



CEQA LITIGATION UPDATE

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City Attorneys Spring Conference

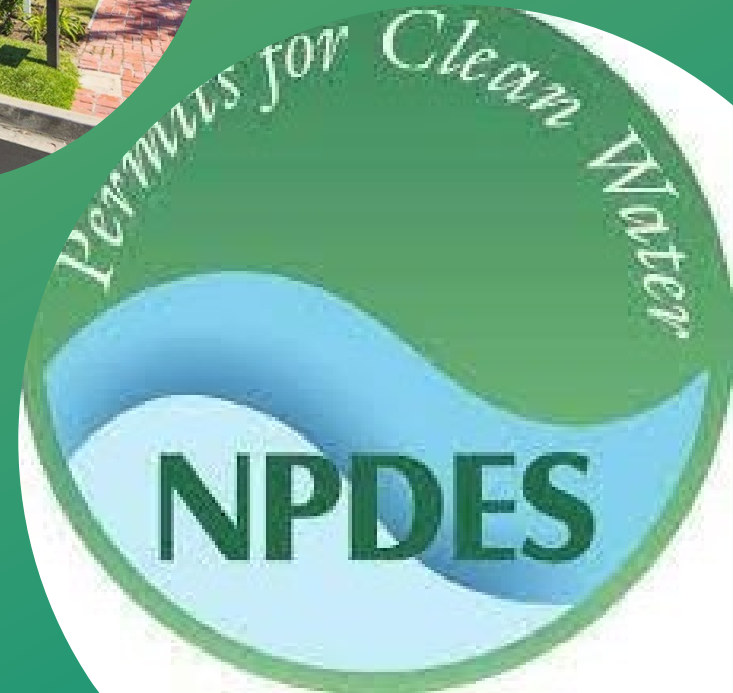
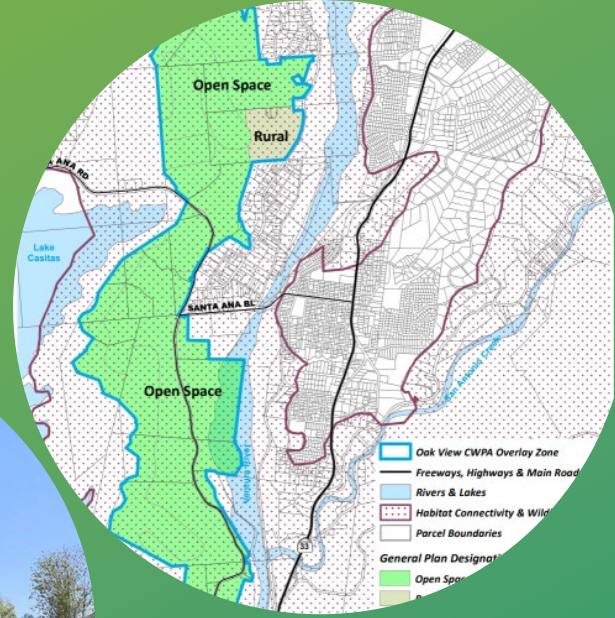
May 8, 2024

2023-2024 Published CEQA Cases

- Cases related to four areas of CEQA:
 - Exemptions
 - Tiering and Supplemental or Subsequent Review
 - EIR Adequacy
 - CEQA Litigation and Remedies

EXEMPTION CASES

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 - - Historic house complying with SOI Standards
 - Wildlife mitigation corridor ordinance
 - NPDES permit activities





*Historic Architecture Alliance v. City of
Laguna Beach*
(2023) 96 Cal.App.5th 186

CEQA Refresher:

- Class 31 (CEQA Guidelines Section 15331) exemptions are “categorical exemptions” and must be supported by substantial evidence.
- Categorical exemptions cannot be used where any of the Section 15300.2 exceptions to the exemptions applies.
- Section 15300.2(f) excepts projects impacting historic resources.

Background:

- Historic home remodel proposed to comply with applicable Secretary of the Interior Standards for the Treatment of Historic Properties (SOI Standards).
- Petitioner sued the City claiming that the City improperly relied on the Class 31 exemption for projects restoring or maintaining historic resources because an exception to categorical exemptions applied due an adverse change to a significant historic resource.



Petitioner's Argument:

- The City's finding that the project complied with SOI Standards was not sufficient for a Class 31 exemption.
- There existed a "fair argument" that the project would still result in a substantial, adverse change to the house, requiring further environmental review.

Holding:

- Class 31 exemption was supported by substantial evidence, including various rounds of review to confirm the project's compliance with SOI Standards.
- When a project follows the SOI Standards, it necessarily has a "less than significant" effect on the historical resource and a challenger cannot make a "fair argument" that the project will result in a substantial, adverse change.

Takeaway/Practice Tip:

- Beware project opponent “historians”
- Diligently build a record of compliance with SOI Standards
 - Multiple rounds of review for compliance by staff and/or outside experts
 - Support/sign-off from neighboring property owners
- **REMEMBER:** Courts will usually be more deferential to a determination that a resource is not historic in the first place. Once the resource is determined to be historic, you need a stronger record to justify the exemption.



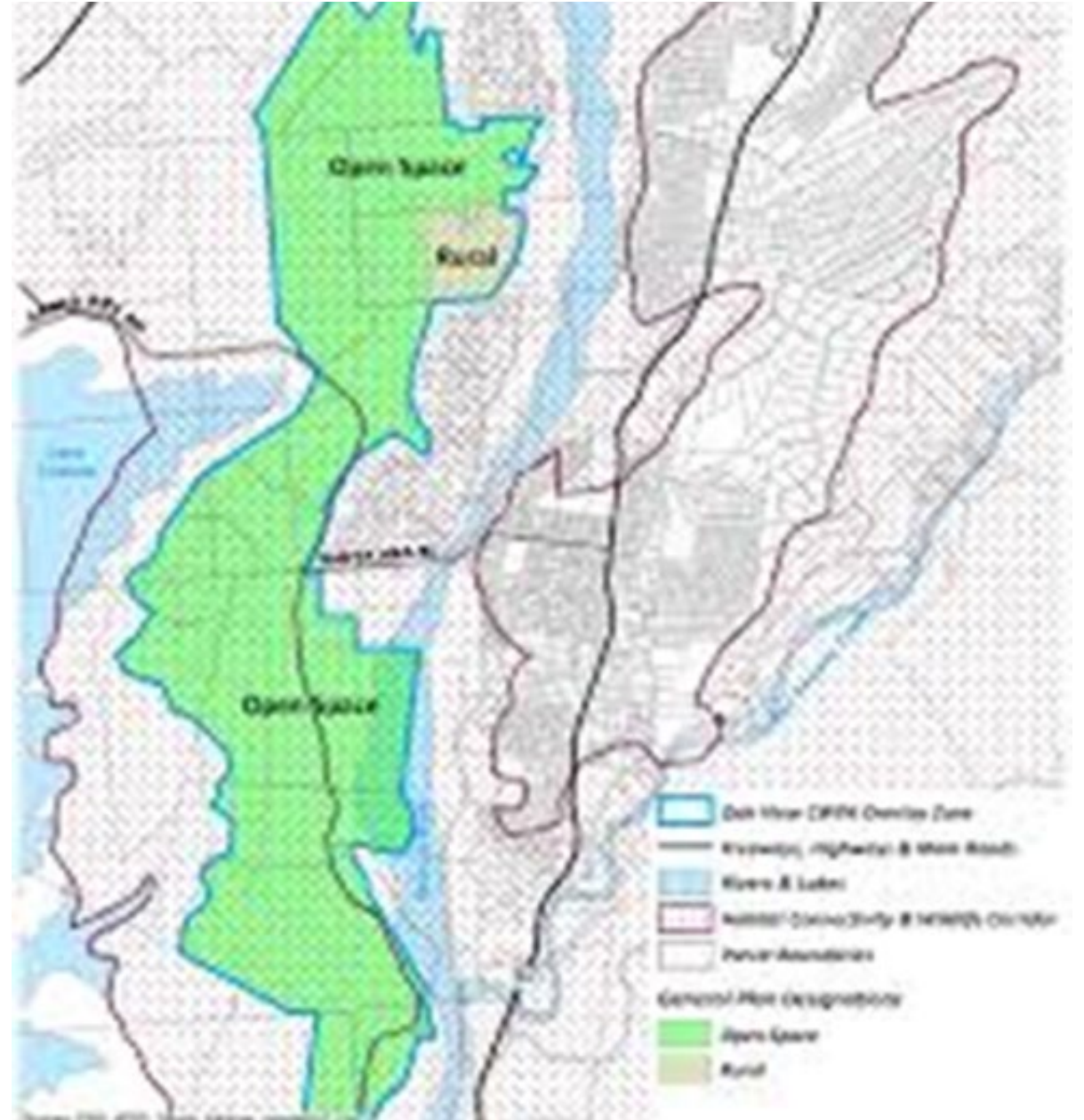
*California Construction and Industrial Materials
Association v. County of Ventura
(2023) 97 Cal.App.5th 1*

CEQA Refresher:

- Class 7 (CEQA Guidelines Section 15307):
actions by regulatory agencies for protection of
natural resources
- Class 8 (CEQA Guidelines Section 15308):
actions by regulatory agencies for protection of
the environment

Background:

Ventura County adopted an ordinance creating overlay zones to protect wildlife migration corridors throughout the County. When approving the Ordinance, the County relied on the common sense exemption, as well as the Class 7 (actions by regulatory agencies for protection of natural resources) and Class 8 (actions by regulatory agencies for protection of the environment) CEQA exemptions.



Petitioners' Arguments:

- Project could not apply an exemption because it would have adverse impacts on the environment.
- Local mining would effectively be prohibited in the overlay zones and thus building materials would have to be transported from a distant area, which in turn would create pollution.
- Project was larger than others in its class and thus “unusual” such that an exception applied and an exemption could not be used.

Holding:

- There was substantial evidence that the ordinance fell squarely within Classes 7 and 8, including studies and experts citing the need to preserve wildlife corridors.
- There was no evidence that the ordinance prohibited mineral extraction and Petitioners failed to show an unusual circumstance existed under CEQA Guidelines Section 15300.2, which requires that “the project has some feature that distinguishes it from others in the exempt class, such as its size or location.”
- The Class 7 exemption specifically refers to even larger, statewide projects (i.e. State Department of Fish and Wildlife preservation activities with a statewide scope).

Takeaway/Practice Tip:

- General disclaimer on Classes 7 and 8: these are *fairly rare*.
- Beware resolutions that cross your desk claiming these exemptions because they should be applied only to projects that are being carried out in order to protect natural resources or the environment (i.e. *not* a project that simply may benefit the environment, such as re-zoning to a less intensive use, prohibiting gas stations, etc.).
- Bottom line: make sure your project is designed to protect the right thing if you employ Classes 7 and 8.



*Los Angeles Waterkeeper v. State Water Resources
Control Board
(2023) 92 Cal.App.5th 230*

CEQA Refresher:

- Pub. Res. Code Section 21002 declares it the policy of the state that agencies should not approve projects if there are feasible alternatives or feasible mitigation which would lessen significant environmental impacts.

Background/Petitioner Argument:

- LA Regional Water Quality Control Board issued permits allowing millions of gallons of treated wastewater to be discharged into the LA River and Pacific Ocean.
- Petitioner alleged that Section 21002 placed an affirmative duty on the Board to prevent waste and evaluate potential recycling options, despite Water Code Section 13389's specific CEQA exemption for "adoption of any waste discharge requirement."



Holding:

- Pub. Res. Code Section 21002 does not impose its own environmental review requirements.
- The court declined to reach the broader question whether Water Code Section 13389 provides a *complete* exemption from CEQA; the scope of the Water Code exemption for issues not related to discharge permits remains unsettled.

Takeaway/Practice Tip:

- For non-NPDES permit activities/projects, cities may not be able to rely on Water Code Section 13389's CEQA exemption.

TIERING AND SUPPLEMENTAL REVIEW CASES

- Tiering under 15183
- Supplemental review for a changed project after Program EIR
- Supplemental review after denial of a project's regulatory permit

Hilltop Group, Inc. v. County of San Diego
(2024) 99 Cal.App.5th 890

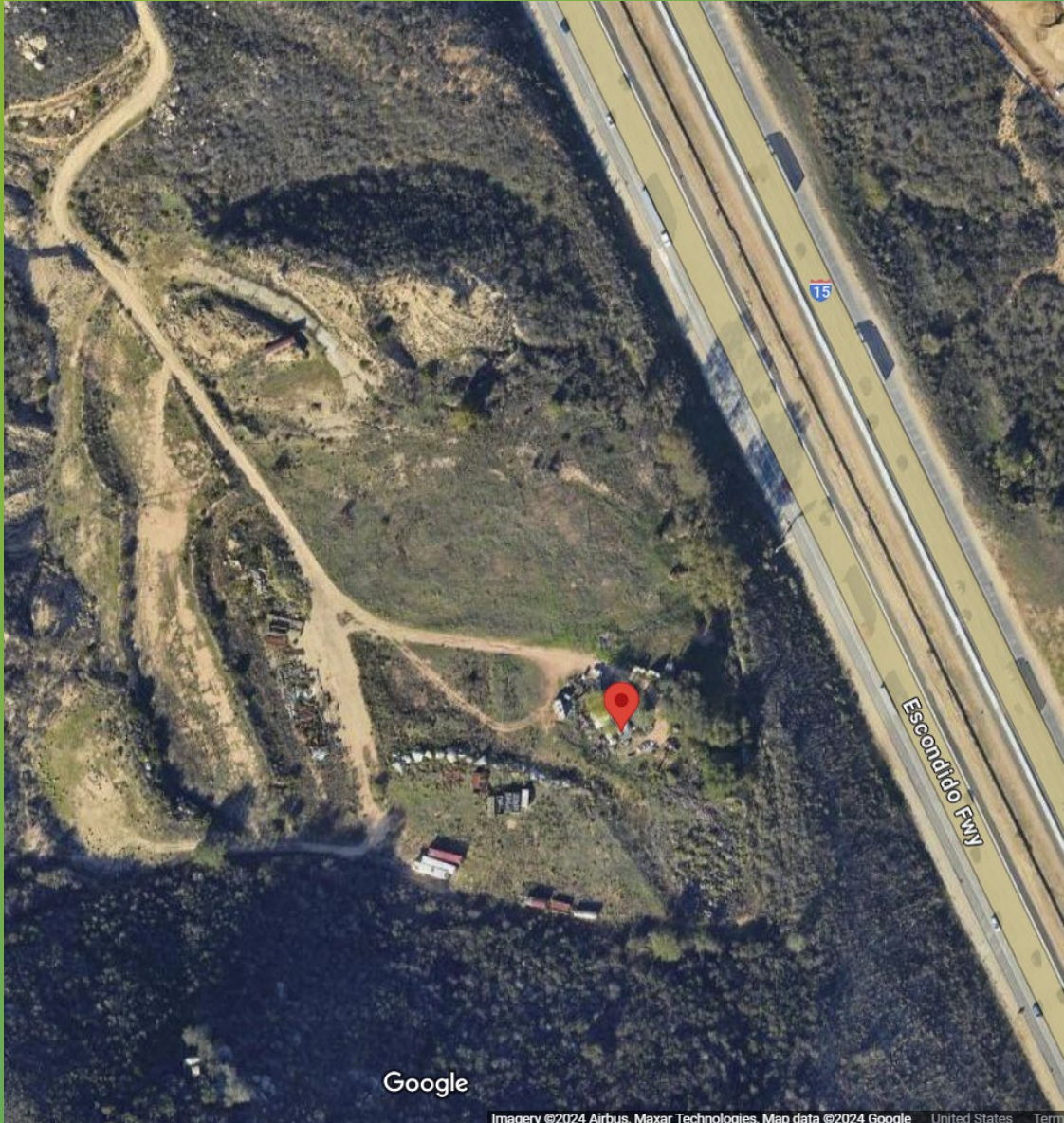


CEQA Refresher:

- Projects consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review, except as necessary to examine significant effects which are peculiar to the project.

Background:

- County determined that a recycling facility project was subject to review under CEQA Guidelines section 15183 because it was consistent with the County General Plan Update and did not contemplate significant environmental impacts that were not identified by the Program EIR prepared for the GPU.



Project construction:

- 12,000-square foot steel building
- 100,000 gallon water tank
- Security trailer
- Truck scales
- Up to twenty (60 feet by 60 feet by 18 feet high) adjustable storage containers

Project operations:

- Process and recycle trees, logs, wood, construction debris, asphalt, and other inert material from construction projects
- 48 tons exported per day (15,000 net tons annually)

General Plan and Zoning

- General Plan: High Impact Industrial
- Zoning: General Impact Industrial (which allows recycling facilities)

Approval:

After 150 public comments opposing the project, County Board of Supervisors voted against staff's recommended 15183 determination and ordered preparation of an EIR.

Holding:

- Project was eligible for streamlining under CEQA Guidelines Section 15183 because it was consistent with the GPU and its related zoning designation for which a program EIR was certified.
- There was insufficient evidence to support the Board of Supervisors' findings that the project would result in "project-specific peculiar impacts that were not analyzed as significant impacts in the [PEIR] related to air quality, traffic, noise, and greenhouse gas emissions."
- If a project is consistent with the land use designation of a General Plan for which an EIR was certified, the lead agency must limit its environmental review to site-specific impacts per Guidelines Section 15183.

Takeaway/Practice Tip:

- It is *rare* for a court to overturn a local decision that an EIR is required due to site-specific impacts, but if the record creates the appearance that the legislative body is reacting more to local political pressure rather relying on actual evidence, you may have a problem.

Save Our Access v. City of San Diego (2023) 92 Cal.App.5th 819

CEQA Refresher:

- Under CEQA Guidelines Section 15168, later activities in a program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared as required by Section 15162.

Background:

- In 2018, City adopted updates to its Midway Pacific Highway Community Plan and prepared a Program EIR.
- At the time of the updates, the Plan area was subject to the Coastal Height Limit Overlay Zone (“Coastal Zone”), which was adopted by ballot measure in 1972 and limited heights to 30 feet.
- In 2020, City adopted an ordinance proposing a ballot measure to exclude the Plan from the Coastal Zone height limit, stating that the measure was “consistent with” the 2018 Plan updates.



City's CEQA determination:

- “This activity is adequately addressed in the Midway-Pacific Highway Community Plan Update Final Program Environmental Impact Report (approved September 25, 2018; SCH No. 2015111013) and is part of a series of subsequent discretionary actions, and therefore, not considered to be a separate project for purposes of CEQA review... Pursuant to CEQA Guidelines Section 15162, there is no change in circumstance, additional information, or project changes that would warrant additional environmental review.”
- Determination was supported by the staff report and a memorandum which stated that a “consistency evaluation” had been conducted.

Community Plan Update Program EIR:

No mention of removal of the 30-foot height limit.

Holding:

There did not exist substantial evidence in the administrative record supporting the City's argument that the PEIR had adequately evaluated the impacts of removing the height limit. In fact, the PEIR was silent on the height limit, and internal City documents demonstrated that the PEIR had analyzed development with this height limit in effect.

Incidental Note:

While the appeal was pending, San Diego actually certified a Supplemental EIR and then placed the measure on the November 2022 ballot, where it was approved by 51% of the voters. The appeal may have been largely moot by the time it was decided.

Takeaway/Practice Tip:

- Addenda and scoped supplemental review – use them!
- Tiering directly from a General Plan or specific/community plan's program EIR is not advisable when the later activity involves a distinct change from the program.



Marina Coast Water District v. County of Monterey
(2023) 96 Cal.App.5th 46 (certified for partial publication)

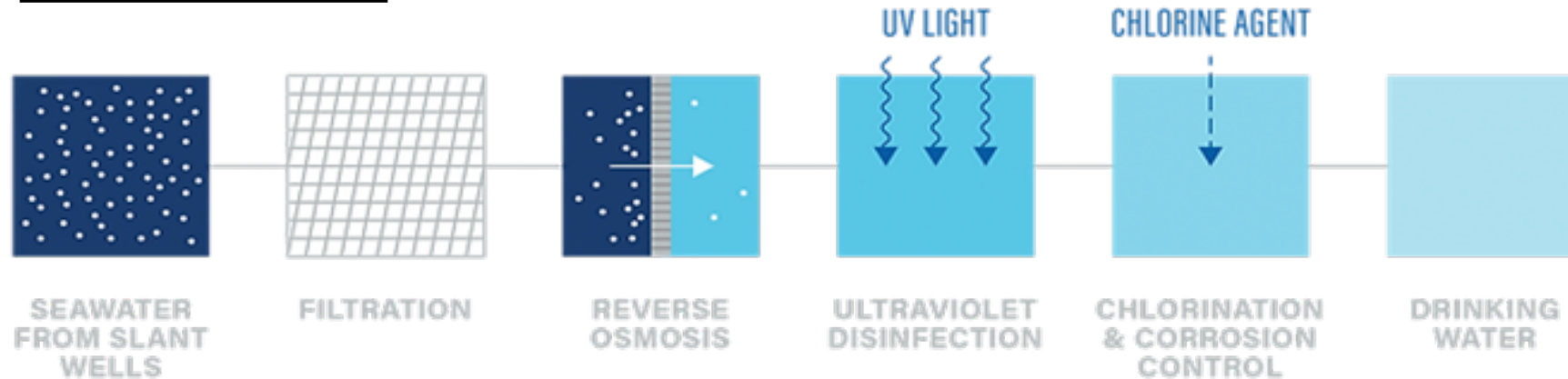
CEQA Refresher:

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Background:

- Monterey County approved Cal-Am Water Company's application for a permit to construct a desalination plant and associated facilities despite the City of Marina's denial of a necessary Coastal Development Permit.

Desalination Process:



Certified EIR Project Description:

- 9.6 million gallons per day capacity desalination plant to be constructed in unincorporated Monterey County, northeast of the City of Marina.
- Plant would produce approximately 10,750 acre-feet per year of desalinated water.
- Related facilities would include pretreatment, reverse osmosis, and post-treatment systems; backwash supply and filtered water equalization tanks; treated water storage tanks; chemical feed and storage facilities; brine storage and conveyance facilities; and other associated non-process facilities.

City of Marina Permit Denial:

- Cal-Am Water Company was required to obtain regulatory permits from both the City of Marina and the County in order to carry out the project, but Marina denied Cal-Am's application for a Coastal Permit for the proposed wells due to water supply concerns.

Petitioner's Arguments:

- County should have prepared a supplemental EIR to analyze the uncertainty of the project's water supply sources given the City of Marina's permit denial.
- County's Statement of Overriding Considerations was not supported by substantial evidence.

Holding:

- No supplemental EIR was required because the City's permit denial was not "new information" or a substantial change that required supplemental environmental review; the Coastal Commission would be tasked with confirming the project's water source(s) (i.e. "...in spite of the denial, Cal-Am continued to pursue approval of the same wells through the same means and subject to the same uncertainties contemplated by the final EIR.")
- The SOC contained substantial evidence of project benefits; the County was entitled to rely on the project's anticipated benefits despite the water supply uncertainties.

Takeaway/Practice Tip:

Uncertainty as to whether necessary permits will ultimately be issued is not a sufficient basis for triggering further environmental review.

EIR ADEQUACY CASES

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 - • Adequate agricultural mitigation
 - GHG impacts and significance thresholds
 - Impacts to public transit
 - Proper EIR baseline
 - Analysis of school funding

V Lions Farming, LLC v. County of Kern
**(2024) 100 Cal.App.5th 412 (certified for partial
publication)**



CEQA Refresher:

- CEQA Guidelines Section 15370 defines mitigation as “compensating for the impact by ... providing substitute resources.”

Background:

- Farmers/environmental organizations sued Kern County following approval of an ordinance streamlining the permitting process for new oil and gas wells, and the court required the County to correct defects in the EIR it had prepared.
- On remand, County concluded that agricultural conservation easements (“ACEs”) would not mitigate loss of prime farmland because they would not actually replace lost agricultural resources.
- Same petitioners appealed the writ discharge, arguing that the revised EIR failed to consider farmland preservation through ACEs.

Holding:

- County failed to comply with CEQA by not including use of Agricultural Conservation Easements (ACEs) as compensatory mitigation to partially offset the significant and unavoidable loss of agricultural land.
- CEQA Guidelines section 15370(e)'s definition of mitigation – “compensating for the impact by ... providing substitute resources” – encompasses use of ACEs “even though, operating by themselves, they do not replace the converted land or otherwise result in no net loss of agricultural land.”

Takeaways/Practice Tips:

- Courts are continuing to reject agency determinations that ACEs cannot, as a matter of law, mitigate the significant and unavoidable loss of prime agricultural lands.
- However, in our experience, there are practical problems with trying to use ACEs as mitigation. We believe there is still room in the caselaw for agencies to make *factual* findings that ACEs are infeasible, even if they are not *legally* infeasible.
 - In terms of providing actual mitigation, ACEs operate very differently than habitat mitigation, but courts so far are missing the difference.
 - And there can be significant practical challenges in actually identifying and purchasing agricultural easements.

Big Takeaways for Remaining Adequacy Cases:

- *Santa Rita Union School District v. City of Salinas* (2023) 94 Cal.App.5th 298
 - EIR for large-scale development (e.g. a specific plan) does not need to analyze or address the possibility that schools ultimately will not be constructed due to lack of funding. (*Santa Rita Union School District v. City of Salinas* (2023) 94 Cal.App.5th 298.)
- *Tsakopoulos Investments, LLC v. County of Sacramento* (2023) 95 Cal.App.5th 280 (certified for partial publication)
 - Agency can exercise discretion to set significance thresholds for GHG emissions with fact-specific local data.
- *Yerba Buena Neighborhood Consortium, LLC v. Regents of University of California* (2023) 95 Cal.App.5th 779
 - Agency should analyze impacts to transit, but the presumption that projects near transit have LTS impacts may be in harmless error.
- *Planning and Conservation League v. Department of Water Resources* (2024) 98 Cal.App.5th 726
 - Agency's re-approval of an existing activity does not need to analyze impacts from continued operations.

BIGGER Takeaway:

Courts continue to defer to agencies' EIR analysis and conclusions if they are clearly articulated and supported by evidence.

CEQA LITIGATION AND REMEDIES CASES

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- Court's continuing jurisdiction over project activities following CEQA violation
- NOD filing and statute of limitations
- Project completion and lawsuit mootness

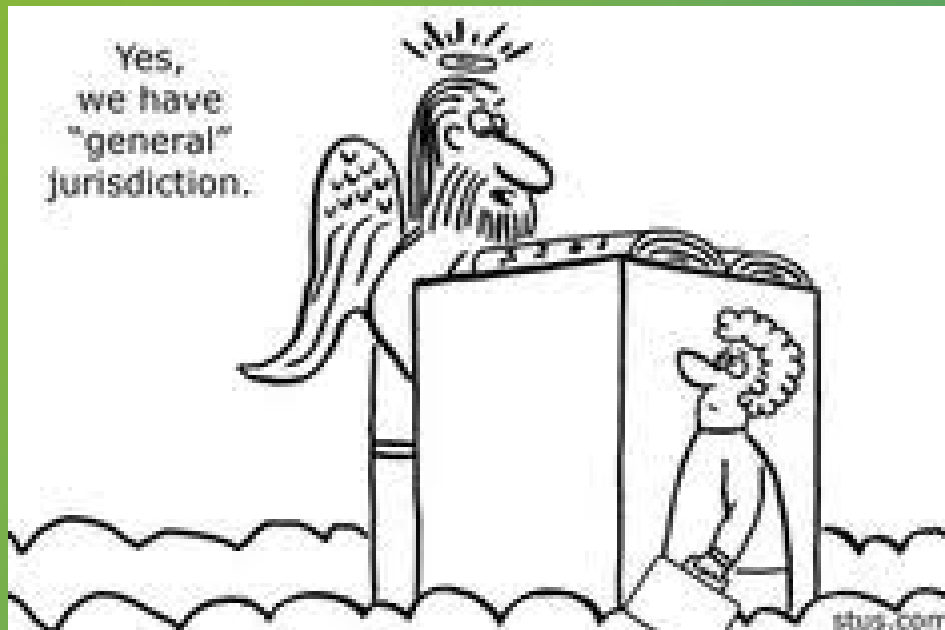
*Natural Resources Defense Council, Inc. v. City of
Los Angeles*
(2023) 98 Cal.App.5th 1176

CEQA Refresher:

- Public Resources Code Section 21168.9 states that a court retains all of its traditional equitable powers to remedy violations of CEQA, and subdivision (a) specifically allows a court to suspend a project activity.

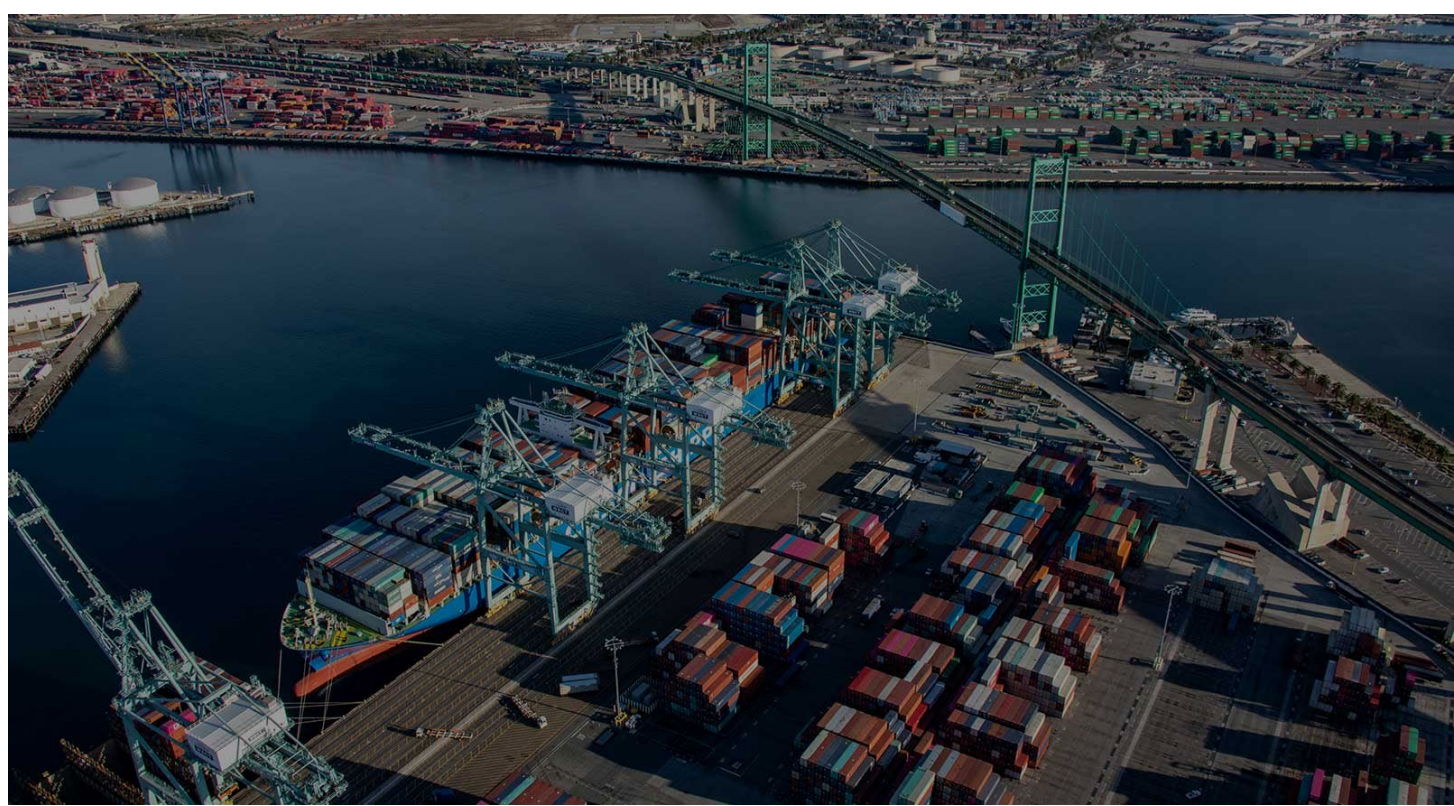
Background:

- Petitioner challenged Port of LA's certification of a supplemental EIR for a project involving continued operations of the China Shipping Container Terminal.
- Trial court found that the EIR failed to analyze emissions impacts and had improperly modified and deleted mitigation measures, and thus ordered the Port to set aside certification and prepare a revised EIR (*with no order to halt existing operations*).
- Petitioner appealed and said that the remedy should not be limited to setting aside certification.



Holding:

- “[T]he trial court’s remedy—ordering the Port to set aside the 2019 SEIR while still allowing the Port to continue to operate the Terminal pursuant to the Lease without any of the purportedly-adopted mitigation being enforced while the Port prepares a new SEIR—permits the Port to violate CEQA without any real consequence. CEQA does not countenance such a result.”
- Section 21168.9(a)(1) through (3) allow the trial court to: (1) void the agency action, (2) suspend project activities, and/or (3) direct the agency to undertake specific actions to bring its decision-making into compliance.



Takeaway/Practice Tip:

Monitor your monitoring programs! MMRPs do not simply fade away once a project is constructed and operational. If a project requests changes requiring new discretionary approvals, ensure that the supplemental review confirms compliance with previously-adopted mitigation.

Takeaways for Remaining Litigation and Remedies Cases:

- *Guerrero v. City of Los Angeles* (2024) 98 Cal.App.5th 1087
 - City filed multiple Notices of Determination (NODs) for each in a series of approvals for a 42-lot subdivision.
 - Court held that the action was not timely filed as it was not filed within 30 days of the first NOD. The city's re-adoption of subsequent NODs did not restart the statute of limitations.
 - Practice Tip: File NODs early and often. It is common for projects to require multiple approvals. Filing the NOD after the *first* discretionary approval triggers the limitations period for challenging the adequacy of CEQA compliance for the project, but subsequent NODs may also be advisable to rule out any challenges asserting that supplemental/subsequent CEQA review became necessary.
- *Vichy Springs Resort, Inc. v. City of Ukiah* (2024) 101 Cal.App.5th 46 (certified for partial publication)
 - CEQA challenge was not rendered moot by completion of the project while litigation was pending, despite petitioner's failure to seek preliminary injunctive relief, where additional mitigation measures could still be implemented.