

## CEQA YEAR IN REVIEW 2020

### A Summary of Published Appellate Opinions Involving the California Environmental Quality Act

Despite relatively few published opinions this year, there were significant appellate court rulings on a range of topics, including discretionary or ministerial, the adequacy of mitigation, age



of limitations.

The one California Supreme Court

CEQA decision addressed the distinction between discretionary projects and exempt ministerial projects. In *Protecting Our Water and Environmental Resources v. County of Stanislaus*, the court held that the agency's issuance of well permits was discretionary in certain circumstances because the permit approval process required the agency to exercise independent judgment and allowed it to modify a project in response to environmental concerns. A key theme in several cases, involving both EIRs and negative declarations, was courts' critical look at the adequacy of mitigation measures. In three cases, the court held that agencies had improperly deferred formulation of mitigation. In one case, the court held that a greenhouse gas mitigation measure allowing for carbon offsets was inadequate because it lacked assurances that the offsets would be effective mitigation and it did not specify objective standards for implementation. In another case, the court held that a mitigation measure requiring oil and gas drillers to develop and implement a plan to reduce their water use improperly deferred formulation and implementation of mitigation and lacked enforceability. The court also ruled that agricultural conservation easements are not adequate mitigation for the loss of farmland because they do not offset that loss or create new farmland. In a third case, the court held inadequate a mitigation measure that required construction monitoring and development of a data recovery excavation program if avoidance of archaeological sites was not possible; the agency had not analyzed whether archaeological sites could be avoided and the mitigation measure did not specify performance criteria for evaluating the feasibility of avoidance. In a significant decision on administrative records, a court held that a lead agency must save all emails about a project, notwithstanding any contrary records retention policy. The court further held that a lead agency could be compelled to produce potential administrative record documents through discovery. One court applied the mootness doctrine to dismiss a case where construction of the project was completed during litigation. In that case, the developer did not begin construction in violation of any court orders or in bad faith, and the petitioners waited to seek an injunction until construction was nearly completed. In a decision that conflicts with holdings

from other appellate districts, the Fifth District held that partial decertification of an EIR is never permissible when the EIR has been adjudged inadequate; rather, decertification of the entire EIR is the only remedy. The court also held that even under the rule followed by other courts, partial decertification was not appropriate because the EIR's defects could not be severed from the statement of overriding considerations that supported the agency's approval of the project. The following summaries are intended to identify the key issues in the cases decided in 2020. Each summary is linked to a more detailed post on this site describing the court's opinion.

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## EXEMPTIONS FROM CEQA

### **Ministerial Determinations: County Improperly Classified All Well Permits As Ministerial**

[\*Protecting Our Water and Environmental Resources v. County of Stanislaus\*](#) 10 Cal.5th 479 (2020) Projects that require only a ministerial approval are exempt from CEQA. A ministerial decision involves the application of fixed, objective standards in a statute, ordinance or other regulation and requires the exercise of little to no personal judgment by the decisionmaker regarding the wisdom or manner of carrying out the project. When an approval entails both ministerial and discretionary decision-making, the project must be treated as discretionary and is not exempt. In *Protecting Our Water*, the California Supreme Court determined that while many of Stanislaus County's well permitting decisions were ministerial, its permitting ordinance required discretionary decision-making in some situations. For example, a standard relating to the permissible distance between a well and a potential contamination source allowed the county to exercise discretion when deciding to approve or disapprove the permit, depending on the specific circumstances. Because the process required the exercise of independent judgment for at least some projects, the court determined that the county's blanket classification of all well permits as ministerial violated CEQA.

## NEGATIVE DECLARATIONS

### **Mitigated Negative Declarations: Deferred and Ineffective Measures Rejected**

[\*Save the Agoura Cornell Knoll v. City of Agoura Hills\*](#) 46 Cal.App.5th 665 (2020) The court of appeal determined that several mitigation measures in a negative declaration for a mixed-use development were ineffective or improperly deferred mitigation. *Impacts on cultural resources.* Archaeological and tribal cultural resources were known to exist on the project site. The mitigation measures called for monitoring of the site during ground-disturbing activities coupled with excavation and data recovery if these resources could not be avoided. Absent, however, were performance standards or guidelines that would ensure the effectiveness of these actions. The MND also failed to define the boundaries of the archaeological site or consider whether resources could actually be avoided and did not contain criteria for assessing the feasibility of avoidance as an alternative to excavation. *Impacts on sensitive plant species.* Special-status plant species on the site would be significantly affected by grading, landscaping, and fuel modification. The court found the mitigation plan, which included restoration, preservation and enhancement measures, failed to define performance criteria that would ensure effective mitigation, relied on outdated botanical surveys, and did not identify alternatives that would be implemented if proposed salvage and replanting efforts failed. *Impacts on native oak trees.* The court found the mitigation measures for loss of native oak trees inadequate because they did not take account of the risk that grading might reduce subsurface water flow to the retained and replacement oak trees on the site and did not include any measures for mitigating that risk. Expert evidence in the record also showed that efforts to recreate or restore oak woodlands had failed in the past, so the city erred in presuming, without supporting evidence, that in-lieu fee payments for off-site tree planting would provide feasible and effective mitigation.

## ENVIRONMENTAL IMPACT REPORTS

### Mitigation Measures: Standards For Use of Greenhouse Gas Offset Credits Found Inadequate

[\*Golden Door Properties v. County of San Diego\*](#) 50 Cal.App.5th 467 (2020) In the first published decision on the use of purchased offset credits to mitigate the impact of greenhouse gas emissions, the court held the measure was inadequate because it did not ensure that offset credits would represent emissions reductions that would be genuine, quantifiable, additional and verifiable. The *Golden Door* case arose from San Diego County's approval of a climate action plan. The key issue in the case was whether a greenhouse mitigation measure in the plan EIR (GHG-1) complied with CEQA. The county argued that GHG-1 provided for effective mitigation because it mirrored California's cap and trade program, which is designed to ensure that offset credits are real, additional, quantifiable, permanent, verifiable, and enforceable. The court disagreed, finding that while GHG-1 required that offset credits be purchased from CARB-approved offset project registries, it did not require application of CARB-approved protocols to ensure offset credits accurately and reliably represent actual emissions reductions. The court also concluded that offsets generated outside California might not be genuine, verifiable and enforceable. Further, the court found that GHG-1 did not incorporate the cap and trade program's requirements that offsets be *additional* to any GHG emission reduction that would otherwise be required by law. Finally, the court concluded that GHG-1 was deficient because it did not specify an objective performance standard, but rather left it to the planning director's unguided discretion to decide whether the offsets identified for a project would be sufficient to provide adequate mitigation of its GHG emissions.

### Impact Analysis and Mitigation Measures: Noise Analysis and Mitigation for Impacts of Oil and Gas Drilling Ordinance Held Inadequate

[\*King and Gardiner Farms v. County of Kern\*](#) 45 Cal.App.5th 814 (2020) The court held the EIR for an ordinance designed to streamline permitting for new oil and gas wells was inadequate on several grounds. *Significance threshold for noise impacts.* The county based its assessment of the significance of noise impacts on whether noise would exceed the 65 decibel threshold in the general plan. The court held the county failed to show that this significance threshold adequately accounted for the impact of the change in noise levels relative to existing noise levels. *Mitigation for water supply impacts.* The court concluded that mitigation measures to address water supply impacts — including requiring oil industry users to work together to develop and implement a plan to reduce water use — inappropriately deferred formulation of the measures or delayed their implementation. The statement of overriding considerations the county adopted did not cure the deficiency because the EIR did not adequately describe the feasibility of mitigation measures and explain the uncertainty in their effectiveness. *Mitigation for conversion of agricultural land.* The court held the county's determination that the effect of converting agricultural land would be adequately mitigated through acquisition of conservation easements over off-site agricultural land was unfounded: conservation easements do not create new agricultural land to replace the land that is converted and do not otherwise offset the impact. The court also held purchase of credits from a farmland mitigation bank or equivalent preservation program was not adequate given the absence of evidence that such programs were in existence and could provide legally adequate mitigation. Further information on this aspect of the court's opinion is available [here](#).

### Mitigation Measures: Can a Responsible Agency with Jurisdiction to Enforce Environmental Regulations Impose Mitigation Measures Outside of the CEQA Process?

[\*Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board\*](#), No. A157127, 2020 WL 7706795 (Cal. Ct. App. Dec. 29, 2020) CEQA does not constrain responsible agency's authority to impose mitigation requirements for environmental impacts subject to its jurisdiction, even though the impacts

and mitigation were not considered in the EIR certified by the lead agency, according to the court's opinion in this case. The District, as lead CEQA agency, prepared and certified an EIR for a flood control project it would operate and maintain. The Regional Water Quality Control Board then issued a federal Clean Water Act water quality certification for the project. The certification stated that water quality impacts relating to construction would be reduced to less-than-significant levels by mitigation measures in the EIR. It also stated that while the Board was approving construction of the project, it believed the EIR lacked the information needed to assess long term impacts that would result from the project's design, operation and maintenance. It would address the need for compensation for those impacts later on, when it considered issuance of waste discharge requirements for the project under the Porter Cologne Act. As the project was nearing completion, the Board issued a waste discharge order requiring new mitigation measures designed to compensate for the project's sedimentation effects. The order purported to comply with CEQA by making findings that the Board had considered the District's EIR and determined that, with the addition of the new mitigation requirements, the water quality impacts of the project would be less-than-significant. The District challenged this order on several grounds, including that the Board was barred from adopting new mitigation measures outside the CEQA process due to requirement that a responsible agency comply with CEQA by using the EIR or negative declaration prepared by the lead agency. Under this rule, a responsible agency may not prepare its own EIR regardless of whether it finds it desirable or even essential to do so. Instead, if a responsible agency believes the lead agency's EIR is not adequate for its use, and the lead agency refuses to change the EIR to address the deficiency, the responsible agency's sole option is to file suit to obtain a court order requiring the lead agency to revise the document to meet the responsible agency's needs. The District argued that the Board's failure to file such a suit meant it was barred both from objecting to the scope of the EIR's mitigation measures and from imposing new measures not in the EIR. The court disagreed, and ruled that the Board had independent authority to impose mitigation under the Porter-Cologne Act. The court relied on section 21174 of CEQA, which states that CEQA does not limit or restrict an agency's power to administer or enforce any other law within its authority. This, the court held, means that CEQA's requirements cannot prevent the Regional Board's from exercising its independent authority to require mitigation under the Porter-Cologne Act in order to protect water quality. This ruling rests on a shaky foundation. While it is true that CEQA does not limit a Regional Water Quality Control Board's authority under the Porter-Cologne Act, it is equally true that the Porter-Cologne Act does not override a Board's mandatory duty to comply with CEQA before approving a project. Here, nothing in CEQA prevented the Board from exercising its authority to impose the mitigation measures it ultimately determined were necessary, and nothing in the Porter-Cologne Act prevented the Board from complying with CEQA before doing so.

**Project Description: An EIR Need Not Assess Impacts That Might Occur If a Planned Component of the Project Is Not Constructed**

*Environmental Council of Sacramento v. County of Sacramento* 45 Cal.App.5th 1020 (2020) The court of appeal found the EIR for a master planned community adequately described and analyzed the project, which included a proposed university, and was not required to evaluate the possibility that the university would never be built. The petitioners claimed the EIR's impact analysis was "based upon a falsehood and speculation" given evidence that a university might never be constructed. The court concluded, however, that the evidence the petitioners relied on was not sufficient to show that the proposed university was "an illusory element of the project." An EIR is required to assume that all proposed phases of the project that are reasonably foreseeable consequences of the project will be built. Accordingly, the court concluded the EIR did not misrepresent the significance of the project's impacts to air quality, climate change, and traffic by assuming the plan for a university would be realized. The court also rejected the petitioners' claim that the county should have required construction to be phased to correspond with development of the university because the community's environmental impacts would be significantly reduced if the university were constructed. The county board of supervisors, in its findings and statement of overriding considerations, had found such a measure infeasible and the petitioners failed to show they were not supported by evidence in the record.



## SUPPLEMENTAL ENVIRONMENTAL REVIEW

### **Subsequent Approvals: CEQA Applies to Discretionary Decision to Increase Enrollment at a Public University**

*Save Berkeley's Neighborhoods v. Regents of the University of California* 51 Cal.App.5th 226 (2020) The court of appeal rejected the University of California's argument that it was not required to prepare a subsequent or supplemental EIR to address the impacts of a series of discretionary decisions it had made over time to increase enrollment on the Berkeley campus. The petitioner alleged these decisions increased campus enrollment well beyond the levels projected in the 2005 campus Long Range Development plan and the program EIR for the LRDP, and those changes required further CEQA review. Under CEQA Guidelines section 15162, a public agency must consider whether further CEQA review is required whenever it makes a discretionary determination to change an approved project in a way that could result in new or substantially more severe environmental impacts. Had the University's enrollment decisions been within the range evaluated in the LRDP EIR, the University could have relied on that EIR for CEQA compliance. The court concluded that if the University had changed the project described in the LRDP and LRDP EIR by increasing enrollment as alleged in the petition, it violated CEQA by failing to undertake subsequent CEQA review.

### **Project Implementation: An Agency May Take Steps to Carry Out an Approved Project Without Undertaking Further CEQA Review**

*Willow Glen Trestle Conservancy v. City of San Jose* 49 Cal.App.5th 127 (2020) Once a public agency has approved a project, further CEQA review is not needed for actions it takes to implement the project that do not require a discretionary approval. The city had approved replacement of a railroad bridge with a new pedestrian bridge that would connect with a local trail system, based on a mitigated negative declaration, and obtained a streambed alteration agreement from the California Department of Fish and Wildlife. Several years later, the stream alteration agreement expired and the city applied for a new agreement. In the meantime, the railroad bridge was added to the state Register of Historical Resources. The court rejected the challengers' claim that further CEQA review was required for the city's decision to apply for and accept the second streambed alteration agreement. That decision was not a subsequent discretionary approval of the project which would trigger further CEQA review, but instead simply implemented the project the city had previously approved.

### **Use of a Prior EIR: CEQA Review for a Change to a Project Cannot Be Based on the EIR for a Different Project**

*Martis Camp Community Association v. County of Placer* 53 Cal.App.5th 569 (2020) The court upheld a CEQA challenge to Placer County's decision to abandon public easement rights in a road based on an addendum to an EIR, finding the county had relied on the wrong EIR when making that decision. The addendum concluded that a partial abandonment of easement rights in the road would not result in new environmental impacts because it would simply restore the traffic patterns assumed in the EIR for the development that would primarily be affected by the abandonment, the Martis Camp community. The court concluded, however, that the road was a component of an adjacent development, the Retreat at Northstar, not Martis Camp. While the road was built to connect the two communities for transit and emergency access, it had been constructed and dedicated in accordance with the conditions of approval for the Retreat project. Although the court recognized that relying on the Martis Camp EIR offered practical advantages relative to the Retreat EIR, it concluded that CEQA does not allow an agency to conduct subsequent environmental review of a change to a project by relying on an EIR for a different project.

## CEQA LITIGATION

## **Record of Proceedings: Agencies Must Preserve Emails for Inclusion in the Record**

***Golden Door Properties v. Superior Court*** 52 Cal.App.5th 837 (2020) In a case challenging an EIR, the court held that an agency's duty to preserve documents for inclusion in the record of proceedings under CEQA prevails over its document retention and destruction policies. Consistent with its document retention and destruction policies, San Diego County had automatically deleted all emails not flagged as "official records". The county argued that only emails that had been retained should be included in the record. The court held, however, that the requirement in CEQA section 21167.6 that all written evidence or correspondence to and from the agency, and internal agency communications regarding compliance with CEQA or the project, be included in the record was mandatory. This, the court said, clearly means "*all* and not *some*" correspondence and internal agency communications. Further, the agency's duty to include these documents in the record required that the agency retain them, notwithstanding any contrary records retention policies. Finally, the court held that the county could be compelled to produce potential administrative record documents through discovery.

## **Remedies: Entire EIR Must Be Decertified When Single Aspect of Impact Analysis Is Legally Deficient**

***Sierra Club v. County of Fresno*** 57 Cal.App.5th 979 (2020) The court of appeal held that CEQA requires decertification of the entire EIR rather than partial decertification, when a court has found the EIR legally inadequate in any respect. Following fifth district precedent, and rejecting contrary holdings in cases decided by other appellate districts, the court concluded that because CEQA requires certification of an EIR that is "complete," partial decertification of an EIR is never permitted. The court also considered the factors other courts have analyzed when considering partial decertification of an EIR. These focus on whether the EIR's defects are severable from the decisions or activities the project proponent seeks to preserve while the EIR's defects are being corrected. Here, the court ruled that the EIR's deficient air quality analysis was not severable because the county relied on that analysis in adopting the statement of overriding considerations that supported project approval. Importantly, the court also concluded that even with complete decertification of the EIR, the project proponent would not be forced to relitigate the adequacy of other parts of the EIR once the air quality analysis was corrected and the EIR recertified. Principles of res judicata and collateral estoppel, and the requirement for exhaustion of administrative remedies, would bar such challenges.

## **Justiciability: Completion of Construction Can Moot CEQA Challenge**

***Parkford Owners for a Better Community v. County of Placer*** 54 Cal.App.5th 714 (2020) The court of appeal held that legal challenges to permits for expansion of a commercial self-storage facility based on claimed violations of CEQA and the Planning and Zoning Law were moot. The petitioner waited to seek a preliminary injunction to halt construction until the project was nearing completion and the trial court declined to grant the petitioner's application. The court of appeal noted that the developer did not violate any court orders by starting construction and there was no indication it had attempted to evade the requirements of CEQA or other laws by proceeding with the project. Because construction of the project had been completed by the time judgment was entered in the trial court, the court of appeal held the case was moot, and dismissed the petitioner's appeal.

## **Limitation of Actions: Agency Misrepresentations Can Bar it from Relying on Statute of Limitations**

***Citizens for a Responsible Caltrans Decision v. California Department of Transportation*** 46 Cal.App.5th 1103 (2020) The court held Caltrans could be barred from relying on the 35-day statute of limitations that is triggered by the filing of a notice of exemption where the petitioners alleged Caltrans had led the public to expect it instead would circulate a final EIR for review and comment and would file a notice of determination after

approving the project. Caltrans prepared a draft and final EIR for an interchange project which indicated the project was exempt from CEQA but also stated that Caltrans would decide whether to approve the project after the final EIR was circulated, and would adopt findings and file a notice of determination if it approved the project. A few weeks after the final EIR was released, Caltrans approved the project and filed a notice of exemption. The petitioner alleged that it was unaware of Caltrans's position that it would approve the project and file a notice of exemption; that it relied on Caltrans's representation that it would circulate the final EIR before approving the project and would file a notice of determination; that Caltrans made no effort to inform the public it would file a notice of exemption; and that the petitioner relied on Caltrans's representations to its injury. The court held that these allegations, if shown to be true, would bar Caltrans from asserting that the notice of exemption triggered the statute of limitations, based on principles of equitable estoppel.

**Limitation of Actions: Statute of Limitations Bars Untimely Action Challenges the Agency's Authority to Approve the Project**

*Coalition for an Equitable Westlake/Macarthur Park v. City of Los Angeles* 47 Cal.App.5th 368 (2020) The court of appeal held that CEQA claims filed more than 30 days after the city filed a facially valid notice of determination were barred by the statute of limitations even if the petitioner alleged that the decision-making body which approved the project had lacked the authority to do so. The petitioner challenged the city's approval of a mitigated negative declaration for a large mixed-use project claiming it did not adequately disclose, analyze, and mitigate the project's impacts and that an EIR was required. The court of appeal held that the petitioner's challenge was barred because the case was filed almost a full year after the notice of determination was filed. The court found that the notice of determination included all the information required by law and was not defective on its face. The petitioner argued that the body that acted on the project approvals and approved the negative declaration was not authorized to do so by the municipal code and that the procedures the city followed to comply with CEQA and approve the project were improper. The court concluded that claims the agency's decision-making process was defective amounted to a challenge to the validity of its actions, and were therefore subject to the limitations period that was triggered by the filing of the notice of determination.

**Attorneys' Fees: Party Seeking Fee Award Must Prove Litigation Enforced Important Right and Conferred Significant Public Benefits**

*Canyon Crest Conservancy v. County of Los Angeles* 46 Cal.App.5th 398 (2020) To obtain a court award of attorneys' fees under the private attorney general statute (Code of Civil Procedure section 1021.5), a successful party must show the litigation resulted in the enforcement of an important right affecting the public interest and that it conferred a significant benefit on the public or a large class of persons. The petitioner, a group of neighbors, challenged a negative declaration and permit approvals for a 1,500-square-foot single-family home. At the petitioner's request, shortly after the case was filed the trial court issued a stay of the permits. The property owner responded by requesting that the county vacate the permit approvals, which the county did, and the petitioner dismissed the case. The petitioner then sought an attorney fee award arguing that it succeeded in preventing the house from being built and had vindicated an important public right by enforcing compliance with CEQA. The court of appeal rejected the petitioner's argument that bringing a "viable CEQA claim" was sufficient to show that an important right had been secured, noting that the statute must have actually been enforced through the litigation. It also rejected the petitioner's assertion that the court-ordered stay benefited the general public. The stay order did not involve a ruling on the merits, the court reasoned, and there was no evidence that the lawsuit would cause the county to reconsider its CEQA review for the project or change its conclusions relating to CEQA compliance in this or any other case. Finally, the court concluded that given the limited nature of the project, the petitioner had not shown that stopping it conferred a benefit on the general public or a large class of persons.

## Topics

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