

# ENVIRONMENTAL ASSESSOR

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This edition looks at the usual collection of CEQA cases from the California courts. In addition, Allan Lind offers insight into what we might expect to happen in the Legislature in 2009. As always, if you have any items you'd like to submit for inclusion in the Environmental Assessor, please feel free to call me at ICF Jones & Stokes (916) 737-3000 or e-mail me at: [trivasplata@jsanet.com](mailto:trivasplata@jsanet.com) to discuss them.

## Draft Amendments to the CEQA Guidelines

On January 8, the Governor's Office of Planning & Research (OPR) announced the availability of preliminary draft amendments to the CEQA Guidelines to address greenhouse gas (GHG) emissions. The proposed amendments cover such areas as determining significance, cumulative impact analysis, and addressing GHG emissions in the Environmental Checklist.

OPR will hold two workshops to present the preliminary draft amendments and accept public input. The workshops will include a presentation by OPR and the Resources Agency staff, an overview of the preliminary draft amendments, and the expected process for adopting the regulations by 2010, as required by SB 97. The workshops will be held on Thursday, January 22, 2009 in Los Angeles and on Monday, January 26, 2009 in Sacramento, respectively.

The draft amendments are available for review at:  
[http://opr.ca.gov/ceqa/pdfs/Workshop\\_Announcement.pdf](http://opr.ca.gov/ceqa/pdfs/Workshop_Announcement.pdf)

The workshop agenda is available at:  
[http://opr.ca.gov/ceqa/pdfs/Workshop\\_Agenda.pdf](http://opr.ca.gov/ceqa/pdfs/Workshop_Agenda.pdf)

For interested persons who are unable to attend one of the workshops, OPR will accept written comments on these amendments until Monday, January 26, 2009. Written comments may be submitted by email to OPR at [CEQA.GHG@opr.ca.gov](mailto:CEQA.GHG@opr.ca.gov), by fax to (916) 323-3018, or by US mail to P.O. Box 3022, Sacramento, CA 95812-3044. If submitting written comments, please provide your name and contact information.

More information on CEQA and GHG is available on OPR's website: <http://opr.ca.gov/index.php?a=ceqa/index.html>. Please contact Ian Peterson at the following if you have any questions: [Ian.Peterson@opr.ca.gov](mailto:Ian.Peterson@opr.ca.gov), (916) 445-0613.

## DFG Fees

The Department of Fish and Game has increased its CEQA review fees. Effective January 1, 2009, the fees are as follows:

- EIR: \$2,768.25
- Negative Declaration or Mitigated Negative Declaration: \$1,993.00
- Certified Regulatory Program CEQA Equivalent Document: \$941.25

As always, the fees are paid at the time of filing a Notice of Determination. No fee is required for filing a Notice of Exemption, or when a "no effects" finding has been made.

## The Courts

By Antero Rivasplata, AICP

*The following discussions of recent court decisions are brief summaries of the main points of each case and are certainly no substitute for legal advice. For more detail and legal interpretation, please consult your legal counsel.*

## California Courts

### I See Your CEQA and Raise you an SMA

*Friends of Riverside's Hills v. City of Riverside* (Nov. 24, 2008) \_\_\_ Cal.App. 4th \_\_\_

Litigation procedure is the foundation of this case. In 2006, the City approved a series of subdivision maps within the La Sierra Lands specific plan. Friends challenged the city's approvals on the basis of CEQA; alleging various failures to incorporate the mitigation measures identified in the specific plan's EIR. Friends initiated the litigation within CEQA's statute of limitations and filed the required litigation notices in accordance with CEQA's requirements.

The City countered the lawsuit by claiming that Public Resources Code Section 66499.37, which is in the Subdivision Map Act (SMA), requires the plaintiff to also file a summons with the City within 90 days of its action on the subdivisions. Absent such additional summons, the City argued, Friends' litigation was time barred. The trial court agreed and dismissed Friends' petition for mandate.

The Court of Appeal affirmed the lower court's action. Case law has made it clear that the 90-day service of summons requirement under Section 66499.37 is mandatory and acts like a statute of limitations for actions under the SMA. Friends argued that this conflicted with the requirements of CEQA and that CEQA's requirements should control.

The Court noted that "[a]s a general rule, when two statutes relate to the same subject, the more specific one will control unless they can be reconciled. When the two statutes can be reconciled, they must be construed 'in reference to each other, so as to 'harmonize the two in such a way that no part of either becomes surplusage.'" (citing *Royalty Carpet Mills v. City of Irvine* [2005] 125 Cal.App.4th 1110, 1118; quoting *DeVita v. County of Napa* [1995] 9 Cal.4th 763, 778-779).

Neither CEQA nor the SMA contain provisions that would preclude compliance with both their requirements. "In sum, Friends was required to comply with the SMA's 90-day service of summons requirement found at Government Code section 66499.37, even though it had already personally served a copy of the petition in compliance with CEQA at Public Resources Code section 21167.6, subdivision (a)."

On a technical point, the Court observed that the proposed cause of action was linked to the SMA even though it was filed under CEQA. The implementation of the mitigation measures related to conditions of approval for the maps in question. Therefore, it could not be argued that the petition for mandate

did not involve the SMA and therefore would not be subject to Section 66499.37. In the court's opinion, "Friends was required to comply with the 90-day summons requirement for the CEQA cause of action, because it both overlapped with the SMA causes of action and could have been (and was) brought under the SMA."

### ... Water's for Fightin'

*OWL Foundation v. City of Rohnert Park* (Nov. 20, 2008) \_\_ Cal.App. 4th \_\_

This case examines the adequacy of a water supply assessment (WSA) for a large development project. Consistent with its general plan, the City of Rohnert Park considered the approval of a number of specific plans. The City has been at the center of a long-running battle with nearby land owners over the availability of water, and the effect of City growth on the land owners' water supplies. Prior litigation had resulted in previous water supply studies and in a limit on the city's use of groundwater. The City prepared a WSA analyzing the availability of water to meet the future demands of these projects. OWL challenged the adequacy of the WSA, alleging that it did not cover a sufficient portion of the underlying groundwater basin to enable the City to properly assess water supply availability, pursuant to the requirements of Water Code Section 10910. OWL contended that the selected study area disguised the actual impact of the new demand on groundwater levels. The trial court held for OWL.

The Court of Appeal reversed. Prior to examining the adequacy of the WSA in light of Section 10910, the Court distinguished this case from *California Water Network (C-WIN) v. Newhall County Water District* (2008) 161 Cal.App. 4th 1464. The C-WIN court had found that a WSA could not be challenged prior to certification of a project's final EIR and approval. As a general matter, the present Court agreed with the C-WIN decision, but it found that there were extenuating circumstances in the Rohnert Park case. Here, the city had certified the EIR and was concurrently being challenged by OWL in another lawsuit on the same grounds that were advanced here. The parties of the CEQA lawsuit had entered into a stipulation staying that lawsuit and agreeing that the outcome of this action would dictate the result in the CEQA suit.

Section 10910(f)(5) provides that when a project will rely on groundwater for its supply the WSA must analyze "the sufficiency of the groundwater from the basin or basins from which the proposed project will be supplied to meet the projected water demand associated with the project." The Court observed that nothing in the plain language of this statute requires a basin-wide study of past and future pumping by all users. Therefore, there was no requirement that the WSA include an estimate of past and projected pumping from all users in the basin, as OWL had argued.

The Court further found that, as a practical matter, "requiring a water supplier to collect data on pumping throughout a groundwater basin would impose an enormous if not impossible burden on the water supplier, particularly given the relatively brief [90-day] time frame required to complete a WSA." Groundwater is not regulated by the state, and detailed groundwater budgets are not available for most groundwater basins. That was the situation here.

The large Santa Rosa Valley Groundwater Basin that underlies the project complicates any attempt to conduct a basin-wide analysis of groundwater sufficiency. The basin is geologically complex and besides municipal users, there are thousands of individual wells tapping its water. The Court noted that this task would not necessarily be simplified by the analysis of a subbasin. The function of a WSA is to provide information about groundwater for a specific project. It isn't intended to be a general planning document for groundwater management. That would be the role of a groundwater management plan or similar exercise.

OWL argued that the WSA must at least examine a representative subbasin large enough to reflect the recharge rates and water production levels throughout the area. They further contended that the study area must conform to a basin or subbasin identified by the Department of Water Resources (DWR) and was defective because it relied in part on watershed boundaries. The Court found that Section 10910(f)(5) does not require the use of a particular method for analyzing groundwater sufficiency. The City, therefore, has discretion to select a suitable methodology as long as its selection is supported by substantial evidence in the record. DWR's boundaries do not necessarily provide "sensible boundaries" for evaluating the adequacy of the groundwater examination for a specific project. DWR itself attested that the Santa Rosa Valley Groundwater Basin has a complex hydrology. The Court concluded that the water supplier must have the discretion to determine what works best in their situation to support their WSA.

The City had substantial evidence to support its selection of the WSA's study area. The City's hydrologists selected an area that reflected past studies, available groundwater data, and their review of subsurface geologic conditions. The Court looked at the administrative record, not simply the WSA, to conclude that there was substantial evidence to support the selected study area. By itself, the WSA's discussion was not enough, but other studies provided the additional substantiation needed. The Court found that the selection was not arbitrary, capricious, or lacking evidentiary support.

The Court looked favorably on the fact that the WSA employed two types of empirical analyses to determine groundwater supplies: a water budget model and an examination of pumping and groundwater levels. Using the two analyses avoided the possibility that the water budget model (which accounted for groundwater flows into and out of the study area) could have been skewed by the improper inclusion of areas with high recharge potential (as OWL contended). Both methods produced similar estimates from a combination of sources, and had consistent results.

### To AIR is Human, to Forgive Bovine

*Association of Irrigated Residents v. San Joaquin Valley Unified Air Pollution Control District* (Nov. 19, 2008) \_\_ Cal.App. 4th \_\_

As mandated by 2003 state legislation (SB 700 [Flores]), the San Joaquin Valley Air Pollution Control District (SJVAPCD) enacted its rule 4570, requiring existing confined animal facilities (generally, cattle feed lots and dairies) to reduce their emissions of air contaminants that contribute to ozone. Rule 4570 establishes a permit process for large confined animal facilities intended to control the release of volatile organic compounds (VOCs) and requiring the operations to choose from a variety of mitigation measures. In addition, the rule provides for monitoring of compliance and requires permitted facilities to maintain records of their activities.

AIR brought suit against the SJVAPCD alleging that rule 4570 failed to comply with the requirements of state law because: (1) the District did not perform a public health effects analysis before adopting the rule; (2) rule 4570 did not reduce all air contaminants; (3) rule 4570 failed to regulate ammonia as an air contaminant; (4) rule 4570 did not reduce VOC emissions; and (5) the District acted arbitrarily and capriciously when claiming emissions reductions. The trial court held for the SJVAPCD on all issues.

The Court of Appeal reversed part of the trial court's decision and invalidated rule 4570 pending further consideration by the SJVAPCD. The Court first reviewed whether the SJVAPCD had prepared a health effects analysis, as required by state law. Public Resources Code Section 40724.6(e) requires that before the SJVAPCD could adopt rule 4570 it must have performed an assessment of the impact of the rule on human

health. This assessment must include the nature and quantity of emissions as well as their significance “in adversely affecting public health and the environment and causing or contributing to the violation of a state or federal ambient air quality standard.” AIR claimed that although the record contained information on public health impacts, the SJVAPCD had failed to prepare the required public health assessment. The Court opined that the statutory language does not specify a particular form for this assessment, nor does it require that the assessment be prepared by independent experts. Nonetheless, the SJVAPCD staff report did not contain an assessment of the impact of rule 4570 and therefore failed to meet the statutory requirement. The evidence submitted during the SJVAPCD’s hearing process discussed health problems in general, but did not constitute a health impact assessment as required by Section 40724.6(e).

The Court observed that SB 700 “was enacted to ensure that valley air must be improved to protect public health and that the past practice of exempting agricultural sources of air pollutants was not justified by potential adverse economic impacts on the agricultural industry.” From the record, the Court could not tell whether rule 4570’s planned reduction in VOC emissions would have any impact on public health at all. Therefore, the SJVAPCD “provides no insight into how it balanced public health concerns against other interests in the rule-making process.” The Court noted that the SJVAPCD had met its other assessment requirements under Section 40724.6, so it “obviously knows how to provide an appropriate assessment.” The SJVAPCD’s key failure was to adopt rule 4570 “without informed and transparent decisionmaking.”

The Court next examined AIR’s claim that SB 700 intended that the SJVAPCD address all air contaminants (including ammonia) in its rule, not simply those relating to ozone production. The Court concluded that this was not the case.

“A complete reading of the statutory changes accomplished by SB 700, and the statement of legislative intent provided in SB 700, compel the conclusion that the legislative intent is to control agricultural emission sources as they impact state and federal ambient air quality standards, particularly those for which the state is classified as being in nonattainment. This means that section 40724.6 is, as the district contends, an ozone-specific statute.”

The Court further noted that even if it were to read section 40724.6 to apply to all ambient air quality standards (meaning both particulate matter – which is addressed elsewhere in SB 700 – and ozone), ammonia is not subject to a national ambient air quality standard and therefore would not be regulated.

The Court reviewed the SJVAPCD’s findings to determine whether they were supported by substantial evidence, or whether they were arbitrary and capricious. AIR asserted that the SJVAPCD had arbitrarily relied on incorrect reduction assumptions, had miscalculated reduction levels, and failed to analyze more expensive mitigation measures on the assumption that facilities would choose the cheapest measures. SB 700 requires reductions in emissions, but does not establish a quantitative level of reduction. The Court held that the SJVAPCD’s reduction assumptions were justified in that precise results cannot be expected in the absence of more specific science. The SJVAPCD had disclosed during the rulemaking that because the supporting science is still developing it was using conservative assumptions and it will apply more specific percentages as science becomes available. In other areas of contention, including reduction in VOCs through feed manipulation, management of phototrophic manure lagoons for higher control efficiency, and application of manure to cropland, substantial evidence supported the SJVAPCD’s assumptions. The Court further concluded that it “is reasonable to assume that the facilities would opt not to use those measures so expensive that the cost far outweighs annual profits. It is not unreasonable

for the district to calculate the potential emission reduction of its rule based on the likelihood that only the cheapest options will be chosen. This is a conservative approach, not an arbitrary one.” While the SJVAPCD’s rule would allow more expensive technologies (such as fully enclosed facilities with biofilters) to be used, it did not count those as reducing emissions.

The Court ordered that the SJVAPCD complete a public health assessment and reconsider the rule on that basis.

### Frankly Scarlet, I Do Give a ...

*Save Tara v. City of West Hollywood* (Oct. 30, 2008) \_\_ Cal. 4th \_\_

In May of 2004 the City of West Hollywood approved an agreement with a developer for the reuse and redevelopment of a large historic home (nicknamed “Tara” after the home in *Gone with the Wind*) that had been willed to the City by a wealthy widow. The agreement would convey the property to the developer, provide the developer a substantial loan, and allow the construction of 35 units of housing on the site. While the agreement that all CEQA requirements be satisfied at some future time, it also gave the City Manager authority to waive those requirements. The historic home would be retained as part of the project, but would have been altered by the development. The agreement would allow the developer to receive final approval of a grant from the federal Housing and Urban Development Department (HUD) that would provide additional funding for the project. A “Scope of Development” discussion attached to the draft agreement described the construction related to the project in some detail. At the time of the approval, the City’s housing manager assured the Council that the project would be subject to further planning approvals and these were “not a rubber stamp” for the project.

Save Tara sued the City in July 2004 alleging that the City had violated CEQA by failing to prepare and consider a CEQA document prior to approving the agreement. In August, the City and the developer executed a revised agreement that specified that CEQA requirements would apply and could not be waived by the City Manager. The trial court held for the City, finding that the provision for future CEQA compliance was satisfactory.

The Court of Appeal reversed, opining that conditioning a development agreement on future CEQA compliance is insufficient because CEQA “is intended to be part of the decisionmaking process itself, not an examination, *after the decision has been made*, of the possible environmental consequences of the decision.” The Court of Appeal was satisfied that prior to the May approval the City knew enough about the project to prepare a CEQA analysis. Meanwhile, between the time of the trial court decision and consideration by the Court of Appeal, the City had prepared and certified a Final EIR for the project. The Court of Appeal, by a 2-1 vote, ordered the City to prepare a new EIR. The dissenting justice argued that the case was moot in light of the certified EIR.

The Supreme Court upheld the decision of the Court of Appeal in most regards. The City asserted that certification of the Final EIR rendered the case moot. The Supreme Court disagreed. “No irreversible physical or legal change has occurred during pendency of the action, and Save Tara can still be awarded the relief it seeks, an order that City set aside its approvals.”

The Court set out two considerations important to the timing of EIR preparation: “(1) that CEQA not be interpreted to require an EIR before the project is well enough defined to allow for meaningful environmental evaluation; and (2) that CEQA not be interpreted as allowing an EIR to be delayed beyond the time when it can, as a practical matter, serve its intended function of informing and guiding decision makers.” The Court held that the decision over when a project is sufficiently defined to allow CEQA analysis is a legal question (which allows independent judicial review). Citing its 2007 *Muzzy Ranch* decision, the Court noted that it had already found the question of whether an action is in

fact a project is one of law. The Court opined that:

*“To accord overly deferential review of agencies’ timing decisions could allow agencies to evade CEQA’s central commands. While an agency may certainly adjust its rules so as to set “[t]he exact date of approval” (Cal. Code Regs., tit. 14, §15352, subd. (a)), an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR.”*

The City argued that the August 2004 agreement committed the City to future CEQA compliance, thereby eliminating the need to prepare a CEQA document before entering into the agreement. Save Tara countered that allowing deferral of CEQA analysis rendered the EIR requirement a “dead letter.” The Court adopted what it called “an intermediate position:”

“A CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review.”

The Court distinguished the Court of Appeal decisions in *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772 and *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181 from the present case. Neither case convinced the Court that a “broad rule exists permitting EIR preparation to be postponed in all circumstances by use of a CEQA compliance condition.” Section 15004(b)(2)(A) provides an exception for land purchases, but that should not be interpreted as allowing the deferral in situations other than that described in the section. The City argued to limit the need for a CEQA analysis to “unconditional agreements irrevocably vesting development rights.” The Court disagreed:

“Such a rule would be inconsistent with the CEQA Guidelines’ definition of approval as the agency’s “earliest commitment” to the project. (Cal. Code Regs., tit. 14, §15352, subd. (b), italics added.) Just as CEQA itself requires environmental review before a project’s approval, not necessarily its *final* approval (Pub. Resources Code, §§21100, 21151), so the guideline defines “approval” as occurring when the agency *first* exercises its discretion to execute a contract or grant financial assistance, not when the *last* such discretionary decision is made.”

The Court rejected the notion that CEQA can be “postponed until the last governmental step is taken.” Here, the City had expressed its favor for the project, defended it publicly, devoted substantial public resources to it, and announced a detailed agreement to go forward with the project, all without CEQA review. Under those circumstances, it is not practical to assume that a later CEQA review would be more than a post hoc rationalization of the project’s approval.

In keeping with its theme of taking an intermediate road, the Court refused to find that “any agreement, conditional or unconditional, would be an ‘approval’ requiring prior preparation of CEQA documentation if at the time it was made the project was sufficiently well defined to provide ‘meaningful information for environmental assessment.’” Approval is not the same as an agency’s mere interest in, or inclination to support a project, no matter how well-defined the project may be. In the Court’s words: “we look both to the agreement itself and to the surrounding circumstances, as shown in the record of the decision, to determine whether an agency’s authorization or execution of an agreement for development constitutes a ‘decision ... which commits the agency to a definite course of action in regard to a project.’ (Cal. Code Regs., tit. 14, §15352.)”

Here, the City had committed to the project by advising HUD the City had approved the sale of property and had committed up to \$1 million in financial aid; announcing that the HUD grant would be used to redevelop Tara; advising residents who opposed the project that while variations in the project might be considered, the City must fulfill its obligation to redevelop the property; and ruling out other public uses of the property such as a library, park, or cultural center. Furthermore, the City was proceeding with relocating the existing tenants of the property.

The Supreme Court disagreed with the Court of Appeal only on the issue of whether to require the City to prepare a new EIR. Save Tara did not challenge the adequacy of the Final EIR certified by the City in 2006. As a result, that EIR “is conclusively presumed to comply with CEQA’s standards unless a subsequent or supplemental environmental EIR is needed for any of the reasons set out in [Public Resources Code] section 21166.” Since the 2006 EIR was based on the City’s invalidated approvals, it may need revision. Whether that is so can be decided by the City, subject to review of the superior court under the substantial evidence standard.

### You Win a Few, You Lose a Lot

*Gray v. County of Madera* (Oct. 24, 2008) \_\_ Cal.App.4th \_\_

Madera County approved a zone change, Williamson Act cancellation, conditional use permit, and mining permit to allow operation of a hard rock quarry (producing aggregate) and hot-mix asphalt batch plant on a 125-acre portion of the 540-acre Madera Ranch. In addition, the project included a two-mile long road to connect the site to County Road 209 and realignment of the County Road. The approval stipulated that the quarry would be allowed to produce up to 900,000 tons of aggregate per year for 50 years and projected truck traffic to be about 320 round trips daily. In full operation, the quarry was expected to use up to 72,000 gallons of water per day. After closure of the quarry, there would be a three-year reclamation phase. After hearings before the Planning Commission and Board of Supervisors, the County certified an EIR and approved the project.

Gray then brought suit, offering several arguments for invalidating the EIR. The trial court held for the County and this appeal ensued.

The Court of Appeal reversed the lower court’s decision. Gray alleged that the Final EIR should have included written responses to expert comments they had submitted regarding the alleged inadequacy of the hydrology/water and noise analyses after the end of the review period. The Court opined that “a lead agency may, but is not required, to respond to late comments.” Accordingly, the absence of written responses to these “untimely expert opinions” did not by itself invalidate the Final EIR. However, the County does have the burden to show that substantial evidence exists to support its environmental conclusions. That can include evidence to counteract the information submitted in the comments.

Gray argued that the EIR failed to adequately analyze impacts on surface and ground water, that its mitigation measures were inadequate in that regard, and that the draft EIR should have been recirculated because an amended mitigation measure and to analyze economic impacts related to water. The EIR found that the project could result in declines in water levels and pumping rates at nearby wells both during operations and after closure of the mine. The EIR offered mitigation measures providing for monitoring and replacement of water from Madera Ranch wells or, if necessary, bottled water. At its meeting, the Board modified one of the water supply mitigation measures to include a contingency provision: if the measure failed to provide sufficient bottled water to affected residences, the Board would hold a public hearing, require preparation of a hydrologic report, and require the formation of a water system to supply the water.

The Court held that the expert evidence submitted by Gray

did not undermine the groundwater study prepared for the draft EIR. Additionally, the findings of the draft EIR study supported the conclusions in the draft EIR. While Gray argued that the County should have undertaken further groundwater testing, the Court held that the fact that testing was feasible didn't require the County to do additional testing because the initial testing was sufficient to support the County's conclusions. Additional testing would be necessary for other reasons, however.

With regard to the adequacy of the water resources mitigation measures, the Court found that "there is no substantial evidence to support the EIR's conclusion that the proposed mitigation measures are adequate." The mitigation measures were made conditions of approval, so the Court concluded that they are fully enforceable, as CEQA requires. However, while the mitigation measures will provide a replacement for the neighbors' lost water, none of the measures "will provide neighboring residents with the ability to use water in substantially the same manner that they were accustomed to doing if the Project had not existed and caused a decline in the water levels of their wells."

Further, there was no substantial evidence on which to conclude that neighboring wells would provide additional potable water. No evidence supported the County's contention that the currently confined aquifers that supplied the Project and neighboring wells would remain confined once the mine pit was excavated. The Regional Water Quality Control Board (RWQCB) had warned that the pit could form a connection between production wells and neighboring wells. In the event that occurred, the neighboring property owners would be subject to the RWQCB's regulatory oversight.

The Court held that providing replacement water through bottled water at neighbors' request "is not a viable or effective mitigation measure." The RWQCB had advised the County that such an approach could not account for fluctuating water demand and suggested that a water system be required. Although the Board modified a mitigation measure to require a water system as a contingency, the proposal was not studied further.

The Court also found that the EIR did not analyze the potentially significant effects of the water replacement measures. Examples cited by the Court include the impact of using non-potable water for livestock and on wildlife and habitats. The EIR also failed to consider the impacts of disposing of empty water bottles.

Further, the Court held that the water supply mitigation measures were improperly deferred. Deferred mitigation is allowed only when the lead agency commits to the mitigation and the measure contains performance standards to ensure its adequacy. The County's mitigation goal of replacing neighbors' lost water is not a performance standard, according to the Court. And, the Board of Supervisors' contingency measure for installing a water system was never studied for feasibility. In the words of the Court, "[t]hus the County is improperly deferring until the impact occurs the study of whether such a system is feasible."

Curiously, the Court noted that the County could have found the impact unavoidable and adopted a statement of overriding considerations. Instead, the County relied upon infeasible or unproven mitigation measures to conclude that the measure was less than significant.

Given that the Board had amended one of the mitigation measures, the Court found that the water portion of the DEIR should have been recirculated. The addition of the contingency measure with its potential water system requirement was "significant new information" requiring recirculation.

The Court dismissed Gray's claim that the EIR should have addressed the economic impacts on neighboring property owners. Gray "presented no evidence that any significant physical changes to the environment will result from any loss in

the property value of neighboring lands [arising] from a potential decline in water levels in private wells." The County had information about property values surrounding a similar mine in Colorado that indicated that there may not be a decline in property values anyway.

The Court held that the DEIR improperly deferred traffic mitigation. The mitigation required improvements to Road 209, construction of State Route (SR) 41 improvements in coordination with Caltrans, contribution of "an equitable share of the cost of construction of future improvements if requested by Caltrans or Madera County" (as determined by a formula provided in the DEIR), and contribution to a long-term County maintenance fee. These were apparently to be ad hoc, project-specific fees and were not contributions to a county traffic impact fee program. The Court found no substantial evidence that Caltrans had made any definite commitment to when improvements would take place. It concluded that there was no evidence that the SR 41 improvements would be made when needed. The County, meanwhile, had no mitigation plan in place for the affected roadways. So, the Court concluded that there was no substantial evidence that this mitigation would be adequate. (Note that here the Court relied on past cases where a contribution to an existing road impact fee program was held to be adequate traffic mitigation and a mitigation plan was required for adequate mitigation of impacts to endangered species [*Save our Peninsula Comm. v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99 and *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261]. Those cases did not address a situation like this one, where the traffic fee is project-specific, and no other cases have required there to be a traffic "mitigation plan" in order to find that the traffic fee is feasible. In fact, *Save our Peninsula* set no requirement for ad hoc fees such as the one imposed by Madera County to be linked to a mitigation plan.)

Gray also claimed that the noise study for the quarry was inadequate because it used the wrong methodology for determining cumulative impact. The County noise analysis found that, with the exception of one residence (for which it adopted a statement of overriding considerations), no other noise increases exceeded 2.1 dB. Because this did not exceed the 3-5 dB increase the County "commonly required to identify noise impacts," the County concluded that the impacts were less than significant. The Court found that the County failed to account for the fact that noise levels along SR 41 already exceeded the County's standard for residential exposure. Therefore, the County should have assessed whether the 2.1 dB increase was considerable in light of the existing cumulative noise level. The statement of overriding considerations for the single home did not fulfill this requirement.

Gray alleged that the surveys done for the presence of California tiger salamander (CTS) were inadequate, based on a comment from the California Department of Fish and Game asserting that a protocol survey was necessary. The Court disagreed. The County had contracted for surveys that indicated that no suitable aquatic breeding habitat existing within 1.3 miles of the project site. This provided substantial evidence that the project would not affect the CTS. "The fact that additional studies might be helpful does not mean they are required" (citing *Associated Irrigated Residents v. Madera County* [2003] 107 Cal.App.4th 1383). The Court then added that "requiring a study that takes place over two winters could conflict with the requirement that EIRs for private projects be prepared and certified within one year." It is unknown whether the Court intended this to be a restriction on needed biological surveys.

The Court also dismissed Gary's contention that the air quality analysis was inadequate. The draft EIR concluded that project emissions of ROG, NOx, and PM10 would be significant and included seven mitigation measures. Gray argued that the

draft EIR was flawed because it failed to include an analysis of diesel emissions from transport trucks. The Court found that the discussion of diesel emissions in the County's Health Risk Assessment for toxic air contaminants was based on an air dispersion model that took into account transport emissions. That provided substantial evidence for the County's conclusion.

The Court dismissed Gray's argument that the draft EIR deferred mitigation of light and glare impacts. The draft EIR had found light and glare to be less than significant on the basis of mitigation requiring lights to be hooded, limiting lighting to within the site boundaries, prohibiting blinking or bright lights, and other restrictions. In the Court's view, these were adequate performance standards. "More specific details of the lighting plan may be deferred until the quarry and its related buildings and plants are built and the placement of lights determined."

The Court found that the draft EIR failed to adequately analyze the project cumulative impacts. In particular, the analysis did not reference all of the documents used and did not specify where a copy of the Madera County General Plan could be found. "the lack of evidence on what planning documents were used leads us to conclude that there is no substantial evidence supporting any of the cumulative impacts analysis..." The Court did uphold the County's limiting of probable future cumulative projects to those for which an application had been filed with the County and for setting the date of the Notice of Preparation's release as the cut-off date for the search of probable future projects.

The Court dismissed Gray's contention that the growth inducing analysis was inadequate. The Court held that "[w]hile we agree that lowering the cost of aggregate would reduce one of the barriers to growth, the DEIR could reasonably conclude that there were other barriers to growth, including the zoning of the lands surrounding the Project site."

Finally, the Court also held that the County should have prepared a SB 610 water supply assessment for the project. Here, the water to be used for the mine is not part of a public water system. However, the mitigation measure revised by the Board of Supervisors will potentially require domestic water to be supplied to nearby residences. Based on the conclusion in *Vineyard Area Citizens v. City of Rancho Cordova* (2008) 40 Cal.4th 412 that "[a]n EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water," an SB 610 analysis is therefore required. The Court did not discuss whether there would be 500 or more residences affected.

### Attorney General's Opinion

**Opinion 07-503, November 13, 2008** – Legality of an MOU to Implement an MSHCP

The California Attorney General has opined that a memorandum of understanding (MOU) between a county and certain cities within the county, under which the county would agree to implement certain land use development standards within each city's sphere of influence in exchange for the cities' agreement to adopt resolutions in support of a multiple species habitat conservation plan (MSHCP), would not in itself amount to an illegal exchange of votes within the meaning of Penal Code Section 86 (which prohibits the solicitation or taking of bribes by public officials, and their trading of votes). Section 86 is aimed at the actions of individual elected officials, not with the substance of actions taken by the governing bodies as a whole. It is intended to ensure that "the official decision to take a particular action is not tainted by the exertion of illegal influence, whether by bribe or promised vote-swap, on one or more of the individual decision-makers." The mere fact that the item voted upon involves a proposed trade-off between jurisdictions does not dictate or even imply that any trade-off will occur between the officials voting on that item. To conclude otherwise would, in effect, criminalize the conduct of entering into intergovernmental

contracts which, by their very nature, mutually commit participating jurisdictions to any number of obligations, and thereby subject the public officials who vote to enter into such agreements to the severe criminal and civil sanctions reserved for bribery and like offenses.

The proposed MOU, and an associated agreement between the cities, county, and various federal, state, and local agencies to implement the MSHCP, would continue in effect even as the memberships of the legislative bodies of the county and signatory cities change over time, provided that the agreements do not purport to surrender the "police power" of any of the local agencies involved. Assuming that the MOU does not contract away any of the jurisdictions' police power or that of successor legislative bodies (and the Attorney General found no evidence that this MOU would do so), a contract that appears to have been fair, just, and reasonable at the time of its execution is neither void nor voidable simply because some of its features may extend beyond the terms of office of the members of the legislative body that entered into the contract.

## State Capitol Update

Sacramento, California

By Allan Lind, AEP Public Policy Advisor

January 5, 2009

- *Budget Crunch*
- *A CEQA "Furlough" in our future?*
- *Is the federal Endangered Species Act endangered?*
- *Selected Internet sites to track California's climate change policies and programs*

### Budget Crunch

Here in the Capital it seems like the New Year started two months early.

At press-time, we're at the beginning of a new Legislative Session. Following the November elections we ordinarily expect to see our newly elected legislators make a brief visit to the Capitol on the first business day of December to be sworn into office and choose their leaders for the next two years. The politicians then spend the remaining weeks of December cultivating their legislative district interests while Capitol staff work on turning campaign promises into legislative proposals, bureaucrats grind out state programs, and the administration prepares next year's budget.

But not this year. The first nine months of 2008 were overshadowed by deteriorating fiscal conditions, delaying enactment of the 2008-09 State Budget in mid-September (nearly three months late). And then budgetary matters actually got worse.

Knowing full-well that the state's \$103 billion General Fund Budget for 2008-09 was held together by little more than bailing wire and chewing gum, the only unknown to Capitol observers was how soon it might unravel. In the weeks following enactment of the 2008-09 Budget, the mortgage crisis deepened, unemployment increased, the stock market lost 20% of its value and the state's financial condition deteriorated at an astonishing rate. More importantly, the state's revenue collapse was so dramatic and the underlying economic factors were, and continue to be, so weak that state budget experts forecast huge budget shortfalls through 2013-14 absent corrective action.

On November 6 (two days after a new Legislature was elected) the Governor called a special session of the lame duck Legislature to address an \$11.2 billion "revenue problem" in the 2008-09 State Budget. The Governor proposed solving the revenue problem with \$4.5 billion in budget cuts, \$4.7 billion in new revenues and allowing the state's Reserve for Economic Uncertainties to evaporate. On the same day, the Governor also

promoted an economic stimulus plan to stop the downward spiral of California's economy. Among other things, the stimulus plan would accelerate highway and transit construction projects by providing CEQA exemptions for specified projects and expedited project delivery schedules for others.

Needing a 2/3 vote to effect just about any meaningful change to the state's fiscal affairs, the lame duck Legislature quarreled to a stalemate and adjourned for good (*sine die*) on November 30.

The new Legislature, sworn in on December 1, was greeted that day with a Governor's proclamation declaring a Proposition 58<sup>1</sup> fiscal emergency. The Governor called the new Legislature into a "Prop. 58 Special Session" to address an immediate cash-flow emergency, and an additional Special Session to address long-term fiscal problems, including the need for economic stimulus.

Legislative Republicans immediately made it clear there would be no Republican votes for any tax increase (2/3 vote being a requirement for tax increases, the Republican position essentially doomed have of the Governor's plan for fixing the state budget). On December 17, the state's Pooled Money Investment Board, which oversees state financing of bond-funded infrastructure projects, voted to shut down six months of projects valued at \$3.8 billion as a result of the state's critical cash flow problems and declining state credit rating. According to the State Treasurer's office, close to two thousand bond-funded projects worth \$16 billion are in jeopardy.

On December 18, relying on a series of creative interpretations of the state Constitution regarding voting requirements for tax measures, legislative Democrats passed an emergency funding plan with a simple majority vote to address the immediate cash flow problems. Democrats also passed alternatives to the Governor's economic stimulus plan. The Governor declared the Democrat funding and economic stimulus plans dead-on-arrival. Among other things, the Governor explained that the Democrat plan lacked meaningful CEQA relief for transportation projects.

On December 19, noting that the current year budget shortfall had grown to \$14.8 billion (increasing to \$41.8 billion by the end of the 2009-2010 fiscal year if nothing is done), and also noting that the state is projected to run out of cash in February, the Governor:

Declared a second Prop. 58 emergency and called the Legislature back into a second Prop. 58 Special Session; Directed the Department of Personnel Administration to develop a plan, effective February 1, to furlough state workers two days per month regardless of funding source;

Directed DPA to work with all state agencies to achieve a General Fund payroll reduction of up to 10% through personnel layoffs, effective January 1 through June 30, 2010; and Prohibited any new personal services contracts or consulting contracts to backfill for productivity lost through furloughs and layoffs.

By the time you're reading this, we can only hope the state's fiscal condition is better. At stake for environmental professionals are the economic consequences of freezing billions of dollars in construction projects, as well as severe

budget cuts to the natural resource and environmental protection agencies that employ environmental professionals and contract for their services. As solutions emerge, so should the fortunes of environmental professionals, provided the solutions respect fundamental responsibilities of those professionals and avoid the emasculation of environmental protection laws like the California Environmental Quality Act or the California Endangered Species Act.

### Another CEQA Furlough In Our Future?

Accelerating investments in public infrastructure is high on almost everyone's economic stimulus *to-do* list – agreeing on how to accelerate the investments hasn't been as easy.

The Governor's economic stimulus package involves changing laws governing employee working conditions, "fixing" the state's Unemployment Insurance Fund, reduce barriers to public-private partnerships and "design-build" agreements, providing tax credits to the film and television industry, and accelerating \$2.3 billion in highway construction projects. The Governor would accelerate highway projects by providing CEQA exemptions for eleven specified transportation projects;<sup>2</sup> providing an additional \$700 million in Prop. 1B funds to cities and counties for local road improvements in 2009; and provide an additional \$800 million to local transit systems to acquire transit vehicles in 2009.

Déjà vu. In 2006, the Schwarzenegger Administration and the Legislature reached agreement on the largest one-time economic stimulus plan in California history: a \$37.3 billion General Obligation bond package to finance essential four years of infrastructure projects in the areas of transportation, housing, education, and flood protection. At the Governor's request, the package also contained various environmental permit streamlining provisions.<sup>3</sup> As approved by the voters in November, the 2006 bond package authorized:

- A CEQA exemption, until June 30, 2010, for five specified CalTrans seismic retrofit projects;<sup>4</sup>
- A CEQA exemption, until January 1, 2011, for seismic retrofit projects on existing local bridges as determined by CalTrans to be urgently needed to bring a dangerous and unsafe bridge up to contemporary seismic standards;
- Preparation of a Master EIR for a plan adopted by CalTrans for improvements to various segments of Highway 99 for the purpose of streamlining environmental review of subsequent specific projects; and
- CalTrans, until January 1, 2009, to consent to the jurisdiction of the state and federal courts with regard to the assumption of certain federal responsibilities under the National Environmental Policy Act (NEPA).<sup>5</sup>

The 2006 bond package also:

- Exempted from CEQA, until July 1, 2016, the repair of critical levees of the Sacramento River Flood Control Project that are within an existing levee footprint to meet standards of public health and safety, and
- Authorized, until January 1, 2011, the Secretary of the Resources Agency to establish a process for issuing unified, consolidated

<sup>1</sup> Proposition 58, approved by the votes in May, 2004, amends the California Constitution to allow the Governor to proclaim a fiscal emergency in specified circumstances and submit proposed legislation to address the fiscal emergency. Under Prop. 58 the Legislature has 45 days to pass a bill or bills to the Governor's desk addressing the budget crisis. If the 45 days pass and the Legislature has not passed bills to address the problem, Prop. 58 prevents the Legislature from enacting any other measures and requires the Legislature to stay in session until they have passed bills to address the fiscal emergency proclaimed by the Governor.

<sup>2</sup> U.S. 50 carpool lanes, Sacramento County; U.S. 101 improvements, Santa Clara County; I-5/I-805 Corridor, San Diego County; U.S. 99 improvements, Tehama County; U.S. 99 auxiliary lanes, Sacramento County; U.S. 99 widening, Fresno County; U.S. 99 widening, San Joaquin County; Sacramento intermodal track relocation; S.R. 12 pavement rehab., San Joaquin County; U.S. 101 pavement rehab., San Luis Obispo; and U.S. 101 reconstruction, San Francisco.

<sup>3</sup> See AB 1039, Nunez (Chapter 31, Statutes of 2006).

<sup>4</sup> The I-880 Fifth Avenue Overhead in Alameda County; The I-880 High Street Separation Overhead in Alameda County; The S.R. 101 Hollister Avenue Overcrossing in Santa Barbara County; The Schuyler Heim Bridge in Los Angeles County; and The Mojave River Bridge on SR 18 in San Bernardino County.

<sup>5</sup> This authority was extended to January 1, 2021 by enactment of AB 2650, Chapter 248, Statutes of 2008.

permits for urgent levee repairs funded by the flood protection bond, including lake or streambed alteration agreements, incidental take permits, waste discharge requirements, and local permits or approvals of projects within the existing levee footprint to meet public health and safety standards.

So far, the Legislature has been unable to agree with the administration on the design of a new economic stimulus package. With respect to CEQA exemptions, the response by legislative Democrats in December included a *conditional* CEQA exemption for eight of the eleven highway projects specified by the administration, provided CalTrans performs CEQA-like analyses before the projects may proceed. This proposal was rejected by the Governor.

### Is the Federal Endangered Species Act endangered?

On the federal front: the Bush Administration finalized new regulations in mid-December, 2008, that largely eliminate a requirement that federal agency decisions affecting endangered and threatened species and their habitats are subject to independent scientific review under the auspices of the U.S. Fish and Wildlife Service. The changes allow federal agencies to undertake or permit mining, logging, oil and gas exploration and development, and other commercial activities on federal land and other areas without obtaining review or comment from federal wildlife biologists on the environmental effects of such activities.

The new regulations are the most significant changes to the Endangered Species Act and its implementing regulations in 20 years. Now that these regulations have been adopted, many decisions on whether to permit commercial activities on protected land will be made at the discretion of federal agency project proponents. These agencies generally lack adequate biological expertise to determine whether or not, and to what extent, a project may adversely affect endangered and threatened species and their habitat.

The changes also eliminate the requirement to consider the effects of greenhouse gas emissions on species and ecosystems from proposed federal projects. Federal agencies now no longer need to consider the possible adverse impacts on species like the polar bear from commercial projects that require federal approval or funding such as highway construction and coal-fired power plants.

If you oppose this regulatory change — you'll have to get in line. Within hours of the federal announcement, environmental groups filed suit in federal court to block their enforcement. Attorney General Jerry Brown has also filed suit in federal court; members of Congress have vowed to reverse the regulations; and President-elect Barack Obama has said he would reverse the rule changes as well.

### Selected Internet sites to track California's climate change policies and programs

With the final adoption of the *AB 32 Scoping Plan* by the California Air Resources Board on December 11, 2008, we now have a broad and very complex road-map for meeting the state's ambitious greenhouse gas (GHG) emissions reduction goals. Next up: technology and economic sector regulations, plans, guidelines and programs, including CEQA GHG thresholds guidelines. If California's climate change and global warming programs are your cup of tea, you'll want to keep an eye on these state-sponsored web sites.

#### California's "Climate Change Portal"

<http://www.climatechange.ca.gov/>

#### ARB's Climate Change Program

<http://www.arb.ca.gov/cc/cc.htm>

#### The Natural Resources Agency's Climate Change Sites

Department of Water Resources

<http://www.water.ca.gov/climatechange/>

#### Department of Forestry and Fire Protection

[http://www.fire.ca.gov/resource\\_mgt/resource\\_mgt\\_EPRP.php](http://www.fire.ca.gov/resource_mgt/resource_mgt_EPRP.php) — watch for link to new *Climate Change* page

#### California Coastal Commission

<http://www.coastal.ca.gov/climate/climatechange.html>

#### California Energy Commission

<http://www.energy.ca.gov/climatechange/>

### CEQA and GHG Thresholds of Significance

#### Governor's Office of Planning and Research

<http://opr.ca.gov/index.php?a=ceqa/index.html> — new guidance document to be released soon.

#### California Air Resources Board: CEQA and GHG

<http://www.arb.ca.gov/cc/localgov/ceqa/ceqa.htm#contacts>

#### California Energy Commission: CEQA and GHG Impacts of Power Projects

[http://www.energy.ca.gov/ghg\\_powerplants/index.html](http://www.energy.ca.gov/ghg_powerplants/index.html)

#### CAPCOA on CEQA and Climate Change

<http://www.capcoa.org/> and click on the report "CEQA and Climate Change"

#### South Coast AQMD: CEQA GHG Significance Thresholds for Stationary Sources, Rules and Plans

<http://www.aqmd.gov/hb/2008/December/081231a.htm>

#### Bay Area AQMD: Climate Protection Program

<http://www.baaqmd.gov/pln/climatechange.htm>

### Climate Change and SB 375 Discussions

#### Resources Agency AB 32 "Adaptation Strategy"

<http://www.climatechange.ca.gov/adaptation/>

#### CalTrans Climate Action Program:

<http://www.dot.ca.gov/hq/tpp/offices/opar/climate.html>

Watch for CalTrans development of a recommended threshold approach for transportation projects and SB 375 implementation.

#### California State Association of Counties

<http://csac.counties.org/default.asp?id=1824> scroll down to CSAC SB 375 (Steinberg) Analysis

#### League of California Cities

[http://www.cacities.org/index.jsp?displaytype=11&zone=loc&section=&sub\\_sec=&tert=&story=27494](http://www.cacities.org/index.jsp?displaytype=11&zone=loc&section=&sub_sec=&tert=&story=27494) and

[http://www.cacities.org/index.jsp?displaytype=11&story=27505&zone=ilsg&section=land&sub\\_sec=land\\_planning](http://www.cacities.org/index.jsp?displaytype=11&story=27505&zone=ilsg&section=land&sub_sec=land_planning)

**A**s always, the AEP Legislative Review Committee welcomes comments and advice on legislation from the general membership. To perform your own research on any bill listed in this report, the Committee recommends the Legislative Counsel Bureau's "Official Legislative Information" web site at [www.leginfo.ca.gov](http://www.leginfo.ca.gov). For more information about the AEP Legislative Committee you can reach Allan Lind at 916-503-2250 or [allanlind@sbcglobal.net](mailto:allanlind@sbcglobal.net). Better yet, contact your chapter representative:

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