Volume 21, Number 9
June 2012

CALIFORNIA LAND USE™
LAW & POLICY Reporter

CONTENTS

FEATURE ARTICLE

REGULATORY DEVELOPMENTS

LAWSUITS FILED OR PENDING

RECENT CALIFORNIA DECISIONS

Continued on next page

ARGENT COMMUNICATIONS GROUP

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, P.O. Box 506, Auburn, CA 95604-0506; 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $615.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

FEATURE ARTICLE

THE THIRD DISTRICT COURT OF APPEAL ADDRESSES TRIAL COURT NON-PREJUDICIAL ERROR, THE DELIBERATIVE PROCESS PRIVILEGE, RES JUDICATA AND VARIOUS ASPECTS OF CEQA ANALYSIS

By Holly Wagenet, John Wheat and Laura Harris

The Third District Court of Appeal recently rejected challenges filed by two citizens groups to the City of Lodi's re-approval of a Conditional Use Permit for a proposed Wal-Mart shopping project after the original Environmental Impact Report (EIR) for the project was revised and recertified. The Court of Appeal found the trial court abused its discretion in permitting the City of Lodi to withhold various emails under the deliberative process privilege. The court concluded, however, that petitioners had failed to meet their burden to show that the city's improper exclusion of the emails from the administrative record constituted prejudicial error. The court also found that the doctrine of *res judicata* barred petitioners from raising certain challenges to the revised EIR. In addition, the court found substantial evidence supported the revised EIR's analysis and conclusions regarding the range of alternatives evaluated in the revised EIR, agricultural impacts and urban decay impacts.

The case is an excellent study for land use professionals and municipalities in that it addresses so many "meat and potato" issues often encountered; including use and the limitations of the deliberative process privilege, examination of the doctrine of *res* judicata, non prejudicial error by the lower court, and various aspects of analysis under the California Environmental Quality Act (CEQA) including alternatives analysis, urban decay, agricultural impacts and water supply analysis. *See,* Citizens *for Open Government v. City of Lodi*, ___Cal.App.4th___, Case No. C065719 (3rd Dist. Mar. 28, 2012, *modified partial publ.*, Apr. 25, 2012).

Factual and Procedural Background

In 2002, Browman Company applied to the City of Lodi for a use permit to develop a 35-acre shopping center. In 2003, the city issued a Notice of Project (NOP) for a draft EIR for the proposed project. The city approved the project in 2004. Lodi First and Citizens for Open Government (COG) filed separate lawsuits (*Lodi First I* and *Citizens I*) challenging the project.

In December 2005, the trial court granted the petition for writ of mandate in *Lodi First I*. The city council rescinded approval of the project and decertified the 2004 EIR. In 2006, the city issued a NOP for the revised EIR. In 2007, COG and the city stipulated to dismiss *Citizens I*.

In October 2007, the city circulated revisions to the EIR for public review and comment. The city concluded some of the comments it had received on the revised draft EIR were beyond the scope of the revisions and barred by the legal doctrine of *res judicata*. The city declined to provide substantive responses to these comments. In May 2009, the city council conditionally approved the project entitlements and adopted findings of fact and a statement of overriding considerations for the project.

To proceed with the project, the city filed a petition to discharge the writ in *Lodi First I*. As part of this process, the city lodged a supplemental administrative record. Both COG and Lodi First filed separate lawsuits challenging the final revised EIR. After filing their lawsuits, both groups contended the supplemental administrative record excluded key

documents, including internal agency communications and communications with consultants.

COG filed a motion to augment the supplemental administrative record. The court granted the motion in part and denied the motion in part based on the attorney-client, attorney-work-product and deliberative process privileges. In 2010, following a hearing on the merits, the trial court granted the city's request to discharge the 2005 writ in *Lodi First I* and deny the petitions in *Citizens II* and *Lodi First II*. Both Lodi First and COG appealed.

The Court of Appeal's Decision

On appeal, Lodi First and COG argued the trial court erred in applying the deliberative process privilege to exclude some emails from the administrative record. Appellants also challenged the sufficiency of the revised EIR on numerous grounds and disputed the trial court's ruling precluding them from challenging certain issues based on res judicata.

The Deliberative Process Privilege

Under the deliberative process privilege, senior officials in government enjoy a qualified, limited privilege not to disclose certain materials or communications. These include the mental processes by which a given decision was reached and other discussions, or deliberations, by which government policy is processed and formulated. The deliberative process privilege showing must be made by the one claiming the privilege. Not every deliberative process communication is protected by the privilege. Instead, the privilege is implicated only if the public interest in nondisclosure clearly outweighs the public interest in disclosure.

At the trial court, the city argued the deliberative process privilege applied because the city manager, city attorney, community development director, and other consultants engaged in various deliberative discussions and document exchanges concerning revisions to the EIR. The privilege was required, the city argued, "to foster candid dialogue and a testing and challenging of the approaches to be taken…" On appeal, Lodi First claimed this assertion was insufficient to support nondisclosure through the deliberative process privilege. The Court of Appeal agreed, finding the city offered a correct statement of policy, but that invoking the policy was not sufficient to explain the public's specific interest in nondisclosure of the documents at issue. As a result, the city failed to carry its burden, and the Court of Appeal held that the trial court erred in excluding 22 e-mails from the administrative record based on the deliberative process privilege.

The court explained, however, that while the trial court erred in excluding these documents, this error was not necessarily prejudicial. Under the standard for prejudicial error established by the California Constitution, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred.

Lodi First acknowledged it could not satisfy its burden to prove prejudice on appeal because it had not seen the documents that were erroneously withheld. Lodi First claimed the improper withholding of the documents itself was prejudicial because it was impossible for Lodi First to acquire them. The court disagreed and noted Lodi First should have sought writ review of the trial court's ruling on the motion to augment the administrative record. In addition, the Court of Appeal disagreed with Lodi First's contention that the incomplete record itself was a prejudicial error requiring reversal regardless of the actual contents of the withheld documents.

The Range of Alternatives Considered

Lodi First also argued the revised EIR did not comply with the California Environmental Quality Act (CEQA) because the range of alternatives to the project did not both satisfy most of the project objectives and reduce significant effects of the project. Relying on both the CEQA Guidelines and long-standing precedent, the court rejected Lodi First's argument.

First, the Court of Appeal cited CEQA Guidelines § 15126.6 for the assertion that:

> …there is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.

In addition the court noted that the California Supreme Court has explained how a "rule of reason" must be applied to the assessment of alternatives to proposed projects.

In this case, the revised project considered five alternatives: (1) no project; (2) alternative land uses; (3) reduced density; (4) reduced project size; and (5) alternative project location. The alternative land use and reduced project density alternatives were not considered for further evaluation because they were infeasible or would not meet the goals of the project. The Court of Appeal found the rejection of these alternatives for further review was reasonable. The three remaining alternatives were discussed in detail in the revised EIR and provided substantial evidence of a reasonable range of alternatives.

Urban Decay Analysis

The trial court granted the petition for writ of mandate in *Lodi First I*, in part, because the analysis of cumulative urban decay impacts was inadequate since it omitted two related projects in the geographic area. An updated economic impact and urban decay analysis was prepared in response to the trial court's order to decertify the original EIR.

Lodi First argued the revised EIR inaccurately described the project's environmental setting by failing to discuss existing blight and decay conditions in East Lodi. The Court of Appeal, by *de novo* review, determined the blight at issue was not necessarily related to the retail environment. Further, the revised EIR analyzed the potential for urban decay, including consideration of conditions in East Lodi. The revised EIR's discussion of cumulative urban decay impacts was adequate under CEQA.

The Economic Baseline

COG argued the city erred by failing to assess urban decay impacts "under radically changed economic conditions" in the revised EIR. COG asserted the city should have reassessed urban decay impacts in light of the economic recession that occurred after the 2006-2007 economic analysis performed for the project. The Court of Appeal determined the city's decision not to update the baseline was supported by substantial evidence. First, the city offered evidence that updating the baseline presented a "moving target" problem, where updates to the analysis would not be able to keep pace with changing events. In addition, the city presented evidence that the changing economic conditions did not affect the urban decay findings based on the 2006-2007 economic analysis. Therefore, the city did not abuse its discretion when it declined to update the baseline.

Agricultural Impacts

COG argued the original EIR and revised EIR failed to disclose cumulative impacts to agriculture and that there was no substantial evidence to support the rejection of a heightened mitigation ratio.

The Court of Appeal first determined that the revised EIR satisfied the standards established by the CEQA Guidelines for discussing cumulative impacts. The EIR examined the amount of prime farmland lost due to the project and the amount of other land lost due to the project as well as other proposed projects, and determined that the cumulative impacts to agricultural resources would be significant and unavoidable. The discussion met the standard for "adequacy, completeness, and a good faith effort at full disclosure."

After finding the revised EIR's discussion of cumulative impacts to agricultural resources adequate, the Court of Appeal determined the city did not have to accept a heightened mitigation ratio as asserted by COG. The city required a 1:1 conservation easement ratio for the loss of farmland, but also determined that agricultural easements do not completely mitigate for the loss of farmland. The city adopted a statement of overriding considerations and asserted a 1:1 ratio is appropriate for the project. COG argued the rejection of a 2:1 mitigation ratio was not supported by substantial evidence. The Court of Appeal disagreed and noted that the appropriate standard was whether the finding that there were no feasible mitigation measures to reduce the impacts to prime farmland was supported by substantial evidence.

The Doctrine of *Res Judicata* and the Water Supply Analysis

Lodi First attempted to argue the revised EIR failed to disclose cumulative water supply impacts. The trial court held that *res judicata* barred Lodi First from raising this claim. The Court of Appeal agreed.

Res Judicata, also known as claim preclusion, bars re-litigation of a cause of action that was previously adjudicated in another proceeding between the same parties, where the lawsuit resulted in a final decision on the merits. In this case, a writ was issued in *Lodi First I* and was final on the merits. The trial court

granted Lodi First's petition and held the 2005 EIR was inadequate under CEQA. The city chose not to appeal, and the ruling was final because the time to appeal had passed.

Lodi First attempted to argue *res judicata* did not preclude its water supply challenge because it was based on new information and the city's 2009 findings regarding the project's water supply impacts differed from its 2005 findings. For the purpose of *res judicata*, causes of action are considered the same if they are based on the same primary right. A claim is based on the same primary right if it is based on the same conditions and facts that were in existence when the original action was filed.

The Court of Appeal determined the problem of water overdraft cited by Lodi First was not new evidence. The city's own 1990 General Plan identified overdraft in the local aquifer. While Lodi First claimed new evidence established more information than the 1990 EIR, the critical fact was that the city's water supply was inadequate to serve new development. This was known at the time of the 2004 EIR. In addition, the court determined the findings were consistent, because both findings were that the project would have no significant impact on water supply and therefore, no mitigation was necessary.

Finally, the Court of Appeal disagreed with Lodi First that *res judicata* should not be applied to the water supply issue for public policy reasons. When the issue is a question of law rather than of fact, res judicata may not apply if injustice would result or if the public interest requires that re-litigation be allowed. Lodi First's water supply argument did not present a question of law, so the public interest exception did not apply.

Conclusion and Implications

This case demonstrates the limitations of the deliberative process privilege for public agencies. Agencies attempting to rely on this privilege must be prepared to support their assertion of the privilege with a specific showing that the nondisclosure of the documents in question outweighs the public interest in disclosure of the particular documents; broad policy statements are not enough to support application of the privilege. In addition, the case offers an important reminder of the consequences of failing to raise all potential arguments in original CEQA proceedings, and indeed, most regular civil proceedings. A copy of the court's modified partially certified for publication opinion at: http://scholar.google.com/scholar_case?case=11803223447256196473&q=Citizens+for+Open+Government+v.+City+of+Lodi&hl=en&as_sdt=2,5&as_vis=1

Holly Wagenet is an associate attorney at Remy Moose Manley, new to the firm, working in the firm's land use and environmental law practice group. Prior to joining RMM, Ms. Wagenet was a law clerk at the Governor's Office of Planning and Research, the California Energy Commission and the California Attorney General's office.

John Wheat is an associate attorney at Remy Moose Manley and his practice focuses on land use and environmental law, handling all phases of the land use entitlement and permitting processes, including administrative approvals and litigation. Mr. Wheat's practice includes the California Environmental Quality Act, the State Planning and Zoning Law, the Subdivision Map Act, the California Endangered Species Act, the National Environmental Policy Act, and the federal Endangered Species Act.

Laura Harris is an associate attorney at RMM, and her practice focuses on land use and environmental law. Ms. Harris handles all phases of the land use entitlement and permitting processes, including administrative approvals and litigation. Ms. Harris's practice covers the California Environmental Quality Act (CEQA), the State Planning and Zoning Law, the Subdivision Map Act, initiatives and referenda, air and water quality, solid and hazardous waste, forestry, natural resources, endangered species, wetlands and related matters. Ms. Harris sits on the Editorial Board of the *California Land Use Law & Policy Reporter*.

REGULATORY DEVELOPMENTS

STATE WATER BOARD DISMISSES CHALLENGES TO RENEWAL OF IRRIGATED LANDS DISCHARGE WAIVER AND EIR FOR RELATED REGULATORY PROGRAM

The California State Water Resources Control Board (SWRCB) has dismissed challenges to the Central Valley Water Quality Control Board's (RWQCB) short-term renewal of conditional waivers of waste discharge requirements for discharges from irrigated farm lands in the Central Valley and to the programmatic environmental impact report for a long-term Irrigated Lands Regulatory Program. The waivers renewed by the RWQCB exempt Central Valley farmers from certain water quality requirements on the condition that the farmers participate in water quality management and monitoring programs. The two-year renewals of these waivers were granted by the RWQCB in order to provide its staff additional time to propose a long-term Irrigated Lands Regulatory Program to replace the conditional waivers.

Irrigated Lands Waiver and Regulatory Background

In 2006, the RWQCB adopted a conditional wavier of waste discharge requirements for discharges from irrigated farm lands in the Central Valley. The waiver allowed the formation of groups of individual dischargers, called Coalition Groups, to obtain exemption from the reporting and water quality requirements for waste discharges that could affect the quality of waters in the state set forth in Water Code § 13260 *et seq*. The waiver is conditional upon members of the Coalition Group complying with certain plans and policies containing regulatory requirements applying to the discharge of waste from irrigated land, implementing and evaluating management practices to achieve compliance with applicable water quality standards, and monitoring and reporting information to determine the effects of irrigated lands on water quality and to evaluate the effectiveness and compliance with the waiver. Approximately 25,000 of the 35,000 farm landowners in the Central Valley are part of Coalition Groups that have conditional waivers.

The conditional waiver granted in 2006 served to give the RWQCB time to develop a long-term regulatory program to protect surface water and groundwater from quality impacts due to runoff from irrigated agricultural lands. On April 7, 2011, the RWQCB certified its Final Program Environmental Impact Report (PEIR) for a long-term Irrigated Lands Regulatory Program (ILRP).

On June 9, 2011, the RWQCB approved a short-term renewal of the Coalition Group conditional waivers. The RWQCB found that a two-year renewal of the waivers was necessary to allow its staff sufficient time to complete proposed orders establishing the long-term ILRP that was the subject of the PEIR. The RWQCB reasoned that a waiver was appropriate because discharges from the irrigated lands of Coalition Group members continue to have similar waste from similar operations and involve similar treatment methods and that the Coalition Groups have been collecting water quality and management data allowing for ongoing assessment.

Petitions Challenging Regional Board Approvals

The California Sportfishing Protection Alliance and California Water Impact Network (collectively: CSPA) filed a petition with the SWRCB to review the RWQCB's approval of the PEIR and short-term waiver renewal on grounds that the short-term renewal improperly continues the conditional waivers in violation of California law and policy and that the PEIR is insufficient under the California Environmental Quality Act (CEQA). First, CSPA argued that the conditional waivers fail to meet certain SWRCB water quality policies by relying on region-wide monitoring instead of farm-specific water quality management plans and by failing to address groundwater pollution. Second, CSPA asserted that the PEIR violates CEQA by *inter alia* failing to identify a proposed project alternative, defining overly narrow

project objectives, and failing to include a meaningful analysis of proposed alternatives. CSPA requested that the SWRCB vacate the RWQCB's resolutions adopting the short-term renewal and PEIR and order the RWQCB to issue a new EIR.

Several Coalition Groups and other agricultural organizations (Agricultural petitioners) also filed a petition to review the RWQCB's certification of the PEIR and short-term renewal of the conditional waiver. The Agricultural petitioners' challenges to the PEIR were similarly based on CEQA violations such as failure to include an adequate project description, failure to adequately represent baseline conditions and insufficient analysis of the proposed alternatives. The challenge to the short-term renewal, however, was based only on the inclusion of certain new mitigation monitoring and reporting requirements in the conditional waivers and did not seek to vacate the short-term renewal in its entirety.

In addition to a response submitted by the RWQCB setting forth the basis for its adoption of the short-term renewal and certification of the PEIR, both CSPA and the Agricultural petitioners opposed the petition for review filed by the other. In particular, the Agricultural petitioners opposed CSPA's request to vacate the short-term renewal in its entirety and argued that the RWQCB should only be directed to re-issue an EIR for the long-term ILRP. In addition, the Agricultural petitioners argued that CSPA's CEQA challenge to the PEIR was flawed in numerous ways and that the Board should reject CSPA's argument that only one of the alternatives is viable. On the other hand, while CSPA concurred in several of the flaws in the PEIR identified by the Agricultural petitioners, CSPA contended that the short-term renewal must be vacated in full because it is based on that faulty PEIR. CSPA further argued that the Agricultural petitioners cannot seek only to vacate the additional monitoring requirements imposed by the short-term renewal, which itself is not related to the alleged flaws in the PEIR.

In a short letter issued only to the parties on April 26, 2012, the SWRCB dismissed both the CSPA and Agricultural petitioners' petitions after concluding that the petitions "fail to raise substantial issues that are appropriate for review by the State Water Resources Control Board."

Conclusion and Implications

The SWRCB's dismissal of the petitions challenging the RWQCB's PEIR and short-term conditional waiver renewal leaves the RWQCB's resolutions in tact for the time being. Neither CSPA nor the Agricultural petitioners obtained the relief they sought from the SWRCB, but the petitioners may now look to other forums to pursue their challenges. (Meredith Nikkel, Maya Ferry Stafford)

LAWSUITS FILED OR PENDING

NEW LAWSUIT SEEKS TO REVERSE BUREAU OF RECLAMATION'S FINAL DECISION TO RECIRCULATE FLOOD WATERS FOR THE BENEFIT OF WESTSIDE FARMERS

The Friant Water Authority (Friant), a joint powers authority that consists of 20-member water, water conservation, water storage and irrigation districts representing 15,000 East Valley farmers, sued the federal government on Friday April 13, 2012, claiming flood water released from Friant Dam in wet winters for the San Joaquin River restoration should be returned to their farms. The lawsuit, filed in U.S. District Court for the Eastern District of California, Fresno, is aimed at a federal decision in February to use the flood water as fulfillment of contract requirements for some west-side farmers (Westside Contractors). The suit alleges that the final decision by the U.S. Bureau of Reclamation (Bureau) goes beyond the scope of the San Joaquin River Restoration Settlement Act and will result in an average annual water loss between 27,000-3 5,000 acre-feet, of recirculated water the plaintiffs would otherwise be entitled to receive under their repayment contracts with the Bureau. *Friant Water Authority, et al. v. U.S. Department of the Interior*, Case No. 1:12-cv-00583-LJO-SMS, *filed* Apr. 13, 2012 (E.D. Cal.).

Background

In 2009, the San Joaquin River Restoration Settlement Act, Public Law 11-111, was passed by Congress and signed into law by the President (SJRRSA). The SJRRSA was the culmination of over 18 years of environmental litigation related to the use of water in the San Joaquin Delta region and the effect of such use on the environment and native animal species. In 2006, after 18 years of litigation, the parties to the litigation reached agreement on a settlement (Settlement). The two co-equal goals of the Settlement are: (1) the Restoration Goal, and (2) the Water Management Goal. The Restoration Goal is to restore and maintain fish populations "in good condition" in the San Joaquin River below Friant Dam. The Water Management Goal is to reduce or avoid adverse water supply impacts to all of the Friant Division long-term water contractors that may result from the Interim Flows and Restoration Flows provided for in the Settlement.

The SJRRSA gives the Secretary of the Interior (Secretary) the power and authority to implement the terms and conditions of the Settlement. The SJRRSA authorizes and directs the Secretary to implement the terms and conditions of the Settlement, by, among other things: (1) modifying Friant Dam operations to provide the release of water for Interim Flows and Restoration Flows and (2) developing a plan for the recirculation, recapture, reuse, exchange, or transfer of water released for Restoration Flows or Interim Flows, for the purpose of accomplishing the Water Management Goal of the Settlement.

The Final Decision

The "Final Decision" in dispute in this case relates to the Bureau's operations of the Central Valley Project (CVP) and the CVP's Friant Division. The Final Decision is premised on the Bureau's interpretation of the SJRRSA that the Settlement shall not result in the involuntary reduction in contract water allocations to the Westside Contractors. The Final Decision sets forth a number of mitigation measures aimed at protecting the Westside Contractors allocations of water, including the decision that water recaptured in normal wet and wet years shall be made available to the Westside Contractors rather than the Friant Division contractors.

The Complaint

Friant brought this action seeking judicial review and declaratory relief under the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §

701, *et seq*. Friant claims that the Bureau exceeded its authority under the SJRRSA when it issued the Final Decision providing mitigation protections for the benefit of the Westside Contractors.

Friant asserts that the SJRRSA compels the Secretary to develop a recirculation plan for the purpose of reducing or avoiding impacts to water deliveries to all of the Friant Division long-term contractors caused by the Interim Flows and Restoration Flows.

At issue in this case, is the proper interpretation of § 10004(a)(4) of the SJRRSA. Section 10004(a)(4) of the SJRRSA authorizes and directs the Secretary to:

> Implement the terms and conditions of paragraph 16 of the Settlement related to recirculation, recapture, reuse, exchange, or transfer of water released for Restoration Flows or Interim Flows, for the purpose of accomplishing the Water Management Goal of the Settlement.

Paragraph 16 of the Settlement requires the Secretary:

> …to develop and implement a plan for the recirculation, recapture, reuse, exchange or transfer of the Interim Flows and Restoration Flows for the purpose of reducing or avoiding impacts to water deliveries to all of the Friant Division long-term contractors caused by the Interim Flows and Restoration Flows.

Friant argues that the Bureau has incorrectly interpreted § 10004 of the SJRRSA to provide protections to the Westside Contractors, which protections will reduce deliveries to the Friant Division Long-term contractors. It argues that the Final Decision to provide recaptured water to the Westside Contractors does not meet the purpose of reducing or avoiding impacts to water deliveries to the Friant Division long-term contractors as required by § 10004(a)(4).

Conclusion

The lawsuit relates only to the narrow issue of flood management flows being used for San Joaquin River Restoration. Friant is not challenging any other aspect of the Settlement or the SJRRSA and has expressed a desire to work out a resolution with the Bureau. No response has been filed by any of the defendants yet. (Jeanne Zolezzi)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT UPHOLDS LEAD AGENCY'S DECISION NOT TO PREPARE SUBSEQUENT CEQA ANALYSIS FOR A PROJECT INITIALLY EVALUATED IN A NEGATIVE DECLARATION

Abatti v. Imperial Irrigation District, ___Cal.App.4th___, Case No. D058329 (4th Dist. Apr. 26, 2012).

The Fourth District Court of Appeal has upheld an irrigation district's decision not to require subsequent analysis under the California Environmental Quality Act (CEQA) for changes to an "equitable distribution plan" initially evaluated in a negative declaration instead of an Environmental Impact Report (EIR). In so doing, the court reaffirmed key principles articulated in *Benton v. Board of Supervisors*, 226 Cal. App.3d 1467 (1991), which established that CEQA's subsequent environmental review requirements applied to negative declarations as well as EIRs.

Factual Background

The Imperial Irrigation District (IID) adopted a resolution in November 2006 to establish an "equitable distribution plan" pursuant to state law. The plan is to be implemented in the event that in any year, the expected demand for water is likely to exceed the supply expected to be available to IID. IID prepared a negative declaration for the plan pursuant to CEQA.

In December 2007, IID adopted regulations to implement the plan. Those regulations set forth the manner in which water apportionment would be conducted under the plan in the event a supply and demand imbalance occurred. IID adopted an "environmental compliance report" that concluded certain modifications to the plan have been incorporated into the regulations, and those modifications did not require any further CEQA review.

IID adopted revised regulations to implement the plan in November 2008. Like the 2007 regulations, those regulations established a means of apportioning water in the event of a water supply and demand imbalance. IID adopted another "environmental compliance report" that again concluded no additional CEQA review was warranted pursuant to § 21166 of CEQA (Pub. Res. Code § 21166) and CEQA Guideline § 15162 (14 Cal. Code Regs. § 15162).

A group of agricultural land owners and users (collectively, appellants) in Imperial County sued IID, alleging that the district violated CEQA because IID did not prepare an environmental impact report for the 2008 regulations. The trial court denied appellants' claim and held that there was substantial evidence supporting IID's determination that the adoption of the 2008 regulations did not require the preparation of an EIR.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court decisions, finding that IID complied with CEQA for two overarching reasons. First, the court held that CEQA Guideline § 15162 is a valid regulation that implements § 21166 of CEQA. Second, the court held that there was substantial evidence in IID's record to support the district's determination that adoption of the 2008 regulations did not require the preparation of an EIR.

CEQA Guideline § 15162 Is a Valid Regulation Implementing CEQA § 21166

Appellants alleged that IID improperly applied a "substantial evidence" standard and relied on CEQA § 21166 and CEQA Guideline § 15162 to determine whether an EIR was required for the 2008 regulations. Instead, appellants argued, IID should have applied the "fair argument" standard to determine whether an EIR was required. The court disagreed.

The court began by confirming the holding in *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467 (1991). *Benton* held that CEQA § 21166 extended CEQA's requirements for subsequent environmental review to those projects in which an agency's initial environmental determination resulted in the issuance of a negative declaration rather than an EIR, even though the text of CEQA § 21166 refers only

to EIRs. As a corollary, the *Benton* court held that CEQA Guideline § 15162 was valid even though the text of CEQA § 21166 refers only to EIRs and makes no mention of negative declarations.

The court determined that the *Benton* court correctly concluded that CEQA Guideline § 15162 validly implements CEQA § 21166. The court found that the guideline is valid because it furthers the purposes of CEQA § 21166. The court quoted *Benton*:

> If a limited review of a modified project is proper when the initial environmental document was an EIR, it stands to reason that no greater review should be required of a project that initially raised so few environmental questions that an EIR was *not* required, but a negative declaration was found to satisfy the environmental review requirements of CEQA.(Quoting *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467, 1479-80 (1991) (emphasis in original).)

The court found this rationale persuasive, noting in addition that CEQA Guideline § 15162 was adopted pursuant to CEQA § 21083, which mandates that the CEQA Guidelines include objectives and criteria for the preparation of both EIRs and negative declarations.

Substantial Evidence Supported the District's Determination that the 2008 Regulations Did Not Require an EIR

Turning to the substantive merits of appellants' challenge, the court held that the record contained substantial evidence to support IID's determination that the 2008 regulations did not require the preparation of an EIR. In particular, the court determined that the 2008 regulations did not constitute a substantial change to the project requiring additional environmental review. The court based this determination on the fact that the 2008 regulations did not substantially increase the priority preference that industrial users of water would receive over agricultural users in times of a water shortage.

Conclusion and Implications

The court concluded that the *Benton* court correctly determined that CEQA Guideline § 15162 is a valid regulation that implements the principles contained in CEQA § 21166. The court also concluded that there is substantial evidence to support IID's determination that it was not required to prepare an EIR prior to adopting the 2008 regulations. This case reaffirms the principle articulated in *Benton* that the subsequent environmental review standards built into CEQA § 21166 and CEQA Guideline § 15162 also apply to projects initially evaluated by way of a negative declaration, and not just by way of an EIR. As such, this case reaffirms the principle that the standard of review that applies to changes in a project initially evaluated in a negative declaration is the substantial evidence—rather than the "fair argument"—standard of review. (Scott Birkey)

FIFTH DISTRICT DENIES CEQA CHALLENGE, PAVES WAY FOR TEJON RANCH DEVELOPMENT

Center for Biological Diversity, et al. v. Kern County, *unpub.*, Case No. F061908 (5th Dist. Apr. 25, 2012).

The Court of Appeal for the Fifth District has denied the petition filed by Center for Biological Diversity, Wishtoyo Foundation, Tricounty Watchdogs, and Center on Race, Poverty & the Environment (collectively: petitioners), challenging Kern County's approval of an Environmental Impact Report (EIR) for the Tejon Mountain Village Project (Tejon Project).

Background

The Tejon Project is a large housing and resort development along Interstate 5 in the Tehachapi Mountains. The Tejon Project includes 3,450 homes, as well as hotels, restaurants, retail and commercial developments, recreational facilities and utilities. Combined with other proposed projects in the area, the project would reshape this virtually undeveloped area into an urbanized community. The developer, Tejon Ranch Company, entered an agreement with several environmental groups to preserve portions of the property for conservation purposes. Petitioners are not parties to that agreement.

The County of Kern prepared an EIR pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000, *et seq.*) and approved the Tejon Project in 2009. Petitioners filed a CEQA lawsuit challenging the adequacy of the EIR with respect to water supply and water quality, climate change and greenhouse gas emissions, air quality, the California condor and other biological resources, Native American archaeological sites, traffic, and earthquake and wildfire hazards. The trial court noted that petitioners had not briefed all issues raised in the petition and, therefore, such issues were forfeited. On the merits, the trial court found that the EIR was adequate in all respects and denied the challenge. Petitioners appealed.

The Court of Appeal's Decision

In an *unpublished* decision, the court affirmed the trial court's decision and concluded that the EIR was adequate. The court considered the adequacy of the EIR's analysis of air quality, water supply, Native American cultural resources, and the California condor, as well as a piece-mealing claim.

CEQA and Air Quality

In its evaluation of the air quality challenge, the court examined legal precedents related to deferred mitigation and the payment of fees as mitigation. The EIR included an air quality mitigation scheme that relied on payment of fees to the local air district to offset emissions. One offset program had been adopted by the local air district, two other programs were under consideration, but it was not precisely clear how the fees would be used to offset air quality impacts. The EIR nonetheless concluded that emissions of most constituents could be reduced to less than significant levels by implementation of this mitigation, but that emissions of reactive organic gases (ROGs) would remain significant and unavoidable even with mitigation.

The court concluded that, with respect to the adequacy of the air quality mitigation, "the question is close," but the fee-based mitigation was adequate in this case. In particular, the court cited the local air district's comments that it was confident the fees would successfully be used to offset air emissions. The court stated, however, that if the issue were traffic impacts, the uncertainty surrounding the implementation of the fee-based mitigation likely would not be adequate. The court concluded that air quality impacts are different, particularly when the majority of the emissions come from cars the Tejon Project will attract. The court stated its opinion that onsite mitigation measures are not enough to offset such impacts, that it seems typical offsite emissions reduction cannot be clearly defined where the project will be built over a long period of time, and that it is appropriate to allow the air district, as a responsible agency, to identify the necessary offsite projects over time. The court concluded:

> …[i]f we were to hold that a lead agency cannot rely on an air pollution control district's contractual commitment to use the fees to offset

> the pollution, and on its opinion, based on its experience and expertise, that it will be able to do so, project proponents and lead agency will be discouraged from using fee-based mitigation for air pollution at all, even though no other mitigation may be available.

The court evaluated other air quality related challenges to the EIR and similarly held that the EIR was adequate in its analysis of air quality impacts.

CEQA and Project Water Supply

The court then turned to the challenges that the EIR failed to adequately analyze impacts to water supply. The water supply analysis in the EIR relied, in part, on supply from a wastewater reclamation plant. The petitioners argued there is no guaranty the wastewater reclamation plant will be built and, therefore, reliance on it as a source of water is inappropriate. The court disagreed, finding substantial evidence that the facility will be built as planned. In particular, the Tejon Project approvals provide no certificate of occupancy can be issued unless a wastewater connection is available. The court also found the EIR contained a fairly detailed discussion of the facility, supporting the conclusion that it is not speculative.

Next, the court considered petitioners' challenge that the water supply analysis improperly relies on water banks to maintain a reliable water supply over the life of the Tejon Project. Petitioners argued that a water bank is not a "supply" of water and, therefore, cannot be relied on to provide water to the project. The court concluded, however, that the EIR does not rely on water banks as a supply, but rather as a backup source for drought conditions and that the EIR included substantial evidence to support the conclusion that sufficient water would be available to supply the Tejon Project.

CEQA and Cultural Resources

Turning to the EIR's analysis of impacts to Native American cultural resources, the court addressed petitioners' claim that the county's failure to release a map showing the locations of the discovered archaeological sites was improper. The court held that while Government Code § 65352.3(b) requires the county to protect the confidentiality of the resource locations from the public, the county was required to consult with Native American representatives regarding these resources and could not properly withhold the map from such representatives. Here, the court found that the county had properly consulted with the affected Native American representatives and, therefore, had complied with its duty to consult while maintaining the confidentiality of sensitive resource locations. The court similarly concluded that the EIR adequately described the known cultural sites and provided sufficient mitigation to protect them. The court found that mitigation by preservation is place was adequate and that the EIR was not required to compare the pros and cons of various available methods of preservation in place.

CEQA and the California Condor

The court also dismissed petitioners' claims that the EIR failed to adequately analyze impacts to the California condor. The court concluded that there was no error in the county relying on an expert opinion that petitioners' expert disagreed with. Rather, the court cited CEQA case law in concluding that, while petitioners' interpretation of the evidence was different, the county's interpretation was not unreasonable.

CEQA and 'Piece-Mealing'

On the issue of piece-mealing, petitioners focused on Castac Lake, a natural lake on the Tejon Project site. Originally, the project description described the on-going use of the lake. Over time, as the scope of the Tejon Project was reduced, the project boundaries were redrawn in a manner that excluded the lake. Petitioners argued this resulted in piece-mealing and the lake must be considered part of the Tejon Project for purposes of analysis in the EIR. The court held there was substantial evidence in the record to support that the lake was being maintained for reasons unrelated to the project. Because the evidence supported a conclusion that operation of the lake was separate and independent from the project, the court concluded that it was not required to be considered part of the Tejon Project evaluated in the EIR. Finally, the court noted that the EIR did analyze the impacts of the Tejon Project on the lake and, therefore, had properly considered the lake.

Conclusion and Implications

This decision paves the way for the development of a substantial new community in the Tehachapi Mountains. The decision is unpublished and, therefore, cannot be cited as precedent. Much of the court's decision depends heavily on the facts in the record and the consideration of substantial evidence, which is typical and appropriate in a CEQA case. The court does take an interesting approach to the fee-based air quality mitigation, however, distinguishing air impact mitigation from mitigation for other impacts, such as traffic. Although not citable, the opinion provides an interesting analysis that could be incorporated into future CEQA decisions that apply fee-based air quality mitigation. (Kristen Castaños)

FIFTH DISTRICT RULES ON MATERIALS THAT MUST BE INCLUDED IN THE ADMINISTRATIVE RECORD UNDER CEQA

Consolidated Irrigation District v. Superior Court of Fresno County, ___Cal.App.4th___, Case No. F063534 (5th Dist. April 26, 2012).

The Consolidated Irrigation District (CID) petitioned for a writ of mandate after the Superior Court of Fresno County denied its motion to conduct limited discovery, a motion to augment the record of proceedings, and a petition for writ of mandate under the California Public Records Act (Gov. Code § 6250 *et seq.*; PRA). The trial court's orders were issued in a proceeding brought under the California Environmental Quality Act (Pub. Resources Code § 21000 *et seq.*; CEQA), challenging the City of Selma's approval of an Environmental Impact Report (EIR) for Selma Development Partners, LLC's (DP) proposed Rockwell Pond Commercial Project. The Court of Appeal issued an order to show cause and stayed further proceedings in the Superior Court, concluding that the petition raised novel legal questions regarding the proper interpretation and application of CEQA § 21167.6(e).

Background and Procedural History

In September 2009, the city issued a notice of availability of a draft EIR for the proposed project. In January 2010, the city council held a public hearing to consider entitlements for the proposed project, and on March 1, 2010, approved the project by adopting Resolution No. 2010-8R, which certified that the final EIR. The resolution included a finding stating that Melanie A. Carter, city clerk, served as a the custodian of the record of proceedings.

On March 30, 2010, CID sent a letter to the city and the DP notifying them of its intention to file a CEQA petition challenging the approval of the project. The same day, CID sent the city a separate letter containing a PRA request for access to certain public records in order to prepare the administrative record for litigation. In early April 2010, CID filed a lawsuit challenging the city's approval of the project and certification of the EIR. CID also filed a notice of CID's election to prepare the record of proceedings pursuant to CEQA § 21167.6(b)(2). An attorney representing the city sent a response letter to CID regarding its PRA request, stating that CID was a public agency and not a "person" entitled to request another local agency to provide documents under the PRA. The city provided no responsive documents.

CID alleged that after receipt of the letter from city's attorney, the city indicated it would put together a group of documents concerning the project, and the parties agreed that the PRA request would be deferred pending CID's receipt of the documents from the city. The city alleges that no such agreement was ever made. In a June 2010 e-mail, the city's attorney stated, "I have what I believe may be all the necessary records to prepare an administrative record" and offered to stipulate "that the record would be prepared jointly according to the applicable provision of CEQA." CID's attorney responded that he would go along with the proposal tentatively and requested a short written stipulation regarding the contents of the agreement.

In August 2010, the city's attorney informed CID's attorney that the city and DP were compiling documents to generate a proposed record and that the proposed record would be provided to CID's attorney

for review. The city's attorney also stated that if CID's attorneys agreed nothing else was required to be included, the city clerk would certify the record. In August, 2010, counsel for the DP sent a pro forma index for the proposed administrative record to the attorneys representing CID. The parties stipulated to an order extending the time for preparation and certification of the administrative record to September 17. In August, CID's attorneys received from counsel for DP a DVD containing the scanned documents that constituted the proposed administrative record. CID's attorneys subsequently sent a letter to the DP's attorney stating that an entire category of documents—internal agency communications—was missing from the index.

In September 2010, the DP's counsel revised the index and in October, sent CID's attorney a DVD containing the scanned, Bates-stamped images of the proposed administrative record. A week letter, CID's attorney responded with a letter requesting the administrative record include three transcripts and 39 documents, some of which were available online. In a letter dated October 26, 2010, counsel for the DP rejected most of the requests for the inclusion of additional materials in the administrative record, many on the ground that the additional materials had not been consulted or utilized in the preparation of the EIR.

On November 9, 2010, the city filed a "Certification of City Clerk of Administrative Record" in which the city clerk declared that the administrative record lodged with the court consisted of true and correct copies of the documents on file in her office relating to the proceedings before the city of Selma and the city council of the City of Selma and Selma planning commission resulting in approval of the project. CID's attorneys sent a letter to counsel for city and for DP (1) asserting the city had abandoned its agreement to cooperate in the preparation of the administrative record and (2) renewing CID's request under the PRA.

In December, CID filed a motion for leave to conduct limited discovery. CID asserted that at the time the motion was filed (1) the administrative record prepared by city and lodged unilaterally with the superior court included almost no internal agency communications and (2) city had refused to produce any original correspondence, as well as technical data and documents used in the preparation of the EIR. CID also filed a motion to augment the administrative record of proceedings on the ground that documents required to be included by § 21167.6, subdivision (e) had been omitted. CID filed a petition for writ of mandate under the PRA seeking an order requiring city to provide CID with access to city's project files, including the files held by city's consultants.

On March 9, 2011, counsel for DP provided additional materials to CID's attorneys. They disagreed on the characterization of these documents. CID described them as an augmented administrative record. DP described the material as a submittal in support of a proposed stipulation among the parties to augment the administrative record. At the hearing on the motions and petition for writ of mandate under the PRA, the trial court continued the hearing and directed CID's attorneys to review the documents provided on March 9. After the parties filed supplemental briefing, the trial court held hearings and took the matter under submission.

On September 14, 2011, the trial court issued an order denying CID's (1) motion for leave to conduct limited discovery, (2) motion to augment the record of proceedings, and (3) petition for writ of mandate under the PRA. The motion to augment was denied "with the exception that all documents agreed upon by the parties to be included in an augmented record during the course of these proceedings to date were approved by the court and were to be included in the administrative record. The court deemed the augmented administrative record to be complete and ripe for briefing and review by the court. CID filed its petition for writ of mandate.

The Court of Appeal's Decision

The Court of Appeal concluded that tape recordings of public agency hearings qualify as "other written materials" for purposes of CEQA § 21167.6(e)(10), and therefore, that copies of tape recordings should have been included in the record of proceedings that city lodged with the trial court.

Second, interpreting § 21167.6(e)(7), the court concluded that the term 'submitted" as used in the statutory phrase "written evidence …submitted" to mean made readily available. When applied in this case, the court explained, "written evidence … submitted" included (1) documents named in a comment letter along with a specific web page address containing that document and (2) documents previously

delivered to the public agency where the commenter's letter (a) named the documents, (b) stated the documents were provided previously in connection with another project, (c) offered to provide another hard copy upon the agency's request, and (d) requested the document be included in the record of proceedings. Documents that are simply named in a comment letter or named along with a reference to a general web site had not been made readily available to the public agency and, therefore, were not "written evidence … submitted" under § 21167.6(e)(7).

Third, the court held that the trial court did not err when it determined that for the purposes of § 21167.6, the "public agency's files on the project" did not include files maintained by subconsultants. In this case, the city retained a primary consultant to prepare the EIR and the primary consultant hired subconsultants to prepare reports, studies, or certain sections of the EIR. The record failed to show that the city had any ownership or other rights in the files of the subconsultants.

Fourth, the court concluded that a March 2010 letter to the city from the County of Fresno concerning the project should have been included in the record of proceedings pursuant to § 21167.6(e)(7), which covers all written correspondence submitted to the public agency concerning the project.

Finally, the court concluded that the record sufficiently supported the implied findings of fact underlying the trial court's denial of CID's petition under the PRA. Specifically, the court explained, the record supported the findings that files maintained by sub-consultants who worked on preparing portions of the EIR were not subject to disclosure as public records "in the possession of" the city. (Gov. Code §. 6253(c)).

Conclusion and Implications

Based on the foregoing, the court issued a writ of mandate directing the Superior Court to (1) vacate the portion of its order dated September 14, 2011, that denies Consolidated Irrigation District's motion to augment the administrative record and (2) enter a new order granting the motion to augment the administrative record with documents identified in opinion. (Nadia Costa, Robia Chang)

THIRD DISTRICT REVERSES JUDGMENT ON DEMURRER DISPOSING OF A CEQA LAWSUIT INVOLVING CASINO

Jamulians Against the Casino v. Randell Iwasaki, ___Cal.App.4th___, Case No. 67138 (3rd Dist Mar. 29, 2012)

Plaintiff Jamulians Against the Casino and various individual plaintiffs who are primarily JAC members (collectively: JAC) filed a petition for a writ of mandate challenging defendant Randell Iwaskaki's execution of an April 2009 settlement agreement in his capacity as the Director of Caltrans (Caltrans), with real party in interest and respondent Jamul Indian Village (tribe). The agreement resolved federal litigation between Caltrans and the tribe over application of the California Environmental Quality Act (Pub. Res. Code, § 21000 *et seq.*; CEQA)) to the tribe's efforts to upgrade its interchange on State Route 94 to allow for access to a proposed casino. JAC alleged the agreement itself was subject to CEQA review based on the argument that Caltrans had committed itself in the agreement to granting a permit for the interchange upgrade. The tribe made a special appearance to quash the summons, raising the doctrine of sovereign immunity, and seeking dismissal of the action. The tribe asserted it was an indispensible party without whom the action could not proceed.

The trial court sustained Caltrans' demurrer and dismissed the action, but declined to rule on the tribe's motions to quash and for dismissal in light of its ruling on the demurrer. On appeal, the court reversed the judgment sustaining the demurrer with directions to the trial court to address the merits of the issue on remand.

Factual and Procedural Background

The court considered the procedural propriety of the trial court's "foray outside the 'four corners' of the pleading through the vehicle of judicial notice"

and provided no summary of the allegations of the petition beyond the general facts set forth above. Beginning with a description of a few procedural details, the court explained that JAC initially filed its petition in Alameda County Superior Court in August 2009, which petition incorporated three brief quotes from the agreement. The first quoted provision represented a Caltrans commitment to issue a permit without CEQA review and the other two were simply part of a description of the tribe's duty under the agreement to fund mitigation measures to further the express purpose of the agreement, in the course of an allegation that Caltrans did not have "sufficient enforcement authority over these mitigation measures" because the agreement included an express reservation of the tribe's authority to assert sovereign immunity.

In October 2009, the parties, including the tribe, stipulated to a change of venue to Sacramento County. Caltrans filed its demurrer, arguing that the casino proposal itself was nascent and thus not yet a "project" and requested the court to take judicial notice of the entire settlement agreement, without citing any authority for taking judicial notice of the truth of its contents. Caltrans also argued that if the tribe asserted its sovereign immunity, there would not be anyone to represent the tribe's interest in enforcing its interpretation of an agreement it had negotiated at arm's length with an adversary in resolution of the federal litigation.

The tribe filed its motion to quash service and to dismiss the complaint on the ground the tribe was immune from suit and it would be improper to proceed in its absence to interpret its rights under the agreement. In opposition, JAC asserted that it would be improper to consider facts dehors the petition in connection with the "no project" argument. On the issue of whether Caltrans had committed itself in the agreement to granting a permit for the interchange upgrade, JAC did cite to the agreement to quote the language it already had alleged in the petition, as being a commitment to approval of the permit. JAC asserted that Caltrans was an adequate representative for the tribe's interests as another party to the agreement.

In its order sustaining the demurrer and dismissing the action, the trial court stated that the agreement did not include or reference plans for a casino project that were sufficiently defined or specific to allow meaningful rather than merely speculative review of potential impacts. The trial court further explained that the agreement did not bind Caltrans to any particular casino design or action in support of a casino project, effectively preclude alternatives or mitigation measures appropriate for consideration under CEQA, or foreclose a "no project" alternative. The trial court reasoned that in part, the agreement required the tribe to follow Caltrans' processes for the creation of a project scoping document and environmental documentation that would be subject to final approval and adoption by Caltrans in order to analyze all reasonably feasible alternatives for access to the project and to conduct a traffic study. The agreement required Caltrans to process the tribe's completed permit application and issue a permit once mitigation measures were approved and the permit process was complete. Thus, the trial court concluded that the agreement did not commit Caltrans to approving the project and that it retained discretion to reject the permit application upon a determination that the tribe had not complied with CEQA.

The Court of Appeal's Decision

The Proper Scope of Judicial Notice

At the outset, the court set forth the rule of judicial notice, explaining first that a court cannot sustain a demurrer on the basis of extrinsic matter not appearing on the face of the pleading except for matters subject to judicial notice, and that a court can properly take judicial notice of the existence of a document, and notice of the truth of the contents of documents such as findings of fact, conclusions of law, orders, and judgments. However, judicial notice cannot be used to convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show. The fact that the contract in the present case was in the administrative record did not change this rule.

The court considered Caltrans' argument that JAC did not object to the request for judicial notice and concluded that JAC counsel characterized his position regarding judicial notice as having assumed it would be limited to the existence of the document, and not its contents. Caltrans failed to provide any authority to construe its demurrer as some species

of stipulated summary judgment on appeal in the absence of extremely good cause, which requires that the record clearly indicate that the parties and trial court ignored the label placed on the motion and treated it as another.

Incorporation by Reference

Next, the court turned to Caltrans' assertion that the petition's "mere reference to isolated provisions of the agreement is tantamount to incorporation by reference." Although JAC's reading of the agreement was not unreasonable except in light of the agreement as a whole, the agreement as a whole was not properly before the trial court and therefore, the trial court erred in considering its other terms and interpreting the provision that JAC cited in its petition.

The Tribe as an Indispensible Party

In its supplemental briefing, JAC conceded that the tribe was a necessary party within the meaning of Code of Civil Procedure § 389(a) because the tribe obviously had an interest in defending the agreement. It also conceded that the tribe is a sovereign nation not subject to suit. JAC disputed the tribe's claim in its amicus brief that the Court of Appeal should affirm the judgment because the tribe is an indispensible party under C.C.P. §389(b). JAC agreed that if the Court of Appeal concluded that the tribe had colorable arguments in favor of its indispensible status, the court should remand for the trial court to consider the issue in the first instance.

Declining to address the merits of the question of indispensability, the court explained the rule that the designation of a party as indispensible results from a court's discretionary determination that it should dismiss the action in the absence of that party. The four relevant criteria to consider on the issue of indispensability are as follows: (1) the extent to which a judgment would prejudice the absent party; (2) the extent to which measures are available to mitigate any prejudice; (3) the ability of the court to address the issues in the absence of the party; and (4) the adequacy of the plaintiff's alternate remedies if the action is dismissed. The court further explained that actions that involve duties under a contract ordinarily should not proceed in the absence of all the parties to a contract. In this case, the tribe filed the federal litigation to dispute the extent to which it was obligated to comply with CEQA in seeking to upgrade its highway interchange, and reached a settlement that reflected its understanding of the acceptable limits while JAC advocated for its own interpretation of the agreement as constituting preapproval of a project. Thus, ruling in favor of Caltrans may or may not be in accordance with the tribe's interpretation of its rights.

Because the issue involves a trial court's discretionary application of the law to a set of facts, and JAC did not identify any basis for disqualifying the tribe from the status of an indispensible party as a matter of law, the court concluded JAC could address this argument to the trial court on remand.

Conclusion and Implications

The Court of Appeal reversed the judgment dismissing the action remanded the matter to the trial court with directions to enter a new order overruling the demurrer of Caltrans, and to consider the hybrid motion of the tribe to quash-dismiss on its merits. (Nadia Costa, Robia Chang)

SECOND DISTRICT UPHOLDS USE OF FUTURE PROJECTED CONDITIONS AS BASELINE FOR ENVIRONMENTAL ANALYSIS OF A LIGHT RAIL PROJECT

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, ___Cal.App.4th___, Case No. B232655 (2nd Dist. Apr. 17, 2012).

In a *partially published* opinion, the Second District Court of Appeal has upheld the Board of the Exposition Metro Line Construction Authority's (the Expo Authority) Environmental Impact Report (EIR) prepared pursuant to the California Environmental Quality Act (CEQA) for the second phase of the construction of a light rail line along the Exposition Corridor connecting downtown Los Angeles with Santa Monica.

Factual Background

The purpose of the project was to extend "high-capacity, high-frequency transit service" from Los Angeles to Santa Monica. The draft EIR for the project evaluated the proposed project design and a number of project alternatives focused on transportation improvements and alignments. After certain changes to the light-rail train alternatives, the Expo Authority certified the final EIR and approved the project in February 2010.

Pursuant to CEQA, the Expo Authority established an environmental baseline to analyze the project's impacts. The Expo Authority determined that the population and traffic levels current in 2009—*i.e.*, when the Expo Authority began its environmental review of the project—did not provide a reasonable baseline for determining the significance of the project's traffic and air quality impacts. The Expo Authority instead used future 2030 baseline conditions to make those determinations.

A coalition of homeowners' associations, community groups, and unaffiliated citizens (collectively, petitioner) sued the Expo Authority, alleging in part that as a matter of law, projected future conditions cannot provide the baseline for reviewing the significance of environmental impacts. The trial court disagreed and denied petitioner's petition for writ of mandate.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision, finding that the Expo Authority was authorized under CEQA to use the 2030 baseline conditions to analyze the significance of the project's traffic and air quality impacts.

Case Law Interpreting the Use of a CEQA Baseline

The court began its analysis by summarizing the law on the issue of the environmental baseline in CEQA documents. Quoting the CEQA Guidelines, the court explained that the existing:

> physical environmental conditions . . . normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant" (14 Cal. Code Regs. § 15125(a)).

The court discussed recent cases interpreting this CEQA Guideline and the use of existing environmental conditions as the baseline for CEQA documents.

The court first described the California Supreme Court case *Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal.4th 310 (2010) (*CBE*). In *CBE*, the court considered modifications at a petroleum refinery. To evaluate changes in emissions that would be caused by the modifications, the lead agency used as a baseline the maximum emissions allowed under the current permits for the refinery. The court concluded that the agency's baseline—essentially simultaneous maximum operation—was not a realistic description of the existing conditions without the project. The court rejected this use of "hypothetical allowable conditions" as the baseline for environmental analysis. The court noted further, however, that an agency "enjoys the discretion to decide" how the existing physical conditions without the project, *i.e.*, the baseline, "can

most realistically be measured."

The court then described two courts of appeal decisions since *CBE* that have held it was improper to use predicted conditions on a date after EIR certification or project approval as the baseline. The first of these two cases, *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council*, 190 Cal.App.4th 1351, 1383 (2010) (*Sunnyvale*), held that projected 2020 conditions provided an improper baseline for determining traffic and related impacts of a roadway extension project. The second case, *Madera Oversight Coalition, Inc. v. County of Madera*, 199 Cal.App.4th 48, 89-90, 92, 96 (2011) (*Madera*), followed the *Sunnyvale* decision and held that a baseline "must reflect existing physical conditions."

The court also described the *Pfeiffer v. City of Sunnyvale City Council*, 200 Cal.App.4th 1552 (2011), case. In *Pfeiffer*, the EIR used multiple traffic baselines to analyze traffic impacts, one of which was a "background conditions" baseline that included existing traffic volumes multiplied by a growth factor plus traffic from approved but not yet constructed developments. The court found that the use of this baseline was proper in light of the Supreme Court's guidance in the *CBE* case that "predicted conditions may serve as an adequate baseline where environmental conditions vary" (*CBE*, 48 Cal.4th at 327-28). The court pointed out that *Pfeiffer* distinguished *Sunnyvale* on the grounds that in *Sunnyvale*, the traffic baselines included only projected traffic conditions in 2020, while in *Pfeiffer* the baselines also "included existing conditions and the traffic growth anticipated from approved but not yet constructed developments" (*Pfeiffer*, 200 Cal.App.4th at 1572).

The Expo Authority Used the Proper Baseline

In light of this case law, the court held that the Expo Authority's use of 2030 baseline conditions to analyze traffic and air quality impacts was proper. The court determined that in certain cases and when supported by substantial evidence in the record, the:

> …use of projected conditions may be an appropriate way to measure the environmental impacts that a project will have on traffic, air quality and greenhouse gas emissions.

The court based this determination on the principle that an analysis of environmental conditions at the present time would only enable decision makers and the public to consider the impact of the rail line "*if it were here today*" (emphasis in original). According to the court, the problem with analyzing a project's impacts using "anachronistic" current conditions is that it "would rest on the false hypothesis that everything will be the same 20 years later."

Conclusion and Implications

The Court of Appeal rejected petitioner's argument "that CEQA forbids, as a matter of law, use of projected conditions as a baseline." The court explained that nothing in the CEQA statute, the CEQA Guidelines, or the Supreme Court's decision in *CBE* requires this conclusion. The court went further and expressly disagreed with the *Sunnyvale* and *Madera* cases, to the extent those cases eliminated a lead agency's discretion to adopt a baseline that uses projected future conditions. This case is significant because clarifies some of the uncertainty regarding the use of a CEQA baseline since the issuance of the *Sunnyvale* decision. Like the *Pfeiffer* ruling shortly after *Sunnyvale*, *Neighbors for Smart Rail* clarifies that a CEQA lead agency may use projected future conditions as the baseline for environmental analysis. (Scott Birkey)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

FIRST DISTRICT UPHOLDS TOLLING AGREEMENT EXTENDING CEQA'S STATUTE OF LIMITATIONS

Salmon Protection and Watershed Network v. County of Marin,
___Cal. App. 4th___, Case No. A133109 (1st Dist. 2012)

In *Salmon Protection and Watershed Network v. County of Marin*, the Court of Appeal for the First Appellate District affirmed a lower court's holding that a public agency and a private party may agree to toll the limitations period for challenging the adequacy of an environmental impact report under the California Environmental Quality Act (CEQA).

Factual and Procedural Background

The project at issue in this litigation was the adoption of the Marin Countywide General Plan Update. The Marin Countywide General Plan requires the county to implement stream conservation area policies, and the update to the general plan did so for the San Geronimo Valley watershed. The Salmon Protection and Watershed Network (SPAWN) filed a petition for writ of mandate challenging certification of the Environmental Impact Report (EIR) prepared for the General Plan Update. In an attempt to reach a settlement, SPAWN and Marin County entered a series of "tolling" agreements. These agreements extended the 30-day limitation period established by CEQA for challenging the certification of EIRs. Settlement discussions were ultimately unsuccessful, and SPAWN proceeded to file a petition to challenge the county's EIR.

The trial court granted a group of property owners from the San Geronimo Valley watershed area leave to allege that SPAWN's petition was untimely because CEQA does not permit tolling of the statute of limitations. The trial court disagreed with the intervening property owners and sustained demurrers by the county and SPAWN, holding that tolling agreements are not prohibited by CEQA. Instead, the trial court declared:

> …CEQA encourages parties to avoid litigation through pretrial settlements and negotiated dispositions, which may include the use of tolling agreements.

The interveners appealed.

The Court of Appeal's Decision

The Court of Appeal noted the challenge invoked potentially conflicting public policies. While CEQA favors the prompt disposition of CEQA challenges, there is an equally strong public policy, recognized by the California Supreme Court, encouraging settlement. The county argued tolling agreements conserve judicial and local agency resources and had become common practice in Marin County and many other counties and cities. The court cited statements from amicus briefs by the League of California Cities, the California State Association of Counties, The California Building industry, and the Sierra Club supporting the application of tolling agreements as an important tool for achieving settlement and avoiding costly litigation. These parties all agreed that tolling agreements helped foster more effective settlement negotiations, and that this is important considering the high cost in time and resources frequently incurred in CEQA litigation.

The court agreed with the statements supporting tolling agreements and noted that constructive negotiations often require the parties involved to conduct additional research, obtain additional studies, and confer with other affected parties or responsible agencies. The court determined these and other steps inherent in constructive, effective settlement negotiations may require far longer than 30 days to complete. The chances of a successful outcome are greater if the parties have the opportunity to conduct their discussions without being forced into litigation by CEQA's statute of limitations. The court noted that the validity of agreements tolling limitations in other civil litigation have long been recognized by both the California Code of Civil Procedure and other California court decisions.

The court found the policy favoring prompt resolution of CEQA disputes and the policy of encouraging settlement were not irreconcilable. In fact, in many cases, settlement discussions can resolve CEQA controversies much sooner than a trial on the merits and potential appeal. The principle reason for the policy

encouraging prompt resolution of CEQA disputes is to minimize the cost of delaying a project while the validity of the project's approval is litigated. Tolling agreements require approval of the public agency, the party asserting noncompliance with CEQA, and the project proponent. Delay will most likely affect the project proponent's financial interests, but their approval of tolling agreements is required. Therefore, if a project proponent believes adhering to CEQA's limitation period will be the best way to resolve the challenge, the proponent need not agree to toll that limitation period.

For the current case, the court determined that the intervening property owners were not real parties in interest, and therefore, the tolling agreement did not require their approval. The dispute in this case involved an EIR prepared for an amendment to a countywide plan, which involved no individual project proponent. The interveners' properties were only indirectly affected by the update to the plan. Their interests may have justified permissive intervention, but otherwise, they were not real parties in interest for purposes of the litigation.

Intervening property owners attempted to argue the limitation period established by CEQA was intended for public purposes. California Civil Code indicates that laws established for a public reason cannot be contravened by a private agreement. The court determined that the limitation period in CEQA is primarily intended to protect project proponents from extended delay, uncertainty and other disruptions even though it may have incidental public benefit. The court found incidental public benefit insufficient to invoke the Civil Code and prevent private agreements tolling CEQA's limitations period.

Conclusion and Implications

Both Marin County and SPAWN joined in opposition of the interveners' attack on tolling agreements. In addition, numerous amicus offered arguments, cited by the court, in support of tolling agreements as commonplace under CEQA. The Court of Appeal also offered examples of numerous other cases that recognized both the validity and desirability agreements tolling other limitation periods. Ultimately, the court found both public policy and the law allow for agreements tolling the statute of limitations for filing petitions under CEQA. (John Wheat, Laura Harris)

FIRST DISTRICT UPHOLDS COUNTY ORDINANCE PERMITTING SEQUENTIAL LOT LINE ADJUSTMENTS

Sierra Club v. Napa County Board of Supervisors, ___Cal.App.4th___,
Case No. A130980 (1st Dist. Apr. 20, 2012).

The First District Court of Appeal has upheld Napa County's clarifying lot line adjustment ordinance, which allows sequential lot line adjustments that meet certain conditions, concluding that the ordinance is not inconsistent with the Subdivision Map Act and that sequential lot line adjustments in accordance with the ordinance do not trigger environmental review under the California Environmental Quality Act (CEQA).

Background

The Subdivision Map Act regulates the division of land by setting forth specific application and permitting requirements for land divisions. Gov. Code, § 66410, *et seq*. In 1976, the California Legislature amended the Subdivision Map Act to include an exemption for lot line adjustments between two or more adjacent parcels, where land is taken from one parcel and added to another, but no new parcels are created, and provided the lot line adjustment is approved by a local agency. This provision was further amended in 1991 to limit the exemption to lot line adjustments between four or fewer existing adjoining parcels. Gov. Code, § 66412(d).

In 2002, the County of Napa revised its local lot line adjustment ordinance to conform to the legislative changes, specifically providing that lot line adjustments involving four or fewer adjoining parcels were exempt from the Subdivision Map Act. Several years later, in response to applications for sequential lot line adjustments, each affecting four or fewer par-

cels, the county was faced with considering whether its ordinance would permit this type of sequential lot line adjustments. After various public meetings and working group sessions, the county adopted a clarifying lot line adjustment ordinance. The clarifying ordinance authorizes sequential lot line adjustments of four or fewer parcels each, provided the prior adjustments had been completed and recorded before to submitting an application for a subsequent adjustment. The ordinance also provides that all lot line adjustments are deemed ministerial unless they require a variance or are processed concurrently with a discretionary permit.

Sierra Club filed a lawsuit challenging the ordinance on the ground that it is facially inconsistent with the Subdivision Map Act. Sierra Club also asserted that the ordinance improperly determined that sequential lot line adjustments are ministerial and, therefore, exempt from CEQA.

The trial court found in favor of the county, upholding the ordinance, and Sierra Club appealed.

The Court of Appeal's Decision

The Court of Appeal first considered the county's argument that the Sierra Club had failed to properly serve a summons on the county and, therefore, the case should be dismissed on statute of limitations grounds. The court noted, however, that the county had executed a stipulation with Sierra Club, agreeing to extend the deadline to prepare the administrative record, and the stipulation had been signed and filed prior to Sierra Club's deadline to serve a summons on the county. Citing Code of Civil Procedure § 410.50, the court concluded that the county had appeared in the case and thereby waived any irregularity in service.

Consistency with the Subdivision Map Act

The court then considered the Sierra Club's claim that the ordinance is inconsistent with the Subdivision Map Act. In essence, Sierra Club argued that allowing sequential lot line adjustments "games" the Subdivision Map Act, by allowing lot line adjustments affecting more than four parcels to proceed without compliance with the Subdivision Map Act. The court disagreed.

First, the court noted that Sierra Club brought a facial challenge to the ordinance and, therefore, was required to demonstrate that there are no circumstances under which the ordinance would be valid. The court then examined the language of the Subdivision Map Act in comparison to the ordinance. The court noted that the Subdivision Map Act excludes from its requirements "lot line adjustments meeting the following criteria: (1) the adjustment is between four or fewer parcels; (2) the parcels must be adjoining; (3) the adjustment does not result in more parcels than originally existed; and (4) the lot line adjustment is approved by the local agency." The court concluded that the ordinance applied only to lot line adjustments that meet these criteria. The ordinance only allows sequential lot line adjustments where prior adjustments have been completed and approved and, therefore, the sequential adjustment of four or fewer parcels meets the Subdivision Map Act criteria.

The court dismissed Sierra Club's example that submitting four applications for four parcels each is really a lot line adjustment affecting more than four parcels and, therefore, gamesmanship. The court held, however, that Sierra Club's example did not support a "facial" challenge to the ordinance. The court stated that it was not reviewing the example and any number of challenges may be available to attack such gamesmanship. The court also found that a reasonable interpretation of the legislative intent is that the timing of sequential lot line adjustments should be regulated, but not prohibited. This is accomplished by the ordinance's requirements that the prior adjustment be approved and final before an application for a subsequent adjustment is filed.

CEQA—Ministerial or Discretionary Determinations

Finally, the court considered whether it was appropriate for the county to declare that sequential lot line adjustments are ministerial and not subject to CEQA. Citing the CEQA Guidelines §§ 15022 and 15268, the court noted that CEQA gives the county the discretion to determine whether an action is ministerial or discretionary. The court then cited the Subdivision Map Act's exemption of lot line adjustments from discretionary review. Gov. Code, § 66412. The court concluded that the ordinance was consistent with the Subdivision Map Act and CEQA by providing that lot line adjustments are ministerial unless they involve a variance or other discretionary permit.

Conclusion and Implications

This decision provides clarification regarding a prior ambiguity in the Subdivision Map Act. The court analyzed the plain language of the statute, as well as the legislative history, to conclude that sequential lot line adjustments are exempt from the Subdivision Map Act, so long as they meet the conditions of the Act and, in particular, that the prior adjustment is completed before an application for a subsequent adjustment is filed. The decision also affirms a local agency's discretion to determine what types of permits and approvals are ministerial and, therefore, exempt from CEQA. (Kristen Castaños)

LEGISLATIVE UPDATE

The section is designed to apprise our readers of potentially important land use legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication.

Coastal Resources

AB 2178 (Jones)—This bill would amend the California Coastal Act to specify that, for purposes of the Act, "structure" does not include the construction or erection of a flagpole on land or water in the coastal zone. The bill would further prohibit the construction or erection of a flagpole on land or water in the coastal zone from being determined to adversely impact the scenic or visual qualities of coastal areas.

AB 2178 was introduced in the Assembly on February 23, 2012, and, most recently, on May 7, had its first hearing in the Committee on Natural Resources cancelled at the request of its author, Assembly Member Jones.

AB 2211 (Jones)—This bill would amend the California Coastal Act to specify that, in carrying out the provisions of the act, conflicts should be resolved in a manner that balances the protection of significant coastal resources with the economic and social benefits provided by a proposed coastal development project to the community at large, which includes, but is not limited to, the economic prosperity of the region.

AB 2211 was introduced in the Assembly on February 24, 2012, and, most recently, on May 7, failed passage in its first hearing in the Committee on Natural Resources but was subsequently granted reconsideration.

SB 1066 (Lieu)—This bill would amend existing law relating to coastal resources to authorize the State Coastal Conservancy to fund and undertake projects to address climate change, giving priority to projects that maximize public benefits.

SB 1066 was introduced in the Senate on February 13, 2012, and, most recently, on April 30, was placed in the Committee on Appropriations suspense file.

Environmental Protection and Quality

AB 1444 (Feuer)—This bill states the intent of the California Legislature to enact legislation extending the benefits provided under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 for certified environmental leadership development projects to new public rail transit infrastructure projects, which benefits include an expedited judicial review process and specified procedures for the preparation and certification of the administrative record for an Environmental Impact Report prepared under the California Environmental Quality Act (CEQA).

AB 1444 was introduced in the Assembly on January 4, 2012, and, most recently, on May 2, was re-referred to the Committee on Appropriations.

AB 1540 (Buchanan)—This bill would amend existing law identifying the Department of Boating and Waterways as the lead agency in cooperating with other agencies in controlling water hyacinth and Egeria densa in the Sacramento-San Joaquin Delta, its tributaries, and the Suisun Marsh, to additionally designate the Department as the lead agency in cooperating with other agencies in controlling South American Spongeplant (Limnobium laevigatum) in the Delta, its tributaries, and the marsh.

AB 1540 was introduced in the Assembly on January 24, 2012, and, most recently, on April 30, was in the Senate where it was read for the first time and then sent to the Committee on Rules for assignment.

AB 1566 (Wieckowski)—This bill would amend the Aboveground Petroleum Storage Act to revise the definition of "aboveground storage tank" to delete the requirement that the tank be substantially or totally above the ground and to include tanks located in underground areas, as defined in the act. This bill

would also impose criminal penalties for a violation of the act.

AB 1566 was introduced in the Assembly on January 30, 2012, and, most recently, on April 18, was sent to the Committee on Appropriations suspense file after being set for its first hearing.

AB 1570 (Perea)—This bill would amend the California Environmental Quality Act to require the lead agency, at the request of a project applicant, to, among other things, prepare a record of proceedings concurrently with the preparation and certification of an Environmental Impact Report (EIR).

AB 1570 was introduced in the Assembly on February 1, 2012, and, most recently, on April 25, had its first hearing postponed by the Committee on Appropriations.

AB 1620 (Wieckowski)—This bill would amend Health and Safety Code § 25123.5 relating to the treatment of hazardous waste to exclude from the definition of the term "treatment," the separation of air and particulate matter by physical means and the compaction of compatible waste by physical means to reduce volume if the process does not increase the risk of fire or cause the release of hazardous gaseous emissions.

AB 1620 was introduced in the Assembly on February 8, 2012, and, most recently, on May 3, was referred to the Committee on Environmental Quality.

AB 1665 (Galgiani)—This bill would amend the California Environmental Quality Act to specify that the CEQA exemption for railroad grade separation projects is for the elimination of an existing at-grade crossing, and to exempt from CEQA actions or activities taken by the Public Utilities Commission under its authority to regulate railroad crossings.

AB 1665 was introduced in the Assembly on February 14, 2012, and, most recently, on May 10, was read for a second time in the Committee on Appropriations and then ordered to a third reading.

AB 2163 (Knight)—This bill would amend the California Environmental Quality Act to extend indefinitely the use of the alternative method for the preparation of the record of proceedings and the alternative judicial review procedures applicable to actions challenging the certification of an EIR for a project meeting specified requirements, and expand the list of projects that would be eligible for those alternative processes to include, among others, commercial development projects exceeding 125,000 square feet, residential development projects exceeding 50 units, and projects with over 20 acres of cultivated development.

AB 2163 was introduced in the Assembly on February 23, 2012, and, most recently, on April 26, failed passage after its second hearing in the Committees on Natural Resources and the Judiciary.

AB 2245 (Smyth)—This bill would amend the California Environmental Quality Act to exempt from its provisions a bikeway project undertaken by a city, county, or a city and county within an existing road right-of-way.

AB 2245 was introduced in the Assembly on February 24, 2012, and, most recently, on April 16, had its first hearing postponed by the Committee on Natural Resources.

AB 2577 (Galgiani)—This bill would amend the California Environmental Quality Act to specify that a lead agency for a proposed project does not have a duty to consider, evaluate, or respond to comments received after the expiration of the public review period, and would provide that these comments are not a part of the record of proceedings for the EIR, negative declaration, or mitigated negative declaration.

AB 2577 was introduced in the Assembly on February 24, 2012, and most recently, on May 7, had its first hearing in the Committee on Natural Resources cancelled at the request of its author, Assembly Member Galgiani.

SB 962 (Anderson)—This bill would amend the Safe Drinking Water Act provisions requiring the requires the State Department of Public Health to adopt regulations for public water systems to limit these regulations to public water systems with less than 2,500 service connections. This bill would further require emergency regulations adopted by the Department of Public Health to remain in effect until a specified date or the effective date of required non-emergency regulations.

SB 962 was introduced in the Senate on January 11, 2012, and, most recently, on May 2, was read for a second time, amended and then re-referred to the Committee on Appropriations.

SB 964 (Wright)—This bill would amend Government Code § 11352 of the Administrative Procedure Act to provide that the existing exemption for the adoption of regulations for the issuance, denial or revocation of specified waste discharge requirements and permits shall not apply to any waste discharge requirements, general permits and waivers that apply on a statewide, region-wide, or industry-wide basis, thereby requiring the State Water Resources Control Board and the Regional Water Quality Control Boards to comply with provisions that require the adoption of regulations under those circumstances.

SB 964 was introduced in the Senate on January 11, 2012, and, most recently, on April 23, failed passage in the Committee on Environmental Quality but was subsequently granted reconsideration.

SB 965 (Wright)—This bill would amend §§ 13263, 13269, and 13377 of the Water Code, relating to water quality to establish that the issuance, denial, or revocation of certain waste discharge requirements, permits, or waivers by the State Water Resources Control Board and the Regional Water Quality Control Boards that apply statewide, region-wide or industry-wide, and not to a person are not within the meaning of a "decision," as defined under the Administrative Procedure Act.

SB 965 was introduced in the Senate on January 11, 2012, and, most recently, on May 2, was read for a second time, amended and then re-referred to the Committee on Environmental Quality.

SB 972 (Simitian)—This bill would amend existing law under the California Environmental Quality Act requiring a lead agency to provide an organization or individual who has filed a written request a notice of at least one scoping meeting for projects of statewide, regional, or area-wide significance to also provide the notice to an entity that has filed a written request for the notice.

SB 972 was introduced in the Senate on January 18, 2012, and, most recently, on April 23, was read for the first time in the Assembly and then held at the desk.

SB 984 (Simitian)—This bill would amend the California Environmental Quality Act regarding the completion of an EIR to require the lead agency, at the request of a project applicant, to, among other things, prepare a record of proceedings concurrently with the preparation and certification of an EIR.

SB 984 was introduced in the Senate on January 30, 2012, and, most recently, on April 9, was sent from the Committee on Appropriations with the author's amendments, read for a second time, amended and then re-referred to the Committee on Appropriations.

SB 1214 (Cannella—This bill would amend the California Environmental Quality Act to add Public Resources Code § 21168.10 requiring a judicial proceeding challenging a project, except for a high-speed rail project, located in a distressed county, as defined under CEQA, to be filed with the Court of Appeal with geographic jurisdiction over the project.

SB 1214 was introduced in the Senate on February 22, 2012, and, most recently, on April 16, failed passage in the Committees on Environmental Quality and the Judiciary but was subsequently granted reconsideration.

SB 1380 (Rubio)—This bill would amend the California Environmental Quality Act to require a public agency to disclose in an EIR the environmental standards established by specified statutes and the regulations, plans, policies, and permitting programs promulgated, adopted, or issued pursuant to those statutes that are applicable to the project.

SB 1380 was introduced in the Senate on February 24, 2012, and, most recently, on May 3, was read for a second time, amended and then ordered for a third reading in the Committee on Environmental Quality.

Housing / Redevelopment

AB 1585 (Perez)—This bill would amend existing law relating to the dissolution of redevelopment agencies to modify the scope of the term "enforceable obligation[s]" that successor agencies must repay and to modify provisions relating to the transfer of housing funds and responsibilities associated with dissolved redevelopment agencies. The bill would further provide that any amounts on deposit in the Low and Moderate Income Housing Fund of a dissolved redevelopment agency be transferred to specified entities.

AB 1585 was introduced in the Assembly on February 2, 2012, and, most recently, on April 19,

was referred to the Committees on Governance and Finance and Transportation and Housing.

AB 1627 (Dickinson)—This bill would amend Public Resources Code §§ 25402 and 25402.1 to prohibit a local building department from issuing a building permit for a residential or nonresidential building unless the department confirms that the building plan complies with the building standards prescribed by the State Energy Resources Conservation and Development Commission.

AB 1627 was introduced in the Assembly on February 9, 2012, and, most recently, on April 17, had its first hearing in the Committee on Business, Professions and Consumer Protection cancelled at the request of its author, Assembly Member Dickinson.

AB 1672 (Torres)—This bill would amend the Housing-Related Parks Program, administered by the Department of Housing and Community Development, which provides grants for the creation, development, or rehabilitation of park and recreation facilities to cities, counties, and cities and counties that meet certain criteria for housing starts to instead provide that the program provide the grants to local entities based on the issuance of building permits for new housing units that are affordable to very low or low-income households.

AB 1672 was introduced in the Assembly on February 14, 2012, and, most recently, on May 10, was read for a second time, amended and then ordered to a third reading in the Committee on Appropriations.

Public Agencies

AB 1549 (Gatto)—This bill would amend the Permit Streamlining Act to require the Office of Permit Assistance to provide information to developers explaining the permit approval process at the state and local levels, to develop guidelines providing for technical assistance to local agencies to develop an expedited development permit process, to develop a project information form for commercial and industrial projects, and to charge fees to an applicant for such services, and to require a city or county to develop an applicant contact entity.

AB 1549 was introduced in the Assembly on January 25, 2012, and, most recently, on April 25, was set for its first hearing and then sent to the Committee on Appropriations suspense file.

AB 1801 (Campos)—This bill would amend existing law relating to land use fees to prohibit a local agency from charging a fee for permit for a renewable energy system, as defined, that exceeds the actual cost of issuing the permit.

AB 1801 was introduced in the Assembly on February 21, 2012, and, most recently, on May 10, was read for the first time in the Senate and sent to the Committee on Rules for assignment.

AB 2238 (Perea)—This bill would amend the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 to require local agency formation commissions to assess various alternatives for improving efficiency and affordability of infrastructure and municipal service delivery and would require the commissions to include a review of whether the agencies providing those services are in compliance with the California Safe Drinking Water Act.

AB 2238 was introduced in the Assembly on February 24, 2012, and, most recently, on May 2, was re-referred to the Committee on Appropriations.

AB 2551 (Hueso)—This bill would authorize a local legislative body to establish an infrastructure financing district in a renewable energy zone area, as defined, for the purpose of promoting renewable energy projects, and exempt the creation of the district from the requirement under existing law that two-thirds of the registered voters within the territory of the proposed district are in favor of creating the district.

AB 2551 was introduced in the Assembly on February 24, 2012, and, most recently, on May 2, was set for its first hearing and then sent to the Committee on Appropriations suspense file.

SB 1094 (Kehoe)—This bill would amend existing law permitting certain specified entities, including non-profit organizations, to manage and hold title to lands designated for mitigation purposes to also authorize a governmental entity to hold title to, and manage that interest in, the mitigation land, as well as any accompanying funds.

SB 1094 was introduced in the Senate on February

16, and, most recently, on April 30, had its hearing postponed by the Committee on Appropriations.

SB 1495 (Wolk) – This bill would amend the Sacramento-San Joaquin Delta Reform Act of 2009 establishing the Delta Stewardship Council to exclude from the definition of "covered action" specified leases approved by specified special districts, and dredging activities and projects conducted by the federal government or specified special districts to improve interstate and international commerce through the navigable waters of the United States.

SB 1495 was introduced in the Senate on February 24, 2012, and, most recently, on May 10, was referred to the Committee on Water, Parks and Wildlife.

SB 1498 (Emmerson)—This bill would amend the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 to allow a local agency formation commission to authorize a city or district to provide new or existing services outside its jurisdictional boundaries and outside its sphere of influence to support existing or planned uses involving public or private properties, subject to approval at a noticed public hearing, in which certain determinations are made. The bill would also authorize a local agency formation commission to delegate to its executive officer the approval of certain requests to authorize a city or district to provide new or extended services outside its jurisdictional boundaries or outside its sphere of influence, as described above, under specified circumstances.

SB 1498 was introduced in the Senate on February 24, 2012, and, most recently, on April 26, had its second hearing in the Committee on Governance and Finance canceled at the request of its author, Senator Emmerson.

Zoning and General Plans

SB 949 (Vargas)—This bill would amend existing law authorizing cities and counties, and joint exercise of powers agencies comprised of cities and counties, to establish property and business improvement districts for the purpose of financing certain improvements on real property located within the district, to further authorize a local agency to form a community benefit district by complying with specified procedures and requirements, to be operated by a nonprofit management company, and to levy an assessment for the support of the district.

SB 949 was introduced in the Senate on January 4, 2012, and, most recently, on April 12, had its second hearing in the Committee on Governance and Finance canceled at the request of its author, Senator Vargas.

SB 1241 (Kehoe)—This bill would amend existing law relating to general plans to revise the safety element requirements for state responsibility areas and very high fire hazard severity zones, as specified, and require the safety element, prior to January 1, 2015, and thereafter upon each revision of the housing element, to be reviewed and updated as necessary to address the risk of fire in state responsibility areas and very high fire hazard severity zones, taking into account specified considerations. This bill would also revise the Subdivision Map Act to require the legislative body of a county to make three specified findings before approving a tentative map, or a parcel map for which a tentative map was not required, for an area located in a state responsibility area or a very high fire hazard severity zone.

SB 1241 was introduced in the Senate on February 23, and, most recently, on May 4, was set for hearing in the Committee on Appropriations for May 14. (Gregory Regier, Paige Gosney)

CALIFORNIA LAND USE™
LAW & POLICY Reporter

California Land Use Law & Policy Reporter
Argent Communications Group
P.O. Box 506
Auburn, CA 95604-0506

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108