



2018 Update to the CEQA Deskbook, 3rd edition

By Antero Rivasplata, AICP

ICF International

The 2018 update to the CEQA Deskbook, 3rd Edition includes summaries of the decisions by the California Supreme Court and new statutes enacted in 2017. It also highlights new interpretations of CEQA regarding “piecemealing,” identifying the project in the draft EIR, and ministerial projects, among others.

CEQA Deskbook, 3rd edition

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Preliminary Note:

The Natural Resources Agency has begun the administrative rulemaking for a comprehensive set of amendments to the CEQA Guidelines, including substituting vehicle miles travelled (VMT) for level of service (LOS) as the metric for determining the significance of impacts on transportation. At this writing, the amendments are expected to be approved in the Fall of 2018. Because the rulemaking includes a review and comment period, the proposed amendments are subject to change before final approval. In order to avoid presenting incorrect information, the proposed amendments are not reflected in this 2018 Update. More information on the amendments and the associated Technical Advisory on VMT analysis are available from the Office of Planning and Research at: www.opr.ca.gov.

Insert the following after the last paragraph on page 33:

Further, actions that are independent of one another are not considered part of one project simply because they are being considered concurrently. There is no piecemealing when “projects have different proponents, serve different purposes, or can be implemented independently.” (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209). For example, in *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266 the Court of Appeal held that the County did not piecemeal by considering three changes to its zoning code under separate CEQA procedures because “each of the contemplated ordinances are separate and apart from each other.”

Insert the following after the first paragraph on page 38:

The courts have held that a ministerial action may nonetheless allow some limited discretion on the part of the agency. “CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead[,] to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to ‘mitigate ... environmental damage’ to some degree.” (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934). This “functional test” essentially holds that “the existence of discretion is irrelevant if it does not confer the ability to mitigate any potential environmental impacts in a meaningful way.” (*Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11).

Insert the following in Figure 2-2 Statutory Exemptions under “Transportation Related Projects” on page 42:

Type of Action	Exempt Activities	Statutory Provision
Transportation-Related Projects	Adoption of a bicycle transportation plan for restriping of streets and highways, bicycle parking and storage, signal timing to improve street and highway intersection operations, and related signage for bicycles, pedestrians, and vehicles in an urbanized area	Pub. Res. Code 21080.20; Streets and Highways Code 891.2 (sunsets Jan. 1, 2021)

	Restriping of streets and highways for bicycle lanes in an urbanized area, consistent with a bicycle transportation plan	Pub. Res. Code 21080.20.5 (sunsets Jan. 1, 2021)
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Insert the following in Figure 2-2 Statutory Exemptions under “Specific Agency Actions” on page 43:

Type of Action	Exempt Activities	Statutory Provision
Specific Agency Actions	Adoption of an ordinance, rule, or regulation by a local jurisdiction that requires discretionary review and approval of permits, licenses, or other authorizations to engage in commercial cannabis activity. The discretionary review in any such law, ordinance, rule, or regulation shall include any applicable environmental review pursuant to CEQA.	Business and Professions Code 26055(h) (sunsets July 1, 2019)

Insert the following discussion of 2017 streamlining statutes after the discussion of SB 226 following page 112:

In 2017, the California Legislature passed three CEQA streamlining bills as part of a larger package of bills intended to stimulate the affordable housing market. The resultant statutes are actually quite complex. They are summarized below, but readers should familiarize themselves with the actual language of these statutes before deciding whether or not to apply them to a given proposed project.

AB 73 (Chapter 371, Statutes of 2017)

AB 73 authorizes a city or county to establish by ordinance a “housing sustainability district” allowing residential use within the district through the issuance of ministerial permits (new Government [Gov.] Code Section 66200, et seq.). The bill establishes various criteria for such districts, including location, density (not be less than those deemed appropriate to accommodate housing for lower income households as set forth in the bill, and a density range for single-family attached or detached housing for which the minimum densities shall not be less than 10 units to the acre. A district would have a lifetime of 10 years unless extended by the municipality. A density range shall provide the minimum dwelling units per acre and the maximum dwelling units per acre), and affordability. Development would be required to be built by workers paid prevailing wage, with specific exceptions. An application to establish such a district would be subject to prior review and approval by the Department of Housing and Community Development (HCD); the state would provide a grant to cities or counties creating such districts in an unspecified amount. The district would be subject to report to HCD annually regarding its continued status.

AB 73 requires the city or county to prepare an EIR for the proposed housing sustainability project (new PRC Section 21155.10). Its mitigation measures would be applied to “housing projects in the housing sustainability district.”

Further, the bill provides that CEQA would not apply to a housing project undertaken in a housing sustainability district when the lead agency has certified an EIR for the housing sustainability district, and HCD has approved the housing sustainability district pursuant to Section 66202 of the Government Code, within 10 years of the lead agency's review of the housing project. The housing project would be required to comply with the mitigation measures identified in the EIR. (PRC 21155.11).

A developer may choose to develop a project in a housing sustainability district in accordance with the already existing land use approval procedures that would otherwise apply in the absence of the establishment of the housing sustainability district, and in so doing shall not receive any of the incentives and benefits or be required to comply with any of the provisions specified in the housing sustainability district ordinance. Note that this provision doesn't make sense given that an ordinance must be consistent with the general plan and it is unlikely that there would be standards applicable to a given property that would otherwise apply.

SB 35 (Chapter 366, Statutes of 2017)

SB 35 adds Gov. Code Section 65913.4, establishing a "streamlined, ministerial approval process" when a proponent submits an application for the development of multifamily housing containing two or more residential units that qualifies as either: a site that is a legal parcel or parcels located in a city if, and only if, the city boundaries include some portion of either an urbanized area or urban cluster, or, for unincorporated areas, a legal parcel or parcels wholly within the boundaries of an urbanized area or urban cluster, as designated by the United States Census Bureau; or a site in which at least 75 percent of the perimeter of the site adjoins parcels that are developed with urban uses (as defined by PRC Section 21061.3). The project must also be identified for residential or mixed-use residential use in the general plan or by zoning, with at least two-thirds of the square footage designated for residential use. If the zoning and general plan are not consistent, the general plan designation would rule.

Other qualifiers include being located in a city or county that has not approved the number of low- or moderate-income housing units set out in its regional housing needs assessment and its housing element; consistency with objective zoning and design review standards; avoidance of various sensitive or hazardous areas, including farmland, NCCP or HCP lands, habitat, and conservation lands; avoidance of demolition of price-restricted affordable housing or a historic structure; avoiding land that is a mobilehome or recreational vehicle park; and certification that the proposed development is either a "public work" for purposes of the labor code or subject to "enforceable wage requirements." Further, the statute prohibits the city or county from imposing parking standards for a streamlined development in any of the following instances: the development is located within one-half mile of public transit; is located within an architecturally and historically significant historic district; when on-street parking permits are required but not offered to the occupants of the development; or when there is a car share vehicle located within one block of the development. SB 35 limits requirements for streamlined developments to one parking space per unit.

SB 35 establishes timelines for local government action on these projects. It also provides that if the project includes public investment in housing affordability, beyond tax credits, where the majority of the units are affordable to households making below 80 percent of the area median income, then the

approval will not expire. If the project does not include a majority of the units affordable to households making below 80 percent of the area median income, then the approval will automatically expire after three years except that a project may receive a one-time, one-year extension if the project proponent can provide documentation that there has been significant progress toward getting the development construction ready.

SB 540 (Chapter 269, Statutes of 2017)

This authorizes a city or county to establish a Workforce Housing Opportunity Zone by preparing an EIR and adopting a specific plan that is required to include text and a diagram or diagrams containing specified information. SB 540 prohibits the city or county from including more than 50 percent of the number of units in its regional housing needs allocation in a Workforce Housing Opportunity Zone. The bill requires the city or county proposing to adopt a Workforce Housing Opportunity Zone to hold public hearings on the specific plan. The bill authorizes the local government, after a specific plan is adopted and the zone is formed, to impose a specific plan fee upon all persons seeking governmental approvals within the zone. The bill requires a local government to comply with certain requirements when amending the specific plan for the zone, including certifying a new EIR.

This bill requires a city or county, for a period of 5 years after the plan is adopted, to approve any development that is proposed within the area of the zone if that development satisfies certain criteria, including long-term guarantees of affordability unless the city or county makes certain findings. The bill provides that, after the zone is adopted, a lead agency is not required to prepare an EIR or negative declaration for a housing development that occurs within the zone if specified criteria described in new Government Code Section 65623 are met. The bill requires a city or county to approve a housing development located within the zone within 60 days after the application for that development is deemed complete. SB 540 would require a local government has received an application for a housing development within a Workforce Housing Opportunity Zone to post notice of that application on its web site and mail or deliver that notice within 10 days of receiving the application to any person who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests.

Within 5 years after adoption of the specific plan, the city or county will be required to consider whether any trigger under PRC Section 21166 would require preparation of a subsequent EIR. Also, at any time during the 5-year period, the city or county can only deny a project if the local government finds, based upon substantial evidence in the record of the public hearing on the project, that a physical condition of the site of the development that was not known at the time the specific plan was prepared would have a specific, adverse impact upon the public health or safety, then the local government shall either: (A) approve the project subject to a condition that satisfactorily mitigates or avoids the impact, or (B) deny the project if the cost of complying with the condition renders the project unaffordable for the intended residents of low, moderate, or middle income and approval would cause more than 50 percent of the total units in the zone to be sold or rented to persons and families of above moderate income.

The approval of a development that does not include a majority of the units that will be sold or rented to persons and families of lower income, as defined in Section 50079.5 of the Health and Safety Code,

shall expire three years from the date of the approval, if construction has not begun on the housing units in the development. A local government may grant one extension for an additional three-year period upon a determination that good cause exists for the delay in commencing construction. A local government shall not consider the same or substantially similar project on the same parcel of property if the development expires pursuant to this subdivision.

The bill authorizes a local government to apply for grant or no-interest loan from the Housing and Community Development Department (HCD) to support its efforts to develop a specific plan and accompanying EIR within the zone. The bill, upon appropriation by the Legislature, would authorize a transfer from the Controller to HCD for purposes of establishing this loan program.

Modify the discussion under “GHG Reduction Threshold Target” that was added to page 166 by the 2016 revisions of the CEQA Deskbook by adding the following paragraph to the end of that addition:

The Association of Environmental Professionals has published a useful overview of the options for addressing GHG emissions analysis in light of the Newhall Ranch decision. This October 2016 whitepaper is entitled: *Beyond Newhall and 2020: A Field Guide to New CEQA Greenhouse Gas Thresholds and Climate Action Plan Targets for California*. It is available from AEP: <http://www.califaep.org/>.

Insert the following paragraph after the first full paragraph on page 176:

When the lead agency chooses to examine alternatives at an equal level of detail, it should identify the project or preferred alternative in the Draft EIR and Final EIR. Analyzing a range of substantially different alternatives at an equal level of detail without identifying either a project or a preferred alternative in the Draft EIR has been held to be inadequate in a Court of Appeal decision. (*Washoe Meadows Community v. Department of Parks and Recreation* (2017) __ Cal.App.5th __)

Revise and replace the second paragraph under “Statutes of Limitation” on page 216 as follows:

~~Pursuant to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) enacted in 2005, certain high-way and public transit projects undertaken or funded by the U.S. Department of Transportation are subject to a 180-day statute of limitations on NEPA challenges. This is currently the only NEPA statute of limitations, and it does not apply to any other types of projects subject to NEPA.~~

NEPA does not contain a general statute of limitations; litigation is subject to the Administrative Procedures Act with its 6-year statute of limitations. However, the Safe Accountable Flexible Efficient Transportation Equity Act, A Legacy for Users (SAFETEA-LU) Section 6002 (23 U.S.C. 129) establishes a 180-day statute of limitations on claims against the U.S. Department of Transportation (USDOT) and other federal agencies for certain environmental and other approval actions when certain circumstances apply (23 Code of Federal Regulations (CFR) 771.139). The Moving Ahead for Progress in the 21st Century Act (MAP-21) subsequently reduced this to a 150-day statute of limitations. (23 United States Code (U.S.C.) 139). To qualify for this shortened period, the action must be related to a transportation project and a statute of limitations notice must be published in the *Federal Register* announcing that the agency

has taken a final action on a transportation project under the federal law pursuant to which the action was taken. Where the FHWA has assigned NEPA responsibilities to a state transportation agency (like Caltrans), FHWA remains the agency that must publish the *Federal Register* notice. (23 U.S.C. 327). Absent this notice being published in the *Federal Register*, the normal period for claims under the Administrative Procedures Act applies. All federal agency decisions, permits, and approvals must be final before the notice can be published.

Title 41 of the Fixing America's Surface Transportation (FAST) Act of 2015 establishes a separate statute of limitations for complex infrastructure projects involving an investment of \$200 million or more. (42 U.S.C. 4370m-6). The statute of limitations for challenging a qualifying project is 2 years. The FAST Act also establishes a 2-year statute of limitations for any railroad project that is subject to NEPA and requires the approval of the U.S. Secretary of Transportation. (49 U.S.C. 24201). The lead agency must file notice of the project's authorization in the *Federal Register* to begin the statute of limitations. For more information about the FAST Act and its shortened SOL, see the 2017 CEQ and OMB memorandum "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects." (Council on Environmental Quality, 2017). It is available online at - <https://www.permits.performance.gov/about/news/omb-and-ceq-jointly-issue-fast-41-guidance>.

Revise the second paragraph under Analysis of Alternatives on page 218 as follows:

This standard differs from CEQA, which does not require substantially equal treatment of alternatives. Rather, under CEQA, the analysis of the proposed project is often evaluated at a greater level of detail than that of the alternatives. Although CEQA allows this equal analysis of alternatives, it nevertheless requires a meaningful comparison of the impacts of the alternatives (Guidelines § 15126.6(d)). Further, at least one California court has held that when evaluating a range of different alternatives, CEQA requires the "preferred alternative" to be identified in the Draft EIR. (*Washoe Meadows Community v. Department of Parks and Recreation* (2017) Cal.App.5th) This may be problematic in joint EIR/EISs when the federal agency intends to defer identification of the preferred alternative until the Final EIR/EIS. In such cases, the state agency should identify its preferred alternative in the Draft EIR/EIS for CEQA purposes.

Add the following new subsection under the first full paragraph on page 232:

Environmental Leadership Projects. The Jobs and Economic Improvement Through Environmental Leadership Act of 2011, as amended, authorizes the Governor, until January 1, 2020, to certify projects that meet certain requirements, including the requirement that the project invests \$100 million in California, is certified as LEED gold by the United States Green Building Council, achieves a 15% greater standard for transportation efficiency than comparable projects, and creates high-wage, highly skilled jobs that pay prevailing wages and living wages. (Pub. Res. Code Section 21183). The statute provides that if a lead agency fails to approve a project certified by the Governor before January 1, 2021, the certification expires and is no longer valid. The statute itself sunsets on January 1, 2021.

Under this statute the Judicial Council has adopted a rule of court establishing procedures applicable to "actions or proceedings brought to attack, review, set aside, void, or annul" the certification of an EIR

for an environmental leadership development project “or the granting of any project approvals that require the actions or proceedings, including any potential appeals therefrom, be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceedings with the court.” (Pub. Res. Code Section 21185). The statute requires the lead agency to prepare the administrative record concurrently with the CEQA process in order to facilitate the rapid resolution of litigation.

The following constitutes the minimum requirements for concurrent preparation of the administrative record (Pub. Res. Code Section 21186(b)-(g)):

- All documents and other materials placed in the record of proceedings shall be posted on, and be downloadable from, an Internet Web site maintained by the lead agency commencing with the date of the release of the draft environmental impact report.
- The lead agency shall make available to the public in a readily accessible electronic format the draft environmental impact report and all other documents submitted to, or relied on by, the lead agency in the preparation of the draft environmental impact report.
- A document prepared by the lead agency or submitted by the applicant after the date of the release of the draft environmental impact report that is a part of the record of the proceedings shall be made available to the public in a readily accessible electronic format within five business days after the document is released or received by the lead agency.
- The lead agency shall encourage written comments on the project to be submitted in a readily accessible electronic format, and shall make any comment available to the public in a readily accessible electronic format within five days of its receipt.
- Within seven business days after the receipt of any comment that is not in an electronic format, the lead agency shall convert that comment into a readily accessible electronic format and make it available to the public in that format.
- Notwithstanding the above paragraphs, inclusive, documents submitted to or relied on by the lead agency that were not prepared specifically for the project and are copyright protected are not required to be made readily accessible in an electronic format. For those copyright-protected documents, the lead agency shall make an index of these documents available in an electronic format no later than the date of the release of the draft environmental impact report, or within five business days if the document is received or relied on by the lead agency after the release of the draft environmental impact report. The index must specify the libraries or lead agency offices in which hardcopies of the copyrighted materials are available for public review.

In addition, the lead agency is required to certify the final record of proceedings within five days of its approval of the project. The superior court hearing the case will resolve any dispute arising from the record of proceedings. Unless the superior court directs otherwise, a party disputing the content of the record is required to file a motion to augment the record at the time it files its initial brief.

Add the following summaries of California Supreme Court decisions to page 243 in addition to the revision made by the 2015 - 2017 updates of the CEQA Deskbook:

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

The North Coast Railroad Authority (NCRA) entered into a contract with the Northwestern Pacific Railroad Company (NWPRC) that allows the NWPRC to provide freight service on tracks controlled by NCRA. NCRA is a public agency established under state law (Government Code section 93000 et seq.). Its enabling statute identifies Humboldt, Mendocino, Sonoma, and Trinity Counties as the NCRA's service area. It authorizes the NCRA "to provide rail passenger and freight service within those counties." NCRA certified an EIR in conjunction with its approval of the NWPRC contract.

Friends of the Eel River and Californians for Alternatives to Toxics (together, FOER) brought suit to challenge NCRA's certification of the EIR and approval of NWPRC's freight operations. The trial court denied the petitions for writ, concluding that CEQA review is actually preempted by the Interstate Commerce Commission Termination Act (ICCTA). The ICCTA grants the federal Surface Transportation Board (STB) exclusive jurisdiction over rail operations. The STB must give its permission before a rail carrier can operate. The Court of Appeal similarly found that federal law preempted the requirement to prepare an EIR.

The Supreme Court reversed in a split decision. The majority opinion carefully examined the law related to federal preemption, particularly the extent to which states may regulate their own activities within the "regulatory voids" within the preemption.

When we consider that the ICCTA has a deregulatory purpose that leaves railroad owners with a considerable sphere of action free from regulation, we see that the state, as owner, must have the same sphere of freedom of action as a private owner. But unlike other owners, to act in that deregulated sphere, the state ordinarily acts through its laws. In the circumstances here, those state laws are not regulation in the marketplace within the meaning of the ICCTA, but instead are the expression of the state's choice as owner within the deregulated sphere. This is how the deregulatory purpose of the ICCTA necessarily functions when state-owned, as opposed to privately owned, railroad lines are involved.

We acknowledge that, like the private owner, the state as owner cannot adopt measures of self-governance that *conflict* with the ICCTA or invade the regulatory province of the federal regulatory agency. But there is a sphere of regulatory freedom enjoyed by owners, and there are at least two specific areas of regulatory freedom that are present in this case. Specifically, environmental decisions concerning track repair on an existing line and the level of freight service within certain boundaries to be offered on an existing line appear to be within the regulatory sphere left open to owners. We conclude that this freedom belongs to the state as owner, as well, and under these circumstance, the ICCTA does not preempt the application of CEQA to this project.

The Court limited the scope of this exception to the ICCTA preemption to state-owned railroads. Were the state to apply CEQA to privately-owned railroads, it would conflict with the ICCTA's intent to deregulate railroads by creating a regulatory burden.

As the Court of Appeal correctly pointed out, the national system of railroads is of peculiarly federal, not state, concern. The ICCTA is both unifying and deregulatory; it would undermine both values if states could compel the rail industry to comply with regulation of railroads that conflicted with federal law, or even to comply with supplementary regulation of railroads on a state-by-state basis. We acknowledge that, at least as to privately owned railroads, state environmental permitting or preclearance regulation that would have the effect of preventing a private railroad from operating pending CEQA compliance would be categorically preempted.

It viewed the actions of state-owned railroads to comply with CEQA as being a sort of internal operating procedure. Specifically:

Because the present project appears to fall within that area of freedom of action, applying CEQA to NCRA's decisions on the project appears not to be regulation by the state but instead self-governance by the owner. As we will explain, because we see no indication in the language of the ICCTA that Congress intended to preempt such self-governance in that field, we will conclude that application of CEQA to NCRA in the present case is not preempted.

The Court further explained:

We acknowledge that CEQA actions might cross the line into preempted regulation if the review process imposes unreasonable burdens outside the particular market in which the state is the owner and developer of a railroad enterprise. But in the context of addressing the competing federal and state interests in governing state-owned rail lines that are before us in this case, such a line is not crossed by recognizing CEQA causes of action brought against NCRA to enforce environmental rules of decision that the state has imposed on itself for its own development projects.

We by no means posit that the ICCTA does not *govern* state-owned rail lines. It appears undisputed that state-owned rail lines, like private ones, must comply with the ICCTA's provisions and with STB regulation and that state *regulation* of rail carriers is preempted even when the state owns the line. But it does not appear unmistakably clear that in adopting the preemption provision of the ICCTA, Congress intended that state self-governance extending over how its own subdivisions would enter a business and make decisions a private owner could decide how to make for itself would be considered preempted regulation of rail transportation within the meaning of the preemption clause.

The Court noted that the STB has currently rendered an opinion that the ICCTA preempts CEQA as related to the California High Speed Rail project. "But these decisions on the part of the STB did not consider the deregulatory aspect of the ICCTA and the different way in which deregulation affects public and private rail lines. We are not bound to follow them."

The Court summed up its thought process as follows:

... in a sense, application of CEQA is not solely a matter of self-governance by the state. CEQA can be seen as an expression of how the state, as proprietor, directs that a state enterprise will be run — an expression that can be analogized to private corporate bylaws and guidelines governing corporate subsidiaries. To the extent a private corporate parent would have a zone of freedom under the ICCTA to govern how its subsidiaries will engage in the railroad business — including the freedom to direct them to undertake environmental fact finding as a condition of approving or going forward with their projects — the state presumably has the same sphere of freedom of action.

The Court distinguished its conclusion over CEQA's application to NRCA from the situation regarding the private operator NWPRC. Because NWPRC is a private entity, applying state regulations in the form of CEQA would be inconsistent with the ICCTA's preemption of such regulations on rail operators. Therefore, NWPRC's operations cannot be challenged under CEQA.

The case was remanded to the Court of Appeal for reconsideration.

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

This case concerns a challenge to adequacy of the program EIR (PEIR) certified for SANDAG's 2011 Regional Transportation Plan/Sustainable Communities Strategy (RTP/SCS). SANDAG was the first regional government to adopt an SCS after the passage of the Sustainable Communities and Climate Protection Act (SB 375) in 2008. An SCS is intended to establish land use policies complimentary to regional housing needs and transportation investments that will help reduce regional greenhouse gas (GHG) emissions from autos and light trucks.

SANDAG's RTP/SCS is fundamentally a plan for long-term transportation investments within the San Diego region, identifying transportation projects that will receive a share of an estimated \$214 billion in financing that will be available over the next several decades. Under SB 375, the RTP/SCS must also identify a land use pattern that in conjunction with transportation investments and local planning decisions will meet the region's GHG emissions reduction target.

The EIR for the plan found that although the RTP/SCS would meet the 2020 reduction target, it would increase GHG emissions levels in comparison to 2010 conditions for the 2035 and 2050 planning years. It identified the increase in GHG emissions in 2050 as a significant effect and included mitigation measures, but chose not to use the 2050 reductions target contained in Governor Schwarzenegger's Executive Order No. S-3-05 as a threshold of significance. The RTP/SCS EIR was invalidated by the trial court, largely on the issue of GHG emissions reduction. The Court of Appeal upheld that decision in a 2-1 opinion, finding that the EIR should have used the Executive Order as the 2050 GHG emissions threshold.

Plaintiffs brought a number of challenges in the case that was heard by the Court of Appeal. However, the California Supreme Court chose to address only one question in its opinion: "Must the

environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?" The Supreme Court reversed the decision of the Court of Appeal, concluding that the SANDAG EIR did not have to rely on Executive Order No. S-3-05 as a significance threshold.

The Court found that "the EIR does not obscure the existence or contextual significance of the Executive Order's 2050 emissions reduction target. The EIR makes clear that the 2050 target is part of the regulatory setting in which the Plan will operate. Further, the EIR straightforwardly mentions the 2050 target in the course of explaining why SANDAG chose not to use the target as a measure of significance." The Court found that this satisfactorily disclosed the 2050 projected RTP/SCS emissions and how it related to the Executive Order's 2050 emissions reduction target.

... it was not difficult for the public, reading the EIR, to compare the upward trajectory of projected greenhouse gas emissions under the Plan from 2020 through 2050 with the Executive Order's goal of reducing emissions to 80 percent below 1990 levels by 2050. The fact that part of the discussion of greenhouse gas impacts and the Executive Order occurs in the "Response to Comments" section of the EIR rather than the original draft (see *dis. opn., post*, at p. 8) is not an infirmity. Because a lead agency's response to comments is an integral part of the EIR (see *Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1023 [EIRs must adequately address comments of state agencies]), it is reasonable to expect that those interested in the contents of an EIR will not neglect this section.

Moreover, SANDAG did not abuse its discretion in declining to adopt the 2050 goal as a measure of significance in light of the fact that the Executive Order does not specify any plan or implementation measures to achieve its goal. In its response to comments, the EIR said: "It is uncertain what role regional land use and transportation strategies can or should play in achieving the EO's 2050 emissions reduction target. A recent California Energy Commission report concludes, however, that the primary strategies to achieve this target should be major 'decarbonization' of electricity supplies and fuels, and major improvements in energy efficiency [citation]." We cannot say that SANDAG abused its discretion by refusing, on these grounds, to say more in the EIR about whether the projected emissions were consistent with the 2050 goal. Neither the Attorney General nor the other plaintiffs point to any guidance as to how the 2050 goal translates into specific reduction targets broken down by region or sector of emission-producing activity. Further, as SANDAG notes, "there are presently no reliable means of forecasting how future technological developments or state legislative actions to reduce greenhouse gas emissions may affect future emissions in any one planning jurisdiction. . . . Lead agencies can only guess how future technical developments or state (or federal or international) actions may affect emissions from the myriad of sources beyond their control." (See *Marin Mun. Water Dist. v. KG Land California Corp* (1991) 235 Cal.App.3d 1652, 1663 [CEQA does not require analysis of potential impacts from possible future development that are too speculative to evaluate].) It is not clear what additional information SANDAG should have conveyed to the public beyond the general point that the upward trajectory of emissions under the Plan may

conflict with the 2050 emissions reduction goal. (Cf. *Center for Biological Diversity, supra*, 62 Cal.4th at pp. 225–228 [discussing difficulty of inferring required level of emissions reduction for an individual project from a statewide emissions reduction goal].)

Nor can we say it was unreasonable for SANDAG to use its threefold approach in the EIR: (1) Where statute and regulation provide specific regional emissions reduction targets, as for cars and light trucks for 2020 and 2035, the EIR analyzes consistency of projected emissions with those targets (GHG-2). (2) For longer-term emissions through 2050, for which no statute or regulation provides regional or sector targets, the EIR analyzes projected emissions against a baseline of current emissions ([Impact] GHG-1). This is one of the approaches specified in Guidelines section 15064.4, subdivision (b), which calls on lead agencies to consider “[t]he extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting.” (3) The EIR analyzes whether the Plan incorporates land use changes and transportation improvement designed to reduce emissions, as reflected in SANDAG’s Climate Action Strategy and CARB’s Scoping Plan ([Impact] GHG-3). (See *Center for Biological Diversity, supra*, 62 Cal.4th at p. 229 [recognizing the potential value of — “performance based standards” as outlined in the Scoping Plan or other authoritative body of regulation].) Whether or not any one method, by itself, would have provided sufficient analysis, we conclude that these three methods together adequately informed readers of potential greenhouse gas emission impacts.

The Supreme Court’s decision is, by its own description, narrow and “does not mean that [the SANDAG] analysis can serve as a template for future EIRs.” The Court noted that:

... Our decision is not a general endorsement of the adequacy of SANDAG’s EIR, much less an endorsement of the adequacy of the regional plan that the EIR analyzes. Specifically, we do not address whether SANDAG’s responses to the indisputably significant greenhouse gas impacts of the 2011 regional plan were adequate. The Court of Appeal concluded that the EIR failed to sufficiently consider feasible mitigation measures and project alternatives that would reduce vehicle miles traveled and curb the rise in greenhouse gas emissions. These issues are not before us, and we express no view on them. We hold only that SANDAG, in analyzing greenhouse gas impacts at the time of the EIR, did not abuse its discretion by declining to adopt the Executive Order as a measure of significance or to discuss the Executive Order more than it did.

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

After the City’s approval of the Banning Ranch project, a residential and commercial development on about 100 acres of the 400-acre Banning Ranch, the Conservancy sued on a variety of grounds under Planning and Zoning Law and CEQA. The Conservancy claimed that the project was inconsistent with the City general plan and that the City had failed to properly coordinate with the Coastal Commission. It also claimed that the EIR was inadequate for failing to identify the “environmentally sensitive habitat areas” (ESHAs, a Coastal Act term of art) within the site. The City countered that designation of ESHAs are the

sole responsibility of the Coastal Commission and, because the Banning Ranch site was not within the city's Local Coastal Program, the EIR was not required to identify potential ESHAs within the project.

The project's draft EIR dedicated approximately 625 of its 1,400 pages to an examination of biological resources on the site. Although it mapped resources in detail, it did not identify potential ESHAs because, under the Coastal Act, determining the boundaries of ESHAs is the prerogative of the Coastal Commission during its deliberations on a local coastal permit. The city's Local Coastal Program does identify ESHAs on areas outside the Banning Ranch project. .

The Coastal Commission submitted comments on the draft EIR expressing concern that the draft EIR did not identify ESHAs and requesting that it do so in order to disclose whether the project would be consistent with the Coastal Act. Other commenters raised the same concern. The City's response to this and other comments described the purpose of an EIR as analyzing the impacts of a proposed project on the physical environment, but noted that determining what constitutes an ESHA is within the discretion and authority of the Coastal Commission and outside the responsibility of the EIR. It further explained that the Coastal Commission can use the information in the EIR in its deliberations and identification of ESHAs.

The California Supreme Court emphatically rejected the City's arguments regarding ESHA, and set aside the EIR and project approvals. Because the case was decided on CEQA grounds, the Court declined to rule on the issue of general plan consistency.

The City's EIR and CEQA process failed in several areas. The process failed to include sufficient coordination with the Coastal Commission over the potential ESHAs within the site and the Final EIR did not contain good faith responses to comments from the Commission and others regarding the practicality of identifying potential ESHAs. Although the City could not identify the final boundaries of ESHAs, it had the ability to identify potential ESHAs using accepted delineation standards and identify those parts of the development that would affect potential ESHAs. By failing to identify potential ESHAs, the EIR withheld key information from the reader and decision-makers, and failed CEQA's requirement to disclose the project's consistency (or, in this case, inconsistency) with plans and other regulatory standards that protect the environment. Failure to identify potential ESHAs left out a crucial factor in disclosing the project's potential impacts and affected the mitigation measures and alternatives analyzed in the EIR. Inadequate disclosure of information about the potential ESHAs and the proposed project's impacts, mitigation, and alternatives was a prejudicial error.