus when they include five percent low-income housing within their market-based development projects. AB 2222 (Nazarian) is aimed at advancing this affordable housing program. This new law prohibits applicants from receiving a density bonus or other inducement for proposed residential developments that were previously occupied by low-income households or rent-controlled for a five-year period prior to the application. This new law also increases the time frame for which housing must remain affordable from 30 years or longer to 55 years in order to receive the density bonus.

Assembly member Ting states that AB 2135 was introduced to promote, among other objectives "affordable housing in California. Under this new law, local agencies must give priority to disposing of surplus land for affordable housing, parks and recreation, open-space purposes, and transit-oriented development. Entities agreeing to use the surplus land for the above-referenced uses receive a right of first refusal for the property. This new law, among other provisions, offers more time (i.e., 90 days instead of 60 days) to complete good faith negotiations between local agencies and a potential purchaser. Lastly, developers willing to commit 25% of their units as affordable are given first priority for using surplus land for development.

In 2012 Governor Brown replaced redevelopment agencies with successor agencies charged with winding down and disposing of their assets and properties. AB 1484 (Blumenfield), Chapter 26, Statutes of 2012 was enacted to address the mechanics of the dissolution process. AB 1963 (Atkins) is an urgency law that extends the deadline for completing the due diligence necessary to dispose of the assets. Without this extension to January 1, 2016, according to the author, there would be "a widespread fire sale of properties." Prior to their repeal, the redevelopment agencies were responsible for below market affordable homes which were subject to deed restrictions to maintain the low income status. AB 1793 (Chau) is another law addressing the aftermath of the former redevelopment agencies. It responds to a recent survey that found a number of successor agencies do not have sufficient staff to monitor whether the deed restrictions are being maintained. AB 1793 requires housing successor agencies to annually inventory the housing units subject to deed restrictions.

Two new laws address the California Land Conservation Act of 1965 (also known as the Williamson Act) established a program to preserve agricultural lands. The Williamson Act permits agricultural land owners to enter into contracts with their city or county to preserve the land for agriculture or open space for ten years. In exchange for restricting the land use, the landowner enjoys a lower cost burden. The 2009-10 California state budget significantly curtailed the Williamson Act by reducing subventions to $1,000. AB 1265 (Nielsen, Chapter 90, and Statutes of 2011) established an alternative funding mechanism that allowed counties to increase the assessed values of these restricted lands. Eleven counties have elected to join this program including Butte, Kings, Lassen, Madera, Mendocino, Merced, Shasta, Stanislaus, Sutter, Tulare, and Yolo. SB 1353 (Nielsen) eliminates the sunset date for AB 1265 and thus extends the life of this law indefinitely.

Recent law—SB 618, Wolk—(Chapter 596, Statutes of 2011) allows signatories to a Williamson Act contract to rescind the contract on marginally productive land and create a solar-use easement for at least 20 years. AB 2241 (Eggman) is the other Williamson Act law which was introduced to encourage wider participation on the Williamson Act rescissions to promote solar energy. AB 2241 (Eggman) increases the rescission fee from 6.25% to 10% of the fair market value of the property and decreases the rescission fee for a farmland security zone (FSZ) contract from 12.5% to 10% in order to replace the Williamson Act Contract with a solar-use easement contract.

The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 governs local agency formation commissions (LAFCOs) which manage shifts in local government boundaries. LAFCOs additionally evaluate strategies to optimize governmental organizations and the services they provide. Joint Powers Agreements (JPAs) do not explicitly fall under LAFCO review. While LAFCOs can request specified information from individual special districts and other local government agencies, LAFCOs don't have statutory authority to review JPAs' agreements, even when JPAs are formed by local agencies and provide direct municipal services. AB 2156 (Achadjian) now permits LAFCO's to request information from JPAs to gather information for their evaluations.

The Legislature produced three new laws advancing the governor's drought declaration which implored California residents conserve water use by 20%. The Davis-Stirling Act governs common interest developments (CIDs) such as condominiums, community apartments, housing cooperatives and planned unit developments. That law provides that CID governing documents prohibit a homeowner

from installing low water-using plants or provisions that effectively restrict compliance with local water-efficient landscape ordinances. AB 2104 (Gonzalez) is the first of these new laws which makes it easier for Californian's to reduce their water foot print. This new law further voids CID restrictions that have the effect of prohibiting, low water-using plants as a replacement for existing turf.

AB 2100 (Campos) is another law that responds to a homeowners association (HOA) that fined a homeowner for saving water. This new law is an urgency measure that prohibits HOAs and local governments from fining homeowners that reduce landscape watering during a state or locally declared drought emergency. Finally, SB 992 (Nielsen) is an urgency law that prohibits HOAs from issuing fines to owners that use recycled water for landscaping during a locally or state declared drought. This new law further voids HOAs governing documents that require pressure washing the exterior of separate property interests (and any exclusive use common areas) during a state or local government emergency drought declaration. This new law further voids any HOA provision that requires pressure washing during a state or local government declared drought emergency.

AB 1738 (Chau) is another law that modifies the Davis-Stirling Act. AB 1738 amends a recent law (AB 1836 (Harmon), Chapter 754 2004) that addressed conflicts between HOAs and their members. That law required HOAs to provide an informal dispute resolution (IDR) process at no cost to its members. AB1738 clarifies that law and provides that, with five days-notice, HOA members may invite legal counsel to participate in the IDR procedure.

Beginning January 1, 2017, AB 968 (Gordon) requires HOA's responsible for making repairs to the exclusive use common area. By clarifying HOA duties, this new laws assists HOAs in their budgeting process.

In 2012, Governor Brown signed an Executive Order which established a goal of 1.5 Electric Vehicles (EV) by 2025 and required several state agencies "support and facilitate the rapid commercialization of zero-emission vehicles." Prior to AB 2565 (Muratsuchi) property owners could refuse a tenant's request to establish an EV charging station at their own cost. AB 2565 removes this barrier by requiring owners of commercial or residential properties to approve EV charging stations for leases executed on and after July 1, 2015. The approval is conditioned on the tenant agreeing to, among other things, pay costs connected to the charging station and maintaining a million dollar general liability insurance policy. This new law additionally voids terms in commercial leases that are renewed on or after January 1, 2015, that "prohibit or unreasonably restrict," installations or use an electric vehicle charging station.

AB 2008 (Quirk) responds to the safety, environmental, and traffic congestion impacts generated from urban freight and delivery vehicles. This new law is intended to manage the impacts which include double-parked and idling vehicles that deliver goods in transit villages. This new law allows for dedicated commercial loading and unloading at transit-oriented developments.

AB 1193 (Ting) is designed streamline efforts by cities and counties to establish bikeways on local streets. This new law replaces the cumbersome process of seeking an exemption from Caltrans standards governing bikeways. This new law requires that Caltrans develop minimum bikeway safety design criteria that local governments can follow in lieu of Caltrans' design criteria (i.e., California Highway Design Manual (HDM)).

The California Subdivided Lands Act (CSLA) governs housing cooperatives which provides for a corporation to hold the title to property and allows shareholders to lease units in that property. Provisions of the CSLA effectively ban housing cooperatives in California. Because the CSLA prohibits the sale of cooperative shares of units that are secured by a single mortgage (i.e., a "blanket encumbrance"), banks have been unwilling to provide loans for individual units connected to a cooperative. AB 569 (Chau) amends the CSLA in an effort to advance the financing of cooperative housing. This new law specifically allows the sale or lease of individual interests in cooperatives subject to a blanket encumbrance.

CEQA

The Governor approved two CEQA exemptions this session. SB 674 (Corbett) expands on a 2002 law [SB 1925, enacted in 2002] that carved out an exemption to CEQA for residential infill projects located within an urbanized area and limited to retail uses comprising no more than 15% of the total floor area. SB 674 (Corbett) modifies this CEQA exemption and expands it to include urban infill housing projects of up to four acres and 100 units located within one-half mile of a major transit stop. SB 674 (Corbett) now applies to retail uses up to 25% of the total floor area of these projects instead of a 15% retail limit. The second CEQA exemption was introduced to support biogas from dairy operations. This new law also expands upon an existing CEQA exemption for projects which limits the exemption to under one mile in length. AB 1104 (Salas) exempts pipeline projects up to eight miles in length involving maintenance and replacement. This new law changes the exemption to cover transport dairy biogas in Fresno, Kern, Kings, or Tulare County that is

used to transport biogas derived from dairy operations and that complies with ARB compressed natural gas specifications.

AB 52 (Gatto) was enacted to clarify the degree to which CEQA governs lead agency time and consultation involving California tribal governments. This new law requires a lead agency to consult with California Native American tribes that are ''traditionally and culturally affiliated with the geographic area of the proposed project.'' The tribes must submit a written request to the lead agency requesting that they be informed of proposed projects in the area. This new law additionally establishes specific requirements governing the consultation process with respect to avoiding or mitigating tribal cultural resources impacts. This law new additionally specifies that projects that could ''cause a substantial adverse change in the significance of a tribal cultural resource'' are projects that may have a significant effect on the environment. Lastly, this law requires that the Office of Planning and Research, by July 1, 2016, to develop regulations addressing tribal cultural resources. In addition, the regulations must draw a distinction between tribal cultural resources and paleontological resources.

Climate Change

According to the National Research Council (2012 report), sea level has risen approximately eight inches in the last century and is projected to rise an additional six inches by 2030. During 2014, the California Select Legislative Committee on Climate Change convened several hearings throughout the state to evaluate the impact of sea level rise on several sectors of the California economy. The committee discovered that there is no central repository that captures agency projects designed to manage sea level rise impacting ports, airports, roads, bridges, power infrastructure, tourism, and coastal agriculture. AB 2516 (Gordon) was introduced to establish a database that inventories projects to adapt to or manage sea level rise. This new law requires, the Natural Resources Agency, by January 1, 2016, to establish a Planning for Sea Level Rise Database Internet Website. This internet site must describe statewide efforts to prepare for, and adapt to, sea level rise.

The California Global Warming Solutions Act of 2006 (AB 32, Núñez, Chapter 488) establishes a greenhouse gas (GHG) objective of reducing GHG emissions in California to 1990 levels by 2020. The California Air Resources Board (ARB) updated the climate change strategy (known as the Scoping Plan) in April 2014 in order to achieve a more ambitious goal of reducing GHG emissions to 80% below the 1990 level by 2050. The Scoping Plan update sets forth a five year plan to help ensure that California's long-term GHG reductions are on track to meet this more ambitious target. The Scoping Plan update requires that the ARB develop a strategy to manage ''short-lived climate pollutants'' (SLCP). SLCP are more impactful than carbon dioxide with respect to climate change potency. SB 605 (Lara) builds upon the Scoping Plan update by requiring the ARB to develop a comprehensive strategy to reduce SLCP emissions by January 1, 2016. Among other things, the SLCP strategy must provide an inventory of SLCP emission sources and identify and prioritize control measures to reduce SLCP emissions.

SB 1204 (Lara) is intended to promote zero- and near-zero-emission truck, bus, and off-road vehicles along with similar technologies for equipment serving ports, railroads, agriculture, construction, and the marine sector. ''Zero and near-zero emission'' technologies reduce GHG emissions compared to conventional vehicles, fuels and other technologies. This new law establishes a California Clean Truck, Bus, and Off-Road Vehicle and Equipment Technology Program administered by the ARB, with support from the State Energy Resources Conservation and Development Commission (the CEC). This new law is structured to use funds from the Greenhouse Gas Reduction Fund (GGRF), (from cap and trade revenues) to support development and demonstration of zero- and near-zero-emission truck, bus, and off-road vehicle and equipment technologies. In addition, this program funds projects that assist with clean goods movement. The program must additionally prioritize those projects located in disadvantaged communities.

In search of permanent funding for his favored project—the Bullet train—Governor Brown secured a source of continuous funding from the Greenhouse Gas Reduction Fund (GHGRF). Beginning in fiscal year 2015/2016, thirty-five percent of the revenues are earmarked to support high-speed rail, while 25% are continuously appropriated for transit, affordable housing, and sustainable communities. Another 40% support low-carbon transportation, energy efficiency, renewable energy, natural resources, and waste diversion. AB 1447 (Waldron) clarifies that these funds are also available to support traffic signal synchronization.

Air Quality

The Legislature focused on increasing the use of cleaner vehicles, increased fuel efficiency, and promoting the use of bicycles. SB 1275 (De León) is intended to facilitate the introduction of at least one million zero-emission vehicles (ZEVs) and near-zero-emission (NZEVs) by 2023. This new law, which will be managed by the ARB, creates the Charge Ahead California Initiative. This new

law is also aimed at making these vehicles available in disadvantaged and low-and-moderate-income communities. SB 1265 (Hueso) is another mobile source law that responds to a recent report from the Department of General Services (DGS) that concluded that the state has exhausted strategies to reduce fuel consumption from the State Vehicle Fleet. This new law requires DGS to include in its fuel economy standard the purchase of higher efficiency vehicles (e.g., light duty nonplug-in hybrid electric trucks and other vehicles). In addition, DGS must ensure that new state vehicle purchases meet the state minimum fuel economy standard (currently at 27.5 miles per gallon).

Several new laws were approved that tinker with regional requirements governing the HOT lanes. AB 2405 (Blumenfield), Chapter 674, Statutes of 2012 was enacted to support the clean air vehicle market. That law provides an exemption from high-occupancy toll (HOT) lane toll charges for clean air vehicles. HOT lanes permit single-occupant and lower-occupant vehicles to pay a fee to use the HOV lanes. Assembly member Linder introduced AB 1721 because the HOT lane exemption results in a loss of revenues to support the upkeep of California roadways. According to the author, clean air vehicles do not contribute to the state funding model to maintain and repair roadways because these vehicles do not purchase fuel and thus avoid paying excise fuel taxes. This new law affords clean air vehicles (displaying a green or white decal) a reduced rate or free access to the HOT lanes. According to the author, the incentive to purchase clean air vehicles will be honored while "HOT lane operators will be better able to manage the related financial implications."

Assembly member Fong introduced AB 2090 (Fong) to provide a more flexible approach to HOT lanes. This new law repeals level of service (LOS) requirements HOT lanes within the jurisdiction of San Diego Association of Governments (SANDAG) and the Santa Clara Valley Transportation Authority (VTA). AB 2090 also requires that these transportation agencies establish alternate performance measures for their HOT lanes. This new law additionally authorizes SANDAG and VTA to require HOV drivers to use electronic tolling equipment to enforce HOT lanes.

SB 1298 (Hernandez) extends the sunset date to operate the HOT lanes on State Highway Routes (SRs) 10 and 110 in Los Angeles County. AB 1811 (Buchanan) authorizes high-occupancy vehicle (HOV) lane drivers to use electronic tolling equipment (e.g., FasTrak toll electronic transponders) to enforce (HOT lanes on the Sunol Grade portion of State Highway Route 680. Finally, AB 2013 (Muratsuchi) further advances Governor Brown's Executive Order that promotes electric vehicles in California. AB 2013 increases from 55,000 to 70,000 the number of vehicles with green clean air vehicle stickers that can access the HOV lanes for advanced technology partial zero-emission vehicles (enhanced AT PZEVs).

AB 2707 (Chau) was introduced to accommodate bicyclists that use public transit for their commute. Prior to this new law, transit buses could only accommodate two bicycle racks because they were limited to front-mounted bicycle racks extending only 36 inches from the front of the bus. This new law expands the bicycle racks from 36 inches to 40 inches and increases the handlebar limit from 42 to 46 inches from the front of the bus.

Energy

This session, the Legislature produced several bills addressing renewable energy, pipeline safety, at utility facilities, demand side management, and distributed energy.

Assembly member Maratsuchi introduced AB 2188 in an effort to bring cohesion to a patchwork of localized solar permitting programs. AB 2188 (Muratsuchi) requires municipalities to adopt an ordinance, no later than September 30, 2015, to establish an expedited permitting process for small, residential rooftop solar energy systems. This new law requires that, from the standpoint of the CEQA, that local approvals of these solar systems must be considered "ministerial" and thereby exempt under CEQA. In addition, this new law requires municipalities to provide for expedited inspections of residential solar systems. This new law also provides that a municipality may not require a "use permit" for a solar energy system unless they make a finding based on "substantial evidence," instead of a finding based on "a good faith belief." This new law additionally facilitates solar energy systems in common interest developments. Specifically, it reduces the time frame (from 60 to 30 days) for which a solar energy system application must be deemed approved pursuant to covenants, conditions, and restrictions.

SB 871(Committee on Budget and Fiscal Review) is another solar law. In addition to changing tax levies, this is an urgency law that extends the sunset for solar tax exemption for new active solar energy systems until January 1, 2025.

SB 96 (Budget and Fiscal Review Committee), Chapter 356, and Statutes of 2013 authorized local agencies to issue bonds to finance renewable energy upgrades, energy or water efficiency retrofits, and electric vehicle charging stations. In exchange for the upfront loan, property owners that participate in this Property Assessed Clean Energy (PACE) repay the loan over time. The duty to replay stays with the property even if it is sold or

transferred. AB 2597 (Ting) is a budget trailer bill that responds to Fannie Mae and Freddie Mac underwriting limitations. These underwriting provisions conflict with the PACE loan underwriting standards that require PACE obligations to be paid before mortgage obligations in the event of a foreclosure. AB 2597 helps underwrite the PACE program and requires that the California Alternative Energy and Advanced Transportation Financing Authority (CAEATFA) develop a loss reserve program to fund the mortgage during a foreclosure or a forced sale. This new law is also intended to clarify that PACE liens are special tax assessments, not loans. The new law additionally modifies the underwriting standards for the PACE program which frees up financing to include more middle-income homeowners in the PACE program.

AB 2137 is another law intended to assist with energy efficiency upgrades. This new law requires the Office of Small Business Advocate (OSBA) GO-Biz (within the Governor's Office of Business and Economic Development) and the CPUC to alert small California businesses about demand side energy management programs. GO-Biz must upload this information to its internet website.

AB 1478 (Committee on Budget) is an urgency law that makes adjustments to the CPUC-run program that provides incentives for generating distributed energy. This new law modifies requirements governing eligibility for the self-generation incentive program.

Senator Hill, who represents constituents who experienced gas pipeline explosion in San Bruno in 2010, has championed a number of new laws that improve safety for utilities. He introduced SB 900 in response to a Senate Subcommittee report (on Gas and Electric Infrastructure Safety) which concluded that the CPUC has not incorporated safety measures into electrical and gas utility rate cases. SB 900 requires the CPUC to include safety information gathered from the CPUC's audits and accident investigations in utility rate cases.

SB 1371 (Leno) seeks to prioritize management of natural gas leaks to improve public safety and to combat climate change. According to Senator Leno, utility ratemaking procedures indirectly discourage repairs of leaks due to insufficient funding. SB 1371 requires the CPUC to consider adopting rules and procedures to minimize natural gas leaks from gas pipeline facilities regulated by the CPUC. This new law requires that the CPUC require gas corporations to report, as soon as practicable, on their leak management practices and to list their methane leaks in 2013 along with open leaks that are being monitored or repaired. This report must also estimate the amount of natural gas lost as a result of leaks. IT requires the CPUC to collaborate with the ARB and to convene a proceeding by January 15, 2015 to entertain rules and procedures impacting CPUC-regulated intrastate transmission and distribution natural gas pipelines.

These forthcoming rules must prioritize safety, reliability, and affordability of service. These rules and procedures must "provide for the most technologically feasible and cost-effective avoidance, reduction, and repair of leaks and leaking components in CPUC-regulated pipeline facilities within a reasonable time after discovery." In addition, these rules must "provide for the repair of leaks as soon as reasonably possible after discovery..." They must capture many management system methodologies including establishing and requiring best practices to manage and prevent leaks. The rules and procedures must be also incorporated in safety plans. In addition, the rules require that the CPUC evaluate current maintenance and repair practices and operations to minimize leaks at CPUC-regulated gas pipeline facilities. Finally, when establishing the rate case, the CPUC must take into account the efficacy of the workforce to minimize the hazards and emissions from leaks.

AB 1937 (Gordon) is designed to improve public safety and responds to a number of high profile natural gas pipeline accidents including the 2010 San Bruno explosion. AB 1937 (Gordon) was introduced to inform schools of scheduled maintenance and excavation activities for gas pipelines. Prior to AB 1937, there was no duty to notify schools (or hospitals) when maintenance or pipeline testing was scheduled. This new law requires a gas corporation to provide a minimum notice of three days to schools or hospitals. The notice must be provided before they perform nonemergency excavations or construction of gas pipeline maintenance or testing within 500 feet of a school or hospital. The notifications will assist schools in evacuating in the event of a pipeline break resulting from maintenance or excavation activities.

SB 1409 responds to the failure of the CPUC to produce an Electric, Natural Gas, and Propane Safety Report (ENGPSP) chronicling fatality investigations in several years. SB 1409 (Hill) was introduced to determine whether the gas and electrical incidents that occurred since the last report was issued in 2009 have been fully investigated. This new law requires the CPUC to annually publish a report beginning February 1, 2016 that describes the status of gas or electric safety incident investigations by gas or electric corporations including details summarizing open investigations.

Senator Hill also introduced SB 699 in response to a high-powered rifle attack on a Pacific Gas and Electric Company substation in April 2013. The extensive damaged highlighted the vulnerability of critical electric infrastructure to terrorist attacks. SB 699 is focused on grid reliability and requires the CPUC to convene a hearing by July 1, 2015, to entertain regulating physical security risks at electrical distribution systems.

SB 1414 (Wolk) enhances reliability of the electric grid by requiring the CPUC ensure that electricity demand response is reliable and cost effective.

Natural Resources

Several new laws make changes to the Z'Berg-Nejedly Forest Practice Act of 1973 (Forest Practices Act), establish habitat for bees, and modify Coastal Commission procedures.

Assembly member Dahle introduced two new laws impacting timber harvesting. The first bill—AB 2112—extends the timeframe governing the extension of a timber harvesting plan (THP) pursuant to the Forest Practice Act. This new law provides that a notice of extension for a THP must be issued 140 days before the expiration date instead of 30 days. Assembly member Dahle's other new law—AB 2082 (Dahle)—updates the forest stocking standards which, prior to this law had not been updated since the Forest Practices Act was enacted in 1973. In an effort to achieve resource conservation, this new law authorizes the Board of Forestry and Fire Protection (Board) to use an alternative post-timber harvesting stocking standard. AB 1867 (Patterson) changes a homeowner's obligation to establish and maintain defensible vegetative space surrounding the structure. This new law extends the 150 foot defensible space exemption to 300 feet for habitable structures. AB 288 (Levine) requires that the California Coastal Commission notify the public of meetings in both English and Spanish.

Last year, the Legislature approved AB 904 (Chesbro), Chapter 648, Statutes of 2013) to support sustained timber yields. That law authorizes non-industrial landowners to implement timber harvesting plans or Working Forest Management Plans (WFMPs). AB 2239 (Chesbro) establishes a uniform process governing the transfer of ownership so that the new owner of timberlands will be apprised of how to assume the operations of the WFMP. These provisions also apply to non-industrial timber management plans or ''NTMPs.'' This new law also authorizes the Department of Forestry and Fire Protection (CAL FIRE) to cancel WFMPs or NTMPs if the new landowners do not assume the plan within one year. This uniform transfer process serves as a functional equivalent to CEQA.

AB 2193 (Gordon) enacts the Habitat Restoration and Enhancement Act which is intended to streamline acquisition of environmental permits for small ecosystems and urban watershed restoration projects. This new law requires DFW to approve small habitat restoration and enhancement projects such as a river revegetation project.

Two new laws are focused on managing the risk from mosquitos and the glassy-winged sharpshooter. AB 896 (Eggman) seeks to provide protection from West Nile virus by requiring mosquito abatement and vector control districts to notify the DFW of managed wetlands within wildlife management districts. The DFW must consult with districts and identify those wetlands posing the highest mosquito risk and thus in need of additional mosquito abatement. AB 1642 (Chesbro) extends the sunset date for the Pierce's Disease Control Program to March 1, 2021. This CDFA program is focused on strategies to control the glassy-winged sharpshooter and Pierce's disease.

AB 2185 (Eggman) creates more habitat for beekeepers by requiring the DFW to ''maximize the coexistence and minimize the conflict between beekeeping and other public land uses.'' DFW must also entertain allowing beekeeping on state-managed wildlife lands to support more foraging.

A couple of laws make minor changes to harvesting and hunting. AB 2105 (Frazier) allows nonprofit organizations to assist in selling big game mammal hunting tags. AB 504, Chesbro) extends the sunset date for the law governing the harvest of sea cucumbers which establishes a permit program addressing the commercial harvesting of sea cucumbers. This new law also modifies the law governing the spawning and cultivation of finfish belonging to the family Salmonidae in the Pacific Ocean, except for certain salmon or steelhead trout species. AB 2364 (V. Manuel Pérez) establishes the California red-legged frog as the official state amphibian.

The California Coastal Act of 1976 prohibits Coastal Commission members from ex parte communications (i.e., communications between Commissioners and interested person concerning Commission business outside a public hearing or proceeding). However, commissioners are permitted to make a public disclosure of the communication by completing a disclosure form. AB 474 (Stone)

expands the content that must be disclosed using the standard disclosure forms. The disclosure must now include the "identity of the person on whose behalf the communication was made, the identity of all persons present during the communication, and a complete, comprehensive description of the content of the ex parte communication, including a complete set of all text and graphic material that was part of the communication."

Looking Ahead

With an improving economy and a budget surplus, the Governor has shifted his attention to making policy and leaving a lasting legacy. Governor Brown is committed to leaving his mark on battling climate change, maintaining fiscal stability, realizing the promise of high-speed rail, and ensuring that the state invests wisely as it builds infrastructure to weather the drought and preserve water quality.

During his State-of-the-State address, the Governor exhorted that "Taking significant amounts of carbon out of our economy without harming its vibrancy is exactly the sort of challenge at which California excels. This is exciting, it is bold and it is absolutely necessary if we are to have any chance of stopping potentially catastrophic changes to our climate system." His speech featured aspirational commitments to, among other things, significantly increase deployment of renewable energy to 50% by 2030. In addition, he called for doubling the energy efficiency of buildings and reducing, by half, the use of fossil fuels consumed in cars and trucks by 2030.

The Legislature has taken notice by introducing a package of bills known as the Senate Clean Energy and Climate Change Package. The new Senate Pro Tempore—Kevin León—is also leading the way with his introduction of SB 350 which would advance the Governor's 2030 renewable energy and climate change objectives. Senator Pavley, a principal author of the Global Warming Solutions Act of 2006, introduced SB 32 (Pavley) which would establish interim GHG reduction targets after 2020. That bill would also establish a firm goal of reducing GHG emissions to 80% below the 1990 baseline level by 2050.

Notwithstanding this vision, the fourth consecutive year of drought could divert attention as the Legislature wrestles with this more pressing near-term challenge.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Cases

Potentially Significant Environmental Effect Does Not by Itself Constitute "Unusual Circumstances"

Berkeley Hillside Preservation v. City of Berkeley
No. S201116, Cal. S. Ct.
2015 Cal. LEXIS 1213
March 2, 2015

A potentially significant environmental effect does not by itself constitute an unusual circumstance for purposes of the exception to categorical exemptions from CEQA set forth in Guidelines section 15300.2(c). In listing a class of projects as exempt, the Secretary of the Resources Agency has determined that the environmental changes typically associated with projects in that class are not significant effects within the meaning of CEQA, even though an argument might be made that they are potentially significant. The plain language of Guidelines section 15300.2(c) requires that a potentially significant effect must be "due to unusual circumstances" for the exception to apply. The requirement of unusual circumstances recognizes and gives effect to the Secretary's general finding that projects in the exempt class typically do not have significant impacts. A bifurcated approach applies to the review of potentially significant effects and "unusual circumstances." The determination as to whether there are "unusual circumstances" [Guidelines section 15300.2(c)] is reviewed under the substantial evidence prong, while an agency's finding as to whether unusual circumstances give rise to "a reasonable possibility that the activity will have a significant effect on the environment" is reviewed to determine whether the agency, in applying the fair argument standard, "proceeded in the manner required by law."

Facts and Procedure. Real parties wanted to build a large house on their lot on Rose Street in Berkeley. The lot is on a steep slope (approximately 50 percent grade) in a heavily wooded area. In May 2009, their architect applied to the city for a use permit to demolish the existing house on the lot and to build a 6,478-square-foot house with an attached 3,394-square-foot 10-car garage. The residence would be built on two floors, would include an open-air lower level, and would cover about 16 percent of the lot.

In January 2010, the city's zoning adjustments board, after holding a public hearing and receiving comments about the project, approved the use permit. It found the project exempt from CEQA review under Guidelines sections 15303(a) and 15332. The former, which the Secretary has designated class 3, includes "construction and location of limited numbers of new, small facilities or structures," including "one single-family residence, or a second dwelling unit in a residential zone," and "up to three single-family residences" "in urbanized areas." The latter, which the Secretary has designated class 32, applies to a project "characterized as in-fill development" meeting the following conditions: (1) it "is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations"; (2) it "occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses"; (3) its "site has no value . . . as habitat for endangered, rare or threatened species" and "can be adequately served by all required utilities and public services"; and (4) its approval "would not result in any significant effects relating to traffic, noise, air quality, or water quality." The board also found that Guidelines section 15300.2(c) (exception from exemptions for unusual circumstances) did not preclude use of these categorical exemptions because the project as proposed and approved would not have any significant effects on the environment due to unusual circumstances.

Several residents of the city filed an appeal with the city council, arguing in part that CEQA's categorical exemptions did not apply because the proposed project's "unusual size, location, nature and scope will have significant environmental impact on its surroundings." They asserted that the proposed residence would be "one of the largest houses in Berkeley, four times the average house size in its vicinity, and situated in a canyon where the existing houses are of a much smaller scale." They submitted evidence that, of Berkeley's over 17,000 single-family residences, only 17 exceeded 6,000 square feet, only 10 exceeded 6,400 square feet, and only one exceeded 9,000 square feet. They also asserted that the proposed residence would exceed the maximum allowable height under Berkeley's municipal code and would be inconsistent with the policies of the city's general plan, and that an EIR was appropriate to evaluate the proposed construction's potential impact on noise, air quality, historic resources, and neighborhood safety. In response, the city's director of planning and development stated that 16 residences within 300 feet of the project had a greater floor-area-to-lot-area ratio and that 68 Berkeley "dwellings" exceeded 6,000 square feet, nine exceeded 9,000 square feet, and five exceeded 10,000 square feet.

The city council received numerous letters and e-mails regarding the appeal, some in support and some in opposition. Among the appeal's supporters was Karp, an architect and geotechnical engineer. In a letter dated April 16, 2010, Karp stated (1) he had reviewed the architectural plans and topographical survey filed with the board, and had visited the proposed construction site; (2) "portions of the major fill for the project are shown to be placed on an existing slope inclined at about 42 º (~1.1h:1v) to create a new slope more than 50 º (~0.8h:1v)"; (3) "these slopes cannot be constructed by earthwork and all fill must be benched and keyed into the slope which is not shown in the sections or accounted for in the earthwork quantities. To accomplish elevations shown on the architectural plans, shoring and major retaining walls not shown will have to be constructed resulting in much larger earthwork quantities than now expected"; (4) the "massive grading" necessary would involve "extensive trucking operations"; (5) the work that would be necessary "has never before been accomplished in the greater area of the project outside of reservoirs or construction on the University of California campus and Tilden Park"; (6) the project site is "located alongside the major trace of the Hayward fault and it is mapped within a state designated earthquake-induced landslide hazard zone"; and (7) "the project as proposed is likely to have very significant environmental impacts not only during construction but in service due to the probability of seismic lurching of the oversteepened side-hill fills."

In a second letter addressing the investigation of a geotechnical engineer (Kropp), Karp stated (1) no "fill slopes" were shown in Kropp's plan and "the recommendations for retaining walls do not include lateral earth pressures for slopes with inclinations of more than 2h:1v (~27 º) or for wall heights more than 12 feet"; (2) the project's architectural plans "include cross-sections and elevations that are inconsistent with the Site Plan and limitations in" Kropp's report; (3) "all vegetation will have to be removed for grading, and retaining walls totaling 27 feet in height will be necessary to achieve grades. Vertical cuts for grading and retaining walls will total about 43 feet (17 feet for bench cutting and 26 feet for wall cutting). [¶] A drawing in the [Kropp] report depicts site drainage to be collected and discharged into an energy dissipater dug into the slope, which is inconsistent with the intended very steep fill slopes"; and (4) "the project as proposed is likely to have very significant environmental impacts not only during construction, but in service due to the probability of seismic lurching of the oversteepened side-hill fills."

In response, Kropp stated that the project site was in an area where an investigation was required to evaluate the potential for landslides, and that he had conducted the

necessary investigation and found there was no landslide hazard. Kropp also stated that, in raising concerns about "side-hill fill," Karp had "misread" the project plans. According to Kropp, "the only fill placed by the downhill portion of the home will be backfill for backyard retaining walls and there will be no side-hill fill placed for the project. The current ground surface, along with the vegetation, will be maintained on the downhill portion of the lot." Karp asserted that because there would not be any "steep, side-hill fill constructed," Karp's concerns did not apply to the proposed construction. A civil engineer (Toby) also submitted a letter stating that he saw "no evidence" in the project plans that fill would be placed "directly on steep slopes" and that Karp's contrary assertion was based on a "misreading" of the plans.

In support of the permit approval, the city's director of planning and development submitted a supplemental report stating: "A geotechnical report was prepared and signed by a licensed Geotechnical Engineer and a Certified Engineering Geologist. This report concluded that the site was suitable for the proposed dwelling from a geotechnical standpoint and that no landslide risk was present at the site. Should this project proceed, the design of the dwelling will require site-specific engineering to obtain a building permit."

The city council addressed the appeal at a meeting on April 27, 2010. Karp was one of the speakers at the meeting. He began by stating his credentials, explaining that he (1) is "a geotechnical engineer specializing in foundation engineering and construction"; (2) has "an earned doctorate degree in civil engineering and other degrees from U.C. Berkeley including two masters and a post-doctoral certificate in earthquake engineering"; (3) is "fully licensed" and had "taught foundational engineering at Berkeley for 14 years and at Stanford for three"; (4) has "experience" that "includes over 50 years of design and construction in Berkeley"; and (5) "prepares feasibility studies before, and engineering during, construction of unusual projects." After affirming the opinion he had earlier stated in his letters, he offered this response to the assertion that he had misread the project plans: "The recent report from [applicants] say I don't know how to read architectural drawings, but I have been a licensed architect for many years and I do know how. [¶] Their reports have not changed my opinion." After hearing from Karp, Kropp, and others, the city council adopted the board's findings, affirmed the permit approval, and dismissed the appeal. The city planning department later filed a notice of exemption, stating that the project was categorically exempt from CEQA under Guidelines sections 15303(a) and 15332, and that Guidelines section 15300.2 did not apply.

Plaintiff Fadley then filed a petition for writ of mandate in the trial court, joined by Berkeley Hillside Preservation. The trial court denied the petition. It first concluded that the administrative record contains substantial evidence to support the city's application of the class 32 in-fill and class 3 small structures categorical exemptions. It next found that Guidelines section 15300.2(c) did not preclude application of the categorical exemptions because, notwithstanding evidence of potentially significant environmental effects, the proposed project did not present any unusual circumstances.

The court of appeal reversed. After noting plaintiffs' concession, for purposes of appeal, that the project satisfied the requirements of the class 3 and class 32 exemptions, the court of appeal agreed with plaintiffs that the unusual circumstances exception precluded the city from relying on those exemptions. The court of appeal stated that "the fact that proposed activity may have an effect on the environment is itself an unusual circumstance" that triggered the exception, "because such action would not fall 'within a class of activities that does not normally threaten the environment,' and thus should be subject to further environmental review." The court next reasoned that the standard of judicial review for an agency's determination that the exception does not apply is whether the record contains evidence of a fair argument of a significant effect on the environment, not whether substantial evidence supports the agency's determination. Finally, finding substantial evidence of a fair argument that the proposed project may have a significant environmental impact, the court held that the unusual circumstances exception renders the categorical exemptions inapplicable. It ordered the trial court "to issue a writ of mandate directing the city to set aside the approval of use permits and its finding of a categorical exemption, and to order the preparation of an EIR." The California Supreme Court granted respondents' petition for review, and reversed and remanded the action, in a decision written by Justice Chin, joined by Chief Justice Cantil-Sakauye, Justices Corrigan and Baxter, and Court of Appeal Judge Boren, sitting on assignment. Justice Liu wrote a concurring opinion, joined by Justice Werdegar.

Potentially Significant Environmental Effect Not Sufficient to Trigger Unusual Circumstances Exception. Plaintiffs conceded for purposes of appeal that the proposed project came within the terms of the class 3 (small structures) and class 32 (in-fill development) exemptions under the Guidelines. However, they argued that the unusual circumstances exception precluded the city's use of those exemptions. Respondents, in challenging the court of appeal decision, raised two primary arguments: (1) a proposed project's potential significant effect on the environment is not, as the court of appeal

held, itself an unusual circumstance that triggers the exception, and an unusual circumstance apart from the project's potential environmental effect is a prerequisite to the exception's application, and (2) in reviewing the city's conclusion that the exception was inapplicable, the court of appeal should have determined whether there was substantial evidence in the record to support that conclusion, not whether the record contains evidence of a fair argument of a significant effect on the environment.

The Court stated that the plain language of section 15300.2(c) (''A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances'') supported the view that, for the exception to apply, it is not alone enough that there is a reasonable possibility the project will have a significant environmental effect; instead, in the words of the Guidelines, there must be "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.''

The Court stated that, contrary to its rules for interpreting regulations, plaintiffs' proposed construction, which mirrored that of the court of appeal and which the concurring opinion would have adopted, would give no meaning to the phrase "due to unusual circumstances." It noted that, according to plaintiffs, this phrase was merely ''descriptive'' in that ''unusual circumstances'' are simply "self-evident underpinnings" when a project that otherwise satisfies the requirements of a categorical exemption nevertheless ''has potentially significant impacts.'' The Court further noted that likewise, the concurring opinion asserted that "the phrase 'unusual circumstances' ... simply describes the nature of a project that, while belonging to a class of projects that typically have no significant environmental effects, nonetheless may have such effects." The Court stated that thus, in the view of plaintiffs and the concurring opinion, the phrase "due to unusual circumstances'' adds nothing to the meaning of the regulation, and the exception applies if there is a fair argument that a project "may" have a significant environmental effect. The court stated, however, that if this had that been the intent of the Secretary of the Natural Resources Agency, the phrase "due to unusual circumstances'' would, no doubt, have been omitted from the regulation; rather than confuse the issue with meaningless language, the regulation would clearly and simply provide that the exception applies "if there is a reasonable possibility that the activity will have a significant effect on the environment." The Court concluded that reading the phrase "due to unusual circumstances'' out of the regulation, as plaintiffs and the concurring opinion proposed, would be contrary to the principle of construction that directs the courts to "accord meaning to every word and phrase in a regulation," citing *Price v. Starbucks Corp.* [(2011) 192 Cal. App. 4th 1136, 122 Cal. Rptr. 3d 174].

The Court agreed with respondents that, under the construction of plaintiffs and the concurring opinion, the categorical exemptions the Legislature, through the Secretary, had established would have little, if any, effect. It noted that CEQA specifies that environmental review through preparation of an EIR is required only "if there is substantial evidence ... that the project may have a significant effect on the environment" [Pub. Res. Code § 21080(d)]. As a corollary to this principle, CEQA also specifies that, if "there is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment," then the proposed project is not subject to further CEQA review [Pub. Res. Code § 21080(c)(1)]. The Court noted that Guidelines section 15061(b)(3), captures these principles by specifying: "Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA."

The Court stated that under these provisions, where there is no substantial evidence a proposed project may have a significant environmental effect, further CEQA review is unnecessary; no categorical exemption is necessary to establish that proposition. It stated, however, that according to plaintiffs, under the unusual circumstances exception, the categorical exemptions are inapplicable unless an agency "checks its files" and finds no "evidence of potentially significant impacts." The Court stated that this is precisely the inquiry an agency makes under Guidelines section 15061(b)(3) to determine whether the proposed project is subject to CEQA review in the first instance, citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* [(2007) 41 Cal. 4th 372, 60 Cal. Rptr. 3d 247 (under Guidelines section 15061(b)(3), agency must determine whether evidence in administrative record shows no possibility proposed activity may have significant effect on the environment)]. The Court further stated that plaintiffs' test for determining whether the unusual circumstances exception applies—whether there is a "reasonable possibility" the proposed project "will have a significant effect on the environment"—is precisely the test used to determine whether Guidelines section 15061(b)(3) applies, citing *California Farm Bureau Federation v. California Wildlife Conservation Bd.* [(2006) 143 Cal. App. 4th 173, 49 Cal. Rptr. 3d 169 (Guidelines section 15061(b)(3) inapplicable if "there is a reasonable possibility that a proposed project will have a significant effect upon the environment'')]. Thus, the Court stated that under plaintiffs' view, the categorical exemptions would serve no purpose; they would apply

only when the proposed project was, by statute and Guidelines section 15061(b)(3), already outside of CEQA review.

Plaintiffs asserted that applying a categorical exemption despite a proposed project's potential significant environmental effect would contravene CEQA statutes and the Legislature's intent in passing CEQA. They relied on three CEQA provisions: (1) Pub. Res. Code § 21100(a), which directs preparation of an EIR "on any project . . . that may have a significant effect on the environment"; (2) Pub. Res. Code § 21151(a), which also directs preparation of an EIR "on any project . . . which may have a significant effect on the environment"; and (3) Pub. Res. Code § 21082.2(d), which provides that an EIR "shall" be prepared "if there is substantial evidence, in light of the whole record before the lead agency, that a project may have a significant effect on the environment." Plaintiffs contended that this statutory authority "does not allow categorical exemptions for any project that may have a significant effect on the environment" and thus "the documented presence of a potential environmental effect . . . always defeats a categorical exemption." Plaintiffs contended that "the statutory authority [the Legislature] has given to the Secretary only allows categorical exemption for projects that have no significant environmental effect, and 'no statutory policy exists in favor of applying categorical exemptions where a fair argument can be made that a project will create a significant effect on the environment.'" Thus, plaintiffs asserted that requiring more than a showing that a proposed project may have a significant effect in the environment "would be inconsistent with" CEQA's statutory "mandates."

The Court stated that plaintiffs' argument ignored a basic principle of statutory interpretation: courts "do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" Thus, the Court stated that it had to consider the three sections plaintiffs cited, not in isolation, but "in the context of the statutory framework as a whole" in order to harmonize CEQA's "various parts," citing *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* [(1978) 21 Cal. 3d 650, 147 Cal. Rptr. 359 (construing the Education Code)].

Legislative History of CEQA Exemptions. The Court noted that when the Legislature enacted CEQA in 1970, it directed the Governor's Office of Planning and Research (OPR), "in conjunction with appropriate state, regional, and local agencies," to "coordinate the development of objectives, criteria, and procedures to assure the orderly preparation and evaluation of" EIRs [former Pub. Res. Code § 21103, added by Stats. 1970, ch. 1433, sec. 1]. Two years later, in *Friends of Mammoth v. Board of Supervisors* [(1972) 8 Cal. 3d 247, 104 Cal. Rptr. 761], the Court held that CEQA applies, not just to public projects, but also to private activities requiring a government permit or similar entitlement. The Court noted that before *Mammoth*, it had been "generally believed" that CEQA "appl[ied] only to projects undertaken or funded by public agencies" [*Friends of Lake Arrowhead v. Board of Supervisors* [(1974) 38 Cal. App. 3d 497, 113 Cal. Rptr. 539]. The Court stated that, cognizant of the decision's potential ramifications, after recognizing that "the reach of the statutory phrase, 'significant effect on the environment,' is not immediately clear," the Court in *Mammoth* noted: "To some extent this is inevitable in a statute which deals, as [CEQA] must, with questions of degree. Further legislative or administrative guidance may be forthcoming on this point among others." The Court continued: "Common sense tells us that the majority of private projects for which a government permit or similar entitlement is necessary are minor in scope—e.g., relating only to the construction, improvement, or operation of an individual dwelling or small business—and hence, in the absence of unusual circumstances, have little or no effect on the public environment. Such projects, accordingly, may be approved exactly as before the enactment of [CEQA]."

The Court stated that the Legislature immediately responded to *Mammoth* by amending CEQA through urgency legislation, citing *County of Inyo v. Yorty* [(1973) 32 Cal. App. 3d 795, 108 Cal. Rptr. 377]. As relevant here, the Legislature added Pub. Res. Code § 21083, which generally directed the OPR, "as soon as possible," to "prepare and develop proposed guidelines for the implementation of [CEQA]," and directed the Secretary to "certify and adopt the [OPR's proposed] guidelines pursuant to" the Administrative Procedure Act. The Court stated that, more specifically, in several provisions, the Legislature provided for categorical exemptions to CEQA by adopting former Pub. Res. Code § 21084: "The guidelines prepared and adopted pursuant to Section 21083 shall include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt from the provisions of [CEQA]. In adopting the guidelines, the Secretary . . . shall make a finding that the list or classification of projects referred to in this section do not have a significant effect on the environment." The Court noted that this provision remains substantively the same today.

The Court further noted that in former section 21085, the Legislature provided that "all classes of projects designated pursuant to Section 21084 . . . shall be exempt from the provisions of [CEQA]." The substance of this section

appears today in section 21080(b)(9), which provides that CEQA "does not apply" to "all classes of projects designated pursuant to Section 21084." Finally, the Court stated that the Legislature enacted section 21086 to establish a mechanism for challenging the Secretary's categorical exemptions. Section 21086(a) provides: "A public agency may, at any time, request the addition or deletion of a class of projects, to the list designated pursuant to Section 21084. That request shall be made in writing to the [OPR] and shall include information supporting the public agency's position that the class of projects does, or does not, have a significant effect on the environment." Section 21086(b) requires the OPR to "review each request" and "submit" a recommendation to the Secretary, and authorizes the Secretary, "following the receipt of [the OPR's] recommendation," to "add or delete the class of projects to the list of classes of projects designated pursuant to Section 21084 that are exempt from the requirements of [CEQA]." Section 21086(c) provides: "The addition or deletion of a class of projects, as provided in this section, to the list specified in Section 21084 shall constitute an amendment to the guidelines adopted pursuant to Section 21083 and shall be adopted in the manner prescribed in Sections 21083 and 21084."

The Court stated that collectively, these provisions indicate that the Legislature intended to establish by statute "classes of projects" that "have been determined not to have a significant effect on the environment," to require the OPR and the Secretary to apply their expertise and identify those "classes" by "mak[ing] a finding" that the projects they comprise "do not have a significant effect on the environment," and to "exempt" from CEQA proposed projects within the classes the OPR and the Secretary have identified [Pub. Res. Code § 21084(a)]. It stated that this conclusion comported with the impetus for the Legislature's enactment of these provisions: the decision in *Mammoth*, which (1) observed that CEQA's applicability turns on "questions of degree," (2) stated that "the majority" of private projects "may be approved exactly as before" CEQA's enactment because they "are minor in scope . . . and hence, in the absence of unusual circumstances, have little or no effect on the public environment," and (3) called for "further legislative or administrative guidance" on these issues.

The Court stated that to address these considerations, the Legislature, through the Guidelines, intended to enumerate classes of projects that are exempt from CEQA because, notwithstanding their potential effect on the environment, they already "have been determined not to have a significant effect on the environment" [Pub. Res. Code § 21084(a)]. It stated that the Guidelines implement this intent, by setting forth the "classes of projects" that the Secretary, acting "in response to [the Legislature's] mandate," "has found . . . do not have a significant effect on the environment" [Guidelines section 15300]. Thus, the Court stated that construing the unusual circumstances exception as requiring more than a showing of a fair argument that the proposed activity may have a significant environmental effect is fully consistent with the Legislature's intent.

The Court stated that plaintiffs' construction of the unusual circumstances exception would render useless and unnecessary the statutes the Legislature passed to identify and make exempt classes of projects that have no significant environmental effect. It stated that plaintiffs could identify no purpose or effect of the categorical exemption statutes if a showing of a fair argument of a potential environmental effect were to preclude application of all categorical exemptions. The Court stated that construing the unusual circumstances exception to apply any time there was a reasonable possibility of a significant environmental effect would, therefore, contravene its duty to adopt a construction that gives effect to all parts of the statutory and regulatory framework, rather than one that renders part of the framework "wholly useless and unnecessary" [*French Bank Case* (1879) 53 Cal. 495].

Concurring Opinion Arguments. The Court stated that the concurring opinion's attempt to succeed where plaintiffs failed—i.e., to show that the categorical exemptions still had some "value" under their construction—was also unpersuasive. The Court stated that the concurring opinion first asserted that proposed projects enjoy "a considerable procedural advantage" when an agency finds that they fall within the terms of an exempt category. As to such projects, the concurring opinion noted, an agency need not follow any particular procedure, include any written determination, undertake an initial study, or adopt a negative declaration. The Court stated, however, that the same is true of proposed projects that fall within the terms of Guidelines section 15061(b)(3), i.e., projects that are "not subject to CEQA" because "it can be seen with certainty that there is no possibility that [they] may have a significant effect on the environment," citing *Muzzy Ranch* (initial study not required where Guidelines section 15061(b)(3) applies). The Court stated that the concurring opinion's interpretation rendered the categorical exemptions duplicative of this guideline, and the concurring opinion did not persuasively demonstrate otherwise. Thus, the Court stated that the concurring opinion's discussion of these "procedural advantages" failed to show that, under its interpretation, the categorical exemptions would have independent value.

The Court stated that the concurring opinion also noted that, when an agency finds that a project meets the terms of a categorical exemption, it "impliedly finds that it has no

significant environmental effect," and "the burden shifts to" project opponents "to produce evidence" that the unusual circumstances exception applies. The Court stated that this is significant, the concurring opinion maintained, because "in many cases, categorical exemptions are not litigated, and the applicability of the exemption is evident."

The Court stated, however, that even if a proposed project faces no opposition, an agency invoking a categorical exemption may not simply ignore the unusual circumstances exception; it must "consider the issue of significant effects . . . in determining whether the project is exempt from CEQA where there is some information or evidence in the record that the project might have a significant environmental effect," citing *Association for Protection etc. Values v. City of Ukiah* [(1991) 2 Cal. App. 4th 720, 3 Cal. Rptr. 2d 488]. The Court stated that this follows from Guidelines section 15061(a) and (b)(2), which, respectively, (1) direct a lead agency to determine whether a proposed project is "exempt from CEQA," and (2) specify that a project is exempt if a categorical exemption applies "and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2." Thus, the Court stated that an agency may not apply a categorical exemption without considering evidence in its files of potentially significant effects, regardless of whether that evidence comes from its own investigation, the proponent's submissions, a project opponent, or some other source. The Court further stated that under the concurring opinion's interpretation, if those files contained "substantial evidence" of a mere "fair argument" that the project would have significant environmental effects, the agency may not apply a categorical exemption. Thus, the Court stated that under the concurring opinion's interpretation of the unusual circumstances exception, the "considerable procedural advantage" the concurring opinion posited was largely illusory.

The Court stated that also illusory was the "second advantage" that, in the view of the concurring opinion, gives some value to categorical exemptions under its interpretation: the "comparative arguments" available to project proponents when an opponent invokes the unusual circumstances exception. The Court noted that according to the concurring opinion, proponents may "argue," if "supported by evidence," that (1) the project's effects are "typical" of those generated by projects in the exempt category, "such that few or no projects in the category would be exempt if the effects were deemed significant," and (2) "the project's dimensions or features are not unusual compared to typical projects in the exempt category, thereby suggesting that the project is similar to those that the Secretary has determined not to have a significant environmental effect." The Court stated, however, that under the fair argument test the concurring opinion would apply here, "an agency is merely supposed to look to see if the record shows substantial evidence of a fair argument that there may be a significant effect. In other words, the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument.. . . It does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument," citing *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* [(2006) 139 Cal. App. 4th 249, 42 Cal. Rptr. 3d 537]. The Court also cited Guidelines section 15064(f)(1) (lead agency "presented with a fair argument that a project may have a significant effect on the environment . . . shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect"). Thus, the Court stated that under the concurring opinion's interpretation, evidence that a project proponent offers to show that the project will only have typical effects, dimensions, and features is irrelevant if a project opponent can make a mere fair argument that those effects, dimensions, or features are not typical, or that the project will have a significant environmental effect. For these reasons, the Court opined that the concurring opinion failed to demonstrate that the categorical exemptions would retain any significant "value" under its interpretation.

The Court further stated that, contrary to the assertion of the concurring opinion, even if the categorical exemptions were to retain some limited value under the concurrence's construction, there would still be "reasons" to reject that construction. First, the Court stated that because that construction would transform the phrase "due to unusual circumstances" into meaningless surplusage, it was one the Court "should avoid." Second, it stated that nothing suggested that either the Legislature or the Secretary intended the categorical exemptions to have such minuscule value.

Accordingly, the Court held that the court of appeal erred by holding that a potentially significant environmental effect itself constitutes an unusual circumstance. It stated that in listing a class of projects as exempt, the Secretary has determined that the environmental changes typically associated with projects in that class are not significant effects within the meaning of CEQA, even though an argument might be made that they are potentially significant. The plain language of Guidelines section 15300.2(c), requires that a potentially significant effect must be "due to unusual circumstances" for the exception to apply. The Court stated that the requirement of unusual circumstances recognizes and gives effect to the

Secretary's general finding that projects in the exempt class typically do not have significant impacts.

Burden of Producing Evidence Supporting an Exception. The Court stated that with respect to projects that meet the requirements of a categorical exemption, a party challenging the exemption has the burden of producing evidence supporting an exception, citing *Davidon Homes v. City of San Jose* [(1997) 54 Cal. App. 4th 106, 62 Cal. Rptr. 2d 612]. It stated that to establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project may have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption [Pub. Res. Code § 21151]. The Court stated that such a showing is inadequate to overcome the Secretary's determination that the typical effects of a project within an exempt class are not significant for CEQA purposes. It stated, however, that evidence that the project will have a significant effect does tend to prove that some circumstance of the project is unusual. The Court stated that an agency presented with such evidence must determine, based on the entire record before it—including contrary evidence regarding significant environmental effects—whether there is an unusual circumstance that justifies removing the project from the exempt class.

The Court stated that this reading of the guideline was not inconsistent with the phrase "reasonable possibility that the activity will have a significant effect on the environment" in Guidelines section 15300.2(c). It stated that a party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. The Court stated that in such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance. Alternatively, the Court stated that a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

The Court stated that its approach was consistent with the concurring opinion's statement of its central proposition: When it is shown "that a project otherwise covered by a categorical exemption will have a significant environmental effect, it necessarily follows that the project presents unusual circumstances." However, the Court disagreed with the concurring opinion when it moves from this central proposition to the conclusion that a reviewing court must find the exception applicable, and overturn an agency's application of an exemption, if there is "substantial evidence" of "a fair argument that the project will have significant environmental effects." The Court stated that the Secretary, in complying with the Legislature's command to determine the "classes of projects" that "do not have a significant effect on the environment," necessarily resolved any number of "fair arguments" as to the possible environmental effects of projects in those classes. It stated that allowing project opponents to negate those determinations based on nothing more than "a fair argument that the project will have significant environmental effects" would be fundamentally inconsistent with the Legislature's intent in establishing the categorical exemptions.

Plaintiffs asserted that *Wildlife Alive v. Chickering* [(1976) 18 Cal. 3d 190, 132 Cal. Rptr. 377] precludes the Court from construing the unusual circumstances exception to require a showing of something more than a potentially significant environmental effect. The Court stated that *Chickering* held in relevant part that the setting of hunting and fishing seasons by the Fish and Game Commission was not exempt from CEQA under Guidelines former section 15107. That former guideline established a categorical exemption for "'actions taken by regulatory agencies . . . to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment,'" and it described as an example "'the wildlife preservation activities of the State Department of Fish and Game.'" The Court in *Chickering* gave two reasons for finding this exemption inapplicable on its terms. First, the Commission was not the Department of Fish and Game. Second, and "more significantly," several of the statutes that granted powers and duties to the Department of Fish and Game "contemplate projects specifically designed for the preservation of wildlife." These were the "departmental functions" to which the former guideline referred in mentioning "the 'wildlife preservation activities of the State Department of Fish and Game.'" *Chickering* observed that "The [Commission's] fixing of hunting seasons, while doubtless having an indirect beneficial effect on the continuing survival of certain species, cannot fairly or readily be characterized as a preservation activity in a strict sense."

The Court stated that after concluding that the Commission's activity did not fall within the language of the former guideline, *Chickering* discussed why it would have been problematic to "expand" that "language to imply" an exemption for that activity. The Court explained in *Chickering* that doing so would contravene the "principle" that "CEQA must be interpreted so as to afford the 'fullest possible protection' to the environment." It further explained in a passage quoted by

plaintiffs here that "if" it "expanded" the former guideline's language "to cover the commission's hunting program, it is doubtful that such a categorical exemption [would be] authorized under the statute.... No regulation is valid if its issuance exceeds the scope of the enabling statute. The secretary is empowered to exempt only those activities which do not have a significant effect on the environment. (Pub. Resources Code § 21084.) It follows that where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper," and "the setting of hunting and fishing seasons has the potential for a significant environmental impact...."

The Court stated that plaintiffs' reliance on *Chickering* was unavailing. First, it noted that *Chickering* predated the Secretary's adoption of the unusual circumstances exception and, thus, addressed neither the meaning nor the validity of that exception. Second, the only issue in *Chickering* as relevant here was whether the Commission's activity fell within the scope of Guidelines former section 15107. The Court stated that after concluding it did not, *Chickering* added the discussion cited by plaintiffs, which, to buttress its conclusion, explored the validity of a hypothetical exemption that would include the Commission's activity. Third, the Court stated that because that added discussion was tangential to the issue before it and unnecessary to resolve the case, it was, understandably, summary. The Court pointed out that *Chickering* did not consider the broader statutory framework, the evolution of the CEQA statutes, or the implications of the statement for the effectiveness of various other CEQA statutes.

Finally, the Court stated that in 1993, after *Chickering*, the Legislature enacted Pub. Res. Code § 21083.1, which directs courts "not [to] interpret [the CEQA statutes] or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the state guidelines." The Court stated that according to the legislative history, the purpose of this statute was to "limit judicial expansion of CEQA requirements" and to "'reduce the uncertainty and litigation risks facing local governments and project applicants by providing a "safe harbor" to local entities and developers who comply with the explicit requirements of the law.' 'It stated that, given plaintiffs' concession for purposes of appeal that the proposed project here fell within two of the categorical exemptions, under Guidelines section 15300.2(c), environmental review is necessary only if "there is a reasonable possibility [the project] will have a significant effect on the environment due to unusual circumstances." The Court stated that given that the listing of a class of projects as exempt constitutes the Secretary's finding, pursuant to the Legislature's command, that the typical effects of projects within that class are not significant within the meaning of CEQA, interpreting the unusual circumstances exception to require environmental review absent unusual circumstances would violate the Legislature's express directive in section 21083.1 "not [to] interpret" the CEQA statutes and the Guidelines "in a manner which imposes procedural or substantive requirements beyond those" the statutes and the Guidelines "explicitly state."

The Court noted that "in the ... years since CEQA was enacted the Legislature has, for reasons of policy, expressly exempted several categories of projects from environmental review. (*See* § 21080, subd. (b)(1)–(15).) This court does not sit in review of the Legislature's wisdom in balancing these policies against the goal of environmental protection because, no matter how important its original purpose, CEQA remains a legislative act, subject to legislative limitation and legislative amendment," citing *Napa Valley Wine Train, Inc. v. Public Utilities Com.* [(1990) 50 Cal. 3d 370, 267 Cal. Rptr. 569]. The Court stated that, consistent with the directive of section 21083.1, it has held that "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement," citing *Citizens of Goleta Valley v. Board of Supervisors* [(1990) 52 Cal. 3d 553, 276 Cal. Rptr. 410]. The Court stated that adopting plaintiffs' interpretation would do precisely that, by requiring environmental review of projects that one could argue may have a significant environmental effect, but that the OPR and the Secretary, exercising the authority the Legislature has by statute delegated to them and required them to exercise, have already determined do not, in fact, "have a significant effect on the environment."

The Court stated that plaintiffs also substantially relied on *Mountain Lion Foundation v. Fish and Game Com.* [(1997) 16 Cal. 4th 105, 65 Cal. Rptr. 2d 580], in which the majority held in relevant part that the same categorical exemption previously at issue in *Chickering* (renumbered as Guidelines section 15307, and establishing an exemption for "actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment") did not apply to the Commission's decision to remove the Mojave ground squirrel from the threatened species list. The majority found that "a delisting action cannot be fairly included within this class" because it "removes rather than secures [the] protections" that an endangered or threatened species enjoys under the California Endangered Species Act. The Court noted that the majority added, in light of

other guidelines, that a delisting could not come within a categorical exemption: "A categorical exemption represents a determination by the Secretary that a particular project does not have a significant effect on the environment. (§ 21084.)" "It follows that an activity that may have a significant effect on the environment cannot be categorically exempt." The majority in *Mountain Lion* reasoned that under Guidelines section 15065(a), an agency "must find" that a proposed project may have that effect if it has "'the potential to . . . reduce the . . . number or restrict the range of an endangered, rare or threatened species.'" Because a delisting, by "withdrawing existing levels of protection," "creates at least the potential for population reduction or habitat restriction," this guideline "obligates" the Commission "to find a delisting may have a significant environmental effect. Such a finding precludes invocation of a categorical exemption."

The Court stated that for reasons similar to those discussed in connection with *Chickering*, plaintiffs' reliance on *Mountain Lion* was unavailing. It stated that like *Chickering*, *Mountain Lion* addressed neither the meaning nor the validity of the unusual circumstances exception. The Court stated that, also like *Chickering*, *Mountain Lion* presented only the issue of whether the Commission's activity fell within the express terms of a categorical exemption. The Court stated that because the majority found it did not, the hypothetical discussion of whether the Secretary could have established a categorical exemption was tangential, unnecessary, and summary. In any event, the Court stated that properly understood, the discussion in *Mountain Lion* stands only for the proposition that the Secretary, having established in one guideline that a delisting may have a significant effect on the environment, could not in another guideline "make a finding" that delistings, as a class, "do not have a significant effect on the environment" and are therefore exempt from CEQA. The Court stated that *Mountain Lion* did not establish that where the Secretary, exercising statutorily delegated authority, has found that projects of a certain kind "do not have a significant effect on the environment" and are exempt from CEQA, a proposed project that falls within that class and does not involve any unusual circumstances is, nonetheless, subject to environmental review if an argument can be made that it may have a significant effect on the environment. The Court stated that this question simply was not before it in *Mountain Lion*.

Standards of Review. The Court noted that several CEQA statutes expressly address judicial review of agency action. Section 21168 provides the standard of review for decisions "made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency." Section 21168.5 provides the standard of review in all other actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." The Court stated that because nothing required the city to hold an evidentiary hearing in this case, the latter section governed. It noted that under section 21168.5, a court's inquiry is "whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Thus, the Court stated that reversal of the city's action here would be appropriate only if (1) the city, in finding the proposed project categorically exempt, did not proceed in the manner required by law, or (2) substantial evidence failed to support that finding.

The Court observed that the parties disagreed about how these standards apply to an agency's determination that the unusual circumstances exception is inapplicable. Defendants, invoking the traditional substantial evidence standard, argued that a reviewing court must uphold such a determination if substantial evidence supports it, even if substantial evidence in the record also shows that a contrary conclusion would be equally, or even more, reasonable. Plaintiffs, on the other hand, contended that, even if substantial evidence supported the agency's determination, a reviewing court must overturn the determination if there is a fair argument based on substantial evidence that the proposed project may have a significant effect on the environment due to unusual circumstances. Plaintiffs contended that a fair argument exists "if any facts, fact-based assumptions, or expert opinion in the administrative record support . . . arguments that [the] exception may apply, regardless of contrary evidence."

The Court noted that the fair argument approach derives from the application of section 21168.5 in *No Oil, Inc. v. City of Los Angeles* [(1974) 13 Cal. 3d 68, 118 Cal. Rptr. 34]. It stated that *No Oil* reviewed the City of Los Angeles's application of Pub. Res. Code § 21151, which requires preparation of an EIR for a nonexempt project that "may have a significant effect on the environment." The Court stated that although the proposed project in *No Oil* did not qualify for an exemption under the CEQA statutes or the Guidelines, the city had found, after conducting an initial threshold environmental study, that no EIR was necessary because the project would not have a significant effect on the environment. The Court reversed, concluding that the finding constituted a prejudicial abuse of discretion under section 21168.5 because, in making it, Los Angeles had failed to proceed as required by law in two ways: (1) it had not made its determination in writing; and (2) it had used the wrong standard to

determine whether the proposed project might have a significant effect on the environment.

The Court stated that, regarding the latter, *No Oil* construed Pub. Res. Code § 21151 to require preparation of an EIR for a nonexempt project "whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact." At the trial court's direction, Los Angeles had applied "a far more restrictive test that limited use of an EIR to projects which may have an 'important' or 'momentous' effect of semi-permanent duration." In reaching our conclusion, we cited the following factors: (1) "the preparation of an EIR is the key to environmental protection under CEQA"; (2) the statute speaks, not of projects that will have a significant effect on the environment, but of projects that "may" have such effect; (3) the Legislature intended that CEQA be interpreted to afford the fullest protection to the environment within the reasonable scope of the statutory language, but the test Los Angeles had applied afforded the least possible protection within the statutory language; and (4) by "barring preparation of an EIR" in "close and doubtful cases," the test Los Angeles applied would "defeat the Legislature's objective of ensuring that environmental protection serve as the guiding criterion in agency decisions" The Court here stated that because it concluded that Los Angeles had failed to proceed as required by law, in part by applying the wrong standard, *No Oil* expressly declined to decide whether its decision was "supported by substantial evidence."

The Court noted that the Natural Resources Agency expressly incorporated *No Oil*'s fair argument approach into Guidelines section 15064(f)(1): "If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR (*Friends of B Street v. City of Hayward* (1980) 106 Cal. App. 3d 988, 165 Cal. Rptr. 514). Said another way, if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 118 Cal. Rptr. 34)." If, however, an agency's "initial study" for a nonexempt project "shows that there is no substantial evidence that the project may have a significant effect" on the environment, the agency "prepares a negative declaration" (Guidelines section 15002(k)(2)) describing "the reasons" why no EIR is required [Pub. Res. Code § 21064].

The Court stated that the fair argument standard set forth in Guidelines section 15064(f)(1) applies by its terms to determinations of a lead agency, not of a court. It stated that under Pub. Res. Code §§ 21168 and 21168.5, judicial review of agency decisions is for abuse of discretion, citing *Laurel Heights Improvement Assn. v. Regents of University of California* [(1993) 6 Cal. 4th 1112, 26 Cal. Rptr. 2d 231] (*Laurel Heights II*). It noted that the scope of review of an agency's application of the fair argument standard is described in *Friends of "B" Street*, *above*, which explained that a reviewing court may not uphold an agency's decision "merely because substantial evidence was presented that the project would not have [a significant environmental] impact. The [reviewing] court's function is to determine whether substantial evidence supports the agency's conclusion as to whether the prescribed 'fair argument' could be made. If there [is] substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it [can] be 'fairly argued' that the project might have a significant environmental impact. Stated another way, if the [reviewing] court perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency's action is to be set aside because the agency abused its discretion by failing to proceed 'in a manner required by law.'"

The Court stated that there have been several attempts to extend the fair argument standard to CEQA determinations other than the one at issue in *No Oil*, i.e., whether to prepare an EIR for a nonexempt project. The Court stated that it considered, and rejected, one such attempt in *Laurel Heights II*, which involved an agency's decision not to recirculate an EIR for public comment. It noted that Pub. Res. Code § 21092.1 requires recirculation if "significant new information is added to" an EIR after initial circulation and before certification. The Court stated that in *Laurel Heights II*, a neighborhood improvement association argued that in determining whether recirculation is required, "the 'fair argument' test used to review the decision . . . to prepare a negative declaration" in lieu of an EIR should apply. The Court disagreed, explaining: "Section 21151 commands that an EIR must be prepared whenever a project 'may have a significant effect on the environment.' In *No Oil* . . ., we interpreted section 21151 to require preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. Our decision, however, expressly acknowledged that judicial review of agency decisions under CEQA is governed by sections 21168 (administrative mandamus) and 21168.5 (traditional mandamus) and, of course, did not purport to alter the standard of review set forth in those statutes. Rather, the 'fair argument' test was derived from an interpretation

of the language of, and policies underlying, section 21151 itself. For this reason, the 'fair argument' test has been applied only to the decision whether to prepare an original EIR or a negative declaration. The Association has advanced no persuasive authority or reasons for taking this test out of the context of the statutory language of section 21151 and applying it to an agency's decision under section 21092.1. [¶] We conclude that the substantial evidence standard set forth in section 21168.5 governs the [agency's] decision not to recirculate the EIR in this case."

The Court stated that several courts extended the fair argument approach to aspects of the determination of whether the unusual circumstances exception applies, citing *Voices for Rural Living v. El Dorado Irrigation Dist.* [(2012) 209 Cal. App. 4th 1096, 147 Cal. Rptr. 3d 480]; *Wollmer v. City of Berkeley* [(2011) 193 Cal. App. 4th 1329, 122 Cal. Rptr. 3d 781]; *Banker's Hill*, *above*; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* [(1997) 52 Cal. App. 4th 1165, 61 Cal. Rptr. 2d 447]; and *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* [(1992) 9 Cal. App. 4th 644, 11 Cal. Rptr. 2d 850].

The Court further stated that other courts have noted judicial disagreement as to whether the fair argument standard applies in this context, but declined to decide the issue, finding that the application of the standard would not have affected the result, citing *Save the Plastic Bag Coalition v. City and County of San Francisco* [(2013) 222 Cal. App. 4th 863, 166 Cal. Rptr. 3d 253]; *Hines v. California Coastal Com.* [(2010) 186 Cal. App. 4th 830, 112 Cal. Rptr. 3d 354]; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* [(2006) 139 Cal. App. 4th 1356, 44 Cal. Rptr. 3d 128]; *Santa Monica Chamber of Commerce v. City of Santa Monica* [(2002) 101 Cal. App. 4th 786, 124 Cal. Rptr. 2d 731]; *Fairbank v. City of Mill Valley* [(1999) 75 Cal. App. 4th 1243, 89 Cal. Rptr. 2d 233]; and *Ukiah*, *above*. The Court stated that the principal supporting authority these courts cited for the fair argument standard's inapplicability was *Centinela Hospital Assn. v. City of Inglewood* [(1990) 225 Cal. App. 3d 1586, 275 Cal. Rptr. 901] which, in rejecting the claim that the unusual circumstances exception applied, reasoned: "When appellant argues that the facility is located 'at an extremely sensitive location in terms of public usage and traffic,' and it 'will create a health and safety hazard, which in turn, will place increased demands on public services such as police and fire protection,' appellant is asking us to adopt an improper standard of review and independently reweigh the evidence. We conclude that substantial evidence supports the express findings of the [city planning] Commission and city council as to traffic and public health and safety issues and substantial evidence supports the implied finding in the notice of exemption that the facility would not cause any significant environmental effects."

Bifurcated Approach to Review of Potentially Significant Effects and Unusual Circumstances Exception. The Court here concluded that both prongs of the Pub. Res. Code § 21168.5 abuse of discretion standard apply on review of an agency's decision with respect to the unusual circumstances exception. The Court stated hat the determination as to whether there are "unusual circumstances" [Guidelines section 15300.2(c)] is reviewed under the substantial evidence prong, while an agency's finding as to whether unusual circumstances give rise to "a reasonable possibility that the activity will have a significant effect on the environment" is reviewed to determine whether the agency, in applying the fair argument standard, "proceeded in [the] manner required by law."

The Court stated that whether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry, "founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct" [*People v. Louis* (1986) 42 Cal. 3d 969, 232 Cal. Rptr. 110]. It stated that thus, as to this question, the agency serves as "the finder of fact" [*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 104 Cal. Rptr. 2d 326] and a reviewing court should apply the traditional substantial evidence standard that section 21168.5 incorporates [*Save Our Peninsula Committee*]. The Court stated that under that relatively deferential standard of review, the reviewing court's "role" in considering the evidence differs from the agency's. "'Agencies must weigh the evidence and determine 'which way the scales tip,' while courts conducting [traditional] substantial evidence . . . review generally do not'" [*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 38 Cal. Rptr. 2d 139]. Instead, the Court stated that reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it, citing *Western States* and *Laurel Heights Improvement Assn. v. Regents of University of California* [(1988) 47 Cal. 3d 376, 253 Cal. Rptr. 426] (*Laurel Heights I*) (reviewing court's "task is not to weigh conflicting evidence and determine who has the better argument" or whether "an opposite conclusion would have been equally or more reasonable")].

The Court stated that as to whether there is "a reasonable possibility" that an unusual circumstance will

produce "a significant effect on the environment" [Guidelines section 15300.2(c)], a different approach is appropriate, both by the agency making the determination and by reviewing courts. The Court quoted *Laurel Heights II*, which explained that the fair argument standard "was derived from an interpretation of the language of, and policies underlying," the statute at issue in *No Oil* [Pub. Res. Code § 21151], which "commands that an EIR must be prepared whenever a project 'may have a significant effect on the environment.'" The Court observed that there are "close textual similarities" between this statutory language and the language of Guidelines section 15300.2(c), which precludes application of categorical exemptions "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances," citing *Banker's Hill*. The Court noted that *No Oil* observed that "the word 'may' connotes a 'reasonable possibility. . . .'" Accordingly, it concluded that when there are "unusual circumstances," it is appropriate for agencies to apply the fair argument standard in determining whether "there is a reasonable possibility [of] a significant effect on the environment due to unusual circumstances" [Guidelines section 15300.2(c)]. As to this question, the reviewing court's function "is to determine whether substantial evidence supports the agency's conclusion as to whether the prescribed 'fair argument' could be made" [*Friends of "B" Street*].

The Court stated that the bifurcated approach to the questions of unusual circumstances and potentially significant effects comported with its construction of the unusual circumstances exception to require findings of both unusual circumstances and a potentially significant effect. The Court stated that it would be inappropriate for an agency to apply the fair argument standard to determine whether unusual circumstances exist, because that standard is intended to guide the determination of whether a project has a potentially significant effect, not whether it presents unusual circumstances. The Court stated that while evidence of a significant effect may be offered to prove unusual circumstances, circumstances do not become unusual merely because a fair argument can be made that they might have a significant effect. It reiterated that evidence that a project may have a significant effect is not alone enough to remove it from a class consisting of similar projects that the Secretary has found "do not have a significant effect on the environment." Therefore, the Court held that an agency must weigh the evidence of environmental effects along with all the other evidence relevant to the unusual circumstances determination, and make a finding of fact. It held that judicial review of such determinations is limited to ascertaining whether they are "supported by substantial evidence."

The Court stated, however, that when unusual circumstances are established, the Secretary's findings as to the typical environmental effects of projects in an exempt category no longer control. It stated that because there has been no prior review of the effects of unusual circumstances, the policy considerations discussed in *No Oil* apply. An agency must evaluate potential environmental effects under the fair argument standard, and judicial review is limited to determining whether the agency applied the standard "in [the] manner required by law" [Pub. Res. Code § 21168.5].

The Court rejected defendants' assertion that applying two different standards to the unusual circumstances exception is "fundamentally inconsistent with the legal framework for categorical exemptions" and would, by making the process "too complicated and cumbersome," "defeat the Legislature's intent in having categorical exemptions." The Court stated that requiring an agency to apply the fair argument standard to determine whether unusual circumstances give rise to "a reasonable possibility that the activity will have a significant effect on the environment" [Guidelines section 15300.2(c)] is fully consistent with CEQA's framework and the Legislature's intent to provide categorical exemptions. The court stated that there was not anything particularly "complicated" or "cumbersome" about applying section 21168.5's substantial evidence prong to unusual circumstance determinations, and the "proceeded in a manner required by law" prong to determinations as to potentially significant effects. It stated that courts are well versed in bringing a variety of considerations to bear in making such determinations.

The Court rejected defendants' assertion that applying the fair argument standard to aspects of the unusual circumstances exception was in conflict with *Muzzy Ranch*. The Court stated that the premise of defendants' argument was that *Muzzy Ranch* applied the traditional substantial evidence test in reviewing an agency's determination under Guidelines section 15061(b)(3) that a proposed project was not subject to CEQA. It noted, however, that in *Muzzy Ranch* it had no occasion to identify the applicable standard of review. The Court further stated that the language of Guidelines section 15061(b)(3) is considerably different from the language of the unusual circumstances exception; the former applies "where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment," whereas the latter applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Thus, the Court stated that even under defendants' reading of *Muzzy Ranch*, applying the fair

argument standard in the context of the unusual circumstances exception created no conflict with that decision.

Finally, the Court stated that contrary to defendants' assertion, the Court's approach was fully consistent with, and affirmatively supported by, *Valley Advocates v. City of Fresno* [(2008) 160 Cal. App. 4th 1039, 72 Cal. Rptr. 3d 690]. It stated that in *Valley Advocates*, the following CEQA provisions were in issue: (1) Pub. Res. Code § 21084.1 (''a project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment''); (2) Pub. Res. Code § 21084(e) (a ''project that may cause a substantial adverse change in the significance of a historical resource, as specified in Section 21084.1, shall not be exempted from [CEQA] pursuant to subdivision (a)''); and (3) Guidelines section 15300.2(f) (a ''categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource''). The court in *Valley Advocates* held that, in applying these provisions, ''the fair argument standard does not govern'' an agency's determination of whether a building qualifies as a ''historical resource.'' However, it continued, ''once the resource has been determined to be an historical resource, then the fair argument standard applies to the question whether the proposed project 'may cause a substantial adverse change in the significance of an historical resource' and thereby have a significant effect on the environment.'' The Court stated that this discussion supported the conclusion that, if ''unusual circumstances'' are established, an agency should apply the fair argument standard in determining whether there is ''a reasonable possibility'' that those circumstances will produce ''a significant effect'' within the meaning of CEQA.

Remand for Consideration of Standards Articulated in Decision. The Court stated that in reviewing the city's determination that the unusual circumstances exception did not apply, the trial court identified and made ''two separate determinations'': (1) whether ''there is a reasonable possibility that the activity will have a significant effect on the environment''; and (2) ''whether such reasonable possibility of a significant effect is due to unusual circumstances associated with the project.'' It answered the first question in the affirmative, explaining in part that, ''despite [defendants'] criticisms of [Karp's] report and [his] methodology, and even when discounting the clearly erroneous and misleading portions, Dr. Karp's opinion'' regarding the '''probability of seismic lurching of oversteepened side-hill fills'''' ''provides substantial evidence of a fair argument of a significant environmental effect consequent to the Project.'' However, the court also found that the proposed project did not present ''unusual circumstances,'' explaining: ''Though the Project involves a large house, built in the hills on a steep slope, there is nothing so out of the ordinary about such a project that it would take it out of the exemption. Moreover, there is no evidence to support a finding that any of the circumstances surrounding the Project make it 'unusual.' . . . Though it is a large house proposed to be built on a large and steep hillside lot with grading and retaining walls, the Project is not so unusual for a single family residence, particularly in this vicinity, as to constitute the type of unusual circumstances required to support application of this exception.''

The Court further noted that in reversing the judgment, the court of appeal agreed with the trial court ''that Karp's letters . . . amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts.'' The court of appeal disagreed, however, that the unusual circumstances exception applies only if the proposed project's potentially significant environmental effects are due to unusual circumstances. In the court of appeal's view, ''the fact'' that the proposed project ''may'' have a significant effect on the environment ''is itself an unusual circumstance'' that ''precludes'' the city from applying a categorical exemption. The court of appeal went on to note that it might nevertheless ''be helpful'' to determine ''whether unusual circumstances exist'' apart from the project's potentially significant environmental effect. Considering this question de novo, it found that, with respect to the class 3 small structure exemption, the proposed project's size constituted such a circumstance. In reaching this result, it reasoned that ''whether a circumstance is unusual 'is judged relative to the typical circumstances related to an otherwise typically exempt project,' as opposed to the typical circumstances in one particular neighborhood.'' As to the class 32 in-fill development exemption, the court offered no additional analysis.

The Court stated that it was apparent that neither the trial court nor the court of appeal applied the principles set out in this decision. Accordingly, it stated that remand for application of those standards was both appropriate and necessary.

Local Conditions Relevant to Unusual Circumstances Inquiry. The Court further stated that the court of appeal erred in another respect by indicating that the unusual circumstances inquiry excludes consideration of ''the typical circumstances in one particular neighborhood.'' The Court noted that in a number of decisions, the appellate courts looked to conditions in the immediate vicinity of a proposed project to determine whether the unusual circumstances exception applied, citing *Bloom v. McGurk* [(1994) 26 Cal. App. 4th 1307, 31 Cal. Rptr. 2d 914]; *City of Pasadena v. State of California* [(1993) 14 Cal. App. 4th 810, 17 Cal. Rptr. 2d 766]; and *Ukiah*,

above. The Court stated that in the only decision city by the court of appeal for its contrary view*Santa Monica*, *above*,—the court quoted *Ukiah* on this point and declared it to be "instructive." The Court agreed with these decisions insofar as they indicate that local conditions are relevant. It stated that in determining whether the environmental effects of a proposed project are unusual or typical, local agencies have discretion to consider conditions in the vicinity of the proposed project.

Finding of Potential Impacts Must Be Based on Project as Approved. Defendants attacked the conclusions of both the trial court and the court of appeal that Karp's submissions constituted substantial evidence of a fair argument that the proposed project may have a significant environmental effect. The Court noted that Karp opined that the proposed project was "likely to have very significant environmental impacts . . . due to the probability of seismic lurching of the oversteepened side-hill fills." Defendants contended that Karp's opinion did not constitute substantial evidence of a fair argument because it was based on a misreading of the plans approved by the city approved. They argued that the evidence in the record conclusively establishes that "the project approved by the city does not involve 'side-hill fill'" and that Karp was mistaken in reading the plans otherwise. Defendants argued that because Karp's belief that there would be side-hill fill was erroneous, his opinion was not "substantial evidence." Defendants argued that a finding of potential environmental impacts must be based on the proposed project as actually approved, and may not be based on unapproved activities that opponents assert will be necessary because the project as approved cannot be built. They argued that if the proposed project "cannot be built as approved" and applicants want to build a different project, then "they must return to the city for approval of a different project and the city could issue a stop-work notice to prevent unauthorized construction."

The Court agreed with defendants that a finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project, as approved, cannot be built. It noted that *Laurel Heights I* considered whether there are circumstances under which an EIR must address "future action related to" a proposed project. It stated that in that case, the University of California, San Francisco (UCSF), had certified an EIR for moving its school of pharmacy to 100,000 square feet of a 354,000-square-foot building it had purchased. Although UCSF admitted it intended to use the remainder of the building when existing tenants left, the EIR it prepared did not consider the potential environmental effect of that intended future use. To justify this omission, UCSF argued that it had "not formally decided precisely how [it would] use the remainder of the building." The Court stated that in rejecting this argument, *Laurel Heights I* first held that an EIR for a proposed project must consider the potential environmental effects of future expansion if expansion (1) "is a reasonably foreseeable consequence of the initial project" and (2) "will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." The Court in *Laurel Heights I* reasoned that this standard properly balances the following considerations: (1) delayed review may produce "bureaucratic and financial momentum" that "provides a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project"; (2) "'environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences'"; and (3) "premature environmental analysis may be meaningless and financially wasteful." The Court then concluded that UCSF's EIR had to address the potential effects of future use because there was "telling evidence" that UCSF had, by the time it prepared the EIR, "either made decisions or formulated reasonably definite proposals as to future uses of the building." *Laurel Heights I* clarified, however, that an EIR need not discuss "specific future action that is merely contemplated or a gleam in a planner's eye."

The Court declined to extend *Laurel Heights I* to situations where project opponents claim, not that the proposed project will lead to additional future development, but that the proposed project cannot be carried out as approved and will require additional work that may or will have a significant environmental effect. The Court stated that the latter situation, unlike the former, presents little risk of either bureaucratic and financial impediments to proper environmental review or piecemeal review of a project with the potential for significant cumulative effects. It stated that if a proposed project cannot be built as approved, then the project's proponents will have to seek approval of any additional activities and, at that time, will have to address the potential environmental effects of those additional activities. The Court further observed that if a project opponent's opinion that unapproved activities may have a significant environmental effect constituted fair argument, it was doubtful that any project could survive challenge. Accordingly, the Court held that Karp's opinion was insufficient as a matter of law insofar as it was based on the potential effect of unapproved activities Karp believed would be necessary because the project could not be built as approved.

The Court stated that this conclusion had implications for defendants' claim that, because Karp misread the

proposed project's plans, his opinion was legally insufficient. It noted that as part of the permit application, applicants submitted a set of architectural plans for the project. In opining that the proposed project would result in "oversteepened side-hill fills" with potentially significant environmental effects—including "seismic lurching"—Karp relied largely, if not entirely, on a page of those plans entitled "TRANSVERSE SECTION LOOKING EAST." In April 2010, during the appeal to the city council, Karp stated that this page "indicates [that] fills [will be] placed directly on very steep existing slopes," "creating a new slope more than 50 %." The Court noted, however, that the plans the board had already approved three months earlier (along with the use permit) did not include this page, nor did the project plans the city council ultimately approved. The Court stated that insofar as Karp based his opinion regarding the project's potential effects on side-hill fill that had not been approved, his opinion was legally insufficient. The Court stated that on remand, the court of appeal should apply these principles to Karp's opinion if it reached that point in its analysis.

Appropriate Remedy. Finally, the Court stated that because reversal and remand was appropriate, it did not have to resolve defendants' claim that the remedy the court of appeal chose upon finding the proposed project not to be exempt under class 3 or class 32—ordering preparation of an EIR—was improper. The Court stated, however, that it was appropriate to discuss the issue because the question of remedy could arise again on remand.

The Court noted that Pub. Res. Code § 21168.9 specifically addresses the available remedies for CEQA violations. Section 21168.9(a) provides in part that, upon finding that a public agency's decision violates CEQA, a court should enter an order that includes (1) a mandate that the decision be voided in whole or in part, and/or (2) a mandate that the agency "take specific action as may be necessary to bring the . . . decision into compliance with" CEQA. Section 21168.9(b) provides that any such order "shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with [CEQA]." The Court observed that, consistent with these provisions, it ordered preparation of an EIR upon finding that a public agency had improperly issued a negative declaration for a proposed project [*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310, 106 Cal. Rptr. 3d 502] and upon finding that a certified EIR was inadequate [*Laurel Heights I*].

The Court further noted, however, that section 21168.9(c) provides in part that "nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way." It stated that in it;Voices for Rural Living v. El Dorado Irrigation Dist., *above*, the court of appeal held that, on finding that an agency erred in applying a categorical exemption, the trial court had "exceeded its authority" in ordering the agency to prepare an EIR. The court of appeal stated that "how an agency complies with CEQA is a matter first left to the agency's discretion. Having determined the project was not exempt from CEQA, the court should have ordered [the agency] to proceed with further CEQA compliance, which in this case would have been the preparation of an initial study and a determination of whether further environmental review would require an EIR or a mitigated negative declaration." The Court here stated that consistent with these authorities, if, on remand, the court of appeal determined that neither of the categorical exemptions discussed above applies, then it could order preparation of an EIR only if, under the circumstances, the city would lack discretion to apply another exemption or to issue a negative declaration, mitigated or otherwise.

Concurring Opinion. Justice Liu agreed with the majority opinion that "a finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project, as approved, cannot be built." Justice Liu reasoned that this rule will not lead to evasion of the environmental review requirements of CEQA because presumably a developer's failure to build the project as approved will be remedied by the local agency that approved the project. Justice Liu stated that when opponents of a project make a credible argument that it cannot be built as approved, a trial court may exercise its discretion to retain continuing jurisdiction after rendering a judgment in order to ensure CEQA compliance. Here, because the trial court and court of appeal did not limit environmental review to projects actually approved, Justice Liu agreed that reversal and remand were warranted.

Justice Liu did not agree, however, with the Court's reading of Guidelines section 15300.2(c) or with the Court's "novel and unnecessarily complicated approach" to the standard of review. Justice Liu reasoned that a project falling within a categorical exemption is, by definition, a project belonging to a class of projects that does not have significant environmental effects. When there is a reasonable possibility that a project otherwise covered by a categorical exemption will have a significant environmental effect, it necessarily follows that the project presents unusual circumstances. In other words, Justice Liu stated that the reasonable possibility of a significant environmental effect means that some circumstance of the project is not usual in comparison to the typical project

in the exempt category. Justice Liu expressed the view that instead of comprising a distinct requirement, the phrase "unusual circumstances" in section 15300.2(c) simply describes the nature of a project that, while belonging to a class of projects that typically have no significant environmental effects, nonetheless may have such effects. Justice Liu would have held that the sole question for courts reviewing agency determinations under section 15300.2(c) is whether substantial evidence supports a fair argument that the project will have significant environmental effects.

Commentary by Ron Bass

This decision resolves a long-standing disagreement among appellate districts and lead agencies concerning the interpretation and implementation of categorical exemptions and the exceptions to them. Under CEQA, a categorical exemption represents a category of projects that the Secretary for Natural Resources has determined generally would not result in a significant impact on the environment and, therefore, should not have to undergo environmental review. However, categorical exemptions, unlike statutory exemptions, are not absolute. Rather, the Guidelines contain a series of exception to the exemptions which may preclude a lead agency from relying on a categorical exemption. Perhaps the most frequently used exception is the one for "unusual circumstances." That exception states that "a categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." This exception has given rise to several questions over the years, which have come to a head in this Supreme Court decision:

- Does a "reasonable possibility that the activity with have a significant effect" itself represent an "unusual circumstance" or do the circumstances first have to be determined to be "unusual" before getting to the question of "significant effect"?
- In determining whether there are "unusual circumstances," is a lead agency allowed to judge the project relative to the unique site and vicinity where it is proposed or is the agency limited to only comparing to the typical circumstances of an otherwise typically exempt project?
- What is the appropriate standard of review for determining whether the circumstances are "unusual" and whether there is a "reasonable possibility of significant effect"?

The proposed project that gave rise to this case involved the issuance of use permits to demolish an existing house and construct a new 6,478 square-foot, single-family residence with an attached 3,494 square-foot (ten car) garage in the Berkeley Hills on wooded site with slopes up to 50 percent.

The City of Berkeley determined the project fit within two categorical exemptions: Class 3 (Guidelines section 15303) New Construction of Small Structures (e.g., single-family residence) and Class 32 (Guidelines Sec. 15332) Infill Development Projects. The city also concluded that the project as proposed and approved would not have any significant effects on the environment due to the absence of any "unusual circumstances."

The parties agreed that the exemptions fit the project. However, the opponents alleged that the "unusual circumstances" exception should apply because project's unusual size, location, nature, and scope would result in significant environmental effects. To support their allegations, the opponents submitted data that purportedly constituted substantial evidence. Among other things, the evidence consisted of an architectural and geotechnical expert's opinions, based on review of site and development plans, that significant effects would result thereby precluding reliance on the categorical exemptions. Unfortunately, as discussed below, the expert reviewed and based his opinions on the wrong plans.

The trial court upheld the city's determinations that the categorical exclusions should apply because there was substantial evidence in the record to support them. It also held that the "unusual circumstances" exception did not apply, despite the potential for significant effects to occur, because the project did not present any unusual circumstances.

The appellate court reversed because in its opinion the "unusual circumstances" exception applied and therefore, reliance on the categorical exemptions was inappropriate.

In siding with the city, the California Supreme Court made several key holdings. First, the Court held that a potential for significant effect alone is not sufficient to trigger the "unusual circumstances" exception. Rather, according to the Court, the existence of "unusual circumstances" and the potential for significant effects are two separate requirements. The lead agency must first determine that "unusual circumstances" exist and, only then, may it determine that those "unusual circumstances" would lead to potentially significant effects.

Second, in arriving at the above conclusion, the Court also held that in making the determination of whether circumstances are unusual, a lead agency has the discretion to consider the unique features of the project in

relationship to the specific conditions of the site and of the vicinity where the project is proposed.

Third, the Court held that two different standards of review apply to the two respective parts of the "unusual circumstances" exception. According to the Court, the determination of whether a project presents "unusual circumstances" is a question of fact and therefore is based on the "substantial evidence" standard. On the other hand, the determination of whether the presence of "unusual circumstances" may lead to the potential for significant effects to occur is subject to the "fair argument" standard.

In reaching these conclusions, the Court also held that a lead agency is responsible for considering the possibility of "unusual circumstances" applying, even in the absence of an opponent raising them.

Applying these principles to the facts of the case, the Court concluded that, while "unusual circumstances" could have been present, the evidence submitted by the opponents did not constitute substantial evidence because the opponent's expert reviewed and based his opinions on the wrong set of plans—not those approved by the city in issuing the permit. According to the Court, "a finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project, as approved, cannot be built."

According to the majority opinion, in the absence of substantial evidence that there were "unusual circumstances," the exception does not apply, even if a fair argument could be made that potentially significant impacts might occur. The Court reversed the appellate court's decision and remanded the case back to the trial court for reconsideration in view of the principles that it laid out.

The decision was split 5-2, with the minority concurring that the categorical exclusions applied, but basing its decision only on the mistakes made by the applicant's expert, which they agreed gave rise to a lack of substantial evidence. The concurring justices did not like the two-prong approach to the exemption or the two different standards of review for the different parts of it, which they thought was overly complex. According to the concurring justices the potential for significant environment effects to occur should itself constitute "unusual circumstances."

Despite the Supreme Court's decision, the use of the "unusual circumstances" exception will no doubt still be considered complex by many agencies and CEQA practitioners. However, it does at least settle the questions about the exception having two parts and that the standard of review is different for each.

Commentary by Al Herson

The Supreme Court's decision in *Berkeley Hillside* resolves a split of authority and provides much-needed certainty regarding which standard of review lead agencies should use when applying the "reasonably possibility of significant impact due to unusual circumstances" exception to categorical exemptions. On its surface, the majority decision is a straightforward two-step process. First, determine whether unusual circumstances exist, using the substantial evidence standard of review. If unusual circumstances do exist, then determine whether a reasonable possibly of significant impact exists, using the fair argument standard of review.

But the case still leaves lingering uncertainty about when unusual circumstances can be found to exist because it provides examples rather than a straightforward legal test. As one example, the Court stated that unusual circumstances may exist if the project is not typical of its class due to its size or location. Neighborhood conditions can be taken into account in making this determination.

But the Court also stated that "evidence that the project will have a significant effect does tend to prove that some circumstance of the project is unusual." It is questionable whether this part of the decision will have much force. If petitioners have evidence, even strong evidence, that a project's impact "will" be significant, but the agency has any substantial evidence that the impact will not be significant, then the agency may conclude there is no unusual circumstance. Given the deferential substantial evidence standard of review, it would relatively easy for a lead agency to defeat a claim of unusual circumstances if it is based solely on petitioner evidence that a project will have a significant effect.

Aside from these two examples of unusual circumstances articulated by the Court, others may exist or be created. Some examples might be found combing through past appellate cases reviewing agency determinations of unusual circumstances based on the substantial evidence standard, though at least some of the past case examples can be squeezed within "size" or "location." *See*, *e.g.*, *Centinela Hospital Assn. v. City of Inglewood* [(1990) 225 Cal. App.3d 1586, 1601, 275 Cal. Rptr. 901 (substantial evidence supported city's implied finding that residential care facility's location, in terms of public usage and traffic, did not create unusual circumstances)]. Future courts applying the Supreme Court's ruling may well come up with additional examples of unusual circumstances.

◗**References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 21.06[7] (Categorical Exemptions from CEQA).

Review Granted: Must EIR for Regional Transportation Plan Include Analysis of Consistency with GHG Reduction Goals

Cleveland National Forest Foundation v. San Diego Assn. of Governments
No. S223603, Cal. S. Ct.
March 11, 2015

The California Supreme Court has granted review in *Cleveland National Forest Foundation v. San Diego Assn. of Governments* [(2015) 231 adv. Cal. App. 4th 1056, 180 Cal. Rptr. 3d 548], in which the San Diego Association of Governments (SANDAG) certified an EIR for its 2050 Regional Transportation Plan/Sustainable Communities Strategy. CREED-21 and the Affordable Housing Coalition of San Diego filed a petition for writ of mandate challenging the EIR's adequacy under CEQA. Cleveland National Forest Foundation and the Center for Biological Diversity filed a similar petition, in which Sierra Club and the People later joined. The trial court granted the petitions in part, finding the EIR failed to carry out its role as an informational document because it did not analyze the inconsistency between the state's greenhouse gas reduction policy goals reflected in Executive Order S-3-05 and the transportation plan's greenhouse gas emissions impacts after 2020. The court also found the EIR failed to adequately address mitigation measures for the transportation plan's greenhouse gas emissions impacts. Given these findings, the court declined to decide any of the other challenges raised in the petitions. SANDAG appealed, contending the EIR complied with CEQA in both respects. Cleveland National Forest Foundation and Sierra Club cross-appealed, contending that the EIR further violated CEQA by failing to analyze a reasonable range of project alternatives, failing to adequately analyze and mitigate the transportation plan's air quality impacts, and understating the transportation plan's impacts on agricultural lands. The People separately cross-appealed, contending that the EIR further violated CEQA by failing to adequately analyze and mitigate the transportation plan's impacts from particulate matter pollution. The court of appeal, in a 2-1 decision, concluded that the EIR failed to comply with CEQA in all identified respects. It therefore modified the judgment to incorporate its decision on the cross-appeals and affirmed. The Supreme Court limited review to the following issue: "Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05, so as to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?"

Emergency Exemption from CEQA Applied to Permanent as Well as Temporary Repairs

CREED-21 v. City of San Diego
No. D064186, 4th App. Dist. Div. 1
234 Cal. App. 4th 488, 2015 Cal. App. LEXIS 147
January 29, 2015, cert. for pub. February 18, 2015

The emergency exemption from CEQA requirements for storm drainage repair applied to permanent as well as temporary repairs to the storm drain. Although the emergency exemption did not apply to revegetation of the site, the commonsense CEQA exemption [Guidelines section 15061(b)(3) (exemption where the activity is covered by "the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment")] applied to that activity, and plaintiff failed to show that the exception to that exemption for unusual circumstances was applicable.

Facts and Procedure. In June 2007, the city's engineering and capital projects department applied for an assessment by the city's development services department of a public project known as the 7435 Via Rialto Storm Drain Replacement. That project was described as the installation of 135 feet of storm drain pipe, cut-off walls, and a headwall, and the repair of the failed slope. In August 2007, a limited geotechnical investigation report was completed for the project. In April 2008, a biological resources report was completed for the project by RBC. The report described the project as the replacement of 135 feet of damaged storm drain pipe and construction of two new cleanout boxes, several new cutout walls, and a headwall within the city's existing easement. RBC created a vegetation map and performed general surveys for flora and fauna on the site. No endangered, threatened, or other rare species were found on the site. However, temporary impacts to sensitive vegetation would occur because of the project, including impacts on 0.3 acres of diegan coastal sage scrub/chaparral and 0.4 acres of southern mixed chaparral.

In June 2009, the Via Rialto storm drain failed, causing significant erosion along the adjacent steep slopes and undermining the hillside on which single-family

residences were located. the city's engineer concluded that if the erosion were allowed to continue, it would present an imminent threat to public safety. He requested the city issue an emergency exemption from CEQA to allow reconstruction of the failed storm drain. In so doing, he noted that since the April 2008 biological report, the 2007 replacement project had been modified to eliminate the use of mechanized equipment, resulting in a reduced work area and less impact on sensitive vegetation. He described the proposed emergency work as including the replacement of the failed pipes, construction of a concrete headwall, a modified cleanout, and a storm drain rack, rehabilitation of the remaining pipes with cast-in-place pipe, and revegetation of the area with appropriate hydroseed mix and jute matting pursuant to the biological resources report.

In June 2009, the city issued a determination of environmental exemption, finding the proposed emergency work was exempt from CEQA pursuant to CEQA Guidelines section 15269(b). That determination described the proposed work as the replacement and upgrading of the failed storm drain pipes with approximately 135 feet of new high-density polyethylene pipes and construction of two new cleanout boxes, new cutout walls, and a new headwall. The city based the emergency exemption on its engineer's finding that deterioration of the storm drain and metal support systems presented an imminent risk to public health and safety. It found that if the storm drain was not immediately repaired, its existing condition could result in further erosion of the slope and could result in slope failure.

On January 15, 2010, the city issued a notice of exemption for the emergency storm drain repair project that had been modified from its June 2009 description. The notice described the work as the installation of a concrete headwall, replacement of about 50 to 55 feet of existing pipe starting from the headwall to where the pipe separation occurred, installation of a modified cleanout, application of about 310 square feet of shotcrete to the exposed slope, rehabilitation of the remaining pipe using cast-in-place pipe, and installation of a storm drain rack. The notice also stated that the impacted areas would be revegetated with appropriate hydroseed mix and jute and a restoration plan would be submitted to the city manager after completion of the emergency work. The notice stated that the reason for the CEQA exemption was that the combination of the very steep slope and resulting erosion caused by the failed pipe were continuously undermining the hillside below single-family homes on Caminito Rialto, and that if the erosion continued unabated, it would present an imminent threat to public safety.

Also on January 15, the city issued an emergency permit (No. 133188) approving the requested emergency work, described as: "Reconstruct failed storm drain, replacement will include the replacement of failed pipes; upgrade the remaining pipes on the steep slopes, and installation of a new headwall to dissipate the energy of the water flow." The emergency permit included the express condition that within 60 days the city's engineering department "shall apply for a regular coastal permit to have the emergency work be considered permanent. If a regular permit is not received, the emergency work shall be removed in its entirety within 150 days of the above date unless waived by the City Manager."

In addition, the city's engineering and capital projects department issued an updated biological letter report modifying RBC's April 2008 report to reflect the revised scope of work. The update letter stated that the use of only hand tools and the elimination of mechanized equipment would avoid direct impact to sensitive biological resources. The letter revised the type of vegetation communities impacted by the project, the project impact analysis, and the biological resources map. The revised project area was about 2,835 square feet, or about 0.065 of an acre. The letter stated that during three recent site visits no rare, endangered, or threatened plant or animal species were observed. The letter stated that the project would directly impact only "disturbed habitat (Tier IV)" and would no longer impact diegan coastal sage scrub (Tier II) or southern mixed chaparral (Tier III). As described in the April 2008 report, "Tier IV" or "disturbed" habitat, also known as "ruderal" vegetation, "typically includes areas that have been previously disturbed by development or agricultural activities. It includes lands generally cleared of vegetation such that little or no natural habitat remains and lands disturbed such that at least 50 percent of plant cover is broadleaved non-native species." The update letter stated that under the city's biological guidelines, "impacts to lands classified as Tier IV upland habitat are not considered significant."

In May 2010, the emergency storm drain repair work was completed. In October, the city filed an application for a regular coastal development permit and site development permit. In November, a notice of application for the permits was posted. In June 2011, a revegetation/restoration planting plan was prepared for the city's project. The revegetation plan noted that the storm drain repair work had been completed and the city's applications for regular permits for that work would include the revegetation plan for restoration of the impacted area. The goal of the plan was to restore the area entirely with native vegetation (i.e., diegan coastal sage scrub and southern mixed chaparral) and thereby biologically improve on

the current post-impact conditions of the site. The plan stated the areas impacted by the storm drain repair work were "mostly devoid of vegetation." The plan provided that the site would be revegetated with a combination of native container plantings and an application of native seed mix hydroseed slurry, with specific species set forth in tables based on the native habitat immediately adjacent to the site. In September, the La Jolla Community Planning Association approved the project.

On November 29, 2011, the city issued a notice of exemption (NOE) for the project, describing it as follows: "Coastal Development Permit and Site Development Permit for previous emergency work to repair a failed storm water drain. As a result of past heavy rains a portion of the existing storm drain was washed out and on January 11, 2010, the City Engineer requested to perform emergency repair work to the failed storm water drain and eroded steep slope. On January 15, 2010, Development Services staff issued a Determination of Emergency Environmental Exemption and Emergency Coastal Development [Permit] No. 673200. The emergency work was completed in May, 2010. The emergency work restored the storm water drain which included installation of a new 5-foot by 5-foot manhole/cleanout at the failure location, removal and replacement of 55 feet of damaged CMP storm water drain with high density polyethylene (HDPE) storm pipe, lining of the existing storm drain from the street to the inlet to the new manhole/cleanout, and installation of a headwall with an energy dissipater at the outlet. Revegetation of the slope has not been completed; however, a Revegetation Plan is included as part of the Coastal Development and Site Development Permits. The current project includes the emergency repair work that has already been completed plus the proposed revegetation plan."

The city concluded that the project was exempt from CEQA, explaining that it had "conducted an Initial Study that determined the project would not result in significant environmental impacts and met the criteria set forth in Guidelines Sections 15301, 15302, and 15061(b)(3) (General Rule). The only physical change associated with the project was the implementation of the revegetation plan. Since the revegetation would not result in a significant effect on the environment, the project would be exempt from CEQA in accordance with Section 15061(b)(3). Furthermore, since the project replaced an existing storm drain with a new storm pipe without increasing capacity and would return the surrounding vegetation to preexisting conditions[,] the project is exempt from CEQA [Guidelines] Sections 15301 and 15302. These CEQA sections allow for the replacement of damaged public facilities with new facilities serving the same purpose without increasing capacity." The city concluded that the project was exempt from CEQA and the exceptions listed in Guidelines section 15300.2 did not apply.

Also on November 29, the city issued a notice of right to appeal the environmental exemption determination. On December 5, 2011, plaintiff CREED filed an appeal of the city's environmental determination for the project, arguing that the project did not qualify for the exemptions stated and had the potential for significant environmental impacts.

The city council denied CREED's appeal of the exemption determination for the project. The city's hearing officer considered the permit application for the project and approved the application. CREED appealed that decision to the city's planning commission. The planning commission denied the appeal and upheld the hearing officer's written findings that the "overall siting and design of the emergency work and revegetation of the eroded slope does not adversely affect environmentally sensitive lands" and "the project is for emergency work which has been completed and to revegetate the eroded slope." It further found "the emergency work has been completed and the siting and design resulted in no impacts on any adjacent environmentally sensitive lands by including revegetation and erosion control plans to stabilize the slope." The city then granted coastal development permit No. 79264 and site development permit No. 79265 for the project, granting permission for the existing storm water drain that was part of the emergency repair and replacement and revegetation of the eroded slope, including an existing concrete headwall and revegetation of the slope. The permits required the establishment and maintenance of the landscape improvements shown on the approved plans and, in particular, the revegetation plan dated November 30, 2011.

Plaintiff brought this action seeking a writ of mandate, contending that the project was not exempt from review under CEQA. The trial court entered judgment for CREED. It concluded that no categorical exemption applied to exempt the city from conducting environmental review of the project. The judgment declared the project permits invalid, declared the project was not exempt from environmental review under CEQA, and enjoined the city from undertaking any physical activities relating to the project until the court finds the city has issued all required permits and subjected them to environmental review under CEQA. The city appealed, and the court of appeal reversed and remanded.

Project Baseline. The city contended that the trial court erred by setting the baseline for the project under CEQA prior to the issuance of the 2010 emergency permit for the storm drain repair work. It argued that because the

emergency work completed in 2010 was exempt from CEQA, the only work remaining to be completed, and thus the only proposed "project" under CEQA, was the revegetation plan. The city argued that the baseline for the revegetation project should have been established as the physical conditions that existed after the emergency work had been completed (i.e., no earlier than Oct. 2010 when it applied for the regular permits for the emergency work already done and the revegetation work proposed to be done).

The court noted that in the NOE for the project, the city found that "the only physical change associated with the project is the implementation of the revegetation plan. Since the revegetation would not result in a significant effect on the environment, the project would be exempt from CEQA in accordance with [Guidelines] Section 15061(b)(3)." It stated that in granting CREED's petition challenging the project, the trial court concluded that the project was not exempt from CEQA based on its finding that the project's baseline was in 2007 when the storm drain repair work was initially proposed by the city. The court reasoned that environmental review of that proposed work began after June 2007 when the city filed its application for that work. It noted that a geotechnical investigation was conducted in August 2007 and a biological resources report was prepared in April 2008. Although the trial court acknowledged that the storm drain repair work was subsequently performed pursuant to an emergency exemption in 2010, it nevertheless concluded that the baseline for the project should remain as of 2007 when the environmental review for the storm drain repair work and revegetation plan were originally proposed. The court rejected the city's argument that the baseline should be set after the 2010 emergency work: "If the city's logic is accepted, it would undermine the purpose of CEQA, as an applicant who is granted an emergency permit would be able to avoid more stringent scrutiny of its project during the regular permitting process due to the fact that it was previously able to obtain this type of permit."

The court noted that under CEQA, an agency must determine what, if any, effect on the environment a proposed project may have. To do so, a public agency must first make a fair assessment of existing physical conditions (i.e., baseline physical conditions) and then compare it to the anticipated or expected physical conditions were the project completed, thereby allowing the agency to focus on the nature and degree of changes expected in those physical conditions after the project and whether those changes result in any significant effect on the existing environment, citing Guidelines section 15125(a); *Communities for a Better Environment v. South Coast Air Quality Management Dist.* [(2010) 48 Cal. 4th 310, 106 Cal. Rptr. 3d 502]; and *County of Amador v. El Dorado County Water Agency* [(1999) 76 Cal. App. 4th 931, 91 Cal. Rptr. 2d 66 (agency must focus on impacts to existing environment). It observed that "the comparison must be between existing physical conditions without the [project] and the conditions expected to be produced by the project. Without such a comparison, the EIR [or other environmental review] will not inform decision makers and the public of the project's significant environmental impacts, as CEQA mandates," citing *Communities*.

Based on its review of the administrative record, the court concluded that the trial court erred by finding that the baseline for the project consisted of the physical conditions existing at the site in 2007. The court stated that the storm drain repair work completed in 2010 pursuant to the emergency exemption was, in effect, an intervening and superseding event that changed the physical environment without any requirement for CEQA review of that work for a significant effect on the environment. Accordingly, after the 2010 emergency work was completed, the only activity to be performed, or the "project," under CEQA was the implementation of the revegetation plan. Therefore, the court concluded that CEQA baseline for the revegetation project had to be set after the 2010 emergency work was completed and any qualification for a CEQA exemption and/or significant environmental effect of that project had be considered based on the post-emergency-work physical environment of the site.

The court noted that Pub. Res. Code § 21080(b) provides a statutory exemption from CEQA requirements for certain emergency projects: "This division does not apply to any of the following activities: . . . (4) Specific actions necessary to prevent or mitigate an emergency." CEQA defines an "emergency" as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage" [Pub. Res. Code § 21060.3; Guidelines section 15269]. The court further noted that it was undisputed that the storm drain repair work done in 2010 was exempt from CEQA pursuant to the statutory exemption for emergency projects. However, CREED argued that 2010 emergency exemption was merely for "temporary" work and CEQA required that the city conduct at least a preliminary review, if not also an initial study and EIR, to determine whether the storm drain repair work already completed may have a significant effect on the environment.

The court noted that in support of its position, CREED relied solely on a condition of the emergency permit issued by the city that was based on the San Diego Municipal Code. The court stated that the January 2010 emergency permit for the storm drain repair work included the express condition that within 60 days the city's engineering department "shall apply for a regular coastal permit to have the emergency work be considered permanent. If a regular permit is not received, the emergency work shall be removed in its entirety within 150 days of the above date unless waived by the City Manager." The court noted that San Diego Municipal Code section 126.0718 provides that an emergency coastal development permit may be issued when a coastal emergency exists, but the emergency coastal development permit must include a condition requiring the processing of a regular coastal development permit application thereafter for that emergency work. Accordingly, the court stated that any "temporary" status of the emergency work performed by the city in 2010 was based solely on the San Diego Municipal Code and not on CEQA or the Guidelines. It stated that because CREED did not allege any violation of the San Diego Municipal Code independent of CEQA requirements, it could not argue that the trial court's declaratory and injunctive relief, based on violation of CEQA, could instead be affirmed based on a violation of the San Diego Municipal Code. The court noted that in any event, in April 2012 the city did, in fact, issue the regular site and coastal development permits for the emergency work completed at the site.

The court further stated that because CEQA and the Guidelines do not contain any provisions for environmental review of emergency projects, any emergency work completed pursuant to an emergency exemption and permit is deemed to be done outside of CEQA's requirements and therefore no subsequent environmental review of that completed work is required. The court cited *Western Mun. Water Dist. v. Superior Court* [(1986) 187 Cal. App. 3d 1104, 232 Cal. Rptr. 359], which explained: "The question of [environmental] impact is irrelevant to the emergency exemption.... The text of the emergency exemption does not address the question of impact [on the environment]. Indeed, the self-evident purpose of the exemption is to provide an escape from the EIR requirement despite a project's clear, significant impact." The court stated that whether the work completed pursuant to an emergency exemption and permit is a short-term or "stop-gap" measure or long-term or "permanent" construction, that work is exempt from CEQA's environmental review provisions. Therefore, the court stated that the "permanent" emergency repair of the storm drain pipe in this case was exempt from CEQA requirements and no environmental review of that work was required either before or after it was completed.

The court stated that one effect of the emergency exemption and permits for the storm drain repair work completed in this case was that the physical environment existing at the site in 2010 changed for purposes of CEQA review and any future work proposed to be completed at that site was required to be considered under CEQA based on the physical environment that existed thereafter without any environmental review of the emergency work completed in 2010 and without any consideration of the physical conditions that existed prior to that emergency work. That meant that the revegetation plan, the only work to be done at the site after 2010 and not included in the emergency exemption and permits, had to be reviewed under CEQA based solely on the physical environment that existed after completion in 2010 of the emergency storm drain repair work. Thus, the court stated that the baseline for consideration of the revegetation plan under CEQA was the post-2010 emergency work physical conditions and not the 2007 pre-emergency work physical conditions of the site.

The court observed that the "environment" under CEQA is "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance" [Pub. Res. Code § 21060.5]. It stated that because CEQA applies only to discretionary projects proposed to be carried out or approved by public agencies and the revegetation plan was the only "project" under CEQA proposed to be carried out at the site after completion of the 2010 emergency work, CEQA applied only to the revegetation plan and not to the work done as part of the 2010 emergency storm drain repair. Therefore, the court stated that in conducting a preliminary review of the revegetation project under CEQA, the city was charged with making a comparison between the existing physical conditions after the 2010 emergency work was completed without the revegetation project and the conditions expected to be produced by the revegetation project, citing **Communities for a Better Environment**. It stated that those baseline conditions were the actual environmental conditions (i.e., real conditions on the ground) existing at the time environmental analysis of the proposed project was commenced.

Standing to Challenge Application of Emergency Exemption to Storm Drain Repair. The city contended that the trial court erred by finding CREED had standing to challenge the city's determination that an emergency exemption under CEQA applied to its 2010 storm drain repair work. The court noted that in granting CREED's

petition, the trial court stated: "As a preliminary matter, the Court notes that City stated that it does not contest [CREED's] standing to challenge the exemptions applied for the after-the-fact permits. However, it does contend that the Court has no jurisdiction to hear [CREED's] objections to work done under the emergency exemption. The Court disagrees." The court stated that the trial court apparently based its conclusion on the presumed hesitance of trial courts in general to issue a temporary restraining order and delay emergency repairs if a party timely challenges an agency's emergency exemption determination.

The city asserted that the trial court erred by concluding CREED had standing to challenge the city's determination that an emergency exemption under CEQA applied to its 2010 storm drain repair work even though CREED did not timely challenge that determination. The court stated that absent a timely challenge to an agency's emergency exemption determination, any emergency work completed pursuant to that exemption determination cannot thereafter be collaterally challenged, citing Pub. Res. Code § 21167(d) (35-day period for challenging notice of exemption and, if none was properly filed, maximum 180-day statute of limitations for challenges to agency determinations under CEQA)]. Therefore, the court held that CREED did not have standing to challenge the city's storm drain repair work completed in 2010 pursuant to its emergency exemption determination. It stated that any concern of the trial court regarding the hesitancy of courts to issue temporary restraining orders on timely filed challenges to emergency exemption determinations was not sufficient to create standing for a party that did not timely file a challenge to that determination. Accordingly, the court stated that the city correctly asserted that CREED had standing to challenge only the city's determination that its revegetation project was exempt from CEQA.

The court stated that to the extent CREED argued it retained standing to challenge the "permanent" aspects of the emergency storm drain repair work but not the "temporary" emergency work, it misconstrued and/or misapplied CEQA and the Guidelines. The court reiterated that all emergency work, whether considered "temporary" or "permanent" work, is exempt from CEQA environmental review, citing Pub. Res. Code §§ 21080(b), 21060.3, and Guidelines section 15269. It stated that thus, absent a timely challenge to an agency's emergency exemption determination, a party does not have standing to challenge that determination, whether or not the emergency work is considered "permanent."

Likewise, The court stated that CREED wrongly argued that the city's NOE in effect gave it a "second bite at the apple" because the city described the work covered thereby as the "emergency repair work that has already been completed plus the proposed revegetation plan." The court stated that to the extent the city included the completed emergency repair work in its NOE, 2011 exemption determination, and 2012 regular site and coastal development permits, that inclusion was redundant and unnecessary, because the 2010 storm drain repair work was exempt from CEQA on the city's determination that the work was exempt under section 21080(b). Thereafter, no subsequent or additional exemption determinations were necessary. The court stated that to the extent the city thereafter found its completed storm drain repair work was exempt from CEQA, it was merely confirming its prior emergency exemption determination.

CEQA Exemption for Revegetation Project. The city contended that it had substantial evidence to support its finding that the regular, nonemergency site and coastal development permits for the revegetation project were exempt from CEQA requirements under either the commonsense exemption or a categorical exemption.

The court noted that in issuing its NOE in November 2011, the city explained that it had conducted a study that determined "the project would not result in significant environmental impacts and meets the criteria set forth in CEQA [Guidelines] Sections 15301, 15302, and 15061(b)(3) (General Rule). The only physical change associated with the project is the implementation of the revegetation plan. Since the revegetation would not result in a significant effect on the environment, the project would be exempt from CEQA in accordance with Section 15061(b)(3)." The court stated that the city relied primarily, if not exclusively, on Guidelines section 15061(b)(3), or the commonsense exemption, to find the revegetation project was exempt from CEQA.

The court stated that CEQA does not apply to projects that are statutorily or categorically exempt or fall under the "common sense" exemption. The Guidelines "list categorical exemptions or 'classes of projects' that the resources agency has determined to be exempt per se because they do not have a significant effect on the environment. A project that qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt under what is sometimes called the 'commonsense' exemption, which applies 'where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment'" [*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372, 60 Cal. Rptr. 3d 247].

Guidelines section 15061(b) provides that a project is exempt from CEQA if it is (1) exempt by statute; (2) exempt pursuant to a categorical exemption; or (3) the activity is covered by "the general rule that CEQA applies only to projects which have the potential for

causing a significant effect on the environment" (i.e., the "common sense" exemption). "A categorical exemption is based on a finding by the Resources Agency that a class or category of projects does not have a significant effect on the environment" [*Davidon Homes v. City of San Jose* (1997) 54 Cal. App. 4th 106, 62 Cal. Rptr. 2d 612]. The commonsense exemption applies "where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment" [Guidelines section 15061(b)(3)]. The court quoted *Davidon*: "A discussion accompanying this Guideline explains its purpose as follows: 'Subsection (b)(3) provides a short way for agencies to deal with discretionary activities which could arguably be subject to the CEQA process but which common sense provides should not be subject to the Act. [¶] This section is based on the idea that CEQA applies jurisdictionally to activities which have the potential for causing environmental effects. Where an activity has no possibility of causing a significant effect, the activity will not be subject to CEQA.'"

Based on its review of the administrative record, the court concluded there was substantial evidence to support the city's determination that the revegetation project was exempt from CEQA pursuant to the commonsense exemption. It noted that it was undisputed that the existing physical conditions of the site in 2011 (after the emergency storm drain repair work had been completed) consisted primarily of bare dirt. The site was described as "mostly devoid of vegetation." The court stated that the 2011 post-emergency-work condition of the site constituted the baseline against which the proposed project, or revegetation plan, was to be compared in the city's determination whether the project might have a significant effect on the environment. The court stated that the existing physical conditions, or real conditions on the ground, in 2011, when the project was analyzed for any possible significant effect on the environment, therefore consisted mostly of bare dirt and vegetation that was mostly nonnative plants. In comparison, the revegetation plan proposed to install native plants, thereby clearly improving the physical conditions at the site. The court stated that although the revegetation plan would change or alter the site's 2011 physical conditions, it is only "a substantial, or potentially substantial, adverse change in any of the physical conditions" that constitutes a "significant effect on the environment" within the meaning of CEQA, citing Guidelines section 15382. The court stated that because the revegetation plan indisputably would improve the site's physical conditions compared to its 2011 physical conditions, that plan would not result in any adverse change in its physical conditions and could have no significant effect on the environment within the meaning of CEQA. Accordingly, the court concluded there was substantial evidence to support the city's determination that the revegetation project was exempt from CEQA pursuant to the commonsense exemption and the city did not abuse its discretion by so finding. The court held that the trial court erred by finding there was insufficient evidence to support the city's determination that the project was exempt from CEQA.

Because the court concluded that there was substantial evidence to support the city's determination that the revegetation project was exempt from CEQA under the commonsense exemption, it did not address the possible alternative exemptions cited by the city [Guidelines sections 15301, 15302]. Nevertheless, the court noted that it was possible the revegetation plan was exempt under the "Class 1" exemption for "'existing facilities,'" which applies to "repair . . . or minor alteration of existing public . . . facilities, . . . or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination" [Guidelines section 15301]. The court noted that among the various nonexclusive examples listed in that section is the example of "maintenance of existing landscaping [and] native growth" [Guidelines section 15301(h)]. The court stated that it seemed logical that the improvement, and not mere maintenance, of the existing landscape with native plants would similarly be exempt under that section.

Unusual Circumstances Exception. The city contended that CREED did not carry its burden to present substantial evidence to show an exception applied to the exemption for the revegetation project based on a reasonable possibility that the project may have a significant effect on the environment.

The court noted that the Guidelines provide exceptions to categorical exemptions. "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances" [Guidelines Section 15300.2(c)]. The court stated that under this provision, a challenger must show not only the existence of unusual circumstances, but also that there is a reasonable possibility the project will have a significant effect on the environment because of those unusual circumstances, citing *Santa Monica Chamber of Commerce v. City of Santa Monica* [(2002) 101 Cal. App. 4th 786, 124 Cal. Rptr. 2d 731]. The court stated that although the guidelines do not define the term "unusual circumstances," case law has interpreted that term as "some feature of the project that distinguishes it" from others in the exempt class *Fairbank v. City of Mill Valley* [(1999) 75 Cal. App. 4th 1243, 89 Cal. Rptr. 2d 233], which is unusual "relative to the typical circumstances related to an otherwise typically exempt project"

[*Santa Monica*]. It noted that cases have held the presence of similar facilities in the local area precludes the existence of unusual circumstances, citing, e.g., *Bloom v. McGurk* [(1994) 26 Cal. App. 4th 1307, 31 Cal. Rptr. 2d 914] and *City of Pasadena v. State of California* [(1993) 14 Cal. App. 4th 810, 17 Cal. Rptr. 2d 766].

The court noted that "once an agency . . . determines, based on substantial evidence in the record, that the project falls within a categorical exemption . . ., the burden shifts to the challenging party . . . to 'produce substantial evidence' . . . that one of the exceptions to categorical exemption applies" [*Santa Monica*]. It stated that the appropriate standard in reviewing on appeal whether an exception applies to a categorical exemption is unclear—some courts have applied the "fair argument" standard and other courts have applied the ordinary substantial evidence standard (i.e., deferring to agency's finding the categorical exemption applies). The court stated that it did not have to decide which standard was appropriate in determining whether CREED carried its burden to present evidence showing the "unusual circumstances" exception applied to the city's exemption determination, because under either standard CREED had not satisfied its burden.

The court stated that although CREED argued below that there was a reasonable possibility that the project would have a significant effect on the environment because of its unusual circumstances, it did not present or cite any evidence showing that reasonable possibility existed. The court stated that CREED primarily cited circumstances relating to the emergency storm drain repair work completed in 2010, but those circumstances were irrelevant to the determination whether the 2011 revegetation plan was exempt from CEQA.

The court noted that CREED also argued that the project site was located on steep slopes that the city regarded as environmentally sensitive lands, and therefore any work, including the revegetation project, done on that site was necessarily "unusual." The court stated, however, that a circumstance is "unusual" if it is unusual relative to the typical circumstances of an otherwise typically exempt project. It stated that CREED did not present any evidence showing The revegetation plan for the site was unusual compared to other typically exempt projects (e.g., other exempt revegetation plans). CREED did not present any evidence showing that the site's steep slope or environmentally sensitive land was so unusual compared to other steep slopes or lands in La Jolla or other parts of the San Diego area or, for that matter, other typically exempt projects, that "unusual circumstances" existed under Guidelines section 15300.2(c). Furthermore, CREED did not show that the 2011 revegetation plan for a steep slope or environmentally sensitive land was an unusual method for "revegetating" the site or stabilizing the slope when compared to other exempt revegetation or slope stabilization plans. Accordingly, the court held that CREED did not carry its burden to show that "unusual circumstances" existed.

The court further stated that, assuming arguendo that unusual circumstances existed, CREED did not present any evidence showing there was a reasonable possibility the revegetation project would have a significant effect on the environment because of those unusual circumstances. CREED argued on appeal that there was a reasonable possibility the storm drain repair work would have a significant effect on the environment. The court stated, however, that this argument was misguided because the only project exemption challenged on appeal was the 2011 revegetation project and not the 2010 emergency storm drain repair work. The court further stated that the revegetation plan indisputably would improve the existing physical conditions of the site by installing native plants to reflect the vegetation in the areas adjacent to the site. It observed that without any possibility of an adverse change to the environment, there can be no significant effect on the environment under CEQA [Pub. Res. Code § 21068; Guidelines section 15382]. The court stated that CREED's argument, speculation, or unsubstantiated opinion or narrative to the contrary did not constitute substantial evidence showing that the unusual circumstances exception applied. Accordingly, it held that CREED did not carry its burden to show that exception applied.

No Due Process Violation. The city contended that the trial court erred by finding CREED was denied due process of law when the city did not timely disclose a document requested under the California Public Records Act (CPRA).

The court noted that in November 2011, the city's staff prepared a two-page preliminary review (or "initial study") worksheet evaluating whether the proposed revegetation project might have a significant effect on the environment. On November 29, 2011, the city issued a NOE finding the revegetation project was exempt from CEQA pursuant to the commonsense exemption under Guidelines section 15061(b)(3). That NOE referred to an "Initial Study" conducted by the city. Also on November 29, the city issued a notice of right to appeal (NORA), which CREED apparently received. On December 5, CREED appealed the city's environmental determination for the project. Also on December 5, CREED filed a CPRA request asking the city for a copy of the "Initial Study" on which it relied in finding the project was exempt. On January 31, 2012, the city council heard and denied CREED's appeal of the city's exemption determination.

However, the city did not provide CREED with a copy of the "Initial Study" until after that hearing.

The court stated that in granting CREED's petition, the trial court found the city had violated CREED's right to due process of law and a fair hearing when it did not timely provide CREED with a copy of the "Initial Study" before or at the time of its hearing of CREED's appeal of the exemption determination for the project. The court stated, however, that the trial court considered the "project" as including both the emergency storm drain repair work completed in 2010 and the proposed revegetation plan for the site. The trial court reasoned that because the "Initial Study" considered only the possible effect on the environment by the revegetation plan and did not consider the "whole project" (i.e., both the completed emergency storm drain repair work and the proposed revegetation plan), CREED's lack of the Initial Study at the appeal hearing denied it a fair hearing on its appeal.

The court noted that "due process . . . 'does not require any particular form of notice or method of procedure. If the [administrative remedy] provides for reasonable notice and a reasonable opportunity to be heard, that is all that is required'" [*Bockover v. Perko* (1994) 28 Cal. App. 4th 479, 34 Cal. Rptr. 2d 423]. Due process requires a fair trial before an impartial tribunal, but it is the substance, and not the technical formalism, of an administrative procedure that affords due process [*Bockover*].

Based on its review of the administrative record, the court concluded that CREED was not denied its right to due process of law and a fair hearing. The court stated that CREED received notice of the hearing of its appeal of the NOE. It stated that CREED also had a reasonable opportunity to be heard at that appeal hearing. It was represented at the hearing and argued for a finding that the project was not exempt from CEQA. CREED argued it made a CPRA request for the initial study referred to in the NOE, the agenda materials did not include that study, and the city had a history of using "bogus" emergency exemptions to grant project permits without CEQA environmental review. The environmental planner for the project appeared at the hearing and stated he had prepared the city's initial study for the revegetation project and concluded it was categorically exempt from CEQA. The city council unanimously denied CREED's appeal. In the resolution denying the appeal, the city council noted that the emergency storm drain repair work had been completed in May 2010 and the only work remaining to be completed was the revegetation of the site. It found approval of the project would not allow any physical changes to the environment other than revegetation of the site and therefore would not result in a significant effect on the environment.

The court stated that based on the record, there was nothing to support CREED's assertion it was denied procedural due process based on The city's failure to provide it with a copy of The initial study before The appeal hearing. The court stated that The city council did not have The initial study and instead apparently relied on The other documents before it, as well as The planner's statements at The hearing, in deciding to deny CREED's appeal. It stated that The fact CREED did not have that one item of evidence (i.e., The initial study) at The time of The appeal hearing did not violate its right to due process of law and a fair hearing. The court stated that CREED received reasonable notice of The hearing and a reasonable opportunity to be heard at The hearing. Furthermore, The court stated that The "missing" initial study merely reflected The planner's conclusion, which he provided at The hearing. The court stated hat CREED did not cite anything of substance in The initial study that could have changed The city council's decision to deny its appeal.

The court stated that to the extent CREED complained below, and complained again on appeal, that the initial study addressed only the 2011 revegetation plan and ignored the environmental impact of the 2010 storm drain repair work, the initial study was not deficient and properly addressed only the possible environmental impact of the revegetation plan. It stated that *English v. City of Long Beach* [(1950) 35 Cal. 2d 155, 217 P.2d 22], cited by CREED, was inapposite. The court stated that unlike this case, *English* involved an administrative tribunal that based its decision in part on evidence received without the knowledge of the parties. The court stated that here, the record showed that the city council, like CREED, did not have the initial study and therefore did not base its decision on the content of that study. Accordingly, the court held that the trial court erred by finding the city violated CREED's right to due process of law and a fair hearing.

References: Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, §§ 21.06[5] (Statutory Exemptions from CEQA), 21.06[7] (Categorical Exemptions).

EIR for Downtown Sacramento Arena Did Not Violate CEQA

Saltonstall v. City of Sacramento
No. C077772, 3d App. Dist.
234 Cal. App. 4th 549, 2015 Cal. App. LEXIS 150
February 18, 2015

The court of appeal affirmed the judgment dismissing plaintiffs' challenge to the sufficiency of the EIR for, and the city's

approval of, the Sacramento Kings downtown arena project. The city did not prematurely commit to approving the project before completion of environmental review. The EIR did not violate CEQA by failing to consider remodeling the existing arena as a feasible alternative to building a new downtown arena, adequately considered traffic impacts, and was not required to address crowd safety issues.

Facts and Procedure. Plaintiffs brought this CEQA challenge to the certification of the EIR for, and approval of, a project to build a sports arena for a basketball team in Sacramento (the ESC project). The ESC project required demolition of the Downtown Plaza area. The demolition and construction schedule targeted the opening date of the arena for October 2016 to meet the NBA's deadline for keeping the basketball team in Sacramento.

On September 27, 2013, Governor Brown signed SB 743 (2which, among other things, added Pub. Res. Code § 21168.6.6, which modified several CEQA deadlines specifically for the downtown arena project. Section 21168.6.6 did not change CEQA standards for required content of the EIR or approval for the project. Instead, it provided an accelerated timeline of events along with provisions intended to facilitate expedited CEQA review such as preparation of documents in electronic format, making the administrative record accessible to the public online, mediation of issues among the parties, and a series of informational workshops to be held by the city.

In addition to imposing accelerated deadlines on the city as the lead agency for the project, section 21168.6.6(d) required the Judicial Council, by July 1, 2014, to adopt a rule to facilitate the completion of judicial review of the downtown arena project's compliance with CEQA within 270 days, if feasible.

Consistent with the deadlines set forth in section 21168.6.6, the city engaged in an expedited environmental review process. Also as required by section 21168.6.6, the city engaged in mediation with several interested parties (including plaintiff Saltonstall's attorney) in February 2014 to address issues regarding the draft EIR. The city completed and posted the final EIR for the project on its public website on May 9, 2014. The city council certified the final EIR and approved the project on May 20, 2014. Demolition of the shopping mall began in summer 2014.

The day after the city certified the final EIR and approved the project, Saltonstall filed a petition for writ of mandate in which she alleged the city violated CEQA by certifying the final EIR and that section 21168.6.6 violated the California Constitution.

The city filed its notice of determination on May 27, 2014, and certified the administrative record on June 2, 2014. On June 10, 2014, Saltonstall filed a motion for preliminary injunction to stay demolition of the Downtown Plaza, reiterating her contentions that the city violated CEQA by certifying the final EIR and that section 21168.6.6 was unconstitutional because it imposed unrealistically short deadlines on the courts to resolve issues related to construction of the downtown arena. The city and real party Sacramento Basketball Holdings opposed the motion. The trial court denied the motion for preliminary injunction, and Saltonstall appealed.

In *Saltonstall v. City of Sacramento* [(2014) 231 Cal. App. 4th 837, 180 Cal. Rptr. 3d 342] (*Saltonstall I*), the court concluded that section 21168.6.6 did not materially impair a core function of the courts in a manner that violated separation of powers under the California Constitution, and Saltonstall had not demonstrated any error in the trial court's denial of her request for a preliminary injunction to stop the project.

On October 10, 2014, the trial court held a hearing on the merits of Saltonstall's CEQA challenge as well as another CEQA challenge brought in a related action by the Sacramento Coalition for Shared Prosperity. On October 17, 2014, the trial court issued a decision denying the CEQA challenges. As pertinent to this appeal, the trial court made the following determinations:

The trial court found that the city did not approve the project before concluding its EIR review. The preliminary nonbinding term sheet entered into by the city and Sacramento Basketball Holdings did not create an enforceable contract between the parties. Although the city acquired property at its preferred site for the downtown arena, the property acquisition did not foreclose any mitigation measures or alternatives required by CEQA. The trial court found, "Prior to completing its environmental review of the Project, the city took steps to acquire possession of the Macy's East and Crocker Museum properties." As to the Crocker Museum property, the trial court noted that "as a technical matter, the Crocker Museum transaction involved the city's forgiveness of a $7.5 million loan to the Crocker Art Museum in exchange for the Museum's relinquishment of any and all claims related to city Parking Lots X and Y." The trial court concluded that Saltonstall "failed to show that the city's acquisitions of the Macy's East and Crocker Museum properties precluded consideration of any mitigation measures or alternatives that CEQA otherwise required to be considered."

The trial court rejected Saltonstall's contention that the city violated CEQA by failing to study the alternative of remodeling the current Sleep Train Arena. The trial court noted that the city studied a no project option in which the current arena would continue to operate as presently configured and an option that involved building a new arena near the existing arena. The trial court recounted that Saltonstall asserted it was "'absurd' for the city to

claim the impacts of remodeling the existing arena would be similar to the impacts of building a new arena in the same location." The trial court stated that Saltonstall sought "to have the city analyze the impacts of making minor, cosmetic upgrades to the existing arena, which [she] claim[s], is "perfectly fine" and 'continues to function perfectly.'" The trial court rejected the claim because, "from the city's perspective, [Saltonstall's] proposal is not an alternative to the Project, it is a different project and would defeat the city's core project objectives." The trial court also noted it was not "absurd for the city to conclude that the impacts of a major overhaul for the existing arena would be similar to the impacts of building a new arena." The trial court agreed with the city that anything less than a new arena would not satisfy the city's objectives of "developing a 'state-of the art' and 'world class' entertainment and sports center that is "the country's most technologically innovative and advanced entertainment venue." That was because the existing arena was "an old and outmoded facility."

The trial court also rejected the argument that the city conducted a faulty traffic analysis by underestimating the number of attendees for the downtown arena. The EIR's traffic analysis was based on the arena's 17,500 maximum capacity. Although 1,000 to 2,000 additional ticketed attendees might be accommodated in standing-room-only spaces, the record demonstrated that such supercapacity crowds occur only 0.3 percent of the time among events sampled throughout the country. Thus, the arena's maximum seated capacity served as a reasonable number for studying the traffic impact of the project. The trial court deemed an inadvertently omitted traffic mitigation measure to be part of the city's adopted mitigation measures.

The trial court rejected Saltonstall's contention that the city failed to properly assess the impact of the project on nearby I-5. The trial court found the administrative record supported the conclusion that "the EIR adequately addresses the Project's freeway impacts. The EIR acknowledges that the Project will cause significant impacts on the freeways and that, although payment of a fair share contribution would assist in mitigating the Project's impacts, payment of the fee does not ensure that the Project's impacts will be fully mitigated. The city, having determined that the Project's freeway impacts are significant and unavoidable, adopted a Statement of Overriding Considerations."

The city's response to EIR comments acknowledged that the traffic impact would be significant and unavoidable even with the payment of a fair share of mitigation measures by the project applicant. The city pointed out, however, that Caltrans' comment on the proposed traffic mitigation measures expressed Caltrans's support for the proposed traffic management plan.

The trial court rejected Saltonstall's argument that the city failed to properly analyze impacts to public safety from postevent crowds. The trial court concluded that "speculation about potential crowd violence is not an impact that was required to be analyzed or mitigated as part of the EIR. (See [Guidelines] § 15064(d)(3).)" The trial court further found that "the EIR adequately considered the Project's Impacts on public services."

Saltonstall filed an appeal within the five court days provided by section 21168.6.6(d).The court of appeal affirmed the judgment.

City Commitment to Project Prior to CEQA Review. Saltonstall contended that the city committed itself to the downtown arena project before completing review under CEQA. Saltonstall pointed to (1) public relations efforts coordinated with Sacramento Basketball Holdings, (2) a term sheet with Sacramento Basketball Holdings, and (3) acquisition of the property for the downtown arena and the rights to nearby parking lots from the Crocker Museum before completion of the EIR process. Specifically, Saltonstall argued that "the EIR was fatally corrupted because the city had already entered into an agreement with the NBA to build the arena." The court concluded that the record did not demonstrate premature commitment by the city.

The court noted that when a proposed project will arguably have a significant environmental impact, CEQA requires a public agency to prepare an EIR before giving project approval. It observed that for purposes of CEQA, "approval" by a public agency "means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person," citing CEQA Guidelines section 15352(a) and *Save Tara v. City of West Hollywood* [(2008) 45 Cal. 4th 116, 84 Cal. Rptr. 3d 614]. The Court in *&Save Tara* observed that "the problem is to determine when an agency's favoring of and assistance to a project ripens into a 'commit[ment].' To be consistent with CEQA's purposes, the line must be drawn neither so early that the burden of environmental review impedes the exploration and formulation of potentially meritorious projects, nor so late that such review loses its power to influence key public decisions about those projects." Thus, Save Tara explained that "CEQA review was not intended to be only an afterthought to project approval, but neither was it intended to place unneeded obstacles in the path of project formulation and development."

The court stated that, under *Save Tara*, it applies a two-prong test to ascertain whether a public agency has

committed itself to a project before conducting the requisite environmental review: "First, the analysis should consider whether, in taking the challenged action, the agency indicated that it would perform environmental review before it makes any further commitment to the project, and if so, whether the agency has nevertheless effectively circumscribed or limited its discretion with respect to that environmental review. Second, the analysis should consider the extent to which the record shows that the agency or its staff have committed significant resources to shaping the project. If, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has 'approved' the project." The court stated that the *Save Tara* test reflects "the general principle that before conducting CEQA review, agencies must not 'take any action' that significantly furthers a project 'in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.'"

The court stated that the question of whether "the lead agency approved a project with potentially significant environment effects before preparing and considering an EIR for the project 'is predominantly one of improper procedure' [*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 53 Cal. Rptr. 3d 821] to be decided by the courts independently. The claim goes not to the validity of the agency's factual conclusions but to the required timing of its actions."

City Actions and Land Acquisition Prior to Completion of EIR Process. The city council approved a preliminary nonbinding term sheet, dated March 23, 2013, with the investment group formed to purchase the Sacramento Kings and build the downtown arena, Sacramento Basketball Holdings. The term sheet provided: "Although this Term Sheet contains the proposed, nonbinding terms of a potential transaction which the city has agreed to process, the parties agree that no obligation to enter into definitive transaction documents, or any transaction, shall exist and no project or definitive transaction documents shall be deemed to be approved, until after (i) the proposed project is reviewed in accordance with the requirements of [CEQA], (ii) any additional conditions or changes to the project based on [CEQA] review have been resolved in a manner acceptable to the city and Investor Group [(Sacramento Basketball Holdings)] and (iii) all required permits for the project have been obtained by the city in accordance with applicable laws and regulations."

The court stated that the preliminary nonbinding term sheet further provided: "As required by law, the city retains the sole and independent discretion as the lead agency to, among other things, balance the benefits of the ESC project against any significant environmental impacts prior to taking final action if such significant impacts cannot otherwise be avoided, and determine not to proceed with the ESC project. No legal obligations to approve the project, the permits for the project, or the transaction will exist unless and until the parties have negotiated, executed, and delivered definitive agreements based upon information produced during the CEQA environmental review process and on other public review and hearing processes, subject to all applicable governmental approvals."

On May 7, 2013, the city adopted a resolution to forgive $7.5 million of a $10 million loan to the Crocker Art Museum in exchange for the museum's relinquishment of any claims related to city parking lots X and Y.

A July 9, 2013, agenda for a meeting between the city and Sacramento Basketball Holdings staff listed, as a discussion topic, a need to develop a communication strategy in anticipation of media inquiries about the acquisition of the land for the site of the downtown arena. The agenda stated that "it would be better to initiate control [of] the story with a message crafted and agreed to by the NBA, [Sacramento Basketball Holdings] and city rather than a mad scramble."

On January 7, 2014, the city council adopted a resolution to acquire by eminent domain the block located at 600 K Street in downtown Sacramento. Consistent with the preliminary nonbinding term sheet, the city would retain title to the property and lease it to Sacramento Basketball Holdings according to a schedule that provided the rent would start at $6.5 million and increase according to a set formula.

The city certified its final EIR and approved the downtown arena project on May 20, 2014.

City Did Not Commit to Project Before Completing Environmental Review. The court concluded that although the city took steps toward planning the proposed downtown arena prior to completing its environmental review, the record did not establish premature commitment to the project in violation of CEQA.

The court noted that the only evidence of public relations coordination cited by Saltonstall concerned the agenda item suggesting a unified response to media inquiries about the announced acquisition of the 600 block of K Street for the downtown arena. The court stated that this evidence did not demonstrate premature commitment by the city for several reasons. First, the agenda appeared to have been prepared by the Icon Venue Group and not the city or its staff. It stated that based on this single cited

document, the extent to which the agenda item reflected any view of the city or its staff was entirely unknown. Second, the agenda description suggested that the city had not yet formulated a response to media inquiries about acquisition of the 600 block of K Street. The court stated that rather than showing premature commitment, the agenda suggested instead that there was not yet coordination of a message—at least for the acquisition of the 600 block of K Street. Third, the court stated that even if the agenda item showed the city's favor of and advocacy for the 600 block of K Street as the site for the project, this would still be insufficient to show impermissibly early commitment to the project. The court observed that "If having high esteem for a project before preparing an environmental impact report . . . nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be favorably disposed toward it," citing *Save Tara*.

The court thus concluded that Saltonstall's single citation to the administrative record to demonstrate a concerted media campaign for the project did not establish premature commitment by the city.

The court next noted that under the first prong of the *Save Tara* test, it had to consider whether the city indicated it would perform a proper environmental review before making a commitment to the project. The court stated that on this point, the preliminary nonbinding term sheet declared that the city had "no obligation to enter into definitive transaction documents, or any transaction," and that "no project or definitive transaction documents shall be deemed to be approved, until after" the downtown arena project was "reviewed in accordance with the requirements of [CEQA]." Elsewhere, the term sheet expressly provided that "the city retains the sole and independent discretion as the lead agency to . . . balance the benefits of the ESC project against any significant environmental impacts prior to taking final action if such significant impacts cannot otherwise be avoided, and determine not to proceed with the ESC project." Thus, the court stated that the city retained complete discretion to review the project, mitigate adverse environmental effects, and even to refuse to approve the project.

The court stated that the term sheet was not a binding contract between the city and Sacramento Basketball Holdings. It stated that the term sheet set forth "the process and framework by which the parties agreed to negotiate definitive documents and potential approvals to be considered by the city regarding the potential location, financing, ownership, design, development, construction, operation, use" and other issues related to the project.

The court stated that in essence, the preliminary nonbinding term sheet was an agreement to negotiate. It stated that all provisions of the term sheet were consistent with an agreement to negotiate. The court pointed out that the term sheet noted that the location of the arena remained to be determined, the parties could consider locations other than the site of the Downtown Plaza, the ownership structure for the location remained to be negotiated, and efforts to timely complete the project would be made collaboratively. The court stated that based on the express reservation by the city of the right to disapprove of the project based on its environmental review, Sacramento Basketball Holdings would not have had a breach of contract claim if the city had decided to reject the project. Accordingly, the concluded that the preliminary nonbinding term sheet did not show premature commitment to the project by the city.

The court next stated that the city's exercise of eminent domain to acquire the 600 block of K Street for the site of the downtown arena prior to completion of environmental review was allowed under CEQA. It noted that CEQA provides an exception to the prohibition on commitment to a project before environmental review for purposes of land acquisition, citing Guidelines section 15004(b)(2)(A) (public agency may not "formally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities, except that agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance").

The court further noted that Pub. Res. Code § 21168.6.6(b)(1) expressly provides that "the city may prosecute an eminent domain action for 545 and 600 K Street, Sacramento, California, and surrounding publicly accessible areas and rights-of-way within 200 feet of 600 K Street, Sacramento, California, through order of possession pursuant to the Eminent Domain Law . . . prior to completing the environmental review under this division." The court stated that the city thus had specific statutory authorization to acquire the 600 block of K Street by eminent domain prior to completing its environmental review without running afoul of CEQA. It noted that Saltonstall emphasized that the city did more than agree to acquire the property by actually proceeding with eminent domain. The court stated, however, that section 21168.6.6(b)(1) provided authority for the city to prosecute an eminent domain action for the 600 block of K Street rather than mere authority to decide to condemn the property.

The court recognized that the Supreme Court cautioned that the exception for land acquisition "should not swallow the general rule (reflected in the same regulation) that a development decision having potentially significant

environmental effects must be preceded, not followed, by CEQA review," citing *Save Tara*. It stated, however, that Saltonstall did not provide any citation to the record to show that acquisition of the 600 K Street site compelled the city to approve the project or to reject any mitigation measures. Thus, the court was not persuaded that the city violated CEQA by acquiring the 600 block of K Street by eminent domain.

Saltonstall asserted that the forgiveness of $7.5 million of a city loan to the Crocker Art Museum established premature commitment to the downtown arena project. The court stated, however, that Saltonstall did not explain how forgiveness of the loan showed premature commitment to the project. The court stated that its review of the staff report on loan forgiveness revealed the city's interest in preserving the viability of the Crocker Art Museum and establishing a new program to support the arts and culture in Sacramento. The court stated that the budget resolution for the loan forgiveness did not mention the downtown arena project. Based on the lack of analysis on how forgiveness of a loan for rights to a parking lot already owned by the city demonstrated premature commitment by the city to the downtown arena project, the court deemed the assertion forfeited.

The court further stated that, in any event, as with the 600 block of K Street, mere site acquisition of the rights to the X and Y parking lots did not demonstrate premature commitment of the city. It observed that "Guidelines section 15004, subdivision (b)(2)(A), makes clear that a public agency may designate a preferred site for facilities requiring CEQA review, and enter into agreements to acquire the site, so long as future use of the site is conditioned on CEQA compliance," citing *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* [(2013) 215 Cal. App. 4th 353, 155 Cal. Rptr. 3d 546].

Existing Arena Remodel as Project Alternative. Saltonstall argued that the city's environmental review was deficient because the city did not study remodeling the current Sleep Train Arena as a project alternative. The court rejected the argument.

The court noted that the city's objectives for a new arena included the goals to "Develop an entertainment and sports center project that connects with and enhances downtown from the waterfront to the Convention Center and from the Capitol to the Railyards and intermodal facilities. [¶] ... Establish a framework for successful development surrounding Downtown Plaza. [¶] ... Leverage the entertainment and sports center to develop our workforce and local businesses and help spark redevelopment of underutilized downtown properties throughout the Central Business District." The court noted that, by contrast, the Sleep Train Arena was located in a suburban setting approximately six miles north of the Downtown Plaza. It stated that building the new arena next to the current Sleep Train Arena would not have met the city's project objectives to revitalize the economic and social activity in the area surrounding the Downtown Plaza. The court observed that nevertheless, the city's environmental review considered alternatives at the Natomas location of the Sleep Train Arena.

The court stated that in total, the city studied four alternatives to the downtown arena project. First, the city considered the no project alternative of continuing to operate the Sleep Train Arena without substantial change. Second, the city studied construction of the new arena at the Railyards location a short distance to the north of the Downtown Plaza. Third, the city considered the possibility of building a new arena next to the Sleep Train Arena, and demolishing the old arena on completion of the new one. The city also studied a reduced scale for building at the Downtown Plaza.

The court stated that the city did not study remodeling the Sleep Train Arena as an alternative. It stated that in rejecting remodeling of the Sleep Train Arena as an alternative, the city explained that "many of the impacts of remodeling the existing arena would be similar to building a new arena at the same site, because attendance and the type of events would be similar. The impacts of demolition would be reduced, but not entirely eliminated because a major overhaul would require removal of some existing materials. The relationship to the project objectives for a remodeled Natomas arena also would be similar to that of a new ESC at the Natomas site. Evaluating an alternative in which the existing Natomas arena is remodeled would not add substantially to the alternatives analysis regardless of the cost of remodeling relative to building a brand new arena in the same location."

The city explained that alternatives at the Natomas location failed to satisfy many of the city's objectives for the project: "Locating the [arena] in Natomas would not catalyze redevelopment of previously blighted areas, because it would essentially replace an existing facility. It is unlikely that [a new arena] in Natomas would become a world-class destination given the lack of supporting amenities (e.g., lodging, restaurants, other urban attractions such as museums) in the vicinity of the site. [¶] The Natomas site is not well served by public transportation, with only limited bus service and no light rail or train service in the immediate vicinity. The site is not likely to become a multimodal place, because the distance to homes, restaurants and other employment centers is too far to be conducive to walking, biking and/or taking transit to events at the [new arena]. Attendees at the current Sleep Train arena rely overwhelmingly on automobiles to travel

to events and this would be likely to continue given the transportation infrastructure. [¶] A number of objectives are tied directly to locating the [new arena] in the downtown area, including development of 1.5 million square feet of mixed-use space at the Downtown Plaza, establishing a framework for successful development of the Downtown Plaza, connecting with and enhancing downtown from the waterfront to the convention center, and sparking redevelopment of underutilized properties in the Central Business District. These objectives would not be met by Alternative 3 due to its location."

The court stated that the city also deemed the alternative of building a new arena next to the Sleep Train Arena to be infeasible due to floodplain issues. The draft EIR concluded that "due to the status of the floodplain building regulations, the [new arena] may not be able to be feasibly built in Natomas by the deadline set by the NBA." By contrast, the Downtown Plaza site was outside the 100-year floodplain. Consequently, "the structures on the Downtown project site would be resilient to floods, high winds, and hail storms, even if such events are more frequent in the future."

Review of Project Alternatives Under CEQA. The court noted that for purposes of CEQA, a feasible alternative is one "'capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.' [Citations.] Both the California and the federal courts have further declared that 'the statutory requirements for consideration of alternatives must be judged against a rule of reason' [citations]" *Citizens of Goleta Valley v. Board of Supervisors* [(1990) 52 Cal. 3d 553, 276 Cal. Rptr. 410]. However, despite the requirement to study feasible alternatives, "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose" [*Goleta*].

The court further noted that the ultimate value of an EIR is to serve as an informational document giving the decisionmaking public agency sufficient information to assess the environmental consequences of a project, possible mitigation measures to reduce or eliminate adverse environmental consequences, and the availability of feasible alternatives to the proposed project, citing *Tracy First v. City of Tracy* [(2009) 177 Cal. App. 4th 912, 99 Cal. Rptr. 3d 621, quoting *In re Bay-Delta etc.* (2008) 43 Cal. 4th 1143, 77 Cal. Rptr. 3d 578]. "The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions, thus protecting 'not only the environment but also informed self-government.'" Thus, "an EIR need not consider every conceivable alternative to a project or alternatives that are infeasible" [*Tracy First*]. The court stated that as a corollary, infeasible alternatives that do not meet project objectives need not be studied even when such alternatives might be imagined to be environmentally superior. It stated that tasked with the study of a proposal to build a new shopping center, a public agency need not study a fruit stand as an alternative.

The court quoted *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal. App. 4th 957, 992 [99 Cal. Rptr. 3d 572], which explained that a public agency's decision regarding which project alternatives to study "must be made with 'the ultimate objective being whether a discussion of alternatives "fosters informed decision-making and informed public participation.'" (*Save Our Residential Environment v. City of West Hollywood* [(1992) 9 Cal. App. 4th 1745, 12 Cal. Rptr. 2d 308].) In assessing the claim that exclusion of offsite alternatives renders the EIR defective, the question is whether the range of alternatives 'is unreasonable in the absence of the omitted alternatives.' (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act [(Cont.Ed.Bar 2d ed. 2009)] § 15.17, p. 747.)"

Omission of Sleep Train Arena Remodeling as Project Alternative. The court noted that the city studied Natomas-based alternatives at the location of the Sleep Train Arena. It stated that, given the Sleep Train Arena's location "in a suburban setting, surrounded by a large parking lot, low-density office buildings and two- to three-story multifamily homes," the city concluded that carrying out the project at that location "would not catalyze redevelopment of previously blighted areas, because it would essentially replace an existing facility." The draft EIR noted, "many of the project objectives are aimed at creating an active, multi-faceted community attraction that enlivens the surrounding area that embodies smart growth principles. The Natomas . . . site is not conducive to these objectives."

The court stated that in approving the project at the site of the Downtown Plaza, the city council adopted a statement of overriding considerations reiterating that the Natomas location had been rejected because building a new arena there "would achieve few of the project objectives, and fail entirely to achieve those related to location. Under [this alternative], a state-of-the-art entertainment and sports center with approximately 17,500 seats . . . could serve as the long-term home of the NBA Sacramento Kings. The [new arena] would be located on a site that could be readily assembled, and that should not have extensive budget issues. However, due to the status of

the floodplain building regulations, the [new arena] may not be able to be feasibly built in Natomas by the deadline set by the NBA."

The court further stated that the no project alternative did not meet the city's objectives to revitalize the area surrounding the Downtown Plaza. It stated that even assuming the Sacramento Kings continued to play at the Sleep Train Arena, the no project alternative would not meet the location objectives and neither would a new arena in the same Natomas location. In addition, the no project alternative also would not meet the city's objectives to build a world-class entertainment center in the region. Thus, the court stated that even though the no project alternative might have been environmentally superior, it did not meet any of the city's objectives.

The court stated that as with the no project alternative, a remodeled Sleep Train Arena might be an environmentally superior option that would not meet many or all of the city's objectives for the project, including redevelopment of the downtown area. Thus, the court stated that even if the same concerns of floodplain permitting did not apply to a remodel alternative as they would a new Natomas arena alternative, the city was not required to study this alternative for the project in Natomas. The court noted that the draft EIR explained that many of the impacts of remodeling would have been similar to those of building a new arena in Natomas because existing material would need to be removed and remodeling would be extensive. It stated that the similarities in impacts meant studying the remodeling alternative would not have added substantially to the alternatives analysis in the city's EIR review. Consequently, the court concluded that the draft EIR sufficiently studied no project and new arena alternatives for the Natomas location and thus the city's EIR process was not defective.

Freeway Congestion Analysis. The court next held that the EIR's analysis of traffic congestion on I-5 was not deficient under CEQA. It noted that Saltonstall contended that the city did not properly study the traffic impact of the downtown arena project on I-5, which runs close to the selected project site. Saltonstall contended that the study of local traffic congestion was inadequate for not considering I-5 traffic ranging from Canada to Mexico. Saltonstall also asserted that the city's traffic study was deficient because the EIR understated the number of persons who would surround the downtown arena. The court was not persuaded.

The court noted that with respect to the study methodology for freeway congestion, the draft EIR adopted the "procedures described in the Highway Capacity Manual" published by the Transportation Research Board in its December 2010 edition of the Highway Capacity Manual. The city applied this methodology to data on mainline I-5 traffic gathered by Caltrans. Based on the data and methods used, the draft EIR concluded traffic on parts of I-5 would achieve an "F" level of service rating—the worst rating for traffic congestion. CalTrans concurred with the findings and stated that its analysis showed further effects of additional PM peak hour traffic volumes that would occur on freeways near the project due to current congestion conditions in the area. The city's final EIR responded to Caltrans' comments but noted it was not possible to respond to the comments regarding further effects as "an analysis was not presented in the letter."

The city council's approval of the project was conditioned on a mitigation measure requiring further coordination by the city "with Caltrans, as necessary, to implement the following measures to benefit operations at the J Street/3rd Street/I-5 off-ramps intersection" to address peak congestion in the morning and during pre-event peak hours. The city council also adopted a fair share payment mitigation measure. It found "that there are no additional feasible mitigation measures or alternatives that the City Council could adopt at this time which would reduce this impact to a less-than-significant level. For these reasons, the impact remains significant and unavoidable." Accordingly, the city council adopted a statement of overriding considerations regarding I-5 traffic congestion.

The court noted that the courts "must uphold an EIR if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA. [¶] CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive," citing *El Morro Community Assn. v. California Dept. of Parks & Recreation* [(2004) 122 Cal. App. 4th 1341, 19 Cal. Rptr. 3d 445]. The court further noted that in reviewing the sufficiency of an EIR, its "task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our limited function is consistent with the principle that 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind'" [*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 253 Cal. Rptr. 3d 426]. Accordingly, the court stated that the deferential standard of review for substantial evidence "applies to challenges to the scope of an EIR's analysis of a topic, the methodology

used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions," citing *Bakersfield Citizens for Local Control v. City of Bakersfield* [(2004) 124 Cal. App. 4th 1184, 22 Cal. Rptr. 3d 203]. It stated that the substantial evidence standard applied here.

The court stated that Saltonstall wanted a more comprehensive review of traffic congestion on the section of I-5 adjacent to the downtown arena project. It stated that Saltonstall faulted the city for not considering the effects of the project on interstate travelers with origins as far as Canada and destinations as remote as Mexico. She also argued that the city rejected Caltrans' "repeated efforts to 'participate meaningfully' in addressing the project's traffic impacts," and the city "buried" in tiny footnotes its conclusions about how traffic would be worsened.

The court stated that the draft EIR studied and disclosed existing problems with the nearby section of I-5 at peak traffic times as well as how the downtown arena project would worsen traffic congestion. The EIR set forth the basis for its methodology and the source of its factual data regarding traffic on I-5. The draft EIR reached the conclusion that levels of service would at times reach the worst rating given by Caltrans for traffic flow. Even with proposed mitigation measures, the city acknowledged the adverse impact of the downtown arena project on I-5 traffic would be significant and unavoidable.

The court stated that the draft EIR clearly, and in normal typeface, articulated problems with current traffic congestion and expected worsening of traffic on I-5. It stated that rather than objecting, Caltrans commented on the draft EIR to note it agreed with the methodology of the traffic study. Caltrans also "reviewed and approved a methodology proposed by the city to calculate the fair share fee." Caltrans further agreed with the city that possible mitigation measures were limited by the physical constraints of I-5 near the project site. The court acknowledged that Caltrans informed the city that congestion from events held at the downtown arena would adversely affect I-5 all the way to the interchange with I-80. It pointed out, however, that Caltrans did not include the analysis for reaching its conclusion about the extent of traffic congestion on I-5.

The court stated that the city was entitled to rely on the methodology and conclusions it articulated in its draft EIR because it had the prerogative to resolve conflicting factual conclusions about the extent of traffic congestion that would result from the downtown arena project, citing *Laurel Heights I*. The court stated that for the same reason, the city did not violate CEQA by rejecting Saltonstall's suggestion that the traffic study in the draft EIR was defective for the failure to consider mainline traffic. It observed that "The discussion of alternatives need not be exhaustive, and the requirement as to the discussion of alternatives is subject to a construction of reasonableness," citing *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* [(1980) 106 Cal. App. 3d 893, 165 Cal. Rptr. 401]. CEQA "does not demand what is not realistically possible, given the limitation of time, energy and funds. 'Crystal ball' inquiry is not required" [*Foundation for San Francisco's Architectural Heritage*].

The court also rejected Saltonstall's assertion that the city did not properly study mainline traffic. The court stated that Saltonstall essentially argued that the flaw in the city's EIR was that it did not separately study motorists who were stuck in the same traffic, on the same freeway, going in the same direction, at the same time, based only on the fact those interstate motorists were traveling a greater distance. The court stated that the city was not required to separately study the effect on interstate motorists who would be impacted in the same way as other, local motorists sharing the same section of I-5. It further noted that the EIR did account for mainline traffic because it used the sampling data of mainline freeway traffic collected by Caltrans.

The court stated that it was not persuaded by Saltonstall's contention that the EIR understated the size of crowds attending events at the downtown arena. It noted that the city's review of crowd size included a national survey of similar entertainment and sports facilities as well as review of crowd sizes during the Sleep Train Arena's history. The city's draft EIR used numbers in excess of historical attendance figures. The court stated that although Saltonstall speculated that greater numbers would congregate outside the downtown arena, the draft EIR contained substantial evidence to the contrary. The court stated that while Saltonstall might dispute the city and trial court's "common sense" conclusion that large crowds of nonpatrons would not stand in the cold and dark during Sacramento Kings games, this conclusion was reasonable in light of past seasons at the Sleep Train Arena. The court observed that "common sense in the CEQA domain . . . is an important consideration at all levels of CEQA review," citing *Save the Plastic Bag Coalition v. City of Manhattan Beach* [(2011) 52 Cal. 4th 155, 127 Cal. Rptr. 3d 7105]. Accordingly, the court concluded that the city did not err in declining to speculate that the same games played a few miles away would suddenly and inexplicably draw large crowds of persons who would not watch the game but simply mill about in the winter nighttime.

Safety Impacts. Saltonstall next contended that the city's environmental review was deficient because "the

EIR fails to address substantial evidence in the record . . . from the city's own police force . . . of significant potential impacts to safety by event crowds." Saltonstall argued that the EIR both understated the number of persons who could be expected to congregate around the downtown arena as well as their proclivities toward drunken violence. The court rejected the argument on the basis that Saltonstall did not show how the safety of persons at the site of the downtown arena had to be considered in an EIR studying environmental effects of the project. The court further stated that the EIR's conclusions about the size of crowds inside and around the downtown arena were supported by substantial evidence in the administrative record.

The court noted that the city's draft EIR concluded that the downtown arena "would increase demand for police protection services within the City of Sacramento.... The Sacramento PD does not anticipate that new police facilities would be required to ensure adequate police protection for the Proposed Project. Sacramento PD would adjust staffing levels as appropriate in order to ensure adequate service at the Proposed Project site. The Proposed Project would not require the construction of new or altered police facilities, and the impact to police services would be less than significant." The court stated that this conclusion was supported by statements given during the environmental review process by the city's fire marshal and representatives from the police department. It noted that the trial court agreed with the EIR's conclusions regarding crowd size, stating that "common sense should be sufficient to rebut any claim that the outdoor plaza will be filled to capacity with people during every [Sacramento] Kings game." The trial court concluded that "speculation about potential crowd violence is not an impact that was required to be analyzed or mitigated as part of the EIR. (See Guidelines section 15064(d)(3).) The EIR adequately considered the Project's impacts on public services."

The court observed that as a fundamental principle, "'effects analyzed under CEQA must be related to a physical change.' (Guidelines section 15358(b).) A social or economic change in itself is not a significant effect on the environment. (Guidelines sections 15064(f)(6), 15382.) CEQA is not concerned with . . . direct social effects that do not contribute to a secondary physical impact. (*See* Guidelines, sections 15064 (e) and (f)(6), 15131 (a), 15358 (b); *see also* Pub. Res. Code § 21060.5; Guidelines section 15360)" [*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal. App. 4th 1170, 31 Cal. Rptr. 3d 901]. The court stated that while EIR review under CEQA must consider indirect physical changes to the environment, "an indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable," citing Guidelines section 15064(d)(3).

The court stated that Saltonstall did not establish how the issue of crowd safety would have an impact on the physical environment. Instead, it stated that her argument focused on allegations of "significant potential impacts to safety by event crowds." The court stated that Saltonstall's argument did not implicate an environmental for purposes of CEQA review, citing *Lighthouse*.

The court also rejected Saltonstall's assertion that the city did not account for "the significant numbers who will loiter outside for 'free viewing' of the outdoor monitors." The court stated that review of the record showed that outdoor viewing of events would be strictly constrained and actively managed. The draft EIR explained that, "for some events, a portion of the entry plaza in front of the main entry could be secured and the adjacent exterior walls of the Main Concourse level opened to create an integrated indoor/outdoor experience for ticketed attendees. Video screens and speakers may be placed in the secured entry plaza area, allowing attendees to hear and see the activities going on inside the [downtown arena] while outside in the entry plaza area." The court stated that far from showing that drunken masses would loiter in an outdoor viewing area, the record showed that outdoor viewing would be limited to ticketed patrons in a secured area.

The court noted that in arguing that the city ignored concerns of its own police department regarding crowd control, Saltonstall cited an e-mail sent by the Deputy Chief of Police (Matthes). The court stated, however, that the e-mail showed that Matthes was responding to questions rather than voicing concerns of the police department. It stated that Matthes wrote to articulate the police department's "thoughts on the public vs private space issue along with our responses to your questions." The central point of Matthes's communication was that "if the plaza area is deemed public space, the City will most likely be responsible for the programming of the space as well as addressing issues related to transients, camping, scalping, protestors, etc. Based on actions of other Cities, it appears environmental design along with city ordinances may mitigate most issues. [¶] If the plaza area is private, the owners have more control over the activities but with an easement, we aren't sure if this provides any benefit. Additionally, if they have problems with transients, camping, scalping, etc., and choose not to address the issues, it becomes more difficult for the City."

The court stated that Matthes' response did not express any concerns about rioting, crowd violence, or any effect of the project on the environment. Rather, Matthes

explained that the Sacramento Police Department had learned from the police captain in charge of security at San Francisco's baseball park that even though "the property around the stadium is public," "they do not have any major issues primarily due to ordinances enacted to address various social issues (camping, sleeping, scalping, protesting, etc.)." The court stated that by requiring permits and bonds for various events, San Francisco essentially solved any social concerns arising out of activity surrounding its ballpark. Consequently, the tone of Matthes's letter expressed optimism that any of these social issues would be effectively handled by the police department.

The court stated that although Saltonstall made passing reference to crowds spilling out onto the streets after downtown arena events, the record showed that the issue of crowd entrance and exit from the venue was studied. City police and fire department representatives declared they approved of the design measures and traffic management plans for crowd movements and the project included mitigation measures to ensure crowd movements would not become a problem.

In sum, the court held that Saltonstall had not met her burden to show how the issue of crowd safety at the downtown arena constituted a matter for CEQA review.

Motion to Augment Administrative Record. Saltonstall contended that the city erred in refusing to produce documents relating to its communications with the NBA regarding the project. She further argued that the administrative record should have been augmented to include certain e-mails and a 24-page city staff report pertaining to the city's forgiveness of a $7.5 million loan to the Crocker Art Museum. The court concluded that the argument regarding the NBA documents was not cognizable on appeal. Further, the argument regarding the e-mails and the loan forgiveness report was deemed forfeited for lack of any meaningful analysis on the issue.

Saltonstall contended that the trial court's decision "should be reversed with instructions to obtain the complete record with the 62,000 e-mails." The court noted that the 62,000 e-mails to which Saltonstall referred to were requested under the Public Records Act. The trial court denied Saltonstall's Public Records Act request on grounds the matter was not properly before the court.

The court stated that the issue of the Public Records Act request was not properly before it because review of the denial of such a request is only by petition for writ of mandate—not direct appeal. Accordingly, the court did not consider Saltonstall's argument regarding the administrative record to the extent it pertained to the 62,000 e-mails claimed to relate to communications between the city and the NBA.

With respect to the additional e-mail and staff report, the court stated that Saltonstall's conclusory assertions regarding documents that should have been included in the administrative record failed to properly tender the issue for appellate review. It stated that Saltonstall provided no analysis of why the documents met the definition of documents for inclusion in an administrative record under Pub. Res. Code § 21167.6(e). It stated that Saltonstall's analysis as to the e-mail was limited to the assertion that the "June 3 email is required to be included in the administrative record pursuant to PRC § 21167.6(e)(1), (3), (7) and (10)." Similarly, her analysis regarding the loan forgiveness report asserted only that "the City should be ordered to augment the administrative record with the Crocker staff report pursuant to PRC § 21167.6(e) subsections (2), (3), (8) and (10)." It stated that Saltonstall did not explain how the e-mail and the loan forgiveness report met any of the definitions of documents the Public Resources Code requires to be included in an administrative record. Accordingly, the court stated that the issue of the documents' inclusion in the administrative record was forfeited for lack of any meaningful analysis.

The court further stated that Saltonstall ignored the trial court's conclusion that the e-mail and the loan forgiveness report were not relevant and therefore not necessary parts of the administrative record. It stated that Saltonstall's focus on the city's actions in preparing the administrative record ignored the rule that "it is the trial court's determinations regarding the scope of the administrative record that are reviewable by the appellate court. Appellate courts do not review the agency's decision about what to include in the administrative record" *Madera Oversight Coalition, Inc. v. County of Madera* [(2011) 199 Cal. App. 4th 48, 131 Cal. Rptr. 3d 626, disapproved in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439,160 Cal. Rptr. 3d 1]. The court noted that "review of a trial court's determinations regarding the scope of the administrative record is subject to the principle that appellate courts presume the trial court's order is correct." Consequently, it stated that Saltonstall's failure to address the trial court's conclusion regarding the relevance of the email and the loan forgiveness report would require affirmance of the trial court's denial of the motion to augment even if Saltonstall had not forfeited this issue.

◗**References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, §§ 21.02[2] (When to Prepare CEQA Documents), 22.04[7] (Contents of EIRs—Alternatives), 22.09[7][e] (Streamlined Review for Kings Arena).

AIR QUALITY CONTROL

Regulatory Activity

Certification Procedures—Vapor Recovery Systems. The Air Resources Board is proposing to amend the certification procedures for vapor recovery systems at gasoline dispensing facilities (aboveground storage tanks and enhanced conventional nozzles) [amend 17 Cal. Code Reg. §§ 94010, 94011, and 94016 and documents incorporated by reference; adopt 17 Cal. Code Reg. § 94017]. The item will be considered during a two-day meeting of the Board commencing at 9:00 a.m., April 23, 2015, at Cal EPA, Air Resources Board, Byron Sher Auditorium, 1001 I Street, Sacramento CA. *Written comments* by 5:00 p.m., April 20, 2015, to Clerk of the Board, Air Resources Board, 1001 I St., Sacramento, CA 95814. Comments may also be submitted electronically at www.arb.ca.gov/lispub/comm/bclist.php. *Copies of the proposed text and statement of reasons*: Public Information Office, Air Resources Board, 1001 I Street, Visitors and Environmental Services Center, First Floor, Sacramento, CA 95814, (916) 322-2990. The documents are also available on the Board's website at www.arb.ca.gov/regact/2015/vapor2015/vapor2015.htm. *Substantive inquiries*: Mr. Scott Bacon, (916) 322-8949, or Mr. George Lew, (916) 327-0900. *Procedural inquiries*: Ms. Trini Balcazar, Regulations Coordinator, (916) 445-9564.

WILDLIFE PROTECTION AND PRESERVATION

Regulatory Activity

Flat-tailed Horned Lizard—Listing Petition. At its February 12, 2015, meeting, the Fish and Game Commission accepted for consideration a petition to list the flat-tailed horned lizard as an endangered species. Pursuant to Fish & Game Code § 2074.2(a)(2), the Commission declared the lizard a candidate species as defined by Fish & Game Code § 2068. Within one year of the date of publication of the notice of findings, the Department of Fish and Wildlife must submit a written report pursuant to Fish & Game Code § 2074.6 indicating whether the petitioned action is warranted.

Copies of the petition, as well as minutes of the February 12, 2015, Commission meeting, are available for public review from Sonke Mastrup, Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, CA 94244-2090, (916) 653-4899. Written comments or data related to the petitioned action should be directed to the Commission at this address.

CLIMATE CHANGE

Cases

GHG Offset Credit Regulations Did Not Violate "Additionality" Requirements

Our Children's Earth Foundation v. State Air Resources Bd.
No. A138830, 1st App. Dist., Div. 4
2015 Cal. App. LEXIS 171
February 23, 2015

Air Resources Board regulations implementing a market-based compliance mechanism for achieving reductions in greenhouse gas emissions (the "Cap-and-Trade" program) that afforded offset credits for voluntary reductions in GHG emissions did not violate the Global Warming Solutions Act of 2006 by failing to ensure that the credited reductions would be "in addition to" any GHG emission reduction that was otherwise required by law or that would otherwise occur.

Facts and Procedure. Plaintiff challenged Air Resources Board regulations implementing a market-based compliance mechanism for achieving reductions in greenhouse gas emissions (the ''Cap-and-Trade'' program). Plaintiff alleged that one component of the program that afforded offset credits for voluntary reductions in GHG emissions violated the Global Warming Solutions Act of 2006 [Health & Safety Code § 38500 et seq.] by failing to ensure that the credited reductions would be "in addition to" any GHG emission reduction that was otherwise required by law or that would otherwise occur [Health & Safety Code § 38562(d)]. The trial court rejected the claim and denied plaintiff's writ petition. Plaintiff contended on appeal that the Board exceeded its power under the 2006 Act by implementing regulations

that violated this "additionality" requirement. The court of appeal affirmed the judgment.

Cap-and-Trade Regulations. The court described the cap and trade regulations as follows: In January 2012, the Air Resources Board implemented the "California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms" pursuant to its authority under the Global Warming Solutions Act [17 Cal. Code Reg. §§ 95801–96022]. The purpose of the "Cap-and-Trade" program regulation is "to reduce emissions of greenhouse gases" from sources covered by the program "by applying an aggregate greenhouse gas allowance budget on covered entities and providing a trading mechanism for compliance instruments" [17 Cal. Code Reg. § 95801]. Entities covered by the program are from a broad spectrum of industries, including electricity, natural gas and fuel suppliers, each of whom has previously reported GHG emissions that exceed a threshold established by the Board for that industry [17 Cal. Code Reg. §§ 95811–95812].

The program imposes a "cap" on the aggregate GHG emissions these covered entities may emit during the annual compliance period [17 Cal. Code Reg. §§ 95801, 95802(a)(53)]. The Board enforces the cap, which is lowered over time, by issuing a limited number of compliance instruments referred to as "allowances," the total value of which is equal to the amount of the cap [17 Cal. Code Reg. § 95820]. Each allowance represents a limited authorization to emit up to one metric ton of carbon dioxide equivalent of greenhouse gases (CO2e), subject to stated restrictions. Covered entities demonstrate compliance with the program by the timely surrender of allowances which correspond to that entity's compliance obligation during the relevant compliance period which is calculated pursuant to a formula set forth in the program regulation [17 Cal. Code Reg. §§ 95854–95856]. Subject to restrictions and limitations, allowances are tradable, which means that individual participants can buy, bank or sell allowances which are used by the covered entities to satisfy their compliance obligations [17 Cal. Code Reg. §§ 95920–95923, 95856].

A covered entity can also use offsets to meet a percentage of its compliance obligation under the program [17 Cal. Code Reg. § 95820(b)]. An offset is a voluntary GHG emissions reduction from a source not directly covered by the Cap-and-Trade program that is used by a covered entity to comply with the program's GHG emissions cap. The Board included offsets in the Cap-and-Trade program in order to provide "compliance flexibility" and to "support the development of innovative projects and technologies from sources outside capped sectors that can play a key role in reducing emissions both inside and outside California." Each covered entity may use offset credits to satisfy up to eight percent of its compliance obligation [17 Cal. Code Reg. § 95854].

The court noted that the Board established extensive requirements for projects to qualify as offset credits under the Cap-and-Trade program [17 Cal. Code Reg. § 95970 et seq.]. The program incorporates the requirements for market-based mechanisms set forth in Health & Safety Code § 38562(d)—an offset must be "real, additional, quantifiable, permanent, verifiable, and enforceable" [17 Cal. Code Reg. § 95970(a)(1), (b)]. To implement the additionality requirement of the Cap-and-Trade program, the Board adopted the following definitions: "'Additional' means, in the context of offset credits, greenhouse gas emission reductions or removals that exceed any greenhouse gas reduction or removals otherwise required by law, regulation or legally binding mandate, and that exceed any greenhouse gas reductions or removals that would otherwise occur in a conservative business-as-usual scenario" [17 Cal. Code Reg. § 95802 (a)(4)]. "'Conservative' means, in the context of offsets, utilizing project baseline assumptions, emission factors, and methodologies that are more likely than not to understate net GHG reductions or GHG removal enhancements for an offset project to address uncertainties affecting the calculation or measurement of GHG reductions or GHG removal enhancements" [17 Cal. Code Reg. § 95802(a)(77)]. "'Business-as-Usual Scenario' means the set of conditions reasonably expected to occur within the offset project boundary in the absence of the financial incentives provided by offset credits, taking into account all current laws and regulations, as well as current economic and technological trends" [17 Cal. Code Reg. § 95802(a)(43)].

Another substantive eligibility requirement imposed by the Cap-and-Trade program regulation requires that a qualifying offset credit must result from the use of a "Compliance Offset Protocol" that meets a separate set of program requirements, and that has been formally adopted by the Board. This adoption process must comport to the procedures set forth in the regulation which require public notice and the opportunity for public comment [17 Cal. Code Reg. § 95970(a)(2), (b)].

The court stated that, consistent with the Legislature's directive to recognize early voluntary emission reductions, the Cap-and-Trade program regulation also includes a procedure for early action projects to qualify as offset credits under the program [17 Cal. Code Reg. § 95990]. It stated that the early action offset credit provision of the regulation is itself a detailed program which establishes the requirements for (1) an early action offset program to qualify for and register under the Cap-and-Trade program,

and (2) an early action offset project to qualify as an offset credit under the program.

The court stated that every layer of regulation applicable to offset credits confirms and incorporates the requirement that a GHG emission reduction entitled to a credit must be additional. It noted, for example, that a provision applicable to all offset projects requires that the "activities that result in GHG reductions and GHG removal enhancements are not required by law, regulation, or any legally binding mandate applicable in the offset project's jurisdiction, and would not otherwise occur in a conservative business-as-usual scenario" [17 Cal. Code Reg. § 95973(a)(2)(A)]. Furthermore, a Compliance Offset Protocol cannot be approved by the Board unless it establishes "the eligiblity and additionality of projects using standard criteria, and quantif[ies] GHG reductions and GHG removal enhancements using standardized baseline assumptions, emission factors, and monitoring methods" [17 Cal. Code Reg. § 95972(a)(9)]. It further noted that a specific project may qualify for an offset credit only by meeting both the additionality requirements set forth in the regulation and any additionality requirements in the applicable Compliance Offset Protocol [17 Cal. Code Reg. § 95973(a)(2)].

Compliance Offset Protocols. The court stated that the Cap-and-Trade program regulation requires that an offset credit result from the use of a Compliance Offset Protocol that has been approved by the Board [17 Cal. Code Reg. §§ 95970(a)(2), (b), 95971]. It quoted the Board's explanation in its appellate brief that the function of an offset protocol is to establish "a set of procedures and requirements to qualify and quantify GHG destruction, ongoing GHG reductions or GHG removal enhancements achieved by an offset project." One of the qualification requirements addressed by the Board protocols is that the GHG emissions reduction has to be "additional."

The court observed that the proper way to demonstrate additionality is a controversial subject, citing Schneider, "Is the CDM fulfilling its environmental and sustainable development objectives? An evaluation of the CDM and options for improvement," Okeo-Institute.V. (Nov. 5, 2007). It stated that there are three basic approaches for addressing this challenge when establishing an additionality test: a project-specific approach; a standards-based approach; or a hybrid approach [Broekhoff, "Expanding Global Emissions Trading: Prospects for Standardized Carbon Offset Crediting," World Resources Institute (Nov. 15, 2007)].

Citing Broekhoff, the court stated that the project-specific approach requires a verifier to focus on the project's "unique location and circumstances" in order to make a determination about the project operator's intention as to whether the project would have been undertaken absent the financial benefit associated with the offset credit. The standards-based approach employs a protocol which establishes objective criteria for evaluating whether a specific type of project satisfies the additionality requirement. The "essence of 'standardized' offset crediting is to minimize the subjective judgment required in evaluating whether a project should receive a credit for emission reductions, and how much credit it should receive." The third, hybrid approach incorporates project-specific and standardized requirements.

The court stated that a well-known, but criticized, example of a project-specific approach is the clean development mechanism (CDM), an offset mechanism used in a global carbon offset market program called the Kyoto Protocol which allows the crediting of emission reductions from GHG abatement projects in developing countries [Broekhoff and Schneider]. It stated that critical studies of the CDM highlight problems inherent in the project-specific approach, which include its (1) dependence on the subjective judgment of the regulator; (2) creation of a high degree of uncertainty for project developers; (3) reliance on the integrity and consistency of the regulator's judgment; and (4) being "prone to gaming" by project developers wanting to prove that the project would not have occurred if not for the incentive of the offset program [Broekhoff].

The court stated that by contrast to the CDM, protocols developed by the Climate Action Reserve employ a standards-based approach for ensuring additionality. The Reserve is a national nonprofit organization that (1) develops standards for evaluating, verifying and monitoring GHG emission inventories and reduction projects in North America; (2) issues offset credits for those projects; and (3) tracks offset credits over time "in a transparent, publicly-accessible system." A primary goal of the Reserve is to establish conservative GHG accounting which will ensure that GHG emission reductions are "real, permanent, additional, verifiable, and enforceable by contract." In formulating its standards-based protocols, the Reserve identifies types of emission reduction projects that are both subject to quantification and appropriate for assessment pursuant to performance-based additionality tests.

The court noted that in 2007, the Board adopted Reserve protocols as voluntary early action GHG emission reduction measures under the 2006 Act section [Health & Safety Code § 38560.5]. The court stated that the Board subsequently used Reserve protocols as models for its own protocols, although the administrative record showed that the Board engaged in an intensive independent process to develop the protocols that were ultimately approved under the Cap-and-Trade program regulation.

The court stated that at the time this case was filed, the Board had approved four Compliance Offset Protocols which were incorporated into the regulation [17 Cal. Code Reg. § 95975(e)]. Each protocol represents a class of projects from a distinct economic sector outside the coverage of the program: (1) livestock projects; (2) ozone depleting substance (ODS) projects; (3) urban forest projects; and (4) U.S. forest projects. The court stated that the Board protocols are technically hybrids as they contain some project-specific criteria, but all are highly standardized.

The court stated that the livestock projects protocol encourages the reduction of emissions from methane, which has 21 times the global warming potential of carbon dioxide. The ODS projects protocol is directed at a group of chemicals that destroy the stratospheric ozone layer and is based on a 2010 version of the Reserve protocol for this project area. This protocol authorizes offset credits for the destruction of ODS removed from older equipment and appliances that continue to generate these potent GHGs. However, ODS destruction by the United States government is excluded from this program based on the Board's finding that the "destruction of ODS by the U.S. government is common practice and considered business-as-usual, and therefore ineligible for crediting under this protocol."

The urban forest projects protocol accords offset credits for projects that permanently increase carbon storage through the adoption of a tree planting and maintenance program undertaken by a municipality, educational facility or utility. This protocol is based on a 2010 Reserve protocol. In addition to incorporating the additionality requirements of the Cap-and-Trade program regulation, this protocol requires that the offset project must "demonstrate a priori that it will exceed the business-as-usual threshold" for the project area where the offset project takes place. Those thresholds are "measured in terms of net tree gain," pursuant to formulas outlined in the protocol. The U.S. forest projects protocol is designed to maintain or increase sequestration of carbon dioxide on forest land. This protocol, which is based on a 2010 version of the Reserve protocol covering the project area, authorizes offset credits for three types of projects: (1) reforestation projects that restore tree cover on land that is not at optimal stockage levels; (2) improved forest management projects that maintain or increase carbon stocks on forested land; and (3) avoided conversion projects that prevent the conversion of forest land to a nonforest use.

The court noted that the Cap-and-Trade program regulation also incorporates several Reserve protocols into the early action offset credit provision [17 Cal. Code Reg. § 95990]. That provision establishes a mechanism pursuant to which early voluntary emission production projects that registered with the Reserve, and, therefore, complied with Reserve protocols, can obtain early action offset credits under the Cap-and-Trade program.

Present Action. The court stated that plaintiff sought to invalidate the Board's Compliance Offset Protocols and "Early Action Offset Credit program" on the ground that those provisions violate the additionality requirement of the 2006 Act. Plaintiff acknowledged that the Legislature gave the Board the option of using a market-based compliance mechanism. However, they alleged that the 2006 Act also establishes specific mandatory criteria to ensure the "integrity" of any such mechanism. According to the petition, these integrity standards mandate that the Board "shall ensure" that regulations achieve GHG emission reductions which are "real, permanent, quantifiable, verifiable, and enforceable," and which are "in addition" to any reduction otherwise required by law or "that otherwise would occur" [Health & Safety Code § 38562(d)(1), (2)].

Plaintiff alleged that the Compliance Offset Protocols incorporate a flawed approach for evaluating additionality that failed to satisfy the integrity standards imposed by the 2006 Act. Plaintiff asserted that each protocol was based on a "Performance Standard" that purported to ensure additionality but failed to do so for at least two reasons. First, the standard attempted to exclude activities that otherwise would occur by setting a threshold for GHG emission reductions for a specified activity at a level that is only "signficantly better than average," and/or "beyond 'common practice'" for that specified activity. According to plaintiff, this approach was inherently defective because it necessarily included activities that otherwise would occur.

Plaintiff's second disagreement with the Board's Performance Standard was that it allegedly incorporated a "profitability" factor that assumed a project activity satisfied the additionality requirement if it would be profitable only with the financial incentive of the offset payment. Plaintiff alleged that this standard assumption was subjective and uncertain and that it was nothing more than a "guess about the future." Plaintiff alleged that for these reasons, the Board's Performance Standard would flood the program with nonadditional offsets: "Since non-additional offsets, i.e., activities 'that otherwise would occur,' will always be the least expensive (and therefore be preferred in an offset market by offset purchasers), no truly additional offsets will be financially viable until all non-additional activities have been exhausted. Since the use of the 'significantly above average,' 'beyond common practice' and 'profitability analysis' tests will flood the

system with non-additional offsets, use of these tests are likely to result in a large proportion of non-additional offset projects."

Plaintiff also challenged the early action offset credit provision of the Cap-and-Trade program. Plaintiff alleged that this provision incorporated Reserve protocols that failed to ensure additionality by allowing "offsets to be generated from entire classes of projects, even though projects within those classes are already being undertaken and will be undertaken without the incentive provided by offset payments."

The court noted that plaintiff asserted that "the central contention of this action is that the challenged offset provisions exceed [the Board's] authority and are in conflict with the [2006 Act's] Integrity Standards." Plaintiff sought to invalidate Board regulations implementing the Compliance Offset Protocols [17 Cal. Code Reg. § 95975(e)] and the early action offset credit program [17 Cal. Code Reg. § 95990] and any offset credits that had been issued by the Board pursuant to these allegedly unlawful provisions.

The trial court denied the petition for writ of mandate. In its statement of decision, the court framed the issue as follows: "Plaintiff focus their challenge solely on Respondent's use of a standards-based approach to determine additionality. This Court must determine whether the Legislature foreclosed Respondent's use of these mechanisms because they permit non-additional reductions to receive credit. Plaintiff demands a perfect additionality determination that precisely delineates between additional and non-additional reductions. Respondent contends that additionality is inherently uncertain and it is impossible to design a perfect additionality mechanism. Central to this case is interpreting [section 38562(d)(2)] to determine if it forecloses Respondent from using standardized additionality mechanisms."

The court of appeal noted that to resolve this issue, the trial court conducted a two-part analysis applying different standards of review. First, the trial court employed a de novo standard to determine whether the Legislature delegated to the Board the "authority to use a standards-based approach to determine additionality." It reasoned that the "best source" of legislative intent was the statutory language itself, and found that the 2006 Act conferred to the Board "vast discretion to promulgate any type of GHG reduction measure." The trial court also found that discretion included the authority to adopt a "standards-based" approach which, in this case, took the form of the Compliance Offset Protocols. In the second part of its analysis, the trial court considered whether the Board's offset protocols were arbitrary and capricious in that they failed to achieve the purpose of the 2006 Act. The court considered each of the challenged protocols and concluded all were reasonably necessary to effectuate the purpose of the 2006 Act, and that promulgating them was neither arbitrary nor capricious.

Plaintiff appealed from the judgment, and the court of appeal affirmed.

Board Did Not Violate Act in Adopting Rules and Protocols for Determining "Additionality." The court noted that Health & Safety Code § 38562(d)(2) provides that a market-based compliance mechanism adopted by the Board "shall ensure" that the reduction of GHG emissions achieved by the mechanism "is in addition to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." It further noted that there was no dispute in this case that the Cap-and-Trade program requires that GHG emission reductions that generate offset credits be in addition to GHG emission reductions otherwise required by law or regulation. Rather, the court stated that plaintiff's claim was that the Board exceeded its authority under the 2006 Act by adopting a market-based compliance mechanism that failed to ensure that offset credits would in addition to "any" GHG emission reductions that "otherwise would occur" [17 Cal. Code Reg. § 38562(d)(2)].

Plaintiff argued that "when the Legislature uses the word 'any,' it unambiguously intends to cover each, every, and all," citing, e.g., *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* [(2007) 41 Cal. 4th 929, 63 Cal. Rptr. 3d 50]. The court stated that although plaintiff spent significant time making this point, it did not appear to be disputed in this case. The court agreed with an observation in the trial court's statement of decision that "All parties agree that each and every reduction must be additional. They disagree on how to determine additionality." Thus, the court stated that the real dispute in this case pertained to a different phrase in section 38562(d)(2) which requires that reductions generated by a market-based compliance mechanism must be in addition to reductions "that otherwise would occur." It stated that plaintiff characterized this phrase as "plain language," imposing a clear mandate on the Board to "ensure that each and every reduction that generates an offset would not otherwise occur." The court stated, however, that plaintiff never articulated how a project operator could prove the GHG emission reduction would not otherwise occur or how the Board could provide the assurance that plaintiff claimed the statute demands. Instead, it stated that plaintiff took the rather pedantic position that this part of the section 38562(d)(2)

additionality requirement speaks for itself and expressly requires unequivocal proof that the emissions reduction would not otherwise occur.

The court noted that although the 2006 Act requires additionality in the context of a market-based compliance mechanism, it does not define the word "additional," nor does it define the term "otherwise would occur." The court further noted, however, that the Act does define "market-based compliance mechanism" as including GHG "emissions exchanges, banking, credits, and other transactions, governed by rules and protocols" to be established by the Board. [17 Cal. Code Reg. § 38505(k)(2)].

The court concluded that within this authority, the Board established rules and protocols that gave sufficient meaning to the concept of additionality so that the statutory requirement was capable of enforcement. It stated that by developing these rules and protocols the Board did not exceed its power, but rather exercised the legislative authority delegated to it by the Legislature. The court stated that although it found no case law interpreting section 38562(d), its conclusion was consistent with authority construing other provisions of the 2006 Act. The court cited *Association of Irritated Residents v. State Air Resources Bd.* [(2012) 206 Cal. App. 4th 1487, 143 Cal. Rptr. 3d 65], where the petitioner alleged that the Board's "'Climate Change Scoping Plan'" (which authorized the development of the Cap-and-Trade program) failed to comply with the requirements of the 2006 Act. The trial court rejected that contention and Division Three of the First District affirmed the judgment, holding that the Board did not disregard statutory requirements or act arbitrarily or capriciously. The court noted that *Irritated Residents* found, among other things, that the directives imposed on the Board by the 2006 Act are all "exceptionally broad and open-ended," leaving "virtually all decisions to the discretion of the Board. . . ." The court here agreed with that conclusion.

The court noted that plaintiff conceded that "the Legislature gave [the Board] wide latitude in deciding how the statute's emission reduction goals are to be met and indeed, whether a market-based compliance mechanism should be employed at all." Nevertheless, the court stated that plaintiff contended that the "few parameters the Legislature did explicitly impose . . . must be obeyed." The court stated that, according to plaintiff, one of those parameters is that each and every GHG reduction used to generate an offset must be "additional." Plaintiff contended that this parameter is absolutely mandatory because section 38562(d) uses the word "shall," and no other provision of the 2006 Act "overrides this mandatory prohibition."

The court accepted that additional means additional and that "otherwise would occur" also means what it says. It stated, however, that these concepts are not self-executing. The court stated that the fundamental problem with plaintiff's interpretation of section 38562(d)(2) was that it refused to account for the fact that it is virtually impossible to know what otherwise would have occurred in most cases. The court stated that whether a project would have been implemented without the offset incentive "is hypothetical and counter-factual—it can never be proven with absolute certainty," quoting Schneider. Thus, the court stated that the practical effect of accepting plaintiff's unworkable statutory interpretation would preclude the Board from implementing many, if not all, market-based compliance mechanisms. The court stated that it did not believe that was what the Legislature intended.

Instead, based on its independent review of the relevant statute, the court concluded that the Legislature delegated rule-making authority to the Board to establish a workable method of ensuring additionality with respect to offset credits accepted pursuant to a market-based compliance mechanism like the Cap-and-Trade program regulation at issue in this case. The court stated that although it reached this conclusion independently, the trial court's well-reasoned statement of decision supported its disposition of this case. The court observed that plaintiff made several arguments on appeal to circumvent the court's reaching the same conclusion as did the trial court.

The court stated, for example, that plaintiff appeared to contradict its earlier position by contending that it did not dispute the Board had authority to establish rules defining and implementing the section 38562(d)(2) additionality requirement. Instead, plaintiff argued that its mandate petition challenged only the offset protocols, not the offset provisions, of the Cap-and-Trade regulation. According to plaintiff, the regulatory provisions were not invalid because they could and should be construed as requiring a case-specific assurance that each and every offset credit project would generate an additional reduction. By contrast, plaintiff contended that the Compliance Offset Protocols were inherently inadequate because they predetermined additionality pursuant to a standards-based assessment of the "class of offset projects" covered by that protocol.

Board Did Not Exceed Authority by Using Standards-based Protocols to Implement Market Based Compliance Mechanism. The court stated that while the petition for writ of mandate focused on the Compliance Offset Protocols, it expressly challenged the provisions of the Board regulation that implemented those protocols. The court further stated that the distinction plaintiff drew

between the offset provisions in the regulation and the offset protocols was illusory. It stated that the Board's actions expressly require that an offset project meet the additionality requirements set forth in both the regulation as well as any additionality requirements of the pertinent protocol [17 Cal. Code Reg. § 95973(a)(2)]. The court noted that each offset protocol also explicitly requires compliance with the additionality requirements in the regulation. Thus, the court stated that the Cap-and-Trade program regulation establishes a standards-based mechanism to ensure that GHG emission reductions that generate offset credits are in addition to reductions that would otherwise occur, and the offset protocols are an integral part of that mechanism. It held that because the Board had statutory authority to establish a market-based compliance mechanism that employs a standards-based approach for ensuring additionality, it did not exceed that authority by using standards-based protocols to implement that mechanism.

Plaintiff also asserted on appeal that it never challenged the Board's authority to employ a standards-based approach for assessing additionality. The court stated that plaintiff faulted the trial court for creating this misconception and mischaracterizing the petition as challenging the Board's authority to use performance standards. Plaintiff contended that by doing so, the trial court allegedly created a "false dichotomy" between protocols that use performance standards to assess additionality and the project-by-project approach which "focuses on each project's unique location and circumstances." The court stated that plaintiff insisted that this "'standards based vs. project-by-project' dichotomy was never in dispute" because plaintiff had always recognized that "a performance standards-based approach could conceivably meet the terms of the statute as long as the standard ensures that no project that would otherwise occur would be allowed to generate offset credits."

The court first stated that, as a factual matter, the petition clearly challenged the Board's use of performance standards. It stated that the petition charged that performance-based standards violate the 2006 Act because they fail to weed out projects that would otherwise occur by requiring only that a GHG emission reduction project achieve a reduction that is better than the benchmark for conduct in that industry. The court stated that it rejected this contention because it was based on an interpretation of the statutory phrase "would otherwise occur" that would essentially preclude the Board from exercising its delegated authority to implement most, if not all, market-based compliance mechanism.

Second, the court stated that plaintiff's conception of a "performance standards-based approach" which "ensures that no project that would otherwise occur would be allowed to generate offset credits" incorporated the same unworkable definition of the statutory requirement. It stated that when taken to its logical conclusion, plaintiff's theory was that no approach could establish that an offset was additional because the 2006 Act demanded a degree of certainty that could never be satisfied.

Project Commenced Before Program Was Adopted May Satisfy Additionality Requirement. The court stated that aside from its erroneous theory about the meaning of the phrase "otherwise would occur," plaintiff also contended that the Board exceeded its statutory authority by authorizing offset credits for projects that are "already occurring." The court stated that plaintiff's argument appeared to be that the Board "does not have the statutory authority to treat a project that is already occurring as not occurring." The court stated that in a footnote, plaintiff elaborated that the regulation permits a project to qualify for an offset credit pursuant to one of the Compliance Offset Protocols even if the project commenced before those protocols were adopted. In addition, plaintiff argued that the regulation also permits a project to qualify as an offset under one of the Reserve protocols even if that project commenced before the 2006 Act was passed, citing 17 Cal. Code Reg. §§ 95973(c) and 95990(c).

The court stated that two provisions of the 2006 Act undermined plaintiff's assumption that a project that commenced before the Cap-and-Trade program was adopted can never satisfy the statute's additionality requirement. First, the court noted that the Legislature established several guidelines for the Board to follow when exercising the quasi-legislative power delegated to it by the Act. One of those guidelines provides: "In adopting regulations pursuant to this section . . ., to the extent feasible and in furtherance of achieving the statewide greenhouse gas emissions limit, the state board shall . . . ensure that entities that have voluntarily reduced their greenhouse gas emissions prior to the implementation of this section receive appropriate credit for early voluntary reductions" [Health & Safety Code § 38562(b)(3)]. Second, Health & Safety Code § 38563, part of the Act, provides: "Nothing in this division restricts the state board from adopting greenhouse gas emission limits or emission reduction measures prior to January 1, 2011, imposing those limits or measures prior to January 1, 2012, or providing early reduction credit where appropriate."

The court stated that these provisions of the 2006 Act reflected that the Legislature contemplated that there could be incentives for voluntary early reductions even before the Act was passed, and that it authorized the Board to credit those early actions. Plaintiff contended, however, that the Board exceeded its authority under these statutory

provisions by implementing an early action offset program that incorporated the Reserve protocols because they suffered from the same alleged defects as the Board's other protocols. According to plaintiff, "both sets of protocols fail to weed out activity that 'otherwise would occur,' relying instead on predetermined findings that the type of activity is beyond 'common practice.'" The court stated that in other words, plaintiff challenged the early action offset program on the same ground that it challenged the other offset provisions of the Cap-and-Trade program—because it did not mandate proof of an unknown. The court stated that this challenge failed.

Board's Action Not Arbitrary and Capricious. The court stated that the administrative record demonstrated that the Board engaged in an extensive regulatory process in order to establish a working definition of additionality that (1) furthered the purposes of the 2006 Act and (2) could be implemented through the use of offset protocols incorporated into the Cap-and-Trade program. That process included soliciting input from the public, pertinent industries, and relevant experts.

The court noted that the record produced during regulatory proceedings undertaken by the Board included, among other things, a "Final Statement of Reasons for Rulemaking, Including Summary of Public Comments and Agency Responses," a more than 2,000-page document summarizing the extensive evidence supporting the Board's decision to adopt the Cap-and-Trade program regulation and to include offset credits as an integral component of that program. The record also included a final staff report for each Compliance Offset Protocol that explained the basis for the protocol and the additionality requirement applicable to that category of projects. The court stated that these reports and other evidence in the administrative record substantially supported the many policy decisions the Board had to make in order to formulate protocols that complied with the requirements of the 2006 Act by, among other things, implementing and enforcing the Board's interpretation of the additionality requirement. The court held that plaintiff failed to demonstrate that any action the Board took was arbitrary or capricious.

◗**References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 85.04[7] (Cap-and-Trade Program).

CUMULATIVE SUBJECT INDEX

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