

## California Supreme Court Poised To Decide Key CEQA Questions: The Court's Lineup For 2015

The California Supreme Court's involvement in CEQA cases has been relatively limited since the statute's enactment in 1970, with the court taking review of at most one or two appellate court decisions a year. The last two years have, however, seen a dramatic shift in this trend, with the result that the court now has nine pending cases on its docket. The pending cases span a broad range of issues, but they all involve fundamental questions: the breadth of CEQA's reach, the scope of agency discretion, the vitality of categorical exemptions, limits on mitigation obligations, and procedural limitations on CEQA litigation.

- The court's review in one case will include a key issue regarding CEQA's scope -- does required environmental review end with effects of the project on the environment, or must the environment's impact on the project also be examined? The court's decision should squarely resolve this issue.
- A pair of cases before the court involve categorical exemptions and the exception for significant impacts resulting from "unusual circumstances." Courts of appeal have issued conflicting decisions on this topic, and the high court's decision on this question could have a major effect on the efficacy of these commonly used exemptions.
- Limits on judicial review of an agency's CEQA decisions is the subject of two cases before the court. In both cases, the courts of appeal took an expansive view of the powers of the court to reevaluate agency decisions. The high court may conclude that greater deference is owed lead agencies in light of their knowledge and expertise in the subject matter.
- In two cases, the court will address potential limitations on the mitigation required for environmental impacts, including whether fiscal constraints can be used to limit mitigation measures and whether impacts on public services such as emergency and fire services must be mitigated.
- The court will decide the important question of whether judicial review is limited to CEQA claims raised prior to the close of the period for public comment on a draft EIR, or whether issues raised for the first time during later hearings may also be considered.
- Finally, the court will tackle another subject of conflicting appellate decisions -- the effect of federal preemption on application of CEQA to publicly operated railroads. Resolution of the case will likely have significant implications for California's High Speed Rail project.

### 1. IS THE POSSIBILITY OF A SIGNIFICANT EFFECT ALONE SUFFICIENT TO PRECLUDE USE OF A CATEGORICAL EXEMPTION, OR MUST THE IMPACT RESULT FROM UNUSUAL CIRCUMSTANCES?

*Berkeley Hillside Preservation v. City of Berkeley*

Supreme Court No. S201116 (Review granted May 23, 2012)

In a highly controversial decision, the court of appeal invalidated building permits for a single-family home, ruling that the project did not qualify under CEQA's categorical exemptions for construction of a single-family residence or for infill development, and that an EIR was required.

The City of Berkeley determined that none of the exceptions to the categorical exemptions applied to construction of the proposed home, including the exception for significant effects on the environment "due to unusual circumstances." The trial court agreed, finding that while there was evidence significant impacts might occur, it had not been shown that the impacts were due to unusual circumstances.

The court of appeal rejected this construction of the "unusual circumstances" exception, ruling that the applicability of the exception does not depend on whether the potential impact arises from unusual circumstances. Rather, the court held, the possibility a project will have a significant effect on the environment "is itself an unusual circumstance" that bars resort to a categorical exemption. The court also held that the "fair argument" test applies when use of a categorical exemption is contested which means that an exemption determination cannot survive a legal challenge if there is any substantial evidence before the agency that a significant effect might occur.

Countless activities are routinely found exempt under one or more of the categorical exemptions every year. Because the court of appeal's ruling could severely limit the circumstances under which categorical exemptions may be used, the case is being closely watched by public agencies.

This case was argued on December 2, 2014, and a decision is expected in January 2015.

## 2. DOES CEQA REQUIRE ANALYSIS OF EFFECTS OF THE ENVIRONMENT ON THE PROJECT, OR IS CEQA LIMITED TO EFFECTS OF THE PROJECT ON THE ENVIRONMENT?

*California Building Industry Ass'n v. Bay Area Air Quality Management District*

Supreme Court No. S213478 (Review granted November 26, 2013)

The California Supreme Court has agreed to address a key question that has vexed CEQA practitioners for decades: Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

In *CBIA v. BAAQMD*, the court of appeal rejected a CEQA challenge to a local air district's published significance thresholds for assessing air pollution impacts. The district first adopted the thresholds in 1999 to provide guidance to Bay Area public agencies in their analysis of air pollution impacts. In 2009, the district proposed changes to the thresholds, in its revised "CEQA Air Quality Guidelines," to address new information about the effects of small particulates, toxic air contaminants, and greenhouse gases. The changes prompted concerns among housing advocacy groups and public agencies that application of the proposed thresholds would hamper development of housing in urban infill locations.

The CBIA's suit alleged the air district violated CEQA by failing to review the potential environmental impacts of the revised thresholds before adopting them. The court of appeal disagreed, finding that adoption of the thresholds was not subject to CEQA.

As an alternative basis for its decision, the court of appeal held that adoption of the thresholds was not a "project" subject to CEQA because environmental changes that might result from their adoption were too speculative to be considered "reasonably foreseeable" under CEQA.

The court of appeal declined to address the claim that the thresholds were contrary to established case law by treating impacts of existing air pollution on a proposed project's occupants as an impact on the environment. The appellate court found it unnecessary to reach this issue, reasoning there were circumstances in which the thresholds could lawfully be applied, which defeated CBIA's facial challenge.

The Supreme Court has identified this last question as the key issue for its review.

3. ARE CEQA CLAIMS RAISED IN COURT LIMITED TO THOSE RAISED PRIOR TO CLOSE OF THE PUBLIC COMMENT PERIOD ON THE DRAFT EIR, OR MAY CLAIMS RAISED DURING SUBSEQUENT HEARINGS ON THE EIR ALSO BE CONSIDERED?

*Center for Biological Diversity v. Department of Fish & Wildlife*

Supreme Court No. S217763 (Review granted July 9, 2014)

The California Supreme Court has granted review in this case involving a challenge to an EIR that assessed impacts of a conservation plan and other environmental plans and permits for the Newhall Ranch Specific Plan project, a large, mixed-use development.

The EIR for the project used a threshold of significance for greenhouse gas emissions based on whether the project would impede the state's objective of attaining a 29 percent reduction in emissions when compared to the "business as usual" scenario under which no further efforts to reduce emissions would be made. Consistent with other appellate courts that have considered the issue, the court of appeal sustained this approach. The court of appeal also rejected plaintiffs' claim that mitigation measures intended to protect the endangered Stickleback would themselves constitute a "take" of the species under the California Endangered Species Act

The supreme court granted review on the two above issues, as well as on a significant procedural question -- whether plaintiffs failed to exhaust administrative remedies as to challenges based on impacts to Native American cultural resources because they were not raised during the public comment period on the Draft EIR. The court of appeal held that the claims were barred under Public Resources Code section 21117(a), which requires CEQA claims to have been presented "orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project . . . ." In their petition for review, plaintiffs argued they had complied with section 21117(a) by raising their arguments in comments on the Final EIR and prior to a noticed public hearing held by the agency on the Final EIR. The high court granted review on this ground, framing is issue as whether CEQA "restrict[s] judicial review to the claims presented to an agency before the close of the public comment period on a draft environmental impact report?" (emphasis added). The court's full description of the issues for review appears [here](#).

4. MAY A STATE AGENCY FIND A MITIGATION MEASURE ECONOMICALLY INFEASIBLE IF THE LEGISLATURE DECLINES TO APPROPRIATE FUNDING FOR THE MEASURE? *City of San Diego v. Board of Trustees of California State University*

Supreme Court No. S199557 (Review granted April 18, 2012)

In the latest in a string of CEQA cases the California Supreme Court has taken involving the California State University system, the court will consider whether state agencies may make mitigation measures in an EIR contingent upon the availability of state funding.

The court of appeal in *City of San Diego* reviewed the EIR for a plan to expand the California State University San Diego campus. To mitigate off-site traffic impacts, the EIR recommended measures consisting primarily of "fair share" payments by CSU toward the costs of building various traffic improvements. However, the EIR concluded that any fair share contributions by CSU would be conditioned upon obtaining funds from the California Legislature for that purpose. The EIR explained that "if the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable."

The court of appeal ruled, however, that in deciding whether funds are available for mitigation, state agencies such as CSU are not limited to legislative appropriations earmarked for that purpose. CSU erred, according to the court, because it did not consider other sources of funds besides specific legislative appropriations that might be available for mitigation.

The issue under review, as framed by the California Supreme Court, is: "Does a state agency that may have an obligation to make 'fair-share' payments for the mitigation of off-site impacts of a proposed project satisfy its duty to mitigate under CEQA by stating that it has sought funding from the Legislature to pay for such mitigation and that, if the requested funds are not appropriated, it may proceed with the project on the ground that mitigation is infeasible?"

#### 5. IS MITIGATION UNDER CEQA REQUIRED FOR IMPACTS ON PUBLIC SERVICES? *City of Hayward v. Board of Trustees of California State University*

Supreme Court No. S203939 (Review granted October 17, 2012)

The California Supreme Court has granted review and deferred briefing in this case pending the Court's resolution of the *City of San Diego v. California State University* case.

In *City of Hayward*, the city sued to challenge the EIR for a California State University Hayward campus master plan. The court of appeal's ruling addressed two important, recurring CEQA questions: (1) whether CEQA requires funding of mitigation for a project's effects on public services; and (2) whether an adaptive mitigation program for traffic and parking impacts improperly defers decisions about mitigation. The court of appeal answered no to both questions.

The court of appeal rejected the city's argument that an increased demand for emergency services, and the lengthened response times that would result, was an environmental impact requiring mitigation. The court noted that providing fire and emergency medical services is the city's legal responsibility. While campus expansion will increase the demand for those services, this is an economic effect, the court said, not an environmental effect that must be mitigated under CEQA. As the court put it, there is no legal support for the claim "that CEQA shifts financial responsibility for providing fire and emergency response services to the sponsor of a development project."

The second question before the court of appeal involved the legal adequacy of a transportation demand management plan for mitigating traffic and parking impacts, which included a menu of measures to be put in place in stages, evaluated and then adjusted as conditions evolved. Ruling that the plan did not improperly defer decisions about mitigation, the court of appeal identified specific components of the plan -- including performance goals, implementation plans and monitoring of the effectiveness of mitigation measures -- that the court found made it sufficiently concrete to pass legal muster.

It is not yet clear how the decision in the *City of San Diego* case will affect the *City of Hayward* case, if at all.

#### 6. DOES THE "UNUSUAL CIRCUMSTANCES" EXCEPTION TO A CATEGORICAL EXEMPTION APPLY TO IMPACTS FROM ACTIVITIES NORMALLY SUBJECT TO THE EXEMPTION?

*Citizens for Environmental Responsibility v. State of California ex rel. – 14th Dist. Agricultural Association*

Supreme Court No. S203939 (Review granted July 9, 2014)

In a case raising issues similar to those in Berkeley Hillside Preservation, the court of appeal upheld the use of a CEQA exemption for a proposed rodeo at a county fairground, rejecting the claim that because the rodeo activities would pollute a nearby creek, the exemption was inapplicable due to significant impacts from unusual circumstances.

The court of appeal concluded that the plaintiff had failed to establish unusual circumstances triggering the exception. In contrast to the appellate decision in Berkeley Hillside Preservation, the court reasoned that the unusual circumstances inquiry is exemption- and facility-specific, i.e., the court must determine whether the circumstances of the project differ from those normally justifying use of the categorical exemption. The court found nothing to suggest anything unusual compared to past activities at the fairground, and hence upheld use of the categorical exemption.

The California Supreme Court granted review of the court of appeal decision pending consideration and disposition of Berkeley Hillside Preservation, in which the court will consider similar questions relating to interpretation and application of the unusual circumstances exception to the categorical exemptions.

## 7. WHAT STANDARD OF REVIEW APPLIES TO CHANGES IN A PROJECT THAT HAS PREVIOUSLY UNDERGONE CEQA REVIEW?

*Friends of the College of San Mateo Gardens v San Mateo Community College District*

California Supreme Court No. S214061 (Review granted January 15, 2014)

The California Supreme Court granted review of the unpublished decision in this case, which addresses the standard for determining whether changes in a previously approved project require additional environmental review under CEQA.

The San Mateo Community College District approved a plan to renovate ten campus buildings and demolish sixteen others, using a mitigated negative declaration to address the impacts of its plans. The District later revised its plans to include demolition of one building that had been set for renovation and renovation of two buildings previously slated for demolition. The District evaluated the possible environmental consequences of the change in plans and concluded that the revisions were not extensive enough to require preparation of a subsequent EIR, and instead adopted an addendum to the negative declaration.

Consistent with Public Resources Code section 21166 (which establishes a presumption against subsequent environmental review for the same project), courts generally apply the deferential substantial evidence standard to an agency's decision not to prepare a subsequent EIR when changes are proposed to a previously-approved project. The CEQA Guidelines make it clear that the same presumption applies in the case of a negative declaration. The inquiry in both instances is limited to whether the changes would require major revisions of the previous environmental document "due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." In this case, the District concluded that more severe environmental impacts would not occur due to the changes in plans.

The court of appeal, however, framed the issue as whether the change in plans constituted a "new" project (rather than simply a revision to an existing project under Section 21166), and held that this was a question of law to be reviewed de novo, without any deference to the lead agency's review of the factual circumstances of the project. Neither CEQA nor the Guidelines contain any standards for determining whether revisions to an existing project may constitute a "new" project, and the appellate court's opinion furnishes little guidance on the subject.

The California Supreme Court's decision in this case is likely to resolve the disagreement among the appellate courts regarding the degree of deference to be accorded an agency's determinations regarding the potential environmental consequences of changes in a project.

#### 8. WHAT STANDARD OF REVIEW APPLIES TO THE QUESTION WHETHER AN EIR INCLUDES SUFFICIENT INFORMATION TO COMPLY WITH CEQA?

*Sierra Club v. County of Fresno*

Supreme Court No. S219783 (Review granted October 1, 2014)

In this case, involving a challenge to the EIR for the Friant Ranch project, the Fifth District Court of Appeal concluded, as a matter of law, that the EIR failed to include sufficient information regarding air quality impacts to satisfy CEQA.

The EIR's air quality analysis included a qualitative description of health effects associated with the project's air pollutants, and relied upon quantitative thresholds established by the local Air Quality Management District. The appellate court held, however, that the EIR violated CEQA because it did not include a health impact analysis correlating the project's air emissions with the specific health impacts that will result.

Consistent with other decisions in the Fifth District, the court ruled that the sufficiency of the EIR's air quality analysis was a "question of law subject to independent review by the Courts." Based on this independent review standard, the court gave no deference to the county's decisions regarding the contents or methodology used in the EIR.

The court of appeal's approach conflicts with decisions in other appellate districts, which apply the more deferential "substantial evidence" standard to such claims on the ground that decisions about the amount, type, and scope of information to include in an EIR are factual decisions best left to the discretion of the agency. The California Supreme Court's decision in this case is likely to resolve the conflict.

#### 9. ARE PUBLICLY OWNED RAILROAD SYSTEMS EXEMPT FROM CEQA?

*Friends of Eel River v. North Coast Railroad Authority*

Supreme Court No. S222472 (Review granted December 10, 2014)

The California Supreme Court recently granted review of the appellate court's determination that the federal Interstate Commerce Commission Termination Act preempted state laws governing railroads, including CEQA.

The North Coast Railroad Authority, a public agency, entered into a contract with the Northwestern Pacific Railroad Company, allowing it to conduct freight rail service on tracks controlled by NCRA. Environmental groups challenged the Authority's EIR and approval of the freight operations. The First District Court of Appeal found that the federal Interstate Commerce Commission Termination Act preempted the Authority's CEQA review of rail operations, which fell within the exclusive jurisdiction of the federal Surface Transportation Board. The court also held that the Authority's preparation of an EIR for the project did not estop it from contending that CEQA review was preempted.

The decision conflicts with the Third District's ruling in *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314 (2014) that an exception to federal preemption – the market participation doctrine – applied to block any preemption of CEQA in the context of California's High Speed Rail project because the state was acting in its capacity as an owner rather than a regulator. The appellate court in *Friends of*

the Eel River disagreed, ruling that the market participation doctrine did not apply in the context of a CEQA enforcement action because the preparation of an EIR is regulatory, not proprietary, in nature.

In a recent determination that may have a bearing on the case, the federal Surface Transportation Board issued a decision ([Docket No. FD35861, December 12, 2014](#)), disagreeing with Town of Atherton and concluding that the Interstate Commerce Commission Termination Act preempted application of CEQA to construction of the California High Speed Rail line between Fresno and Bakersfield. The Board found that 49 U.S.C. § 10501(b) prevents states and localities from intruding into matters that are "directly regulated by the Board (*e.g.*, rail carrier rates, services, construction, and abandonment)" or from "imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations." The Board noted that the California Supreme Court had accepted review in the Friends of the Eel River case, and stated: "Lastly, this decision will inform interested parties and the California Supreme Court of our views on federal preemption of CEQA and the market participant doctrine as they relate to this matter involving railroad transportation within the Board's jurisdiction under §10501(b). The Board employs the rationale that 'Section 10501(b) [ ] is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.'" *Id.*

The California Supreme Court has framed the issues for review as follows: (1) Does the Interstate Commerce Commission Termination Act preempt application of CEQA to a state agency's proprietary acts regarding a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine?; and (2) Does the Act preempt a state agency's voluntary decision to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property? In effect, the court will decide which of the two appellate courts was correct.

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