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HIGHLIGHTS

ARTICLE: Fall CEQA Roundup: Significant Developments and a Preview of Coming Attractions

by Arthur F. Coon, Star Lightner, and Ronny Clausner

CEQA

Specific legislative appropriation is not required in order to mitigate off-site environmental effects of a project.

City of San Diego v. Board of Trustees of California State University, 61 Cal. 4th 945, 190 Cal. Rptr. 3d 319, 352 P.3d 883 (2015)

CONSTRUCTION DEFECTS

Homeowners claiming damages arising out of, or related to deficiencies in, the construction of the homeowner's residence may not bring common law action against builder without first engaging in nonadversarial prelitigation procedure of the Right to Repair Act.

McMillin Albany LLC v. Superior Court, 239 Cal. App. 4th 1132, 192 Cal. Rptr. 3d 53 (5th Dist. 2015), review filed, (Oct. 6, 2015)

DEDICATION

Because statute barred all public use, not just recreational use, from developing into an implied public dedication, no implied dedication of a road for public purposes could be found where there was no evidence of public use before 1972, when statute was passed.

Scher v. Burke, 240 Cal. App. 4th 381, 192 Cal. Rptr. 3d 704 (2d Dist. 2015)

INVERSE CONDEMNATION

Positive residual value does not defeat a regulatory takings claim when residual value is not attributable to economic uses, and the proper valuation is without reduction for the regulation that effects the taking.

Lost Tree Village Corp. v. U.S., 787 F.3d 1111 (Fed. Cir. 2015)

MOBILEHOMES

City's finding that mobilehome park conversion was inconsistent with open space element of general plan was a legitimate basis for denial of conversion application and was supported by substantial evidence.

Carson Harbor Village, Ltd. v. City of Carson, 239 Cal. App. 4th 56, 190 Cal. Rptr. 3d 511 (2d Dist. 2015), review filed, (Sept. 10, 2015)

PLANNING, ZONING, AND LAND USE REGULATIONS

Where local agency failed to make required findings under the Mitigation Fee Act, unexpended funds were required to be refunded to current landowners.

Walker v. City of San Clemente, 239 Cal. App. 4th 1350, 192 Cal. Rptr. 3d 635 (4th Dist. 2015), review filed, (Oct. 7, 2015)

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MILLER STARR REGALIA

IN THIS ISSUE:

ARTICLE:
FALL CEQA ROUNDUP: SIGNIFICANT DEVELOPMENTS AND A PREVIEW OF COMING ATTRACTIONS

by Arthur F. Coon, Star Lightner,** and Ronny Clausner****

Introduction

The past year has seen extraordinary activity in the realm of the California Environmental Quality Act ("CEQA")[1]—encompassing new legislation, proposed updates to the CEQA Guidelines, and an unprecedented number of CEQA cases being accepted for review by the California Supreme Court. Propelled by both the ongoing drought in California and the continuing deluge of CEQA litigation, the state is poised to experience significant changes in this far-reaching law. Below we outline and summarize noteworthy legislative changes to CEQA, the draft CEQA Guidelines amendments from the Governor's Office of Planning and Research, new regulations proposed by the Department of Fish and Wildlife that will impact project-specific CEQA reviews, and (briefly) each of the seven cases now pending before the California Supreme Court. This article is intended to present a broad overview and survey of some of these many significant CEQA developments, rather than an in-depth critique or analysis of their legal or policy merit.[2]

CEQA Legislation

In response to the drought and the resulting declaration of a state of emergency, the Legislature and Governor Brown have passed various CEQA exemptions to ease the regulatory burden on projects that are designed to mitigate drought conditions and effects, as follows:

- Senate Bill 88, as amended on June 17, 2015 and chaptered on June 24, 2015, exempts from CEQA various groundwater replenishment projects, the drafting and subsequent adoption of building standards for water recycling systems, and the adoption

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of ordinances imposing conditions on well permits or land use changes that would increase groundwater demand.[3]

- Assembly Bill 115, which was ordered for a third reading on June 18, 2015, seeks to provide a CEQA exemption for recycled water projects (until July 1, 2017), groundwater replenishment projects (until January 1, 2017), the adoption of groundwater protection ordinances (until July 1, 2017), and the adoption of initial water diversion regulations.[4]

Draft CEQA Guidelines Amendments

In addition to new legislation, on August 11, 2015, the Governor's Office of Planning and Research ("OPR") published a Preliminary Discussion Draft of Proposed Updates to the CEQA Guidelines ("Discussion Draft").[5] The Discussion Draft proposes the first comprehensive update of the CEQA Guidelines[6] since the late 1990s. Comments were required to be submitted by October 12, 2015. The Discussion Draft proposes what it classifies as efficiency, substantive, and technical improvements to the existing CEQA Guidelines; the proposals are a result of feedback received by OPR as well as recent CEQA jurisprudence.

A. Efficiency Improvements

Included in OPR's Discussion Draft are several proposed changes intended to provide for a smoother and more predictable review process for agencies, applicants, and the public. In that vein, the Discussion Draft contains the following seven technical improvement revisions:

1. A revision to promote the use of thresholds of significance and regulatory standards for agencies to determine the significance of project impacts.

OPR notes that many local governments treat regulatory standards as thresholds of significance.[7] As a result, OPR proposes to amend Guidelines, §§ 15064 and 15064.7 to "expressly provide that lead agencies may use thresholds of significance in determining significance, and that some regulatory standards may be appropriately used as thresholds of significance."[8]

More specifically, OPR proposes to add a new subdivision (b)(2) to Section 15064. Subdivision (b)(2) would provide that thresholds of significance may be used to determine significance and that an agency relying on a threshold should explain how the use of the threshold by the agency led to the conclusion that the impact will be less than significant. Subdivision (b)(2) would further provide that an agency should exercise care to evaluate any substantial evidence that may support a fair argument that a project's impacts may be significant notwithstanding compliance with thresholds of significance.[9]

In addition, OPR proposes to add a new subdivision (d) to Section 15064.7 to clarify that lead agencies may use environmental standards as thresholds of significance. If a lead agency pursues this option, then the agency needs to explain how the use of the environmental standard indicates that the project will have a less than significant effect.[10] Lastly, OPR would provide lead agencies with specified criteria to determine whether the use of an environmental standard is appropriate, including: (1) whether the environmental standard was adopted through a formal mechanism; (2) whether the standard was adopted for the purpose of environmental protection; and (3) whether the environmental standard governs the studied impact.[11]

2. A revision to clarify the use of Programmatic EIRs.

Recognizing that administrative efficiency is a long standing policy in CEQA, OPR seeks to clarify and assist lead agencies with the determination of whether additional review is required for a project or whether the project falls "within the scope" of a program EIR.[12] To that end, OPR proposes to amend section 15168 by adding subdivision (c)(2) and clarifying that the determination of whether a later project or activity falls within the scope of a program EIR is a question of fact.[13] Furthermore, the determination needs to be supported by substantial evidence and the decision must be made by the lead agency.[14] In addition, OPR proposes to add the following nonexclusive list of criteria to assist lead agencies in their determination of whether a project falls within the scope of a program EIR:

- Whether the project is consistent with allowable land uses as set forth in the project studied in the program EIR;

- Whether the project is consistent with density and building intensities set forth in the project studied in the program EIR;
- Whether the project is located within the geographic area studied in the program EIR;
- Whether the project is included within the infrastructure studied in the program EIR.[15]

OPR's proposal would also include a statement in subdivision (c)(1) clarifying that if a lead agency determines that a project is not "within the scope" of the program EIR, the lead agency may still streamline the environmental review process using the tiering process as set forth in Section 15152.[16]

3. OPR seeks to clarify the rules on tiering.

OPR seeks to amend Section 15152(h) to clarify that there are several streamlining mechanisms, in addition to the rules governing tiering generally, that a lead agency may use to simplify the review process. For example, OPR references Program EIRs,[17] various other types of EIRs,[18] and redevelopment, mixed-use, and infill projects as potential streamlining mechanisms that the Legislature did not intend to displace with tiering.[19]

4. OPR proposes to amend Section 15182 to incorporate the new exemption in Public Resources Code section 21155.4 governing transit oriented development.

To expand the residential exemption so as to make it available to projects located within transit priority areas, OPR proposes to amend section 15182 to track the exemptions available under Public Resources Code section 21155.4 and Government Code section 65457. Proposed subdivision (a) of section 15182 would clarify that a qualifying specific plan is a plan adopted pursuant to the requirements set forth in Article 8, Chapter 3 of the Government Code.[20]

OPR proposes to amend subdivisions (b), (c), and (d) to include eligibility criteria, limitations on the use of the exemption, the applicable statute of limitations, and provisions governing residential projects.[21]

5. OPR seeks to clarify the exemption governing operations and minor alterations of existing facilities.

OPR proposes to amend section 15301 of the CEQA Guidelines to clarify that an agency may consider actual *historic* uses in determining whether a project involves an expansion of existing use that would disqualify it from using this categorical exemption. The idea is to incorporate recent "baseline" case law into the exemption's calculus.[22] In addition, OPR proposes to amend subdivision (c) to highlight that improvement within a public right of way contemplating multiple modes of transport will not normally cause significant environmental impacts.[23]

6. OPR proposes to amend Appendix G to simplify the questions and assist agencies in their determination of whether a project may result in significant impacts.

OPR proposes numerous changes to the Guidelines' Appendix G, including, without limitation, the following:

- Reorganizing and consolidating questions in the open space category to correspond to the categories in a city or county's open space element.[24]
- Clarifying that questions relating to water quality refer to both surface and ground water.[25]
- Changing the question on whether a project will adversely impact the visual character of a site to focus on whether the project is consistent with zoning and other planning regulations governing visual and aesthetic character in the area.[26]
- Updating the questions to include a consideration of whether a project will have an impact on tribal cultural resources as set forth in AB 52.[27]
- Updating the analysis of transportation impacts to focus on a project's vehicle miles traveled rather than "level of service."[28]

7. OPR proposes to add Section 15234 to assist agencies in attempts to comply with CEQA after a remand from reviewing court.

Proposed section 15234 subdivision (a) clarifies that not every

violation of CEQA will compel a court to set aside project approvals.[29] Subdivision (b) sets forth that it is possible that discrete portions of a project may proceed while the agency conducts further review.[30] Subdivision (c) incorporates the *POET, LLC v. State Air Resources Bd.*[31] holding that despite a failure to comply with CEQA, the court may exercise discretion and leave a project in place because it will ensure higher environmental protection. Lastly, subdivision (d) would instruct agencies regarding whether additional environmental review of upheld portions of an EIR may be necessary when circumstances have changed and resulted in new or worse impacts.[32]

B. Substantive Improvements

1. OPR Proposes to add a provision to section 15126.2 to require an analysis of a project's energy impacts.

The amendments would add subdivision (b) to Section 15126.2 to require the following:

- An analysis of whether a project will require "wasteful, inefficient, or unnecessary consumption of energy;"[33]
- The analysis must cover all aspects of the project;[34]
- Compliance with the building code may not be enough;[35]
- The analysis must focus on the actual energy demand caused by the project, so as to place reasonable limits on the analysis.[36]

2. OPR proposes to amend 15155 to clarify the water supply impacts analysis.

In light of the courts' recognition that CEQA requires a water supply impacts analysis, OPR proposes to incorporate into the CEQA Guidelines the principles set forth in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*.[37] The proposed addition of subdivision (f) to section 15155 is intended to clarify that a proper water supply analysis must provide sufficient information so as to allow a lead agency to weigh the benefits and costs of supplying water to the project, including the environmental impacts of doing so and the circumstances affecting the likelihood of water supplies.[38]

C. Technical Improvements

1. OPR proposes to amend subdivision (a) of Section 15125 to clarify how a lead agency may determine the proper baseline.

With this amendment, OPR seeks to clarify that a lead agency may use a well-documented (e.g., supported by substantial evidence) historic condition to determine the environmental "baseline" against which to measure a proposed project's impacts when the current or existing conditions are volatile.[39] The amendment will also provide guidance to lead agencies by clarifying that an existing conditions baseline may be omitted when the use of the existing or current condition would be misleading or lacks informative value.[40] Lastly, the proposed amendment includes a provision instructing that hypothetical conditions that have never actually occurred may not be used as a baseline.[41]

2. OPR seeks to clarify the provisions governing the deferral of mitigation measures.

OPR's proposed amendment to section 15126.4[42] would clarify that an agency may not defer the identification of mitigation measures,[43] but describes circumstances where the deferral of specific details of a mitigation measure may be permitted.[44]

3. Clarifying rules governing an agency's responses to comment.

Recognizing the increased use of technology by the public to submit comments, OPR proposes to clarify in accordance with recent case law the scope of an agency's duty to respond to public comments as required pursuant to Section 15088. Accordingly, OPR's proposal provides that an agency's response to a comment that does not specify the relevance of information contained in the comment may be general and that the agency may respond in electronic form. Further, OPR would clarify that the lead agency enjoys discretion to determine the means by which it will receive comments.[45]

D. Minor Technical Improvements

OPR proposes a host of minor technical improvements on the following issues: Pre-Approval Agreements; Lead Agency by Agreement; Common Sense Exception; Preparing the Initial Study; Consultation

with Transit Agencies; Citations in Environmental Documents; Posting with the County Clerk; Time Limits for Negative Declarations; Project Benefits; Using the Emergency Exemption; When is a Project Discretionary?; and Defining Mitigation.[46] Only a few of these topics are discussed here.

1. Pre-approval Agreements

In an attempt to provide guidance on the point at which preapproval activities require CEQA review, but recognizing a spectrum between "mere interest in a project" and "commitment to a definite course of action,"[47] OPR proposes to add a new subdivision (b)(4) to Section 15004 to give examples of characteristics of agreements that may (e.g., an absence of terms that bind the agency to a definite course of action)[48] and may not (e.g., a development agreement that would grant vested rights)[49] permissibly precede CEQA review.[50] The intent is to apply the principles identified by the California Supreme Court in the *Save Tara* decision.[51]

2. Consultation with Transit Agencies

OPR seeks to improve noticing standards by involving affected public transit agencies in the preparation of an environmental impact report and to ensure environmental transportation impacts are fully considered in accordance to the general statutory mandate under CEQA.[52] The amendment would add a sentence to subdivision (e) of Section 15072 and subdivision (a)(5) of Section 15086 to clarify in those subdivisions that lead agencies should consult public transit agencies with facilities within one-half mile of the proposed project.[53]

3. Time Limits for Negative Declarations

OPR's proposed amendment to Section 15107 would track the time limit rules for completion of an environmental impact report[54] by allowing a lead agency to extend the 180-day time limit for negative declarations one time for a period of no more than 90 days upon the consent of both the lead agency and the applicant.[55]

4. Using the Emergency Exemption

In order to implement and clarify case law holding that an emer-

gency repair may be anticipated,[56] OPR proposes to amend subdivisions (b) and (c) of Section 15269 stating that emergency repairs may require planning and qualify under this exemption, and providing guidance on how imminent an emergency must be to fall within the statutory exemption.[57]

5. When is a Project Discretionary?

Recognizing the need to distinguish between the terms "discretionary" and "ministerial" with respect to public agency decisions, OPR seeks to amend Section 15357 to clarify that a discretionary project is one in which a public agency can shape the project in any way to respond to concerns raised in an environmental impact report.[58]

Department of Fish and Wildlife Draft Regulations

On August 14, 2015, the California Department of Fish and Wildlife (DFW) published draft regulations interpreting Fish & Game Code §§ 3503 et seq. governing the protection of birds as well as nests and eggs of common birds.[59] Of particular interest is that DFW's proposal appears to expand the scope of CEQA to apply a significance test for populations of common bird species.[60]

By way of background, California prohibits the take, possession, or needless destruction of "nest or eggs of any bird, except as otherwise provided by this code or any regulation made pursuant thereto."[61] Similarly, "it is unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds of prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted thereto."[62] Currently, lead agencies ensure consistency with the aforementioned provisions of the Fish and Game Code by analyzing and documenting how a project will not destroy bird nests or result in the taking of birds of prey.

The purpose of the draft regulation is to "provide clarity to terms that are subject to diverse interpretations by stakeholders, the general public and Department staff."[63] Thus, the draft regulations (1) define and interpret terms that appear in the current statutory framework; (2) detail limitations to the scope and reach of the regulations as ap-

plied to other federal and state laws; and (3) propose various thresholds of significance to be used to determine whether the take, possession, or destruction of nests, eggs, or birds of prey will significantly impact avian biological resources.[64]

The definitions section of the draft regulations defines "needlessly destroy" as "any action that physically modifies the nest of a native bird from its previous condition and adversely affects the survival of the native bird's offspring when it is feasible to avoid such effect until eggs, nestlings, or juvenile birds no longer require the nest for survival," and clarifies that "[a]ctions to prevent or mitigate an emergency as defined in Public Resources Code Section 21060.3 are not needless."[65] More specifically, avoidance is considered feasible as defined in the CEQA Guidelines (e.g., "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors").[66] Furthermore, the regulations define a "native bird" as "any bird species determined by . . . [DFW] to occur naturally in California as a resident, regular migrant or occasional migrant species."[67]

DFW also clarifies in the draft regulations that in light of the plethora of federal and state statutes and regulations governing the protection of bird species, an action that would constitute a violation under Sections 3503 and 3503.5 will not be considered a violation when authorized by the United States Fish and Wildlife Service under the Migratory Bird Treaty Act or when authorized by various state agencies under the California Endangered Species Act, the Natural Community Conservation Planning Act, a Lake or Streambed Alteration Agreement, various anadromous fish habitat enhancement projects, or as otherwise provided in the Fish and Game Code and implementing regulations.[68]

The draft regulations' various thresholds of significance may have profound consequence in the CEQA context. DFW provides that an impact to "avian biological resources" will be deemed significant under one of the following four scenarios:

(1) The project will have "a substantially adverse effect, either directly or through habitat modifications, on any population of a native bird spe-

cies" that is considered "endangered," "rare" or "threatened" under 14 C.C.R. 15380(c) or (d);

(2) The project will have the potential to "substantially reduce the habitat, restrict the range or cause a population of a native bird species to drop below self-sustaining levels." This threshold, which relies on language from Appendix G in the CEQA Guidelines, is not limited to endangered, rare or threatened species, and extends to common species of birds.

(3) "The project is likely to have long-term adverse consequences for one or more populations of native bird species." This language does not appear in Appendix G, and again is not limited to endangered, rare, or threatened species.

(4) "The project has direct or indirect environmental effects on native bird species that are individually limited but cumulatively considerable."[69]

DFW's proposal has the obvious and significant potential to expand CEQA analysis to include impacts on common bird species. Of particular concern is that the proposal does not address how a lead agency should identify the population of native bird species, meaning that the interpretation and application of the thresholds are uncertain in the CEQA context.

Pending California Supreme Court Cases

As this article goes to press, there are seven CEQA cases pending before the California Supreme Court, including two in which oral argument has been heard, and several that have been fully briefed but are still awaiting a schedule for oral argument.

Center for Biological Diversity v. Department of Fish and Wildlife (Newhall Land and Farming Company).[70]

On September 2, 2015, the California Supreme Court heard argument in the *Center for Biological Diversity v. Department of Fish and Wildlife (Newhall Land and Farming Company)*. The case involves challenges to the Department of Fish and Wildlife's approval of the Newhall Ranch project and EIR. The Supreme Court granted review to clarify the following issues: (1) whether it is proper to adopt a greenhouse gas ("GHG") threshold of significance for purposes of CEQA based on the "Business as Usual" ("BAU") methodology adopted by the California Air Resources Board ("CARB"); (2) whether mitiga-

tion measures relating to the capture and transplant (i.e., relocation) of a fully protected species constitute a "take" in violation of the state's Endangered Species Act; and (3) whether CEQA restricts judicial review to issues raised prior to the close of comments on a draft EIR.

California Building Industry Association v. Bay Area Air Quality Management District.[71]

On October 7, 2015, the California Supreme Court heard oral argument in what is commonly referred to as the "CEQA-in-reverse" case—*California Building Industry Association v. Bay Area Air Quality Management District*. At issue in the case is whether the thresholds of significance for toxic air contaminant and particulate matter adopted by BAAQMD that are triggered by "impacts that the existing environment may have on future occupants of a project" are proper under CEQA. This case addresses an issue of fundamental and critical importance under CEQA—whether the environmental impact analysis under CEQA is limited to the effects of a project on the environment, or whether it must also include the converse (i.e., an analysis of the effects of the environment on the future project and its users and residents, also known as a "CEQA-in-reverse" analysis). Should the Supreme Court determine that "CEQA-in-reverse" analysis is required, many believe this would essentially rewrite CEQA by expanding its scope, and thus effectively increase the expense and diminish the efficiency of CEQA compliance.

Cleveland National Forest Foundation v. San Diego Association of Governments (SANDAG).[72]

On March 11, 2015, the California Supreme Court granted the San Diego Association of Governments' (SANDAG) petition for review of the Fourth District Court of Appeal's decision in *Cleveland National Forest Foundation v. San Diego Association of Governments*. The issue to be reviewed is whether, in order to comply with CEQA, the environmental impact report for a regional transportation plan must include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in then-Governor Schwarzenegger's 2005 Executive Order No. 5-3-05. The court of appeal ruled against SANDAG, holding that its EIR was deficient because it failed to

analyze the inconsistency between the regional transportation plan and state climate policy as established by the executive order. SANDAG has argued in opposition to that ruling that using the Executive Order "as a baseline or standard for evaluating the significance of GHG impacts" is legally unsupported and could "preclude the use of negative declarations or mitigated negative declarations even for projects that have minimal GHG impacts."[73]

Friends of the College of San Mateo Gardens v. San Mateo County Community College District.[74]

On January 15, 2014, in an unusual move, the California Supreme Court granted review of an *unpublished* case, *Friends of the College of San Mateo Gardens v. San Mateo County Community College District*. That case involved an initial study mitigated negative declaration ("IS/MND") prepared in conjunction with a facility improvements project involving (among many other components) the renovation of a building on the College of San Mateo campus, where the San Mateo Community College District and its Board of Trustees ("the District") had previously adopted a Master Plan for that and two other campuses. The District subsequently decided to demolish the building instead of renovating it, and prepared a revised CEQA addendum to the IS/MND. The lower court agreed with opponents that such demolition constituted a new project, and the District sought review of the question "[i]f a lead agency approves modifications to a previously reviewed and approved project through an addendum, may a court disregard the substantial evidence underlying the agency's decision to treat the proposed action as a change to a project rather than a new project, and go on to decide as a matter of law that the agency in fact approved a 'new' project[75] rather than a modification to a previously approved project, even though this 'new project' test is nowhere described in CEQA or the Guidelines?" The Court's determination of the appropriate standard of review and judicial deference to agency decisions in this "new project vs. modified project" context could have wide-ranging implications and impacts for subsequent review of changed or modified projects in areas subject to approved specific and master plans that have undergone previous CEQA review.

Sierra Club v. County of Fresno.[76]

On October 1, 2014, the Supreme Court granted the petition for review in *Sierra Club v. County of Fresno* regarding the "standard and scope of judicial review under [CEQA]." Environmental and other groups alleged CEQA violations with respect to the EIR of a proposed master-planned senior residential development on 942 acres of unirrigated grazing land near the San Joaquin river. The court of appeal agreed that the EIR was inconsistent with county land use and traffic policies, and provided inadequate information regarding wastewater disposal, air quality impacts, and mitigation measures. The Supreme Court is expected to provide guidance on, among other things, the judicial standard of review to be applied to commonly-asserted claims of informational omissions or deficiencies in EIRs.

Friends of Eel River v. North Coast Railroad Authority.[77]

On December 10, 2014, the California Supreme Court granted review in *Friends of Eel River v. North Coast Railroad Authority*, in which the court of appeal held that CEQA does not apply to railroad operations because it is preempted by the Interstate Commerce Commission Termination Act and the jurisdiction of the federal Surface Transportation Board. California courts of appeal currently appear to be split as to whether federal laws preempt CEQA with respect to railway projects, with the court in *Town of Atherton v. California High-Speed Rail Authority*[78] finding that CEQA applied to the California high speed rail project under the "market participation doctrine" exception to federal preemption. The Surface Transportation Board has also weighed in, issuing a declaratory order indicating that federal preemption applies to the high speed rail project and that it is therefore not subject to injunctive relief under CEQA.[79] A contrary decision by the Supreme Court could set the stage for a state-federal preemption showdown as to railroad projects generally, but the ultimate result of any such conflict may not affect the high speed rail project, which (as noted above) a prior appellate decision (*Town of Atherton*) held was subject to CEQA under the market participant *exception* to federal preemption.[80]

Banning Ranch Conservancy v. City of Newport Beach.[81]

On August 19, 2015, the California Supreme Court granted review in

Banning Ranch Conservancy v. City of Newport Beach. The Court of Appeal's decision is upheld the City of Newport Beach's ("City") EIR for the Banning Ranch Project and determined that the City's approval complied with the general plan. At issue is whether the City's 2012 approval of the project and 9,000 page EIR violated CEQA because it failed to designate "environmentally sensitive habitat area" or "ESHA" in the EIR. Rather, the City insisted that the designation of ESHAs was a legal determination that needed to be made by the Coastal Commission under the Coastal Act and the court of appeal agreed. In addition, the Supreme Court will review whether the City complied with a general plan policy that requires the City to "work with" various agencies to identify various habitats (including wetlands) to preserve, restore, and develop the Banning Ranch property. The petitioner contended that because the City did not reach consensus with the Coastal Commission the City had violated the general plan policy and thus the Planning and Zoning Law. The case has obvious implications for local land use planning authority and autonomy within the Coastal Act framework.

Conclusion

The legislative, regulatory, and case law developments highlighted and discussed above merely "scratch the surface" of recent and forthcoming significant developments in the realm of CEQA. Questions of federal preemption, the applicability of executive orders in the CEQA context, what constitutes a "new project," agency cooperation, deference to agency discretion, and "CEQA-in-reverse," among others, will all be addressed by the California Supreme Court in the relatively near future, in a wide range of cases that involve important and high profile issues such as greenhouse gas emission reductions and high-speed rail. Whatever the outcome of these decisions, when coupled with the actual and proposed legislative and regulatory changes, it is safe to venture that California's signature environmental law will likely be updated and refined fairly extensively on numerous fronts in the near future.

ENDNOTES:

[1]Pub. Resources Code, §§ 27000 et seq. See generally *Miller & Starr*

California Real Estate 4th, Ch. 26, CEQA.

[2]For a more up-to-date and in depth analysis and treatment of CEQA legislative, case law, and regulatory developments, the reader should consult ceqadevelopments.com.

[3]Sen. Bill No. 88 (2015-2016 Reg. Sess.), codified at Pub. Res. Code §§ 21080.08, 21080.45, 21080.46.

[4]Assem. Bill No. 115 (as introduced Jan. 1, 2015, ordered to inactive file by Senator Mitchell, Sept. 11, 2015, (2015-2016 Reg. Sess.)). As a bill on the inactive file, only one day's public notice is required to put AB 115 back on the agenda.

[5]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015; http://opr.ca.gov/s_ceqaguidelines.php. Note that this draft does not reflect changes currently under consideration pursuant to Senate Bill 743 (January 1, 2013 (2013 Stats., ch. 386 (SB 743)) (transportation impacts).

[6]The CEQA Guidelines are found at 14 Cal. Code Regs. §§ 15000 et seq.

[7]See *Oakland Heritage Alliance v. City of Oakland*, 195 Cal. App. 4th 884, 904, 124 Cal. Rptr. 3d 755 (1st Dist. 2011).

[8]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 12-19.

[9]See *Protect The Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1108-1109, 11 Cal. Rptr. 3d 104 (3d Dist. 2004), as modified, (Apr. 9, 2004).

[10]See *Protect The Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, at 1109, 11 Cal. Rptr. 3d 104 (3d Dist. 2004), as modified, (Apr. 9, 2004).

[11]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 13-19.

[12]See CEQA Guidelines § 15168(c)(2).

[13]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 20-21.

[14]See *Citizens For Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency*, 134 Cal. App. 4th 598, 610, 36 Cal. Rptr. 3d 249 (4th Dist. 2005).

[15]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, p. 21.

[16]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, p. 21.

[17]CEQA Guidelines, § 15168.

[18]Pub. Resources Code, § 21083.3.

[19]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 25-28.

[20]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 29-33.

[21]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 29-33.

[22]See, e.g., *Communities For A Better Environment v. South Coast Air Quality Management Dist.*, 48 Cal. 4th 310, 327-328, 106 Cal. Rptr. 3d 502, 226 P.3d 985 (2010) ("Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods") (quoting *Save our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 125, 104 Cal. Rptr. 2d 326 (6th Dist. 2001)).

[23]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 35-37.

[24]See Gov. Code, § 65560.

[25]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, p. 40.

[26]See *Bowman v. City of Berkeley*, 122 Cal. App. 4th 572, 18 Cal. Rptr. 3d 814 (1st Dist. 2004).

[27]See AB 52 (2014 Stats., Ch. 532 (AB 52)).

[28]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, p. 44. Per OPR: "these changes in Appendix G are placeholders while OPR continues outreach on its proposal implementing SB 743."

[29]*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority*, 57 Cal. 4th 439, 463, 160 Cal. Rptr. 3d 1, 304 P.3d 499 (2013) ("[i]nsubstantial or merely technical omissions are not grounds for relief").

[30]See Pub. Resources Code, § 21168.9 (court may allow certain project approvals or activities to proceed as long as continued implementation of the project would not prevent the agency from

fully complying with CEQA).

[31]*POET, LLC v. California Air Resources Board*, 218 Cal. App. 4th 681, 160 Cal. Rptr. 3d 69 (5th Dist. 2013).

[32]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 73-74.

[33]See Pub. Resource Code, § 21100, subd. (b)(3).

[34]See *California Clean Energy Committee v. City of Woodland*, 225 Cal. App. 4th 173, 209, 170 Cal. Rptr. 3d 488 (3d Dist. 2014).

[35]See *Tracy First v. City of Tracy*, 177 Cal. App. 4th 912, 933, 99 Cal. Rptr. 3d 621 (3d Dist. 2009).

[36]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 77-78.

[37]40 Cal. 4th 412 (2007).

[38]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 81-88.

[39]See *Communities For A Better Environment v. South Coast Air Quality Management Dist.*, 48 Cal. 4th 310, 106 Cal. Rptr. 3d 502, 226 P.3d 985 (2010).

[40]See *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority*, 57 Cal. 4th 439, 160 Cal. Rptr. 3d 1, 304 P.3d 499 (2013).

[41]See *Communities for a Better Environment v. South Coast Air Quality Management Dist.*, 48 Cal. 4th 310 at 322, 106 Cal. Rptr. 3d 502, 226 P.3d 985 (2010) (quoting *Environmental Planning & Information Council v. County of El Dorado*, 131 Cal. App. 3d 350, 358, 182 Cal. Rptr. 317 (3d Dist. 1982)).

[42]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 96-98.

[43]See *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 148 Cal. Rptr. 3d 310 (4th Dist. 2012); *Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal. App. 4th 899, 146 Cal. Rptr. 3d 12 (4th Dist. 2012); *City of Maywood v. Los Angeles Unified School Dist.*, 208 Cal. App. 4th 362, 145 Cal. Rptr. 3d 567 (2d Dist. 2012), as modified, (Aug. 14, 2012).

[44]See *Oakland Heritage Alliance v. City of Oakland*, 195 Cal. App. 4th 884, 124 Cal. Rptr. 3d 755 (1st Dist. 2011).

[45]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015,

pp. 102-107.

[46]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 108-145.

[47]See *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 139, 84 Cal. Rptr. 3d 614, 194 P.3d 344 (2008), as modified, (Dec. 10, 2008).

[48]See *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, at 139, 84 Cal. Rptr. 3d 614, 194 P.3d 344 (2008), as modified, (Dec. 10, 2008).

[49]*Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, at 138, 84 Cal. Rptr. 3d 614, 194 P.3d 344 (2008), as modified, (Dec. 10, 2008); see also *Citizens for Responsible Government v. City of Albany*, 56 Cal. App. 4th 1199, 66 Cal. Rptr. 2d 102 (1st Dist. 1997).

[50]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 109-111.

[51]See *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 84 Cal. Rptr. 3d 614, 194 P.3d 344 (2008), as modified, (Dec. 10, 2008).

[52]See Pub. Resources Code, § 21092.4 ("Consultation shall be . . . for the purpose of the lead agency obtaining information concerning the project's effect . . . within the jurisdiction of a transportation planning agency . . . ."); CEQA Guidelines, § 15003(f) ("CEQA was intended . . . to afford the fullest possible protection to the environment . . . .").

[53]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 120-124.

[54]CEQA Guidelines, § 15108.

[55]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, p. 135.

[56]See *CalBeach Advocates v. City of Solana Beach*, 103 Cal. App. 4th 529, 537, 127 Cal. Rptr. 2d 1 (4th Dist. 2002) (emergency repairs need not be "unexpected" and "in order to design a project to prevent an emergency, the designer must anticipate the emergency").

[57]Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 140-141.

[58]See, e.g., *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. App. 3d 259, 267, 235 Cal. Rptr. 788 (2d Dist. 1987) ("[T]he touchstone is whether the approval process involved allows the government to shape the project in any way that could respond to

any of the concerns . . . in an environmental impact report"); see also Governor's Office of Planning and Research, Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft, August 11, 2015, pp. 142-143.

[59]California Department of Fish and Wildlife, Notice of Proposed Rulemaking: Nest Regulations (Section 681, Title 14, CCR) § 681(a) (August 14, 2015).

[60]California Department of Fish and Wildlife, Notice of Proposed Rulemaking: Nest Regulations (Section 681, Title 14, CCR) § 681(d) (August 14, 2015).

[61]Fish & Game Code, § 3503.

[62]Fish & Game Code, § 3503.5.

[63]2015 Cal. Reg. Notice Register No. 33-Z, p. 1356.

[64]See California Department of Fish and Wildlife, Notice of Proposed Rulemaking: Nest Regulations (Section 681, Title 14, CCR) § 681 (August 14, 2015).

[65]California Department of Fish and Wildlife, Notice of Proposed Rulemaking: Nest Regulations (Section 681, Title 14, CCR) § 681(b) (August 14, 2015).

[66]14 Cal. Code. Regs. § 15364.

[67]See California Department of Fish and Wildlife, Notice of Proposed Rulemaking: Nest Regulations (Section 681, Title 14, CCR) § 681(b)(4) (August 14, 2015).

[68]California Department of Fish and Wildlife, Notice of Proposed Rulemaking: Nest Regulations (Section 681, Title 14, CCR) § 681(c) (August 14, 2015).

[69]California Department of Fish and Wildlife, Notice of Proposed Rulemaking: Nest Regulations (Section 681, Title 14, CCR) § 681(d) (August 14, 2015).

[70]*Center for Biological Diversity v. Department of Fish and Wildlife*, 169 Cal. Rptr. 3d 413 (Cal. App. 2d Dist. 2014), review granted and opinion superseded, 174 Cal. Rptr. 3d 80, 328 P.3d 67 (Cal. 2014) (Cal. Supreme Court No. 5217763).

[71]*California Building Industry Association v. Bay Area Air Quality Manangement District*, 161 Cal. Rptr. 3d 128 (Cal. App. 1st Dist. 2013), review granted and opinion superseded, 164 Cal. Rptr. 3d 552, 312 P.3d 1070 (Cal. 2013) (Cal. Supreme Court No. 5213478).

[72]*Cleveland National Forest Foundation v. San Diego Association of Governments*, 180 Cal. Rptr. 3d 548 (Cal. App. 4th Dist. 2014), and review granted and opinion superseded, 184 Cal. Rptr. 3d 725, 343 P.3d 903 (Cal. 2015) (Cal. Supreme Court No. 5223603).

[73]*Cleveland National Forest Foundation v. San Diego Association of*

Governments, Supreme Court Case No. 5223603, San Diego Association of Governments Petition for Review at p. 13.

[74]*Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.*, S214061. (A135892; nonpublished opinion) (Cal. Supreme Court No. 5214061).

[75]See *Save Our Neighborhood v. Lishman*, 140 Cal. App. 4th 1288, 45 Cal. Rptr. 3d 306 (3d Dist. 2006).

[76]*Sierra Club v. County of Fresno*, 172 Cal. Rptr. 3d 271 (Cal. App. 5th Dist. 2014), review granted and opinion superseded, 178 Cal. Rptr. 3d 320, 334 P.3d 686 (Cal. 2014) (Cal. Supreme Court No. 5219783).

[77]*Friends of Eel River v. North Coast Railroad Authority*, 178 Cal. Rptr. 3d 752 (Cal. App. 1st Dist. 2014); Marin County Superior Court; CV1103591, CV1103605.).

[78]*Town of Atherton v. California High-Speed Rail Authority*, 228 Cal. App. 4th 314, 175 Cal. Rptr. 3d 145 (3d Dist. 2014).

[79]Surface Transportation Board, California High-Speed Rail Authority—Petition for Declaratory Order (December 12, 2014, Docket No. FD 35861).

[80]*Town of Atherton v. California High-Speed Rail Authority*, 228 Cal. App. 4th 314, 175 Cal. Rptr. 3d 145 (3d Dist. 2014).

[81]*Banning Ranch Conservancy v. City of Newport Beach*, 187 Cal. Rptr. 3d 495 (Cal. App. 4th Dist. 2015), review granted and opinion superseded, (Aug. 19, 2015) and review granted and opinion superseded, 191 Cal. Rptr. 3d 498, 354 P.3d 302 (Cal. 2015); Orange County Superior Court; 30-2012-00593557).

