

CHAPTER 16

The California Environmental Quality Act Approaches 30 Years of Age: Recent Decisions and Some Surprising New Directions

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§ 16.01 Introduction

The most important procedural requirements in California land use law are those set forth in the California Environmental Quality Act (CEQA).¹ Enacted in 1970, CEQA originally was modeled after the mandates of the federal National Environmental Policy Act (NEPA),² and early decisions under CEQA often cited NEPA precedents.³

As the acts have matured, however, they have diverged in importance. Driven by a large number of United States Supreme Court decisions that have limited NEPA's application,⁴ the NEPA caseload has become relatively prosaic, holding few surprises.

The likelihood was that CEQA would follow the same path, gradually lessening in importance as a conservative judiciary limited its effect.

However, as CEQA approaches the age of 30, that development has not occurred. To the contrary, recent months have brought a number of CEQA decisions in which plaintiffs have prevailed in sweeping opinions. Even more importantly, the judiciary has come to view CEQA as a means of rationalizing a land use decision-making process that seems to have failed in certain fundamental tasks, such as evaluating whether sufficient water will be available for large development projects. As a result, CEQA continues to play a major role in the land use decision-making process.

This discussion of recent CEQA case law is divided into four parts. First, it discusses a series of new cases that bear directly on planning for development. In the most important of these decisions, the courts plainly view the information required by CEQA as a critical component of any logical analysis of new development. The opinions take decision-makers to task for refusing to compile the requisite information.

¹ Pub. Res. Code § 21000 *et seq.*

² 42 U.S.C. § 4321 *et seq.*

³ See Stephen L. Korte and Michael H. Zischke, Practice Under the California Environmental Quality Act 12 ("CEQA was patterned after the National Environmental Policy Act of 1969").

⁴ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

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The second part of the article examines two important areas: the interplay between CEQA and both land use initiatives and redevelopment actions. The California Supreme Court is poised to decide an important case in the former area, while a new decision involving the Mammoth ski area—the site of the seminal CEQA decisions by the California Supreme Court, *Friends of Mammoth v. Board of Supervisors*⁵—has important implications for redevelopment projects.

Next the analysis briefly touches on recent decisions involving litigation over the use of negative declarations and over the adequacy of environmental impact reports (EIRs), two areas where the law seems settled but continued litigation occurs. In the last section, the analysis concentrates on several critical litigation issues: standing, exhaustion of administrative remedies, and the possible award of attorneys' fees.

§ 16.02 Environmental Analysis and Planning

[1] The Relationship Between Water Supply and Planning

CEQA, of course, applies to discretionary decisions by local governments, and thus to most large land use approvals. That much is well-settled. In several recent decisions, however, the courts have found that local government defendants failed to integrate the CEQA analysis with the components of state land use law. In response, courts have insisted on accurate analysis of infrastructure needs generated by development and, in one case, all but required that water supply decisions must precede development approvals.

The most important recent decision in this area is *County of Amador v. El Dorado County Water Agency*.⁶ The defendant water agency undertook an ambitious project designed to provide water to the burgeoning population in the area. It proposed to take approximately 17,000 acre feet of water per year from three high Sierra lakes, and to purchase an existing hydroelectric dam that would be used to provide consumptive water supplies.

In analyzing the environmental effects of the proposal under CEQA, the water agency used projections in a draft county general plan. The court of appeal found fault with this process, concluding that the

⁵ 8 Cal. 3d 247, 104 Cal. Rptr. 761 (1972).

⁶ 76 Cal. App. 4th 931, 91 Cal. Rptr. 2d 66 (1999).

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agency had "place[d] the proverbial cart before the horse."⁷ The problem, thought the court, was that approving the water program before adopting the general plan precluded any proper review of significant growth issues. The court reasoned that, "instead of proceeding from a more general project to more specific ones," the opposite occurred: the water project "drives the general plan process." As a result, "no entity has contemplated the interrelationship of growth and water sources."⁸ The court's concern was "heightened" by the fact that the draft general plan relied upon by the EIR was later judicially determined to be inadequate.⁹

The *County of Amador* decision is one of several decisions in California in which courts have insisted that the relationship between water and growth be closely considered.¹⁰ For example, in one important trial court decision involving a very large residential development north of Los Angeles, the court found that project developers had not shown that they could supply enough water to support the new community.¹¹

The interesting point is that, from a CEQA perspective, the outcome might be questioned. After all, the purpose of CEQA is to examine environmental impacts, and the *County of Amador* Court does not seem to focus on whether the EIR had sufficiently examined those impacts. Instead, it questioned the logic of the underlying planning effort, employing CEQA to conclude that the county's planning effort was flawed. The court plainly thought that growth decisions should be made in the general planning process and that infrastructure decisions should flow from that planning, not precede it.

[2] Realism and the "No Project" Alternative

A second court of appeal decision involving the required "no project" alternative also rests on a judicial insistence on realistic

⁷ 91 Cal. Rptr. 2d at 79.

⁸ *Id.* at 78.

⁹ *Id.*

¹⁰ See, e.g., *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal. App. 4th 182, 55 Cal. Rptr. 2d 625 (1996); *Santiago County Water District v. County of Orange*, 118 Cal. App. 3d 818, 173 Cal. Rptr. 602 (1981).

¹¹ Daryl Kelley, *Ruling Reflects Crucial Shift in Water Policy Growth: Order for Delay in Newhall Ranch Development is an Indication of a New Insistence on Adequate Supplies*, L.A. Times A3 (June 14, 2000) (Judge "found that developers of the 22,000-home Newhall Ranch near Santa Clarita had not proved they could supply enough water to support the new community, especially during periods of drought.")

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planning. In *Planning and Conservation League v. Department of Water Resources*,¹² the department entered into a series of negotiations with a variety of local water districts. The negotiations were intended to address water supply issues arising out of contracts between the state and local water agencies. When the department had originally contracted with the local districts, it had envisioned completion of a larger state water project. The contract nonetheless contained certain provisions—the so-called "article 18" of the contract—designed to allocate water among the contracting parties if the full amount of contract water never became available.

At the conclusion of the negotiations, the parties reached a comprehensive agreement on supply issues and water management. As part of the deal, they agreed to eliminate these contractual provisions for water allocation during shortages. The plaintiffs, not parties to the negotiation, challenged the EIR that the water agencies and the state prepared on the agreement. A local water agency, not the state, had been the "lead agency" in preparing the EIR.

The court of appeal overturned the approval on two grounds. First, the court found that the state Department of Water Resources, not the local agency, was the appropriate lead agency. Then, however, the court continued on to conclude that the EIR failed to examine the "no project" alternative, which was retention of the "article 18" water allocation provision. It reasoned: "So long as article 18 . . . can be plausibly construed in a manner that would result in significant environmental consequences, its elimination should be considered and discussed in the EIR."¹³

The "lead agency" part of the decision is straightforward. The water agencies, apparently for political reasons, chose a local government rather than the state to prepare the EIR. However, CEQA declares that the lead agency is the "public agency which has the principal responsibility for carrying out or approving a project,"¹⁴ and in this case, that agency plainly was the state.

The ruling on the "no project" alternative is much more intriguing. While discussion of the "no project" alternative is unquestionably required,¹⁵ in land use cases it is often a routine, unimportant part

¹² 83 Cal. App. 4th 892, 100 Cal. Rptr. 2d 173 (2000).

¹³ 100 Cal. Rptr. 2d at 190.

¹⁴ Cal. Pub. Res. Code § 21067.

¹⁵ 14 Cal. Code Regs. § 15126.6(e).

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of the EIR. A land use change of some sort is going to occur, and the “no project” alternative is not politically viable. In *Planning and Conservation League*, however, the court thought that analysis of the “no project” alternative was important for an entirely different reason: its relationship to land use planning.

Under the water system as it existed prior to the agreement, water agencies had “paper entitlements” to nonexistent water—water that was originally envisioned to be supplied by the state water project but is now realistically unavailable. These phantom entitlements, however, “serve as the basis for land planning decisions.”¹⁶ Where land use planning determinations were made on this basis, development can outpace the actual availability of water, leading to detrimental environmental consequences such as excessive groundwater pumping. In contrast, if article 18 were actually used, the result would be to allocate the *actual* water available, thus eliminating the paper entitlements.

This was enough to convince the court that the environmental consequences of eliminating article 18 required examination. It found that comments by the public “merely corroborate the common sense notion that land use decisions are appropriately predicated in some large part on assumptions about the available water supply.”¹⁷ The EIR was deficient because it “lacks any projections relating to land planning, demand for water and other environmental impacts of reducing entitlements pursuant to article 18.”¹⁸

Thus, although they address different issues, both *County of Amador* and *Planning and Conservation League* share a common theme. Both are concerned with the interrelationship between water supply and land use planning. Further, both see CEQA as a link binding the two, if the land use planning process alone does not provide that link.

[3] Mitigation Measures and Transportation Planning

A third recent decision continues the same planning theme. In *Federation of Hillside and Canyon Associations v. City of Los Angeles*,¹⁹ the city adopted a “General Plan Framework” as part of

¹⁶ 100 Cal. Rptr. 2d at 190.

¹⁷ *Id.* at 191.

¹⁸ *Id.* at 194.

¹⁹ 83 Cal. App. 4th 1252, 100 Cal. Rptr. 2d 301 (2000).

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its general plan. The framework’s purpose was to provide a long-term strategy to accommodate the anticipated future growth in population and employment. The EIR analyzed the transportation impacts of the envisioned growth and concluded that a proposed “Transportation Improvements Mitigation Plan” (“TIMP”) would alleviate the plan’s significant environmental impacts on transportation. The TIMP itself, however, declared that the city’s projected revenues were inadequate to meet its share of the TIMP’s projected costs.²⁰

Petitioners challenged the approval of the framework, arguing in part that no substantial evidence supported the city’s finding that the mitigation measures identified in the final EIR would mitigate the significant effects on transportation. The court of appeal agreed. The problem, thought the court, was that the city did not require that mitigation measures (including the TIMP) must be implemented as a condition of the development allowed under the framework. Thus, the finding that the mitigation measures had been “required in, or incorporated into” the framework was unsupported.²¹

As a practical matter, mitigation measures are much more important than alternative under CEQA. Public agencies are far more likely to alter the proposal by placing conditions on it to mitigate impacts than they are to require a project proponent to pursue a fundamentally different alternative. Among other mandates, CEQA allows for the use of “mitigation monitoring” to ensure that mitigation measures are implemented.²²

The *Federation* decision takes mitigation seriously. The court refused to allow the city to give lip service to the mitigation requirement without actually implementing it.

§ 16.03 Initiatives and Redevelopment

Since the California Supreme Court decided *DeVita v. County of Napa*,²³ which held that citizens could pass general plan amendments by initiative, land use initiatives have greatly increased in number throughout the state. Similarly, redevelopment efforts continue to play a significant role in the attempted revitalization of urban areas. CEQA

²⁰ 100 Cal. Rptr. 2d at 308.

²¹ *Id.* at 309.

²² Pub. Res. Code § 21081.6.

²³ 9 Cal. 4th 763, 38 Cal. Rptr. 2d 699 (1995).

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aids these redevelopment efforts by simplifying compliance. Once the public agency approves the redevelopment plan, later CEQA challenges to the plan's implementation are limited.²⁴

Both areas of land use law were the subject of important, recent CEQA cases.

[1] Direct Democracy and Land Use

A series of earlier decisions delineated when, if ever, a local government must prepare an EIR before submitting a ballot to the vote of the people.²⁵ In general, the court have held that citizen-drafted initiatives are not subject to CEQA on the grounds that procedural requirements cannot be employed to bar the use of the initiative. In *Friends of Sierra Madre v. City of Sierra Madre*,²⁶ however, the court of appeal found that the city had approved a "project" under CEQA when it placed a city-drafted initiative on the ballot which was designed to remove properties from the city's register of historic places.

The California Supreme Court's affirmation of this case could have a narrow but important impact on land use decision-making by initiative.

As citizens have increasingly utilized direct democracy, local elected officials have begun to respond by drafting their own, competing initiatives and placing them on the ballot.²⁷ If those measures proposed by city officials are subject to CEQA, local elected officials may well be unable to employ this tactic. One might expect that citizens will time their own initiative petitions to arrive later in the election cycle, so that a city council opposing the petition will simply not have time to draft a competing measure and prepare an EIR examining its impacts.

[2] The "Special Rule" for Redevelopment Projects

Redevelopment projects, for better or worse, have long been treated differently from other public approvals subject to CEQA. Under Public

²⁴ Pub. Res. Code § 21090.

²⁵ See, e.g., *Stein v. City of Santa Monica* 110 Cal. App. 3d 458, 168 Cal. Rptr. 39 (1980).

²⁶ 76 Cal. App. 4th 1061, 90 Cal. Rptr. 2d 835 (2000), *aff'd*, 19 P.3d 567, 25 Cal. 4th 165, 105 Cal. Rptr. 2d 214 (2001).

²⁷ See www.cp-dr.com (last visited Oct. 12, 2000) listing land use measures on the ballot in California, including several "competing" measures placed on by local governments.

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Resources Code Section 21090, once a redevelopment plan is approved, later environmental review is restricted.

In *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*,²⁸ ("Friends of Mammoth II") the town prepared a redevelopment plan that had at least 72 separate public improvements and facilities—a group of projects that "read like a municipal wish list."²⁹ The town then prepared an EIR on the redevelopment plan as a "program EIR," but the EIR did not analyze the direct environmental effects of the 72 development proposals. Instead, it focused primarily on the cumulative impacts that could occur if all of the proposed projects were actually developed.³⁰ Much of this analysis was imported from the town's general plan and general plan EIR, as well from other previously prepared planning documents.

The plaintiffs challenged the approval, claiming that the town had not adequately analyzed the environmental impact of the 72 projects. The town responded that its program EIR sufficiently covered the projects. The court, however, disagreed, finding that the city's analysis was deficient.³¹

The court was careful not to make any broad statements about the scope of EIRs on all redevelopment plans. After all, said the court, a redevelopment plan "may be as conceptual as a general plan, as detailed as a conditional use permit, or, as in this case, somewhere in between."³² Here, though, the town had produced a relatively detailed plan; accordingly, "the significant impacts to the environment likely to be caused by each individual project must be analyzed in the redevelopment plan EIR at least to the same extent each project is detailed in the redevelopment plan."³³

Amici supporting the town argued that a ruling in the plaintiffs' favor would deprive municipalities of the ability to use a program EIR to streamline environmental review. The court, however, was unmoved. It obviously saw the danger that large projects with numerous individual components, such as the Mammoth project, might largely avoid specific environmental review.

²⁸ 82 Cal. App. 4th 511, 98 Cal. Rptr. 2d 334 (2000).

²⁹ 98 Cal. Rptr. 2d at 341.

³⁰ *Id.* at 342.

³¹ *Id.* at 348.

³² *Id.*

³³ *Id.* at 349.

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The decision should have important effects on the redevelopment process. After *Friends of Mammoth II*, public agencies will have to carefully match the specificity in the redevelopment plan with the level of detail in the EIR.

§ 16.04 Threshold Determinations and Adequacy

Perhaps the two most litigated issues under CEQA are claims that the public agency erred in adopting a "negative declaration" instead of preparing an EIR, and that the EIR did not adequately discuss certain environmental impacts. Predictably, several recent decisions focus on these issues.

[1] CEQA's "Substantial Evidence" Standard

Since the seminal decision in *Friends of "B" Street v. City of Hayward*,³⁴ one of CEQA's trademarks has been a low threshold for preparing EIRs. An agency must prepare an EIR whenever there is any substantial evidence in the record of a significant impact. Under this test, the court must determine whether there is a "fair argument," based on substantial evidence, that the project may have a significant environmental impact. Although there are periodic attempts to alter this standard legislatively, to date it remains intact and well-settled.

Nonetheless, the flow of litigation challenging negative declarations remains steady, with the most recent example being *San Bernardino Valley Audubon Society v. Metropolitan Water District*.³⁵ In this case the district relied on a so-called "mitigated negative declaration" to justify the failure to prepare an EIR on a "habitat conservation plan." Under this plan, which affects almost 6,000 acres of property, defendant agencies would create a "mitigation bank" containing land that could be used as compensation for species or habitat taken by future construction. The agencies claimed that the project, as a whole, would result in a "cumulative net benefit" for the conservation of species in western Riverside County. The plan would mitigate the impacts of future projects on species by designating habitat land in the mitigation bank as compensation.³⁶

³⁴ 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980).

³⁵ 71 Cal. App. 4th 382, 83 Cal. Rptr. 2d 836 (1999).

³⁶ 71 Cal. App. 4th at 388.

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Applying the "fair argument" test, the court of appeal overturned the negative declaration. It cited numerous reasons why the project, as designed, did not mitigate all potential significant environmental effects. Among other things, the court pointed out that, even if developers used the mitigation bank, endangered and threatened species could be destroyed, and this destruction constituted a potential significant effect. It also noted that, as mitigation for an actually "taken" animal, the mitigation bank would provide only potentially suitable mitigation, not necessarily a "real" animal in return. Finally, the court thought that the "habitat value formula" did not provide compensation on an acre-for-acre or species-for-species basis, and that there might be cumulatively considerable environmental effects.³⁷

The result is hardly surprising. Determining whether the mitigation measures in a negative declaration dispose of all possible environmental impacts identified in the initial study is a relatively mechanical process. In this case, while the habitat conservation plan would "mitigate" the effects of the taking of species, it clearly would not mitigate *all* the potential environmental effects. Indeed, the court noted that the word "mitigation" was used in two different fashions in the habitat plan and in CEQA. It is, said the court, "confusing and circular to refer to the mitigation bank established by the Project as being mitigation for the potentially significant effects on the environment of establishing the mitigation bank."³⁸

One other case challenging a negative declaration, pithily titled *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*,³⁹ merely re-visits well-settled ground. In this case the city previously had approved a tentative tract map and negative declaration, and no one challenged those approvals. Later, the developer submitted a design review application, which the city council denied. The council, however, also found that "no further environmental review" was required of the project.

Plaintiffs then filed a petition for writ of mandate seeking further environmental analysis. The trial court denied the petition, and the court of appeal affirmed. The appellate court's reasoning was simple: since the city denied the design review application, "there was no discretionary approval that would authorize the preparation" of a

³⁷ *Id.* at 397-99.

³⁸ *Id.* at 399.

³⁹ 82 Cal. App. 4th 473, 98 Cal. Rptr. 2d 202 (2000).

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subsequent EIR.⁴⁰ The court cited "the Guidelines, treatises and cases" that unanimously state that CEQA applies only to discretionary approvals.⁴¹ Here, there was no such approval.

[2] Impact Analysis

The general trend of the courts has been a refusal to "second-guess" discussions of specific environmental impacts. Nonetheless, plaintiffs continue to allege that large numbers of impacts are inadequately analyzed, and courts undertake the tedious task of plowing through the claims, almost always concluding that a specific impact has been sufficiently evaluated. Thus, for example, in *National Parks and Conservation Association v. County of Riverside*,⁴² the court of appeal rejected a variety of adequacy arguments, including claims that the EIR failed to analyze noise impacts, biological impacts, and impacts on a neighboring wilderness area.

In contrast, the decision in *Cadiz Land Company, Inc. v. Rail Cycle, L.P.*⁴³ demonstrates why plaintiffs continue to bring multitudes of claims. In this case a neighboring agricultural operation challenged the county's approval of a conditional use permit for a very large landfill to be located in the California desert. The court held that the EIR adequately discussed the plaintiff's future agricultural operations and related potential impacts. Then, however, the court concluded that the EIR did not sufficiently address the impacts of the project on a groundwater aquifer that underlies both the proposed landfill and the plaintiff's agricultural operations. The basic problem, thought the court, was that the EIR did not identify the volume of water contained in the aquifer or the size of the aquifer. Without that information, the county could not "evaluate whether the landfill presents a significant adverse impact on the groundwater contained in the aquifer."⁴⁴

It is hard to know what to make of the decision. On the one hand, the record *did* contain an estimate of the volume of water in the aquifer. This estimate was apparently prepared by an expert hired by the plaintiff during the administrative process. The county, said the court, should have revised the EIR to include this information.⁴⁵

⁴⁰ *Id.* at 479.

⁴¹ *Id.*

⁴² 71 Cal. App. 4th 1341, 84 Cal. Rptr. 2d 563 (1999).

⁴³ 83 Cal. App. 4th 74, 99 Cal. Rptr. 2d 378 (2000).

⁴⁴ 99 Cal. Rptr. 2d at 392.

⁴⁵ *Id.* at 394.

The court of appeal may well have viewed groundwater as so important that any environmental analysis must focus on it, a conclusion that would be consistent with the water supply cases discussed earlier in this article. Another court, however, might easily have concluded that, since the information was in the record, the discussion in the EIR was adequate. The case illustrates how difficult it is to "bullet-proof" an EIR to insulate it from adequacy challenges even when the applicant puts considerable resources into the environmental analysis, as it did here.

Of course, a certain amount of common sense is required in completing any environmental analysis, a point illustrated in *Riverwatch v. County of San Diego*.⁴⁶ In response to numerous complaints that the determination of whether an environmental impact is "significant" is arbitrary, the CEQA guidelines now allow EIRs to rely on regulatory standards, such as air pollution regulations, in making that determination.⁴⁷ If a project, however, has *other* sources of air emissions not covered by the standard, the agency must consider whether those emissions are significant. If it ignores those emissions not governed by the regulatory standard, a court will likely overturn such action, as happened in *Riverwatch*. The court held that, while the process emissions met the air pollution district's emission standard, "that fact did not permit the drafters of the EIR to presume that the other almost 200 pounds of PM sub 10 was insignificant."⁴⁸

[3] Baselines

One other area of EIR adequacy in which the courts have been active is the required "baseline" for analysis of environmental impacts. From the standpoint of measuring environmental effects, the starting point of the analysis is obviously an important factor. However, deciding what exactly is the analytic baseline can be difficult. Furthermore, once the preparer of a draft EIR decides on an appropriate baseline, it is unlikely to want to change the ensuing environmental analysis even if a comment by a citizen presents a serious challenge to that choice of the baseline.

⁴⁶ 76 Cal. App. 4th 1428, 91 Cal. Rptr. 322 (2000).

⁴⁷ 14 Cal. Code Regs. § 15064(f) (agency may presume that air pollution is not significant when air pollution from a project meets an existing local standard for a particular pollutant).

⁴⁸ 91 Cal. Rptr. 2d at 340.

The *County of Amador* decision, discussed in detail above,⁴⁹ considered the baseline question. A water agency had purchased a hydroelectric dam and, to analyze the impacts from releases from the dam, the agency's EIR used "end of the month" water levels at the three lakes impacted by the dam. Contending that this baseline was insufficiently detailed, plaintiffs argued that the baseline had to include information on how those end-of-month lake levels were derived or maintained.⁵⁰

The court agreed with the plaintiffs, concluding that "a mere recitation of end-of-month lake levels does not provide an adequate description of the existing environment" or how the prior owner determined water releases.⁵¹ The point, reasoned the court, was that the end-of-month levels could be reached through a variety of different release scenarios. Unless the specifics of releases during the month were known, the information was insufficient to assess the actual impacts of the releases.

Finally, the court rejected the defendants' argument that the record contained sufficient information to discern all of the necessary information. While the information might be "cobbled together," such an effort "should not be necessary."⁵²

The baseline issue is directly analogous to the issue of how much information must be included to sufficiently analyze an impact. Both involve questions of degree. In the area of analyzing impacts, the courts now give a fair amount of deference to the agencies. As long as the agency makes a reasonable effort to address an issue, the discussion is likely to suffice. On the question of baseline, however, courts have tended to be stricter, emphasizing that the baseline must describe the real situation, not a hypothetical one, and that a baseline cannot operate to mask a variety of different environmental impacts.

But there are limits to the expansion of the baseline. In *Riverwatch v. County of San Diego*, discussed above, the plaintiffs argued that the baseline had to account for prior, illegal activities at the site. In other words, the plaintiffs contemplated that the appropriate baseline was the environment on the site *before* these illegal activities occurred.

⁴⁹ See discussion accompanying N. 6, *supra*.

⁵⁰ 91 Cal. Rptr. 2d at 80.

⁵¹ *Id.* at 81.

⁵² *Id.*

The court of appeal disagreed, holding that the environment to be analyzed is the one existing at the time when a project is approved.⁵³ The court thought that requiring development of an earlier baseline would put too much of a burden on the EIR drafters and might even interfere with an enforcement action against those individuals who had acted illegally earlier.

That reasoning makes sense. For one thing, such an analysis would force the agency into constructing a hypothetical baseline. But the most convincing reason supporting the holding is simply that the purpose of an EIR is to analyze changes in the environment that the approval of the project will cause. If the changes have already occurred, whether illegally or not, they are history, not future changes.

[4] Segmentation

A last adequacy question that has proven difficult to resolve is the question of segmentation: when can a public agency defer analysis of certain environmental impacts for a later date? The classic situation involves oil exploration: can the EIR be limited to the effects of exploration, or must it also consider the possible effects of production? In a 1987 decision, *No Oil, Inc. v. City of Los Angeles*,⁵⁴ the court of appeal held that, to determine whether analysis of some impacts of a multistage project may be deferred, the court is to consider (1) whether obtaining more useful information on a project is "meaningfully possible" at the earlier stage, and (2) how important it is to have the additional information at an early stage. The test, particularly the second part, is somewhat subjective, inevitably leading to litigation.

In *Riverwatch v. County of San Diego*,⁵⁵ a public agency considered the approval a conditional use permit for a rock quarry. The quarry would require a widening of the adjacent state highway. The county approved the project, holding that some of the analysis of the impacts of the road expansion could be deferred until the state later acted on a permit for the highway. The trial court held that this decision unlawfully segmented the project.

The court of appeal disagreed. The court found it significant that the EIR clearly stated that the highway expansion would cause

⁵³ See 14 Cal. Code Regs. § 15125(a).

⁵⁴ 196 Cal. App. 3d 223, 242 Cal. Rptr. 37 (1987).

⁵⁵ 76 Cal. App. 4th 1428, 91 Cal. Rptr. 2d (2000).

environmental effects and generally discussed those impacts. Here, there was "nothing in the record which demonstrates that the new information would alter these conclusions."⁵⁶

The key, then, was that the impacts were fully set forth, although further information regarding their exact scope and contours would not be obtained until later. The *Riverwatch* opinion thus provides useful information for EIR preparers, suggesting what kind of information must be included in the EIR before a court will be willing to hold that additional information can be compiled at a later point in time.

§ 16.05 Litigation Pre-requisites, Attorneys' Fees and Remedies

Several decisions handed down in the past year have considered important procedural "side issues" in CEQA cases. The most important of these concern standing, exhaustion of administrative remedies, and attorneys' fees.

[1] Standing: A Tale of Two Landfills

In *Waste Management of Alameda County, Inc. v. County of Alameda*,⁵⁷ a landfill operator found itself in competition with another landfill located only four miles away but in a distinctly different regulatory environment. When the plaintiff operator sought permission to accept certain designated wastes at its facility, the county responded by requiring the preparation of an EIR. However, when the competing facility sought to accept the same kind of designated wastes, the neighboring county where it was located did not require further review under CEQA. The plaintiff operator, citing unfairness and competitive disadvantage, brought suit against the neighboring county seeking to compel an EIR.⁵⁸

The court of appeal held that the plaintiff lacked standing to bring the action. The court stated that a plaintiff could obtain standing either by showing a beneficial interest or by procuring enforcement of a public duty, but it found that the plaintiff met neither test. It first declared that the plaintiff had no sufficient beneficial interest within the zone of interests protected by CEQA because it identified its injury

⁵⁶ 91 Cal. Rptr. 2d at 336.

⁵⁷ 79 Cal. App. 4th 1223, 94 Cal. Rptr. 2d 740 (2000).

⁵⁸ 94 Cal. Rptr. 2d at 745-46

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as a competitive one.⁵⁹ "[C]ommercial and competitive interests," said the court, "are not within the zone of interests CEQA was intended to preserve or protect."⁶⁰

The court then found that the operator could not use the "public duty" exception. The plaintiff had "no demonstrable interest in or commitment to the environmental concerns which are the essence of CEQA." Instead, said the court, the operator was "pursuing its own economic and competitive interests."⁶¹

There have been relatively few standing decisions under CEQA. If standing were a significant issue under the Act, the court's discussion of what it termed the "public duty" exception to the requirement of a beneficial interest might break new ground. It is, however, likely to be relatively unimportant in CEQA cases.

As to the substance of the plaintiff's complaint, whether it was treated unfairly depends on whether the environmental conditions of the two landfills are actually different. In fact, there were some differences. For example, although the facilities were located only four miles away from each other, a natural geological divide affecting drainage separated them, and the expansion of the plaintiff's facility allegedly involved certain larger issues. In part, however, the difference in treatment simply reflected differing approaches between two regional water quality control boards.⁶² The plaintiff's complaint about that kind of regulatory difference was well-taken, although CEQA proved not to be a vehicle for raising it.

The *Waste Management* case is not the only CEQA decision to firmly reject attempts to use the Act as a weapon in non-environmental disputes. In *Friends of Davis v. City of Davis*,⁶³ a property located near downtown Davis was zoned for commercial use, and a new tenant only needed site plan and architectural approval under the city's design ordinance. When it became known that the owner was negotiating with Borders bookstore chain, however, a number of individuals objected to the city's approval of the design review application.⁶⁴

⁵⁹ *Id.* at 748-49.

⁶⁰ *Id.* at 749.

⁶¹ *Id.* at 751.

⁶² *Id.* at 746 n.2 (county suggested that CEQA review was required for the plaintiff "based on a number of things," including differing regulatory approaches by the Central Valley and San Francisco Bay Area regional water boards the "the view that Waste Management's request was part of a larger project which included added acreage and expanded use.")

⁶³ 83 Cal. App. 4th 1004, 100 Cal. Rptr. 2d 413 (2000).

⁶⁴ 100 Cal. Rptr. 2d at 418-19.

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The court first upheld the city's decision under its design ordinance, concluding that the ordinance "does not encompass tenant approval."⁶⁵ It then ruled against the plaintiff's CEQA claim, in which the plaintiff argued that "the social and economic effects of a Borders bookstore tenancy must be regarded as a matter of law as a potentially significant change in the environment."⁶⁶ While Borders would compete with downtown bookstores, said the court, "CEQA is not concerned with effects on particular persons."⁶⁷

[2] Exhaustion of Administrative Remedies: The End of the "Rehearing" Trap?

For years, the California Supreme Court's 1943 opinion in *Alexander v. State Personnel Board*,⁶⁸ was a trap for the unwary.

It seemed to require that a plaintiff file a petition for rehearing with an administrative agency before seeking relief in court. Most practitioners had concluded that this requirement no longer had any life, but in *Sierra Club v. San Joaquin Local Agency Formation Commission*,⁶⁹ the rehearing trap caught the plaintiff. The court of appeal held that, because the plaintiff had not sought rehearing before the local agency formation commission, it could not bring its action challenging the approval of a city annexation.

The California Supreme Court reversed, concluding that a petition for rehearing or reconsideration was not a prerequisite for judicial review.⁷⁰ Interestingly, however, the court did not completely drive a stake into the heart of *Alexander*. The court noted that a petition for rehearing might still be necessary in some instances, such as to introduce legal arguments that were not originally brought to the attention of the administrative body.⁷¹ Thus, while the rehearing trap is largely done away with, the possibility exists that, in some narrow circumstances, it may still be exist.

One other CEQA case, *Tahoe Vista Concerned Citizens v. County of Placer*,⁷² found that the plaintiff had failed to exhaust administrative

⁶⁵ *Id.* at 419.

⁶⁶ *Id.* at 424.

⁶⁷ *Id.* at 426.

⁶⁸ 22 Cal. 2d 198, 137 P.2d 433 (1943).

⁶⁹ 21 Cal. 4th 489, 981 P.2d 543, 87 Cal. Rptr. 2d 702 (1999).

⁷⁰ 87 Cal. Rptr. 2d at 705.

⁷¹ *Id.* at 717.

⁷² 81 Cal. App. 4th 577, 96 Cal. Rptr. 2d 880 (2000).

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remedies before challenging a negative declaration. In this case the planning commission's adoption of a conditional use permit was appealed to the board of supervisors, which affirmed the approval. When the plaintiff then sought to challenge the negative declaration in court, the court of appeal concluded that he had not exhausted his administrative remedies. The court found that he had only appealed one of the conditions on the conditional use permit to the board, and because there was no appeal from the planning commission's CEQA determination, he was barred from raising that issue.⁷³

The case turned on the peculiar nature of the county's ordinance. Under this ordinance, the plaintiff had to specify the particular subject or grounds of the appeal. On appeal, the board's jurisdiction was limited solely to those issues appealed by the appellants.⁷⁴

Most administrative appeals do not operate in this manner. Furthermore, it is hard to see how the outcome in this opinion would hold under other conditions. For example, the court said that the board had "no jurisdiction" over the negative declaration except to readopt it. But what if, by changing the conditions, the board's action gave rise to new environmental impacts?

In any event, the case is likely to give rise to litigation claiming a failure to exhaust administrative under ordinances that are different from this one. The plaintiffs' attorneys would be well-advised to administratively appeal all relevant issues, just to be safe and avoid any claims that they failed to exhaust administrative remedies under *Tahoe*.

[3] The Statute of Limitations: First Things First

Practitioners are well-aware that the statute of limitations under CEQA requires prompt action by plaintiffs if they are to have a day in court. However, the short statute of limitations, usually 30 or 35 days,⁷⁵ does not commence until the public agency approves the project in question. In the normal case there is no dispute over the time when the approval occurs, but in *County of Amador v. El Dorado County Water Agency*, discussed above,⁷⁶ the defendant agency

⁷³ 96 Cal. Rptr. 2d at 888.

⁷⁴ *Id.* at 890.

⁷⁵ Pub. Res. Code § 21167(d), (e).

⁷⁶ See discussion accompanying N. 6, *supra*.

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claimed that the plaintiff's action was untimely. The defendant cited a "notice of exemption" that it had earlier filed and argued that the plaintiff had not filed suit within 35 days after the notice was filed, as required by CEQA.

The problem was that, prior to filing the notice of exemption, the agency had not actually approved the project. Instead, the court found, the only agency action prior to filing the notice was the passage of a resolution that authorized negotiations, not the actual purchase of the dam in question. Because the agreement did not come until much later, the plaintiff's action was timely.⁷⁷

The court distinguished an earlier case, *City of Chula Vista v. County of San Diego*,⁷⁸ where a resolution authorizing employees to enter negotiations and "subject to successful negotiations . . . award a service contract" was found to be the project approval even though the actual agreement occurred much later. The *County of Amador* court found the *Chula Vista* situation to be "in stark contrast" to that in *Amador*.⁷⁹ It may not be as stark as the court thought. But in any event, the *County of Amador* case got it right: negotiations are not the same thing as reaching an agreement.

[4] Attorneys' Fees: A Contrasting Pair of Cases

California state law allows a successful plaintiff bringing an action affecting the public interest to seek an award of attorneys' fees,⁸⁰ and in the past successful CEQA plaintiffs have been awarded fees. One situation that commonly arises in applications for fees, however, is that of the self-interested plaintiff who vindicates environmental law but whose own property interests are also at stake. Two recent cases considered such plaintiffs.

In *Williams v. San Francisco Board of Permit Appeals*,⁸¹ the plaintiff owned a Victorian house on a street of Victorian houses. He sued to stop the erection of a new four-story building on the block, and after he succeeded, sought an award of attorneys' fees. The principal issue was the requirement of Code of Civil Procedure Section 1021.5 that "the necessity and financial burden of private enforcement

⁷⁷ 91 Cal. Rptr. 2d at 88.

⁷⁸ 23 Cal. App. 4th 1713, 29 Cal. Rptr. 2d 89 (1994).

⁷⁹ 91 Cal. Rptr. 2d at 88.

⁸⁰ See Cal. Code of Civ. Proc. § 1021.5.

⁸¹ 74 Cal. App. 4th 961, 88 Cal. Rptr. 2d 565 (1999).

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. . . are such as to make the award appropriate."⁸² The trial court rejected the award, citing the attorney's large personal stake in the matter.

The court of appeal affirmed. The applicant argued that he had no personal financial stake in the outcome because the new proposed structure would not diminish his own property's value, but the court was not convinced. It found that, aside from any monetary impact, "appellant had a strong personal and property interest in not having a 7000 square foot, three-unit building erected next door to his home."⁸³ Accordingly, the trial court did not abuse its discretion in concluding that the owner's interest in the aesthetic integrity of the neighborhood, as well as in protecting his privacy and access to light, air and views, was sufficient to deny the award.⁸⁴

The *Williams* decision was distinguished in *Families Unafraid to Uphold Rural El Dorado County*.⁸⁵ Again, the issue was the "financial burden" criterion, applied in this case to a fee application filed after a successful challenge to a residential subdivision. In a lengthy opinion, the court of appeal found that the plaintiff's attorney was entitled to attorneys' fees. Application of the "financial burden" criterion, wrote the court, requires "a realistic and practical comparison of the litigant's personal interest with the cost of the suit."⁸⁶

The court first refused to categorically find that a "NIMBY" ("not in my backyard") personal interest "automatically disqualifies the party asserting it from meeting the 'financial interest' criterion of section 1021.5, subdivision (b)."⁸⁷ The court then concluded that, given the complexity of the litigation, in which the attorney spent nearly 600 hours, the trial court abused its discretion in concluding that the applicants had not met the "financial burden" criterion. The *Williams* decision was distinguished. There, the applicant-plaintiff's aesthetic and financial interest "related directly to him"; thus, the aesthetic or environmental interest in that case functioned "essentially in the same way" as the financial interest.⁸⁸

⁸² Cal. Code of Civ. Proc. § 1021.5, subd.(b).

⁸³ 88 Cal. Rptr. 2d at 571.

⁸⁴ *Id.* at 572.

⁸⁵ 79 Cal. App. 4th 505, 94 Cal. Rptr. 2d 205 (2000).

⁸⁶ 94 Cal. Rptr. 2d at 212.

⁸⁷ *Id.* at 213.

⁸⁸ *Id.* at 212.

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Given the importance of factual circumstances to an attorneys' fees award, both cases will be cited by opposing sides in future fee disputes. But the cases do establish the key battleground: the nature of the "specific aesthetic or environmental interest" asserted by the plaintiff, and the extent of the financial burden borne by the plaintiff.

Finally, in *National Parks and Conservation Association v. County of Riverside*,⁸⁹ the court considered the property of awarding attorneys' fees for subsequent proceedings before the public agency and court where a plaintiff had initially prevailed in a CEQA challenge and the agency was attempting to comply with the court's order. The plaintiff sought attorneys' fees for its unsuccessful challenge to the defendant's return to the original writ, but the court of appeal refused. The plaintiff was not compelled to challenge the return to the writ, and having done so unsuccessfully, it presented no grounds for an award of fees.⁹⁰

The court did, however, find that fees could be awarded to the plaintiff for work performed during the administrative process leading to the certification of the return EIR. The test is whether the work performed was "useful and necessary and directly contributed to the resolution of the action."⁹¹ The case was remanded for the trial court to exercise its discretion on this issue.

[e] Remedies: The Civil Rights Act Interface

Lastly, one case gives landowners a damages remedy if a public agency acts unfairly in its application of CEQA. In *Sunset Drive Corp. v. City of Redlands*,⁹² the plaintiff alleged that the city had first required it to prepare a draft EIR. The city then required the applicant to pay for another set of consultants to independently evaluate the draft. According to the complaint, after the applicant revised the draft and re-submitted it, more comments were received, and the applicant again revised the proposed draft EIR. Thereafter, said the plaintiff, the city had refused to either advise the applicant of the draft's inadequacies or to approve it,⁹³ leaving the applicant in a kind of limbo.

⁸⁹ 81 Cal. App. 4th 234, 96 Cal. Rptr. 2d 576 (2000).

⁹⁰ 96 Cal. Rptr. 2d at 581.

⁹¹ *Id.* at 581-82.

⁹² 73 Cal. App. 4th 215, 86 Cal. Rptr. 2d 209 (1999).

⁹³ 86 Cal. Rptr. 2d at 220.

The court first held that mandate was an appropriate remedy to compel the city to act on the draft EIR. Then, however, the court found that the applicant had stated a cause of action for damages under Section 1983 of the federal Civil Rights Act. The basis for the claim was the city's duty "to complete a satisfactory EIR when a project requires it."⁹⁴

§ 16.06 Conclusion

The past year brought more important decisions under CEQA than in many past years. It showed that this state law remains a powerful tool for project opponents, and it demonstrates that CEQA-compliance remains crucial to the land use approval process.

Equally important, the year brought decisions that sought to mesh CEQA with the land use planning process in ways that had not previously occurred. What remains to be seen is how land use planning responds to the challenges posed by these decisions.

⁹⁴ *Id.* at 225.