Update on the California Environmental Quality Act: What’s New for 2018

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BB&K Webinar
March 6, 2018
CEQA Overview

Public Resources Code, § 21000 et seq.
14 Cal. Code Regulations, § 15000 et seq.
CEQA’s Purpose
(PRCE § § 21000-21002; 14 CCR § 15002)

• State’s preeminent environmental law
• Patterned after the National Environmental Policy Act
• Overriding goals are to protect the environment and further public disclosure
• CEQA’s purpose is not to stop projects, but rather to ensure that environmental impacts are adequately disclosed and mitigated to the extent possible
• CEQA has “teeth"
The CEQA Process

• Always ask three questions:
  • Is it a “Project”?
  • Is it “Exempt”?  
  • If it is a “project” and is not “exempt,” what level of CEQA review is required?

• Project = a discretionary approval by a public agency that may result in direct/indirect environmental impacts.

• Exemptions = statutory, categorical, or catch-all.

• What level of review typically determined through an Initial Study.
The CEQA Process (cont.)

• Options for substantive CEQA review?
  • Negative Declaration
  • Mitigated Negative Declaration (MND)
  • Environmental Impact Report (EIR)

• Many other options too depending on the circumstances: Supplemental/Subsequent EIRs, Subsequent MNDs, Addendum, written findings, reliance on NEPA document
The CEQA Process (cont.)

- What do you do with a CEQA document once prepared?
  - Release the document to the public and reviewing agencies for comment (circulation periods vary).
  - Take document to decision-making body for consideration.
  - Written findings required for EIRs, and recommended for MNDs.
  - Any approval happens **LAST**!
- Watch for administrative appeals.
- Finally, litigation....
Proposed Updates to the CEQA Guidelines

Released November 2017
Overview

- Part of the rule-making process
- Deadline for comments is March 15, 2018
- For more information see:
Overview (cont.)

• Per CEQA Guidelines 15007, “[a]mendments to the Guidelines apply prospectively only.”

• Many minor changes, and several major ones.
Thresholds of Significance

- Proposed revisions to Guidelines 15064(b)(2) and 15064.7(d) would increase the emphasis placed on thresholds of significance.
- Would encourage agencies to explain – with substantial evidence – how compliance with a selected threshold means that the project's impacts are less than significant.
- “Compliance with the threshold does not relieve a lead agency of the obligation to consider substantial evidence indicating that the project’s environmental effects may still be significant.”
Water Supply

• Guidelines 15155(f) would require agencies to consider the degree of certainty that exists as to project water supplies throughout the life of the project.

• Agencies must also evaluate the pros and cons of a project based on water demand.

• If an agency cannot determine that water will be available for the life of the project, agency shall evaluate potential alternative water supplies and their respective environmental impacts.
Remedies on Remand  
(NEW Section 15234)

• Public Resources Code 21168.9 already vests the courts with ability to void or partially void project approvals and to use equitable powers to shape relief.

• New Guidelines 15234 would elaborate upon this existing authority, confirming that:
  • An agency may proceed with project activities, during the remand period where the court has exercised its equitable discretion to permit project activities to proceed during that period because the environment will be given a greater level of protection if the project remains operative than if it were inoperative during that period.
  • As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall only be required as required by the court consistent with principles of res judicata.
CEQA Guidelines Appendix G

- Initial Study Checklist reflects many proposed changes.
  - Eliminates duplicative questions (e.g., cumulative air quality question, land use HCP question). Still must analyze these issues, but analysis would appear elsewhere.
  - Reorganizes some issues (e.g., hydrology and utilities questions).
  - Makes other minor clarifications.
- Adds two “new” categories of impacts.
VI. ENERGY. Would the project:

a) Result in a potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy, or wasteful use of energy resources, during project construction or operation?

b) Conflict with or obstruct a state or local plan for renewable energy or energy efficiency?
**CEQA Guidelines Appendix G (Energy Impacts cont.)**

- **Prior approach:** Appendix F was used to consider energy analysis in EIRs (often no analysis for Negative Declarations); focus was largely on operations; analysis was often scattered throughout document or folded into the GHG discussions.

- **New approach:** Energy usage will be considered in all CEQA documents (not just EIRs); construction and operational impacts are pertinent; analysis is more centralized.
CEQA Guidelines Appendix G
(Wildfire Impacts)

XX. WILDFIRE. If located in or near state responsibility areas or lands classified as very high fire hazard severity zones, would the project:

a) Impair an adopted emergency response plan or emergency evacuation plan? ☐ ☐ ☐ ☐ ☐

b) Due to slope, prevailing winds, and other factors, exacerbate wildfire risks, and thereby expose project occupants to pollutant concentrations from a wildfire or the uncontrolled spread of a wildfire? ☐ ☐ ☐ ☐ ☐

c) Require the installation or maintenance of associated infrastructure (such as roads, fuel breaks, emergency water sources, power lines or other utilities) that may exacerbate fire risk or that may result in temporary or ongoing impacts to the environment? ☐ ☐ ☐ ☐ ☐

d) Expose people or structures to significant risks, including downslope or downstream flooding or landslides, as a result of runoff, post-fire slope instability, or drainage changes? ☐ ☐ ☐ ☐ ☐
CEQA Guidelines Appendix G
(Wildfire Impacts cont.)

- Senate Bill 1241 (Kehoe, 2012) required amendments to Appendix G to expressly address fire hazard impacts.

- Used to be – and still will be – generally considered as part of hazards analysis.

- Applies to lands classified as very high fire hazard severity zones, and to lands in or nearby state responsibility areas. (See Pub. Resources Code 21083.01.)
Transportation Impacts

• SB 743 (2013) added Section 21099 to the Public Resources Code, which required OPR to update the CEQA Guidelines to require an analysis of transportation using something other than LOS.

• Legislature specifically focused on using Vehicle Miles Traveled (VMT) instead of Level of Service (LOS).

• Proposed new CEQA Guidelines 16064.3 and changes to Appendix G confirm that vehicle delay is not a significant impact, and that VMT is the focus going forward.
Transportation Impacts (cont.)

• Major Policy-Based Paradigm Shift:
  • Some question whether VMT is any better than LOS (If you only drive six miles, but it takes you two hours to do so, are you really reducing GHGs?)
  • Although it is intended to facilitate infill projects, does it unintentionally worsen the housing crisis by making it harder for rural areas to build affordable housing?

• Practical effects:
  • Most jurisdictions use LOS standards (A through F) to measure roadway function. These delay-based standards are often reflected in local general plan circulation elements.
  • LOS serves as the basis for most fair-share mitigation fee programs.
Transportation Impacts (cont.)

- Regardless of the debate, VMT is here to stay.
  - Guidelines 15064.3 (a): “Except as provided in subdivision (b)(2) below (regarding roadway capacity), a project’s effect on automobile delay does not constitute a significant environmental impact.”
  - Appendix G: Deletes questions focused on delay and congestion management. Requires consideration of transit, bicycle, and pedestrian paths.
Transportation Impacts (cont.)

- Selecting a threshold of significance:
  - If VMT threshold is too low, an EIR will be required for virtually every project.
  - If VMT threshold is too high (i.e., illusory), this may subject the agency to legal challenge.

- The limits of analysis:
  - CEQA does not require lead agencies to analyze impacts that are speculative. (State CEQA Guidelines, § 15145.)
  - However, agencies must analyze all those impacts that are *reasonably foreseeable*. (State CEQA Guidelines, § 15064.)
Transportation Impacts (cont.)

- VMT mitigation measures:
  - Offsite mitigation (GHG credits/renewable energy)?
  - Cap and Trade?
  - Addition of bicycle lanes or pedestrian facilities?
  - Carpool or flex-lanes?
  - Monetary incentives (or dis-incentives)?
Transportation Impacts (cont.)

• Per Guidelines 15064.3(c), agencies may elect to move to VMT immediately. However, the requirements take effect state-wide beginning January 1, 2020 (i.e., there is a phase-in period).

• For more information, see OPR’s Technical Advisory on Analyzing Transportation Impacts under CEQA (December 2017) available at: http://www.opr.ca.gov/docs/20171127_Transportation_Analysis_TA_Nov_2017.pdf
Proposed Update to the SB 375 Greenhouse Gas Emission Reduction Targets
SB 375 – General Overview

• AB 32, passed in 2006, requires California to lower statewide greenhouse gas (GHG) emissions to 1990 levels by 2020.
  • AB 32 directed CARB to develop specific early actions to reduce GHG emissions and to establish a scoping plan.
• SB 375 signed into law on September 30, 2008 – supports implementation of AB 32.
• Aimed at reducing state-wide GHG emissions through regional transportation planning and the express consideration of global warming in that transportation planning process.
• Establishes a multi-year process through which transportation-related GHG reduction emission targets will be developed and incorporated into regional planning.
SB 375 – Transportation GHG Reduction Targets

• SB 375 requires that CARB set GHG emission reduction targets for each regional transportation agency to meet.

• Each of the California MPOs must prepare a "sustainable communities strategy" (SCS) as an integral part of its RTP update process. The SCS contains land use, housing, and transportation strategies that, if implemented, would result in the region meeting its GHG emission reduction targets.

• CARB must adopt GHG reduction targets for the automobile and light truck sector, working in conjunction with the regional transportation agencies, including goals for 2020 and 2035.

• CARB must update the targets every eight years, and may update them every four years to account for GHG emissions reductions achieved through other means such as improved vehicle emissions standards.
SB 375 – Transportation GHG Reduction Targets (cont.)

• CARB initially adopted regional GHG emissions targets for the years 2020 and 2035 in 2010, and are due to be updated in 2018.

• CARB will consider adopting updates to the regional GHG emissions reduction targets on March 22, 2018.
  • Final Environmental Analysis and Response to Comments will be available at least 10 days before March 22, 2018.

• If the Board adopts staff’s final recommendation, the new SB 375 targets would become effective October 1, 2018.
Target Update Considerations

- Updated top-down analysis of climate and air quality needs
- MPO recommendations
- Latest changes to State law and program implementation resources
- Public process feedback
- Lessons learned to date from program implementation
## The Proposed Targets – 2020

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<tr>
<th>MPO</th>
<th>Currently Adopted Target</th>
<th>MPO-Recommended Target</th>
<th>CARB Recommended Target</th>
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## The Proposed Targets – 2035

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\(^a\) If SACOG is not able to secure the funding and commitments to implement their proposed pilot project, CARB staff would evaluate the SCS performance against an 18 percent target. See Appendix A, MPO Target Recommendations and CARB Staff Recommendations, pages A-7 through A-9 for further discussion.

\(^b\) Recommended targets apply to the San Joaquin Valley MPOs third cycle SCS plans.

\(^c\) Current SCS anticipated performance as reflected with updated MPO modeling analysis.

\(^d\) SCS adopted, but CARB evaluation not yet completed.
What This Means for MPOs

• Proposed higher 2035 targets for most regions
• Target framework and evaluation process changes to focus on land use and transportation policy and investments, and changes between plans
  • Identify specific measures MPOs implement
  • Measures tracked with regular progress reports
What This Means for MPOs

- The next set of SCSs subject to the updated targets will be prepared at different times over the next four years.
- SCSs adopted in 2018 will not be subject to the updated targets.

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Case Law Update

What Happened in 2017
The Scope of CEQA

- **Aptos Council v. County of Santa Cruz**  
  (6th Dist. 2017) 10 Cal.App.5th 266

- **Friends of the Eel River v. North Coast Railroad Authority**  
  (2017) 3 Cal.5th 677

Photo: Friends of the Eel River
Aptos Council v. County of Santa Cruz

- Court upholds three separately processed ordinances that (1) extended minor exceptions to zoning site standards, (2) altered certain height, density, and parking requirements for hotels in commercial districts, and (3) established an administrative process for approving minor exceptions to the County’s sign ordinance against a challenge alleging piecemeal review.

- County not guilty of piecemealing.
  - *The ordinances serve different purposes.*
  - None of the ordinances is a reasonably foreseeable consequence of one of the others.
Friends of the Eel River v. North Coast Railroad Authority

- California Supreme Court holds the federal Interstate Commerce Commission Termination Act (ICCTA) does not preempt the requirements of CEQA with respect to the decision of the North Coast Railroad Authority to reinitiate freight rail service on a previously abandoned rail segment along the Eel River.
- ICCTA does not preempt “state self-governance extending over how its own subdivisions would enter [the railroad] business.”
Project Approvals

- *Bridges v. Mount San Jacinto Community College District*  
  (4th Dist. 2017) 14 Cal.App.5th 104
Bridges v. Mount San Jacinto Community College District

• CEQA does not apply to Community College District’s decision to enter into a conditional purchase agreement for an 80-acre piece of unimproved rural property.
  • The purchase agreement is not a project.
  • Per the agreement, commencement of escrow conditional on full CEQA compliance.
  • Nothing in the record indicated the District committed itself to a definite use of the property.
CEQA Exemptions

- *Sierra Club v. County of Sonoma*
  (1st Dist. 2017) 11 Cal.App.5th 11

- *Respect Life South San Francisco v. City of South San Francisco*
  (1st Dist. 2017) 15 Cal.App.5th 449

- *Protect Telegraph Hill v. City and County of San Francisco*
  (1st Dist. 2017) 16 Cal.App.5th 261

Photo: Tasteofadventure.net
Sierra Club v. County of Sonoma

• Court finds issuance of an erosion control permit by the Sonoma County Agricultural Commissioner for the establishment of a vineyard on 54 acres within a 132-acre rangeland property statutorily exempt from CEQA as a ministerial approval.

• The petitioner failed to show the County’s ordinance gave the Commissioner discretion to mitigate to a meaningful degree any potential impacts resulting from the water runoff control system.

• The issuance of an otherwise ministerial permit is not rendered discretionary because the applicant offers to mitigate potential impacts in ways that are not required.
Respect Life South San Francisco v. City of South San Francisco

• Court upholds use of Class 1, Class 3, and Class 32 categorical exceptions for approval of a conditional use permit for conversion of an office building into a Planned Parenthood medical clinic.

• Petitioner failed to identify any substantial evidence there was a significant effect due to unusual circumstances (effects relating to protests).
Protect Telegraph Hill v. City and County of San Francisco

• Court upholds use of Class 1 and Class 3 categorical exemptions for approval of a conditional use permit for project involving restoration of an existing 1,000 square foot cottage and construction of three new residential units and a “basement” with three parking spaces.

• City did not improperly impose mitigation measures on the project – the conditionals of approval addressed concerns other than potentially significant environmental effects.

• Substantial evidence supported City’s determination of no unusual circumstances.

• Project description was adequate.
Environmental Impact Reports

- **Banning Ranch Conservancy v. City of Newport Beach**
  (2017) 2 Cal.5th 918

- **Cleveland National Forest Foundation v. San Diego Association of Governments**
  (2017) 3 Cal.5th 497

- **Residents Against Specific Plan 380 v. County of Riverside**
  (4th Dist. 2017) 9 Cal.App.5th 941

- **Placerville Historic Preservation League v. Judicial Council of California**
  (1st Dist. 2017) 16 Cal.App.5th 187

- **Washoe Meadows Community v. Department of Parks and Recreation**
  (1st Dist. 2017) 17 Cal.App.5th 277

- **Cleveland National Forest Foundation v. San Diego Association of Governments**
  (4th Dist. 2017) 17 Cal.App.5th 413
Environmental Impact Reports (cont.)

- **Association of Irritated Residents v. Kern County Board of Supervisors**
  (5th Dist. 2017) 17 Cal.App.5th 708

- **Los Angeles Conservancy v. City of West Hollywood**
  (2nd Dist. 2017) 18 Cal.App.5th 1031
Banning Ranch Conservancy v. City of Newport Beach

• Court invalidated City’s EIR for failure to identify “Environmentally Sensitive Habitat Areas” (“ESHA”) under the California Coastal Act, even where the Coastal Commission, and not the lead agency, will make the final ESHA identifications.

• City not required to make legal ESHA determinations in EIR, but was required to discuss potential ESHA and their ramifications for mitigation measures and alternatives where credible evidence that ESHA might be present on site.

• Lead agencies should exercise care before deferring regulatory topics to other agencies’ subsequent processes in environmental documents.
Cleveland National Forest Foundation v. San Diego Association of Governments

• Supreme Court reversed court of appeal decision overturning the San Diego Association of Governments’ 2050 Regional Transportation Plan and Sustainable Community Strategy for failing to assess the plan’s consistency with the 2050 GHG reduction goal contained in EO S-3-5.

• SANDAG not required to use EO S-3-5 as a threshold of significance, but do need to provide analysis and not “obscure the existence or contextual significance” of the EO.

• Narrow holding – SANDAG’s analysis not to be used as a template in future EIRs.
Residents Against Specific Plan 380 v. County of Riverside

- Court upheld EIR for master planned community on 200 acres of rural residential property.
- NOD substantially complied with CEQA requirements.
- Changes made to the project did not require recirculation.
- FEIR adequately responded to City of Temecula and SCAQMD comments regarding air quality mitigation measures.
Placerville Historic Preservation League v. Judicial Council of California

• Court upholds EIR for the relocation of the El Dorado County Superior Court out of two existing buildings downtown to a single new building to be constructed in the outskirts of the city.

• Urban decay not a reasonably foreseeable consequence of moving judicial activities from the downtown area.

• Distinguished *Bakersfield Citizens for Local Control* (construction of two supercenters which would siphon business from small shops and cause risk of widespread business failures) from project relocation of government facilities which might reduce some commercial activity, but would be offset by repurposing courthouse.
Washoe Meadows Community v. Department of Parks and Recreation

• Court set aside EIR for failure to provide an accurate, stable and finite project description.

• Notably, a joint CEQA/NEPA document, which studied five different project alternatives without identifying a preferred alternative.

• It didn’t matter whether the EIR had thoroughly analyzed the preferred alternative – the failure to identify the preferred alternative impaired the public’s right and ability to participate in the environmental review process.
Cleveland National Forest Foundation v. San Diego Association of Governments (remand)

• On remand from California Supreme Court, Court of Appeal issued a modified opinion.
  • EIR did not adequately consider GHG mitigation measures that could both substantially lessen the RTP’s significant GHG impacts and feasibly be implemented.
  • There were not enough alternatives in the EIR (omitted an alternative reducing VMT).
  • Air quality impact analysis deficient for lack of detail, deferred analysis of mitigation measures, and failure to set performance standards.
  • Understatement of impact on agricultural lands.
Association of Irritated Residents v. Kern County Board of Supervisors

• Court upholds 2/3 challenged aspects of an EIR for an oil refinery project in Bakersfield.
  • Court approved use of 2007 operating data for the refinery as part of the baseline condition, even though NOP not issued until six years later.
  • GHG discussion adequate. Compliance with cap-and-trade program showed climate change impact would be less than significant.
• Overturned certification of EIR for failing to disclose impacts of off-site rail activities (EIR erroneously concluded federal preemption).
Los Angeles Conservancy v. City of West Hollywood

• Court upholds EIR for mixed use project which requires the partial demolition of a building that qualifies as a CEQA historical resource.

• Alternatives discussion was adequate – design plans for an alternative not required and use of estimates sufficient for a reasonable comparison with the project.

• Response to comments was adequate – comments did not raise new issues or identify flaws in EIR analysis.

• City properly found Preservation Alternative infeasible for conflicting with design-related project objectives that implement general plan policies.
Supplemental Environmental Review

- **Friends of the College of San Mateo Gardens v. San Mateo County Community College District**
  (1st Dist. 2017) 11 Cal.App.5th 596

- Applies Supreme Court’s ruling that fair argument standard applies as to whether further environmental review is required for modifications to a project approved based on a negative declaration.
- Two-step inquiry to determine validity of use of addendum for the modified project.
Certified Regulatory Programs

• **POET, LLC v. State Air Resources Board**
  (5th Dist. 2017) 12 Cal.App.5th 52

• **Pesticide Action Network North America v. California Department of Pesticide Regulation (Valent U.S.A. Corporation)**
  (1st Dist. 2017) 16 Cal.App.5th 224
POET, LLC v. State Air Resources Control Board

• Court rejects CARB’s 2015 Low Carbon Fuel Standards (LCFS) (which were revised from the previous LCFS struck down by the Court in 2013 for failure to comply with CEQA in POET I).

• CARB failed to analyze the original 2009 regulations, which the Court found part of the “project.”
  • CARB erred in using 2014 as the baseline for Nox emissions.

• Existing regulations to stay in place pending CEQA compliance.
CEQA Litigation

- *The Urban Wildlands Group, Inc. v. City of Los Angeles*  
  (2nd Dist. 2017) 10 Cal.App.5th 993

- *Save Our Heritage Organisation v. City of San Diego*  
  (4th Dist. 2017) 11 Cal.App.5th 154

- *Association of Irritated Residents v. California Department of Conservation*  
  (5th Dist. 2017) 11 Cal.App.5th 1202

- *Friends of Outlet Creek v. Mendocino County AQMD*  
  (1st Dist. 2017) 11 Cal.App.5th 1235

- *Grist Creek Aggregates, LLC v. Mendocino County Air Quality Management District*  
  (1st Dist. 2017) 12 Cal.App.5th 979

- *Center for Biological Diversity v. California Department of Fish and Wildlife*  
  (2nd Dist. 2017) 17 Cal.App.5th 1245

- *CREED-21 v. City of Wildomar*  
  (4th Dist. 2017) 18 Cal.App.5th 690
CEQA Litigation

- **The Urban Wildlands Group, Inc. v. City of Los Angeles**: Attorney neglect not grounds for relief from summary judgment for failure to lodge the administrative record under strict interpretation of Code of Civil Procedure section 473(b).

- **Save Our Heritage Organisation v. City of San Diego**: Attorney fee award not available to project proponent who successfully defends a challenge to project approvals unless the lawsuit was detrimental to the public interest.

- **Association of Irritated Residents v. California Department of Conservation**: Res judicata does not apply when prior litigation based on mootness and ripeness grounds because it is not a judgment on the merits.
CEQA Litigation

- **Friends of Outlet Creek v. Mendocino County AQMD:** CEQA claims can be asserted against air quality management district.

- **Grist Creek Aggregates, LLC v. Mendocino County Air Quality Management District:** Tie vote decision resulting in upholding permit approval was subject to judicial challenge under CEQA.

- **Center for Biological Diversity v. California Department of Fish and Wildlife:** After finding EIR legally inadequate, court may order partial decertification and leave approvals in place.

- **CREED-21 v. City of Wildomar:** Imposition of terminating sanction not arbitrary or capricious due to Petitioner’s failure to comply with discovery requests.
CEQA Litigation Update

Cautionary tales for in 2018 and beyond.
Mini-Refresher on CEQA Litigation

- Petition for Writ of Mandate = The Lawsuit
- Petitioner = Plaintiff
- Respondent = Defendant
- Real Party in Interest = any recipients of public agency approvals (i.e., usually a private developer)
- Does not involve witnesses or evidentiary exhibits.
- Evidence = The Administrative Record (all the documentation that formed the basis of the agency's decision).
What is an Administrative Record? (See Pub. Resources Code § 21167.6(e).)

• Action/project description/application materials
• Notices, agendas, staff reports, transcripts, and minutes of all meetings/hearings
• Notices (mail-outs, newspaper prints, etc.) and the addresses to which they were sent/dates on which they were published
• All comment letters/emails/etc. received pertaining to the proposed decision
• Unprivileged agency communications regarding the action
• Any other materials relevant to the agency’s decision
Cautionary Tale #1: Must say why, in detail.

• “Naked checklists” have long been disallowed, but courts are looking for agencies to provide ever-increasing levels of detail about why agencies reached certain conclusions.

• This is consistent with providing “substantial evidence” supporting the decision, but raises questions re whether CEQA’s other provisions are being applied (e.g., EIRs need not be exhaustive; perfection in analysis is not required.; etc.)
Cautionary Tale #2: Courts are looking behind expert opinion and demanding more technical detail.

- “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion support by facts.” (CEQA Guidelines 15064.) However, may not be enough to have an expert opine, unless the expert lays out the facts behind their conclusion.

- “At bottom, the EIR’s deficiency stems from taking a quantitative comparison method developed by the Scoping Plan as a measure of the [GHG] reduction effort required by the state as a whole, and attempting to use that method, without consideration of any changes or adjustments . . . to measure the efficiency and conservation measures incorporated in a specific land use development proposed for a specific location. The EIR simply assumes that the level of effort required in one context, a 29% reduction from BAU statewide, will suffice in the other, a specific land use development.” (Center for Biological Diversity v. California Department of Fish & Wildlife (2015) 62 Cal.4th 204, 227 (the “Newhall” decision).)
Cautionary Tale #3: Managing the Evidence

• As CEQA practitioners, we know that certain things do not go into the administrative record:
  ▪ Trade secrets (CEQA Guidelines 15120(d).)
  ▪ Draft documents that have not been released for public review. (See PRC 21167.6(e).)
  ▪ Location of cultural artifacts. (Pub. Resources Coe 21082.3(c)(1); Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200.)
  ▪ Privileged items (attorney-client, work product, etc.).
  ▪ Items that were not before the agency or post-date the decision. (Western States Petroleum Association v. Superior Court (1995) 9 Cal.4th 559.)
Cautionary Tale #3 (cont.):
CEQA v. PRA v. Discovery Statutes

• In an attempt to obtain what they believe will be damaging evidence or to reduce costs, Petitioners may seek agency files through a Public Records Act request or via litigation discovery demands as opposed to merely requesting documents under CEQA.

• Important to be clear regarding which law you are responding to before making a production.

• **Caution:** CEQA, the PRA, and Discovery demands each have different standards for what must be produced and whose files can be accessed. **Authors beware!!**
Cautionary Tale #3 (cont.):
What do “your files” include?

• “The only evidence that is relevant to the question of whether there was substantial evidence to support [a] . . . decision . . . is that which was before the agency at the time it made its decision.” (Western States Petroleum Association v. Superior Court (1995) 9 Cal.4th 559.)

• **Caution:** The “reach” of what was before the agency continues to expand.
  
  • Consolidated Irrigation District v. Superior Court (2012) 205 Cal.App.4th 697 (files of agency consultant belonged to the agency by contract, so could be treated as within the agency’s files).
  
  • City of San Jose v. Superior Court (2017) 2 Cal.5th 608 (emails pertaining to government business from private email accounts constitute public records).
Cautionary Tale #3 (cont.): Is that privileged?

- CEQA does not abrogate privilege (Attorney-Client, Attorney Work Product, etc.)
  - **Caution:** Privilege does not necessarily attach just because you copy an attorney.
  - **Caution:** Courts may treat “absolute” and “qualified” AWP differently.
Questions?
Thank you!

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