

LAND USE & NATURAL RESOURCES

THIRD QUARTER 2011

VOLUME 3

COX, CASTLE & NICHOLSON LLP 2011 THIRD QUARTER CEQA CASE LAW UPDATE

The California courts continued to be active in considering CEQA cases during the third quarter of 2011, with 11 decisions summarized in this Update. The decisions include a significant ruling from the California Supreme Court regarding the extent to which CEQA applies to agency decisions to ban plastic bags. In addition, a court upheld the greenhouse gas emissions analysis in an environmental impact report for a new hospital, holding that the EIR was not required to consider every single mitigation measure on the Attorney General's recommended list of such measures. There are also two lengthy decisions evaluating EIR analyses of cultural resources and other impacts, one upholding the analysis and another rejecting it.

Plastic Bag Manufacturers Have Legal Standing to Challenge Plastic Bag Ban Under CEQA, but the Environmental Impact of a Small City's Plastic Bag Ban is Too Small to Support a Fair Argument that an EIR is Required: *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155.

The California Supreme Court's most recent CEQA decision, issued in July, includes important rulings about legal standing to bring CEQA claims, and the extent to which indirect and small environmental impacts must be considered in evaluating whether an agency action may have a significant environmental impact requiring an EIR. These are both significant rulings with potentially broad ramifications for CEQA practice.

First, on the standing issue, the Court held that corporations are as free to bring CEQA citizen suits as are natural persons. On this point, the Court rejected the holding in a 2000 Court of Appeal decision, *Waste Management of Alameda County v. County of Alameda*, where the court held that a corporation bringing a citizen suit must make a heightened showing by demonstrating, for example, that the corporation has a continuing interest in, or commitment to, the public rights being asserted in a CEQA lawsuit. Instead, the Supreme Court ruled that "corporate entities should be as free as natural persons to litigate in the public interest."

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Madera Oversight Coalition, Inc. v. County of Madera

Hillside Memorial Park & Mortuary v. Golden State Water Co.

Apart from the corporate standing issue, the Court held that the association of plastic bag manufacturers had direct standing (in addition to citizen suit standing) to challenge the regulations because their business interests were directly affected. The City argued that a CEQA petitioner must be affected by a particular *environmental* impact in order to have the required “beneficial interest” to bring an action. The Court held that there had never been such a limit on the beneficial interest requirement, noting that businesses which are adversely affected by government actions regularly challenge those actions under CEQA. The Court confirmed that parties who are directly affected by governmental action have standing in their own right to challenge the action.

On the CEQA claim itself, the Court stated that the relevant question was not the global question of whether the use of plastic bags or papers bags was better or worse for the environment considering all the life-cycle impacts of either choice. Instead, the determination of significant effect must be based on CEQA’s directive that agencies evaluate whether a specific project will have a significant environmental effect, and the statute’s definition of such effects as “limited to substantial, or potentially substantially, adverse changes in physical conditions which exist . . . within the area which will be affected by a proposed project.” Based on this, the Court held that “When we consider the actual scale of the environmental impacts that might follow from increased paper bag use in Manhattan Beach, instead of comparing the global impacts of paper and plastic bags, it is plain the City acted within its discretion when it determined that its ban on plastic bags would have no significant effect on the environment.”

In explaining this decision, the Court made several significant statements regarding the scope of required analysis under CEQA. First, the Court held that the low level of potential impact affected the level of detail that was required to evaluate the impact. With respect to local impacts within Manhattan Beach, the Court held no “detailed study” was required to show that traffic changes stemming from delivery of paper versus plastic bags would be minimal, and that a “thorough analysis” of additional landfill waste was not required. The Court noted that impacts were not limited to the area of the City itself, but noted that less detail is required when effects are indirect

or difficult to predict (citing the Court’s 2007 *Muzzy Ranch* decision on these points). As to such broader effects outside the City, the Court stated that the City could evaluate these at a “high level of generality.”

Second, the Court held that the City’s plastic bag ban would have only a “miniscule” contributive effect on the broader environmental impacts that were described in the “life cycle” studies of plastic and paper bags. Based on the small size of the City and the small size of the City’s retail sector, the Court held that the increase in paper bag production could only be described as “insubstantial.” The Court took a “common sense” approach to the question of environmental impact, and did not relate this holding to prior CEQA case law. There is at least some tension, however, between this holding and the line of cases which have held that an agency cannot determine that a cumulative impact is less than significant based simply on the relatively small size of the project’s contribution to the overall impact. E.g., *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, (rejecting the use of a “de minimus” standard in CEQA Guidelines); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 (rejecting a “ratio theory” as basis for determining small impacts to be less than significant).

Third, the Court characterized this case as an example of “over-reliance on generic studies of ‘life-cycle’ impacts associated with a particular product.” This statement is in line with other cases which have rejected the submission of generalized information as a basis for challenging impact conclusions about a specific project’s impacts. E.g., *Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, (cumulative impact evidence must relate to specific project; see also *Melom v. City of Madera* (2010) 183 Cal.App.4th 41.) The Court qualified this holding, however, by noting that life-cycle studies “may well be a useful guide for the decision-maker when a project entails substantial production of consumption of the product.”

Approval of Multiple Railroad Grade Separation Projects Exempt Under Statutory Exemption For Such Projects, City’s Preparation of EIR Did Not Waive Ability to Assert in Litigation That Approvals Were Exempt: *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173.

This is the second Court of Appeal decision to hold that an agency's decision to proceed with an EIR does not constitute a waiver by that agency of the ability to argue in litigation that the action in question is entirely exempt from CEQA. The Court also ruled that the statutory exemption for a railroad grade separation project applies to a project consisting of several railroad grade separations.

The case arose out of the City of Placentia's consideration of the Orange County Gateway project, which consisted of multiple railroad grade separation projects. The City had prepared an EIR, even though grade separation projects are exempt, because the City was considering alternatives to the project, and some of those alternatives would have involved activities that were not covered by the statutory exemption for grade separation projects. When the City approved the project and certified the EIR, an affected homeowners association filed a lawsuit. The Orange County Transportation Authority intervened in the lawsuit and demurred on the basis that the activity was statutorily exempt. The City joined in the demurrer.

The Court of Appeal held that the City's preparation of the EIR did not bar the City from later asserting in litigation that the project was statutorily exempt from CEQA. Citing an earlier decision which reached the same result, *Santa Barbara County Flower & Nursery Growers Assn v. County of Santa Barbara* (2004) 121 Cal.App.4th 864, the court held that the doctrine of estoppel did not prevent the City from arguing that the statutory exemption applied, given that the application of the exemption was a matter of law.

The Court also rejected an argument that the statutory exemption could not be applied to multiple grade separation projects. The exemption in question, Public Resources Code section 21080.13, states that CEQA "does not apply to any railroad grade separation project which eliminates an existing grade crossing or which reconstructs an existing grade separation." The homeowners association argued this exemption was stated in the singular and thus could only be applied to a project consisting of one grade separation action. The Court noted, however, that the Legislature's intent in enacting the exemption was to facilitate grade separations, an intent not served by

restrictively interpreting the statutory exemption. Also, Public Resources Code Section 13 sets forth the general provision that, in interpreting the Code, the singular includes the plural and the plural includes the singular.

EIR for Foothills Development Project Upheld Against A Variety of CEQA Claims, Including Challenges to the Analyses of Cultural Resources, Biological Resources, Aesthetics, Growth-Inducement and Traffic: *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200.

This decision by the Third District Court of Appeal covers numerous CEQA issues and also upholds the City's finding of general plan consistency. The CEQA issues decided by the Court include a substantial discussion of the tension between CEQA's information disclosure requirements and the need to protect the confidentiality of information about archeological sites and sacred sites.

Cultural Resources and Confidentiality. The Court rejected claims that the EIR failed to adequately disclose cultural resource information and impermissibly deferred mitigation of cultural resources impacts. The EIR disclosed that 34 sites could be affected by the project, that impacts to all but 8 sites had been avoided, and that impacts at these 8 sites would be mitigated through measures to be included in a historic properties management plan to be approved by the Army Corps of Engineers and the State Office of Historic Preservation. The EIR generally described the sites, the types of resources they contained, and the mitigation measures, but the EIR did not disclose the locations of the sites or the specific content of the management plan on the basis that this information was required to be kept confidential.

The Court rejected claims that this disclosure was inadequate, noting that both state and federal laws, including CEQA Guideline 15120(d), require such confidentiality to protect Native American cultural resources. The Court also noted that guidelines issued by the Office of Planning and Research regarding consultation with tribes stated that site locations and similar information should not be released to the public but should be maintained as confidential.

Growth-Inducing Impacts. The project included an oversized sewer line that could help to provide sewer services to additional development, and the EIR disclosed that this aspect of the project was growth-inducing in that it removed an obstacle to potential development. The EIR described generally the impacts of such growth, and this complied with the requirement that the EIR “discuss the ways in which the proposed project could foster economic or population growth.” The Court rejected claims that more detailed analysis was required. The project was not primarily designed to further such growth, any such growth was only an indirect impact of the project, and the future development would also require its own CEQA review. Finally, the growth had already been evaluated at a general level of detail in the City’s general plan EIR.

Oak Tree Impacts. The EIR calculated the number of oak trees that would be lost, imposed mitigation measures for some loss of trees, and found that overall the loss of oak trees was a significant and unavoidable impact. The Court found the EIR provided adequate disclosure.

Deferred Mitigation of Black Rail Impacts. The EIR disclosed the possible presence of the black rail, concluded there would be no permanent impacts to this bird species because of the project’s conservation of wetlands, and determined that mitigation measures would avoid temporary impacts during construction. These mitigation measures included pre-construction surveys, protection of the wetlands, and obtain any necessary permits for development in and near the wetland habitat. The Court rejected arguments that including the permit requirements in the mitigation constituted impermissible deferral, noting prior case law that reliance on environmental permits is appropriate mitigation.

Aesthetic Impacts. The EIR concluded overall that aesthetic impacts of the development would be significant, but that there would not be a significant impact on views of the project from the Town of Loomis because the project, while visible, would appear similar to adjacent development. The Court found that these statements were not contradictory, and that the analysis in the EIR contained factual statements explaining the EIR’s reasoning, and these factual statements provided the required substantial evidence supporting the ultimate significance determinations.

Traffic Impacts. The Court rejected a claim that the traffic analysis should have evaluated two additional intersections, noting that the City did evaluate the two claimed intersections in the Final EIR and determined the changes in traffic conditions at those intersections to be small and less than significant. The Court also rejected a claim that analysis of AM school hour trips was required, noting that the EIR stated that the analyzed PM peak hour provided the most conservative analysis and there was no evidence to contradict this conclusion in the EIR.

Water Supply Impacts. The Court rejected claims that the EIR did not adequately evaluate the possibility that water would not be available, and the impacts of alternate water supply arrangements. The local water agency had certified, however, that it had sufficient water to serve all development contemplated over the next 20 years, and the Court held this satisfied the requirement that the EIR show that future water supplies “must bear a likelihood of actually proving available.” (citing the Supreme Court’s *Vineyard Area Citizens* case on water supply requirements). Given that the EIR demonstrated future supplies were available, it was not required to evaluate alternate water supply arrangements.

In a Subsequent Review Proceeding, Petitioners Cannot Relitigate Issues Decided in The Earlier EIR Case, and Discovery of Additional Information on Toad Larvae did not Require Recirculation or a Supplemental EIR: *Silverado Modjeska Recreation District v. County of Orange* (2011) 197 Cal.App.4th 282.

Here, the Fourth District Court of Appeal issued an important ruling regarding the finality of CEQA decisions. The case arose out of a 2003 EIR, and a writ requiring certain revisions to that EIR. Orange County as the lead agency prepared a supplemental EIR to comply with that writ, and approved the project again based on that supplemental EIR. The County filed a motion to discharge the writ, asking the trial court to confirm that the supplemental EIR cured the defects that had previously been identified. The trial court granted that motion, and issued an order discharging the writ. There was no appeal from that order discharging the writ, but the opponents filed a new action and in that action raised some of the same issues that were resolved in the original case. The Court held those actions were barred.

The Court also decided that recirculation of the supplemental EIR was not required due to new information about toad larvae being discovered downstream of the project, because the EIR had disclosed that toads were located downstream of the site, and the new discovery only indicated that the toads were somewhat closer. The County responded to the new information with further surveys that did not reveal toads near the project downstream, and on that basis the County concluded it was unlikely there were any toads on the project site, the same conclusion as had been reached in the EIR. Based on this, the Court held (with one justice dissenting) that the new information clarified and amplified information that was already in the EIR, and did not indicate a new or substantially more severe impact requiring recirculation of the EIR.

EIR for Expanded Hospital Campus Upheld; City Findings on Mitigation of Greenhouse Gas Emissions Impacts Were Supported By Substantial Evidence: *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042.

Here the Second District Court of Appeal upheld an EIR evaluating a hospital expansion project against claims that the EIR did not sufficiently evaluate all suggested mitigation measures for climate change impacts, and the City's findings on such mitigation measures were not supported by substantial evidence. The Court also upheld the approval of the project against a claim that the City improperly balanced project benefits and project impacts in making a required finding under the City Code that the project did not adversely affect neighbors.

The EIR evaluated greenhouse gas emissions, with a quantified analysis that divided such emissions into emissions from the hospital complex itself, energy related emissions and emissions from vehicles. The EIR found that the emissions in the first two categories were less than significant, but that the mobile source emissions associated with the project would remain significant even though the project included a number of mitigation measures to reduce such emissions. A local environmental group challenged the City's analysis and findings, arguing that the City did not consider other mitigation measures, and claiming that the

City was required to evaluate each mitigation measure that it decided not to adopt. The Court held there was no authority for the claim that the City must list each mitigation measure that it considered.

The local group had submitted to the City a copy of the Attorney General's recommendations for greenhouse gas mitigation, and the Court noted that the City had in fact adopted many measures that were consistent with those recommendations. The City also generally responded in the Final EIR that the project, as an infill project, embraced many strategies identified as important in combating climate change.

The group also argued that the City's finding was not supported by substantial evidence. The Court rejected this claim as well, noting that the EIR was prepared in accordance with the technical advisory paper on greenhouse gas emissions from the Office of Planning and Research, the only guidance document available at the time the EIR was prepared. The EIR also set forth a variety of traffic and traffic demand management mitigation measures, and also noted that the project reduced vehicle miles over baseline conditions by locating the medical office buildings at the hospital campus.

When a Petitioner Is Entitled to Attorneys Fees, the Administrative Process is Part of the Overall Action for Purposes of Determining the Attorney Fee Award, and Non-Financial Interests Not a Basis for Disallowing Fees: *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312.

Here, an individual neighbor and a nonprofit group filed a CEQA lawsuit challenging a County's approval of a new church. Shortly after the lawsuit was filed, the church notified the petitioners that it was abandoning the approvals and would return to the permitting process. After a number of case management conferences, the County rescinded the challenged approvals, and the petitioners later dismissed their lawsuit.

The petitioners then moved to recover their attorneys' fees, under the theory that, even though there was not a final judgment, the lawsuit was the "catalyst" for the rescission of

the approvals, so petitioners were entitled to fees under Code of Civil Procedure section 1021.5. The trial court awarded such fees for the lawsuit, but did not award any fees for the administrative process leading up to the lawsuit, concluding as a matter of law that there was no entitlement to fees for the separate administrative proceeding. The court also denied the neighbor's request for fees, on the basis that the neighbor had a personal stake in opposing the project and bringing the lawsuit, so that the cost of the litigation was not disproportionate to the neighbor's personal interests.

The Second District Court of Appeal reversed on both of these points. When a party is entitled to fees under section 1021.5, the administrative proceedings leading up to the lawsuit are part of the "action" that provides the basis for the fee award, so a trial court may not decline a fee award on the basis that the administrative proceeding is not part of the overall legal action. The Court remanded the issue to the trial court, noting the traditional rule that whether parties are entitled to fees, and the amount of such fees, lies within the trial court's discretion, based on a variety of factors, including the extent to which the party participating in the administrative process, and the time and cost necessary to prepare to challenge the agency decision. ("The fees the court deems appropriate may range from no fees to reasonable fees under the circumstances.")

With respect to the neighbor, while the fee appeal was pending, the California Supreme Court decided the *Whitley* case, holding that nonpecuniary (or non-financial) interests of a party cannot be the basis for disallowing an award of attorneys' fees. *Conservatorship of Whitley* (2010) 50 Cal.4th 1206. The neighbor's claimed stake in the character of the neighborhood and privacy and noise issues was precisely the type of non-financial interest identified in *Whitley* as not providing a basis to disallow fees.

The court recited the formula given in *Whitley* (and prior case law) for determining whether the cost of litigation outweighs the party's financial stake. "The trial court must first fix - or at least estimate - the monetary value of the benefits obtained by the successful litigants themselves...it must [then] discount these benefits by the estimate of the probability of success at the time the vital litigation decisions were made...Thus, if success would yield . . . an aggregate of \$10,000 but there only a one-third chance of ultimate victory, they won't proceed - as a rational matter -

unless their litigation costs are substantially less than \$3,000 . . . the court must then turn to the costs of the litigation . . . the final step is to make the value judgment whether it is desirable to off the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case . . . a bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs.

Reversing Trial Court Judgment With Instructions to Dismiss Case as Moot is Proper Outcome When a Project is Abandoned During a Pending Appeal: *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal. App. 4th 939.

The Court in *Yucaipa* dealt with the unfortunate situation where a proposed project successfully resists a CEQA challenge at the trial court level, but during an appeal, the project is abandoned, rendering the entire case moot. In *Yucaipa*, the trial court upheld the EIR for a retail project against a CEQA challenge. After petitioners appealed the trial court's CEQA judgment, a contractual dispute and ensuing litigation arose between the landowner and the retail developer, Target Stores (both real parties in the CEQA litigation). The City of Yucaipa ultimately rescinded all of the approvals that had been challenged in the CEQA case. The City and Target then filed a motion before the appellate court requesting dismissal of the appeal as moot.

The sole issue addressed in *Yucaipa* was how best to deal with a moot case that is pending on appeal after the record has been prepared for the appellate court. The problem with simply dismissing the appeal was that it would effectively affirm the trial court's judgment without the appellate court ever reaching the merits of that judgment. This would create a situation where a "less-than-fully-litigated judgment" could have preclusive *res judicata* or collateral estoppel effects on subsequent litigation. The *Yucaipa* court apparently did not approve of this possible result (although California courts are split on the issue), and thus chose a different approach. Following case law from outside the CEQA context, the *Yucaipa* court held that that the proper remedy under these circumstances is to: (1) reverse the trial court's judgment, making it expressly clear that the reversal is not based on an error in the judgment (a "qualified" reversal); and (2) instruct the trial court to dismiss the case as moot.

Single Notice Error Not Prejudicial; CEQA Permits Remand Without Setting Aside Project Approvals: *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949.

In this case, the First District upheld a mitigated negative declaration and found that a single noticing error was not prejudicial and did not require the project approvals to be set aside while the notice error was corrected.

Here, the County had prepared a fifth iteration of a Mitigated Negative Declaration (“MND”) for a warehouse and beverage distribution facility. The County sent the MND to the State CEQA Clearinghouse which normally circulates CEQA documents to other reviewing agencies. The Clearinghouse advised the County that it had complied with the review requirements, but never sent the document to the Bay Area Air Quality Management District (“BAAQMD”). The County had earlier consulted with BAAQMD, and the MND reflected the BAAQMD thresholds, but neither the County nor the Clearinghouse sent the MND itself to BAAQMD.

The project opponents claimed that this noticing error required the project approvals to be set aside. The trial court found the lack of notice did constitute a CEQA violation and ordered the County to provide the notice, but did not order the project approvals to be set aside. The opponents claimed that this order was an improper interlocutory remand, and that the court was required to set aside the project approvals.

The Court disagreed and held that, under the facts of this case, the lack of notice was not prejudicial, as BAAQMD had been consulted at the beginning of the CEQA process and the County “assumed the role of BAAQMD” by publishing the quantitative BAAQMD criteria in the MND. The Court found that the remedy complied with CEQA and Public Resources Code 21168.9 which gives trial courts the authority to fashion a variety of remedies in CEQA cases, including “fix it” or compliance order. The Court held that the trial court fashioned a remedy appropriate to the noticing violation.

Petitioner also challenged the notice to the Water Board and Caltrans, who received and commented on the MND, but were not notified of the public hearing on the project. The Court held that notice of the MND was sufficient. CEQA only

requires that agencies be given notice of a proposed negative declaration, and does not require that notices of all hearings be sent to commenting agencies.

California Coastal Commission’s “Functional Equivalent Document” Satisfied the Requirements of the Commission’s Certified Regulatory Program Under CEQA: *Ross v. California Coastal Commission* (2011) 198 Cal.App.4th 1573 (petition for review pending).

This case clarifies the rules that apply to “certified regulatory programs” under CEQA. Such programs, once approved as such by the Natural Resources Agency, are allowed to prepare “functional equivalent” CEQA documents instead of environmental impact reports. In this case, the Second District upheld the Coastal Commission’s CEQA review for the subdivision of a 2 acre property in Malibu.

First, the court held that the procedural requirements that apply to certified regulatory programs are those set forth in the certified program itself. The project opponents here challenged the Commission’s CEQA compliance on the basis that the Commission did not circulate the document for the length of time required for EIRs under CEQA. Once a program is certified as a CEQA equivalent, however, the notice and other procedural requirements of the program apply, and the Coastal Commission program includes shorter periods for public review.

In defending its actions, the Commission argued it was acting as a responsible agency, and on this basis it had more limited responsibilities than a lead agency. The court rejected this argument, noting that the Commission does act as a lead agency when it approves coastal developments. Still, the Commission is subject only to the more limited requirements in its certified regulatory program.

The court also upheld the Commission’s CEQA review against various substantive claims. The Court held that the Commission adequately responded to comments in the staff report on the project, as allowed under the rules of the certified program. The Court also rejected a challenge to the cumulative impacts analysis, holding that the Commission was not required to engage in speculative analysis about certain other lots not owned by the project applicant and not proposed for subdivision or development.

Court Rejects EIR Analyses of Cultural Resources, Traffic Baseline and Water Supply: *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48 (depublication request pending).

In this case, the Fifth District rejected an EIR for a large, mixed use development on several grounds, including an improper baseline, inadequate water supply analysis, and deferring the identification of whether archeological sites are historical resources under CEQA.

Administrative Record Disputes. First, the court resolved several disputes over the contents of an administrative record. The court held that trial courts independently review the contents of an administrative record when such contents are disputed, and that the trial court's rulings on appeal are presumed to be correct unless a party can demonstrate that the court erred. The court then evaluated whether a number of documents should be included in the record, generally upholding the trial court's decision to augment the record with several documents, including one document that was never presented to the lead agency during the administrative process. (This holding on the administrative record is the basis for the pending depublication request, which argues that allowing extra-record documents conflicts with the Supreme Court's decision in *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, limiting CEQA cases to the administrative record).

The court did not decide another interesting question regarding the record, however. Petitioners argued that a withdrawn comment letter should have been included in the record, but the court held that the exclusion of the letter was not prejudicial, as the decision in the case would have been the same had the letter been included. The court specifically noted that it was not deciding a question that no court has yet addressed – whether someone who submits a comment on a CEQA document can withdraw that comment, or whether the withdrawn letter must still be included in the administrative record.

Improper Post-EIR Analysis of Archeological Resources. The court also rejected one of the mitigation measures for cultural resources on the basis that the measure effectively allowed a consultant to undo the significance determinations in the EIR, without any public review. The mitigation measure in question stated that, prior to construction, the

developer “shall hire a qualified archaeologist to analyze the artifacts previously recovered in test excavations to verify the data potential and integrity of the site,” and if the archaeologist “verified that the site is a historical resource for the purposes of CEQA the qualified archaeologist shall review all existing documentation and make recommendations as to the appropriate course of action.”

The Court interpreted the measure as allowing the archaeologist to undo the EIR's finding that four prehistoric sites are historical resources. Given this, the Court held that the EIR's determination regarding historical resources was not final, and that the lead agency failed to comply with CEQA Guideline section 15064.5(c)(1), which states that “a lead agency shall first determine whether the site is an historical resource” prior to certifying the EIR.

Discussion of Preservation in Place as a Mitigation Measure. The Court also interpreted the CEQA Guidelines which specify that preservation in place is the preferred means of mitigating potential impact to archeological resources. CEQA Guideline section 15126.4(b) states that “[p]reservation in place is the preferred manner of mitigating impacts to archaeological sites. . . . Preservation in place may be accomplished” in many ways, including the four described in subdivision (b)(3). Those four methods are: (1) “[p]lanning construction to avoid archaeological sites;” (2) “[i]ncorporation of sites within parks, greenspace, or other open space; (3) “[c]overing the archaeological sites with a layer of chemically stable soil before building tennis courts, parking lots, or similar facilities on the site;” and (4) “[d]eeding the site into a permanent conservation easement.” The Guideline also notes that “[w]hen data recovery through excavation is the only feasible mitigation, a data recovery plan . . . shall be prepared and adopted prior to any excavation being undertaken.”

Because the relevant Guideline uses the word “shall” in the first sentence, the Court held that “the EIR's discussion of mitigation measures for impacts to historical resources of an archaeological nature must include preservation in place, and the discussion of preservation in place must include, but is not limited to, the four methods of preservation in place listed” in the Guideline. The court also held that the discussion must indicate whether the potential means of preserving in place are feasible, and the basis for selecting one measure over another.

As to the Guideline's use of the phrase "preferred manner," the Court interpreted it "to mean that feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of the impacts." Further, "when the preference [for preservation in place] is not followed, the EIR shall state why another type of mitigation serves the interests protected by CEQA better than preservation in place."

Baseline for Traffic Analysis. The court also rejected the EIR's traffic analysis, on the basis that the EIR did not clearly indicate whether it was using existing conditions as the baseline for analysis. Absent a clear use of existing conditions as the baseline, the court held that the EIR was deficient under the baseline rules promulgated in *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351.

Water Supply Assessment. The court also rejected the EIR's water supply analysis on the basis that the EIR did not sufficiently evaluate potential uncertainties affecting the supply of water. In light of the Supreme Court's decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, the Court found "the legal adequacy of the EIR's discussion of the water supply . . . depends upon whether the discussion included a reasoned analysis of the circumstances affecting the likelihood of the availability of water" under the contract with agency supplying the water. The Court found that the EIR failed to disclose two documents that cast doubts on the certainty of the project's proposed water source, which was a holding contract with the United States Bureau of Reclamation to deliver water from the San Joaquin River. One of these two documents was the extra-record document that was the subject of some of the court's rulings on the administrative record.

CEQA Does Not Apply to Trial Court Orders: *Hillside Memorial Park & Mortuary v. Golden State Water Co.* (2011) 199 Cal.App.4th 658 (petition for review pending).

CEQA generally applies to discretionary actions by public agencies, and the definition of "public agency" in CEQA Guideline 15379 specifically excludes the courts. *Hillside* is the second published decision that has considered the relationship between CEQA and court orders. In *California American Water v. City of Seaside* (2011) 183 Cal.App.4th 471, the court held that a water district could not require an EIR on actions that were mandated by a court order imposing a physical solution for the management of a groundwater basin.

Likewise, *Hillside* arises out of groundwater litigation. A number of parties to a 1961 judgment that established a physical solution governing competing claims to a groundwater basin sought an order from the trial court amending that judgment to permit storage of water in otherwise unutilized capacity within the basin. The trial court declined to amend the prior judgment establishing the physical solution to the basin's water rights on the ground that no EIR had been prepared relating to the proposed storage program. The court of appeals reversed. The court held the trial court was constitutionally mandated to undertake an evidentiary hearing regarding any modifications to the existing judgment. Further, the court held that where there is an existing judgment in place establishing a physical solution to water rights issues, public agencies have no discretionary powers to exercise because the power to act regarding the judgment and the implemented physical solution is reserved to the court. The court concluded that the constitutional mandate vested in the court trumps CEQA, and CEQA cannot serve as a basis to prevent the court from addressing issues presented in the motion to amend the judgment. The court also noted, however, that the trial court "should take into account environmental concerns" in determining whether or how to amend the judgment. The court also stated that the imposition of the physical solution in the modified judgment "will not preclude compliance with CEQA as to future projects to the extent that such projects do not conflict with the physical solution."