Summer of CEQA – Six Recent CEQA Cases Uphold Agency Discretion, Including the Selection of Threshold of Significance for and Analysis of Climate Change/Greenhouse Gas Impacts

07.19.2011

Within the span of two weeks, the California Supreme Court and Courts of Appeal have published a total of six CEQA cases – in every case, the courts sided with the agencies and rejected challenges to the CEQA documents, including a negative declaration and two mitigated negative declarations. Of special note, the Supreme Court decision will be felt far beyond CEQA litigation because it makes it easier for corporate plaintiffs to establish standing to petition the courts for relief.

Summary of Significant Holdings:

1. ***Save the Plastic Bag Coalition v. City of Manhattan Beach*** – The Supreme Court held that a corporate entity bringing a citizen suit to vindicate a public right need not withstand heightened scrutiny to establish standing to sue. Indeed, a corporate entity with direct beneficial interest in the case has standing to petition for a writ of mandate in its own right. Thus, the court upheld the lower courts' determination that the Save the Plastic Bag Coalition could challenge the city's ban on the point-of-sale distribution of plastic bags. However, the Court reversed the judgment of the lower courts and upheld the city's use of a negative declaration to analyze the impacts of the ban.
2. ***South Orange County Wastewater Authority v. City of Dana Point*** – CEQA does not require analysis of the existing environment's impacts on a project. Thus, an EIR is not required to study the impacts of odors from an existing sewage treatment facility on an adjacent subdivision because the odors from the facility are not evidence that the subdivision may have a significant environmental impact by bringing future residents to the

area.

3. ***Silverado Modjeska Recreation and Parks Distr. v. County of Orange*** – Despite allegedly significant new information in the form of observations of endangered species in close proximity to a project site, recirculation is not required when the public had already commented on the project's potential impacts on the species.
4. ***Del Cerro Mobile Estates v. City of Placentia*** – Where an agency has prepared an EIR, and the EIR is challenged in court, the agency may raise a statutory exemption as a defense. Because the approved project qualified for an exemption from CEQA, no EIR was required, and dismissal was proper.
5. ***Citizens for Responsible Equitable Environmental Development v. City of Chula Vista*** – Evidence that a project's impacts to greenhouse gas emissions and climate change would be found significant under alternative thresholds of significance that the lead agency did not use is not evidence that the project may have a significant impact. The city properly exercised its discretion in formulating a threshold of significance, and no substantial evidence suggested that the impacts would be significant under the city's chosen threshold of significance. Thus, no EIR was required.
6. ***Clover Valley Foundation v. City of Rocklin*** – EIR upheld in the face of alleged failure to adequately disclose or analyze impacts to cultural resources, growth-inducing impacts, and impacts to biological resources, views, and water supply.

Discussion

Save the Plastic Bag Coalition v. City of Manhattan Beach

In the landmark decision *Save the Plastic Bag Coalition v. City of Manhattan Beach* (July 14, 2011) 2011 WL 2714056, __ Cal.4th __, the California Supreme Court addressed two questions: "(1) What are the standing requirements for a corporate entity to challenge a determination on the preparation of an environmental impact report (EIR)? (2) Was the city of Manhattan Beach required to prepare an EIR on the effects of an ordinance banning the use of plastic bags by local businesses?"

The Court held that a corporate plaintiff is not required to withstand heightened scrutiny to establish standing to file a citizen suit, disapproving the standard articulated in *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1238, a Court of Appeal case that had vexed corporate plaintiffs in CEQA suits. Moreover, the Court concluded that where a corporate entity such as the Save the Plastic Bag Coalition possesses a "direct and substantial beneficial interest" in the case over and above the interest held in common with the public at large, it may seek a petition for writ of mandate on its own behalf, without having to bring the suit as a "citizen" to protect the public interest. The court also rejected the city's suggestion that to establish standing to bring a CEQA challenge, a plaintiff must be affected by a particular adverse *environmental* impact of the project.

While the decision does not give corporations a free pass to file citizen suits, it relieves them of the burden of withstanding heightened scrutiny to establish standing to challenge legislative and quasi-legislative government actions in citizen suits.

Although these holdings bring relief to corporate plaintiffs generally, they did little good for the Save the Plastic Bag Coalition. The Court reversed the lower courts on the second question and held that the city is not required to prepare an EIR before it may approve its ordinance banning the point-of-sale distribution of plastic bags by retail stores, restaurants, or vendors in Manhattan Beach.

The city adopted a negative declaration instead of preparing an EIR because it concluded that the ban would not have a significant adverse impact on the environment. During the administrative proceedings, the

plaintiff submitted life cycle studies to support its claim that the ban on plastic bags would lead to a switch to the use of paper bags, which require more energy and water to produce than plastic bags, and which require more space in landfills when disposed of. The courts below held that the studies constituted substantial evidence that support a fair argument that the ban may have a significant impact on the environment, thus the city was required to prepare an EIR before it could approve the ban.

The Court of Appeal reversed, holding that no EIR was required because "no evidence suggests that paper bag use by Manhattan Beach consumers in the wake of a plastic bag ban would contribute to [the adverse impacts associated with the production and disposal of paper bags] in any significant way." The Court emphasized that substantial evidence supported the city's conclusion that the ban would not have a significant impact on the city, and because the impacts of the project outside the city are indirect and difficult to predict, "the city could evaluate the broader environmental impacts of the ordinance at a reasonably high level of generality."

South Orange County Wastewater Authority v. City of Dana Point

In *South Orange County Wastewater Authority v. City of Dana Point* (June 30, 2011) 2011 WL 2576837, __ Cal.App.4th __, the court rejected a "reverse-CEQA" challenge to a mitigated negative declaration prepared for land use approvals a yet-to-be-proposed mixed-use development. The subject land is situated next to a sewage treatment plant operated by the South Orange County Wastewater Authority (SOCWA). SOCWA argued that the city should be required to prepare an EIR for the project because substantial evidence in the record before the city supports a fair argument that occasional odors from the sewage treatment plant may have a significant impact on the future residents of the contemplated mixed-use development. SOCWA argued that the city could mitigate this impact to a less-than-significant level by requiring the developer to pay $4.6 million to SOCWA so it could install covers on its aeration tanks.

The court rejected SOCWA's argument – stating that it turns CEQA upside down. The express language and purpose of CEQA is to protect the environment from the adverse impacts of projects, not the other way around. In addition, the court rejected the argument that CEQA Guidelines section 15126.2 and Appendix G expressly require lead agencies to study the impacts of the existing environment on proposed projects. The court held that to interpret the Guidelines to require analysis of the impacts of the existing environment on future residents of proposed development would render the Guidelines inconsistent with the statute.

Silverado Modjeska Recreation and Parks Distr. v. County of Orange

In *Silverado Modjeska Recreation and Parks Distr. v. County of Orange* (July 8, 2011) 2011 WL 2654606, __Cal.App.4th__, a decision with important practical implications for many development projects, the Court of Appeal addressed a common and vexing CEQA issue: When is new information regarding biological impacts important enough to require another round of public review and comment of an EIR? A 2-1 majority of the panel concluded that CEQA did not require the recirculation of a revised supplemental EIR where new information revealed the presence of an endangered species close to the proposed development and where a federal biologist claimed that the new information indicated that the development would impact the species.

The Draft Supplemental EIR disclosed the presence of the endangered arroyo toad 1.5 miles from the project, but concluded that the project site was not suitable toad habitat, and therefore the project would not have a significant impact on the species. After circulation of the supplemental EIR, a biologist discovered

toad larvae a mere 330 feet from the project site. Based on this new information, a U.S. Fish and Wildlife Service biologist concluded that there "was a high likelihood the arroyo toad was present" on the project site. The project proponent's biologist, however, concluded that the new information did not support a conclusion that the toad was present on the project site because the site still provided no suitable toad habitat. The Final Supplemental EIR noted the new observation of toads, but the county did not recirculate the Supplemental EIR before certifying it.

In rejecting the demand for another round of review, the two-member majority emphasized the legislative intent (reflected in sections 21092.1 and 21166 of CEQA) to limit "endless rounds of revision and recirculation of EIRs" and, as the Supreme Court stated in *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1132 (*Laurel Heights II*), "[r]ecirculation is intended to be the exception, rather than the general rule." The majority reasoned that the public had, in fact, already commented on the potential indirect impacts of the project on toads that the commenters claimed were present, but unobserved, in the immediate vicinity of the project site at the time the 2003 draft EIR was circulated. Thus, the observation of toads within 330 feet of the project site did not constitute new information of "substantial importance" because it merely amplified arguments made (and actually litigated) with respect to the 2003 EIR.

Del Cerro Mobile Estates v. City of Placentia

In *Del Cerro Mobile Estates v. City of Placentia* (June 7, 2011) 2011 WL 2199376, ___ Cal.App.4th ___, the Court of Appeal held that a lead agency is not estopped from arguing that the petition challenging the EIR should be dismissed because the approved project is exempt from CEQA.

Normally, if a lead agency determines that a project qualifies for a statutory exemption from CEQA, it does not prepare an EIR. In *Del Cerro Mobile Estates*, the City of Placentia approved a project in which several at-grade railroad crossings would be grade separated. Under Public Resources Code section 21080.13, railroad grade separation projects are exempt from environmental review under CEQA. Nevertheless, the city prepared an EIR for the grade-separation project because it had also considered a potentially feasible alternative that would not qualify for the grade-separation exemption.

Proving once again that no good deed goes unpunished, Del Cerro Mobile Estates challenged the adequacy of the EIR. The City moved to dismiss the case based on the argument that the approved grade separation project is exempt from CEQA. The Superior Court agreed with the city, and the Court of Appeal affirmed.

The petitioner argued that the city waived its right to raise the exemption as a ground for dismissal because it already completed and certified an EIR, it knew of the statutory exemption, but it misled the petitioner into thinking that CEQA applied to the project. Thus, the city should not be allowed to argue for the first time in court that the project is exempt from CEQA, and should be made to defend the adequacy of the EIR.

The court rejected this argument because estoppel would apply only if the city had misled petitioner about certain *facts*, not where the city's action in preparing and certifying an EIR may have lead the petitioner to the erroneous legal conclusion that the project did not qualify for a statutory exemption from CEQA.

Citizens for Responsible Equitable Environmental Development v. City of Chula Vista

In *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (June 10, 2011) 2011 WL 2306237, __ Cal.App.4th __, the court largely upheld the City of Chula Vista's use of a mitigated negative declaration (MND) to analyze the impacts of a project to replace a Target store and several smaller businesses with a larger Target store. Petitioner argued that an EIR should be required because there is substantial evidence that the project may have significant adverse impacts on hazardous materials, air quality, and global climate change. The court rejected petitioner's arguments with respect to air quality and climate change impacts, but remanded to the trial court with instructions to determine if the city's corrective action plan to remediate contamination from leaking underground storage tanks at the former site of a gas station addressed contaminated soils.

The city exercised its discretion to adopt a two-part threshold of significance to assess the project's impact on greenhouse gas emissions and climate change: (1) would the project conflict with or obstruct the goals or strategies of the California Global Warming Solutions Act of 2006 (AB 32)? and (2) would the project's greenhouse gas emissions exceed a level 20% below business as usual? The city chose the 20% reduction as a numeric threshold because it falls between the 11% reduction required to reach AB 32's target of achieving year 2000 levels of emissions by 2010, and the 25% reduction required to reach AB 32's target of 1990 levels by 2020. According to the city's Air Quality Assessment, with implementation of certain energy saving measures, the store's operational emissions would achieve a 29% reduction in emissions by 2020.

The petitioner advanced several arguments to support its claim that the city's analysis was inadequate. First, it argued that under three other "well-recognized" thresholds of significance, the project would be found to have a significant impact on greenhouse gas emissions. The court rejected this argument, citing CEQA Guidelines sections 15064 and 15064.4, both of which expressly give lead agencies the discretion to select a threshold of significance to apply to a project. The court noted that under section 15064.4, which became effective March 18, 2010, lead agencies should make a good-faith effort to "describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project," and consider the extent that the project may increase or decrease emissions, whether the emissions exceed the threshold of significance that the lead agency applies, and the extent that the project complies with statewide, regional, or local plans to achieve reductions in greenhouse gas emissions. The court held that the city properly exercised its discretion in choosing the threshold it applied to the project, and the mere existence of alternative thresholds is not substantial evidence that the project may have a significant impact on greenhouse gas emissions.

Second, the petitioner argued that the city arbitrarily selected a 20% reduction from business as usual because it falls "somewhere" between the 11% and 25% reductions needed to achieve AB 32's 2010 and 2020 targets. The court rejected this argument because the City's calculations of emissions under business-as-usual and project-plus-mitigation conditions are supported by substantial evidence, and those calculations indicate that by 2020, the mitigation measures will result in reductions from "business as usual" which exceed the AB 32 target.

Third, the petitioner argued that the city should have adopted a numeric threshold of significance of 33% reduction from business as usual because that is the target selected by San Diego County in an "On-Road Transportation Report," which is part of the San Diego County Greenhouse Gas Inventory. But the court rejected this argument based on its prior determination that the city properly exercised its discretion in selecting a 20% threshold.

This holding establishes an important precedent. Even if substantial evidence may support the use of a different threshold of significance, and under the alternative threshold, the impacts would be significant, that does not constitute substantial evidence supporting a fair argument that the project may have a significant impact. So long as the lead agency's chosen threshold of significance is supported by substantial evidence, and if there is no substantial evidence to support a fair argument that the project may have a significant impact *under the lead agency's selected threshold,* no EIR is required.

Clover Valley Foundation v. City of Rocklin

In *Clover Valley Foundation v. City of Rocklin* (July 8, 2011) 2011 WL 2671250, __Cal.App.4th __, the court rejected arguments that the EIR for a large residential and commercial development failed to adequately describe and mitigate certain impacts. The court upheld the city's decision not to disclose the exact nature and location of archaeological sites and sacred lands subject to disclosure restrictions under the Public Records Act or the National Historic Preservation Act. The city disclosed that eight sites would be impacted by the project, described the general nature of the cultural resources, and the mitigation measures that would be imposed to reduce the impacts to a less-than-significant level. But, pursuant to various statutes aimed at protecting certain cultural resources from looting, the city refused to disclose the exact location and descriptions of the cultural resources.

The court approved of the balance the city struck between the interest of disclosure of environmental impacts and the statutory mandate not to disclose certain information about cultural resources. Although it withheld certain specifics, the city provided the public and decision makers enough information to assess the impacts of the project on cultural resources, and the effectiveness of the specified mitigation measures.

The court also rejected a challenge to the EIR's discussion and mitigation of the growth-inducing impacts of a new sewer pipeline. The EIR disclosed that the pipeline would not only accommodate the project's needs, it would accommodate the addition of 501 dwelling units north of the project site, and 23 units to the south. The city explained that the land to the north and south was already zoned for the additional dwelling units, the impacts of the additional development had already been analyzed at the programmatic level in an EIR for the city's general plan, and the new sewer line was required by the municipal utilities district's master plan. Thus, because the sewer line would accommodate growth for which the city had already planned, the city concluded that its growth-inducing impacts would not be significant.

The court held that the EIR adequately analyzed the pipeline's growth-inducing impacts. Citing the factors set forth in *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369, the court found that no more detail was required in the EIR's discussion for three reasons: (1) the pipeline was not being constructed for the sole purpose of catalyzing further development, (2) the impact on future growth was indirect because it removed only one of potentially numerous obstacles to future growth, and (3) the future effects of any additional development will undergo CEQA analysis, and had already undergone programmatic analysis in the general plan EIR.

The court also upheld the city's plan to mitigate for any impacts to the California black rail, a bird that is designated as "fully protected" under the California Endangered Species Act (CESA). The EIR disclosed that marshes on the project site provide potentially suitable habitat for the black rail, and that temporary construction impacts to the marshes could impact black rail. The city determined that these impacts would be less than significant because it had imposed a host of mitigation conditions to avoid wetlands, replace any lost wetlands, obtain necessary permits from the U.S. Army Corps of Engineers and the Department of

Fish and Game for impacts to wetlands, conduct bird surveys, comply with established protocols if marsh-occupying birds are observed, and comply with all mitigation measures imposed by regulatory agencies in the event any listed species, including the black rail, are observed. One of the petitioners argued that this constitutes deferred mitigation in violation of CEQA. Because the black rail is fully protected under CESA, a permit cannot be issued authorizing "take" of a black rail. But the court held that this fact is irrelevant. The city imposed a mitigation condition requiring the developer to obtain all required permits for impacts to the black rail's habitat (the wetlands), and because the mitigation measures included in those permits would have to prevent the take of black rails, the mitigation is enforceable, and therefore it does not constitute improperly deferred mitigation.

Finally, the court upheld the EIR's analysis of impacts on views, traffic, and water supply, and determined that the project was consistent with the city's general plan.