2010 CEQA UPDATE

By Leslie Z. Walker, Cori Badgley, Katherine J. Hart and William W. Abbott

Abbott & Kindermann, LLP's annual California Environmental Quality Act ("CEQA") review summarizes important developments over the past year. Among 2010's highlights were three decisions from the California Supreme Court: two enforcing the abbreviated statutes of limitations set forth in Public Resources Code section 21167(d) and (e), and one holding the baseline for air quality emissions to existing *physical* conditions, not existing *permitted* conditions. The question of what constitutes the appropriate baseline for environmental review reverberated through the appellate courts as the Court of Appeal for the Fourth Appellate District held that adjudicated water rights, rather than actual water consumption, could serve as the baseline in a master plan; and the Sixth Appellate District held that the use of 2020 traffic conditions, as opposed to existing conditions, constituted an abuse of discretion.

Other highlights include three firsts on the climate change front: (1) adoption of CEQA guidelines for the quantification and mitigation of greenhouse gas emissions ("GHG"), (2) the adoption of the first thresholds of significance for GHG, and (3) the First Appellate District case finding an Environmental Impact Report's ("EIR") analysis of GHG inadequate.

Condensed summaries of this year's cases and developments are presented below, organized based upon the major CEQA issues discussed, and linked to the full length articles published earlier this year on our blog. To print this summary with all the articles attached, click here.

GREENHOUSE GASES

CEQA Guidelines for Addressing Greenhouse Gas Emissions: The Amendments to the CEQA Guidelines Addressing GHG mandated by Senate Bill 97 (Chapter 185, Statutes 2007; Pub. Resources Code, § 21083.05) took effect in March 2010. The Amendments require the quantification and mitigation of GHGs. The Amendments do not set forth numeric thresholds but add the following questions to the Appendix G checklist: a) Would the project generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment? b) Would the project conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases? See California Environmental Quality Act Air Quality Guidelines.

***Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70:** In the first published CEQA case pertaining to GHG analysis, the court found that a mitigation measure requiring the city to submit a plan for achieving complete reduction of GHG emissions within one year of project approval constituted a classic case of deferred mitigation. See 898,000 Metric Tons of Unmitigated CO2: Prime Conditions for the First Appellate Court Decision on CEQA and Climate Change.

Bay Area Air Quality Management District Thresholds of Significance: In June 2010, the Bay Area Air Quality Management District adopted the first ever numeric thresholds for GHG. The Bay Area Guidelines impose plan-level and project-level guidelines for operations only (as opposed to the construction and operation thresholds proposed for Criteria Air Pollutants.) The project-level thresholds of significance for the San Francisco Bay Area's GHG are:

- For land use developments project, compliance with a qualified GHG Reduction Strategy, or annual emissions less than 1,100 metric tons per year of carbon dioxide equivalent, or 4.6 metric tons per year carbon dioxide per service population, which includes residents and employees. Land use development projects include residential, commercial, industrial and public land uses and facilities.
- At the project level, the threshold is compliance with a qualified GHG reduction strategy or 6.6 metric tons per service population per year of carbon dioxide equivalent.

See Bay Area Air Quality Management District Defers Adoption of Greenhouse Gas Threshold.

IS IT A PROJECT?

***Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305:** A municipal services agreement between the Scotts Valley Band of Pomo Indians of California and the City of Richmond did not constitute a project for the purposes of CEQA. The agreement required the tribe to make payments in exchange for fire, police and public works services and the city to support the tribes fee-to-trust application submitted to the federal government. The court found the agreement was not a project because the city had no authority over the fee-to-trust application, casino construction, or public works programs and the potential construction of fire facilities was too speculative to constitute a project. See City Gambles and Wins on Agreement with Tribe Over Casino: CEQA Does Not Apply.

***San Diego Navy Broadway Complex Coalition v. Manchester Pacific Gateway* LLC (2010) 185 Cal.App.4th 924:** The agency's discretionary authority, if it had any at all, was limited only to aesthetics. Because the agency would have no power related to climate change impacts, there was no discretionary action that triggered CEQA. See Limited Discretion Related to Aesthetics did not Trigger Need for Supplemental EIR on Climate Change Impacts.

***Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286:** A provision of the Palo Alto municipal code requiring a 60-day delay prior to the issuance of a demolition permit did not render the act discretionary. The city properly treated the demolition permit as ministerial and exempt from environmental review under CEQA. The Court found that under the municipal code the issuance of the demolition permit was ministerial because 1) the decision involved only the use of fixed standards or objective measurements; and 2) the city did not have the authority to impose conditions on

approval of the permit that would render it discretionary. See Authority to Delay a Project Does Not Make the Project Discretionary.

City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55*: An agreement between the County of San Diego and the Department of Corrections under which the County identified potential locations for a state prison reentry facility in exchange for preference in the awards of state financing of county jail facilities did not constitute a commitment to a definite course of action. As such, the holding of *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, did not require the county to conduct environmental review prior to entering into the agreement. See Appellate Court Post - Save Tara: Preliminary Exploration Does Not Constitute Project Commitment for CEQA.

***Tomlinson v. County of Alameda,* (2010) 188 Cal.App.4th 1406:** The CEQA Guidelines section 15332 infill exemption only applies to projects within the limits of a city.

LEAD AGENCY

***Nelson v. County of Kern* (2010) 190 Cal.App.4th 252:** The County of Kern was the lead agency under Surface Mining and Reclamation Act and CEQA and thus was required to conduct environmental review of the entire proposed mining and reclamation plan, not just the reclamation plan, as advocated by the county. See County Dug Itself a Hole by Limiting its Scope of Review.

NEGATIVE DECLARATIONS

***Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310:** A Negative Declaration containing evidence that a proposed project would contain between 201 and 420 pounds per day of additional NOx emissions, in light of the District's NOx threshold of 55 pounds per day constituted evidence that the project would have substantial air quality impacts and thus an EIR should have been prepared. See Baseline Depends Upon Whether You Have a New or Modified Project or Existing Project Without Significant Expansion of Use.

***Save the Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521:** Substantial evidence of a fair argument existed that an ordinance prohibiting certain retailers and establishments from distributing plastic bags may have a significant environmental impact and thus an EIR had to be prepared. Petition for Review has been granted. See Paper or Plastic? Public Right Exception Allows Plastic Bag Producers to Challenge Negative Declaration for Environmental Ordinance.

EIRS

PROJECT DESCRIPTION

***Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70:** The EIR prepared for Chevron's Energy and Hydrogen Renewal Project failed CEQA's informational purpose because the project description was inadequate with respect to whether the project would enable the refinery to process heavier crude, and the EIR failed to properly establish and analyze baseline conditions. See 898,000 Metric Tons of Unmitigated CO2: Prime Conditions for the First Appellate Court Decision on CEQA and Climate Change.

***California Oak Foundation v. The Regents of the University of California* (2010) 188 Cal.App.4th 227:** The EIR for projects located within the southeast quadrant of the U.C. Berkeley campus phased master plan, including the Athlete Center in the first phase, contained an adequate project description. The court found the minimal requirements for the project description and project objectives were met, and that additional detail could be inferred from the various topical discussions. With respect to the less precisely stated later phases, the EIR included a commitment to do later EIRs should the project description later prove to be inadequate. See Go Bears! Court Approves Cal Bears Athletic Facility Expansion.

BASELINE

***Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310:** CEQA air quality impacts are to be measured against existing physical conditions not existing permitted level of operations for emitter. See Baseline Depends Upon Whether You Have a New or Modified Project or Existing Project Without Significant Expansion of Use.

***Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316:** In defining the baseline for a water impact analysis, a lead agency could rely upon an adjudicated groundwater right. See Alternative Baseline Considered a Good Egg.

***Sunnyvale West Neighborhood Association v. City of Sunnyvale* (Dec. 16, 2010, No. H035135) __ Cal.App.4th __**: The City of Sunnyvale prepared an EIR for a proposed road extension using 2020 conditions rather than present day conditions, as a baseline. The court held that while deviations for the normal baseline standard of existing conditions is possible, the record in this case did not contain substantial evidence to support a decision to deviate. The city's failure to analyze the project's impacts based on existing conditions constituted a prejudicial abuse of discretion. See Project to Remedy Traffic Congestion Not Exempt from Analysis of Current Baseline Conditions.

ALTERNATIVES

***Jones v. The Regents of the University of California* (2010) 183 Cal.App.4th 818:** The court upheld the EIR for a Long Range Development Plan for Lawrence Berkeley National Library against the challenge that its range of alternatives was insufficient. The court found the range of alternatives was adequate, and an off-site alternative was not necessary because it would not meet the project's primary objective of creating a

campus-like setting with existing facilities. See Regents' CEQA Document Receives a Passing Grade; Opponent Marked Down for Inadequate Participation.

***Watsonville Pilots Association v. City of Watsonville, et al.* (2010) 183 Cal.App.4th 1059:** A city acting as its own Airport Land Use Commission is subject to all of the substantive requirements under the State Aeronautics Act. The city should have considered a low growth alternative as part of its general plan update as it would meet most general plan update objectives. See City's New General Plan is not Cleared for Take-off, Returns to Base and is Grounded.

***Center for Biological Diversity v. County of San Bernardino* (2010) 184 Cal.App.4th 1342:** The County of San Bernardino presented insufficient evidence of economic and technological infeasibility to support its decision to reject a project alternative that could feasibly mitigate the air quality impacts of an open air composting facility by approximately 80 percent. See Put a Lid on It: EIR for Open Air Human Waste Composting Facility Held Invalid.

MITIGATION MEASURES

***Katzeff v. California Department of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601:** Once imposed, an agency must state its basis, supported by substantial evidence, for cancelling or nullifying a mitigation measure, even if the proposed act is many years after the mitigation measure is imposed. See The Long Life of CEQA Mitigation Measures.

***Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316:** A lead agency's rejection of agricultural land mitigation strategies was supported by substantial evidence, and sufficient evidence supported the statement of overriding considerations. See Alternative Baseline Considered a Good Egg.

SUPPLEMENTAL/SUBSEQUENT EIR

***Melom v. City of Madera* (2010) 183 Cal.App.4th 41:** A CEQA document is not mandated to address urban decay merely because the project contains a retail supercenter. The holding in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, does not require this analysis for every CEQA document. Like most CEQA issues, whether an impact analysis is required is determined based upon the specific facts of each situation. See Subsequent EIRs: It is Still a Matter of the Evidence in the Record.

SB 1456 (Chapter 496) – Tiering of Overriding Statement of Considerations

A later project that is tiering off of an environmental impact report for which the lead agency also made a finding of overriding considerations may incorporate the finding of overriding considerations, if specified conditions are met.

WATER SUPPLY ANALYSIS

***Center for Biological Diversity v. County of San Bernardino* (2010) 184 Cal.App.4th 1342:** SB 610 analysis should have been prepared because the project, an open-air composting facility, falls within the definition of processing plants. See Put a Lid on It: EIR for Open Air Human Waste Composting Facility Held Invalid.

Watsonville Pilots Association v. City of Watsonville, et al.* (2010) 183 Cal.App.4th 1059*: A water analysis as part of a general plan update does not have to identify a firm source of water supply, rather it must analyze the likely impacts. See City's New General Plan is not Cleared for Take-off, Returns to Base and is Grounded.

***Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33:** In preparing an urban water management plan ("UWMP"), the agency may rely upon reasonable assumptions, supported by substantial evidence. A reviewing court should apply deference to the agency's decision. The issue is not whether or not there are more reasonable assumptions which should have been incorporated into the UWMP, but whether or not substantial evidence supported the agency's choice. See Court Upholds Agency's Reasonable Assumptions in its Urban Water Management Plan.

EIR EQUIVALENT

***San Joaquin River Exchange Contractors v. State Water Resources Control Board* (2010) 183 Cal.App.4th 1110:** Final staff report prepared by Central Valley Regional Water Quality Control Board Staff for basin plan amendments qualifies for an EIR-equivalent document because basin planning is a certified regulatory program under CEQA. See Basin Plan Amendments Addressing Impairments for Salt, Boron and Dissolved Oxygen are Valid.

FEES

***Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573:** Local agencies may impose a fee for the filing of an appeal of a CEQA decision so long as that fee is reasonable. See Yes, Local Appeal Fees Apply to CEQA Appeals.

AB 2565 (Chapter 210) – Fees for Copies of Environmental Documents

This bill permits agencies to collect a fee from members of the public for copies of environmental documents. The fee cannot exceed the reasonable copying costs. The bill also allows the agency to provide the documents in an electronic format.

CEQA LITIGATION

STATUTE OF LIMITATIONS

***Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32:** Filing a notice of determination triggers a 30-day statute of limitations for all CEQA challenges to the decision announced in the notice regardless of the nature of the CEQA violation. See NODs Provide Bullet-Proof Protection 30 Days After Posting.

***Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481:** Flaws in the decision-making process underlying a facially valid and properly filed Notice of Exemption do not prevent it from triggering the 35-day period to file a lawsuit challenging the agency's approval of a CEQA-exempt project. See No Fooling: A Facially Valid NOE Triggers a 35-Day Statute of Limitations.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

***Jones v. The Regents of the University of California* (2010) 183 Cal.App.4th 818:** Project opponents' general identification of water quality impacts was insufficient to preserve for trial the more specific complaint that the project failed to attain water quality benchmarks. Project opponents also failed to exhaust their administrative remedies on the GHG issue because they had the opportunity to bring the issue to the lead agency's attention prior to certification of the EIR, but did not do so. See Regents' CEQA Document Receives a Passing Grade; Opponent Marked Down for Inadequate Participation.

***Center for Biological Diversity v. County of San Bernardino* (2010) 184 Cal.App.4th 1342:** Petitioner exhausted its administrative remedies to challenge the water supply assessment even though it did not specifically mention the 610 analysis. See Put a Lid on It: EIR for Open Air Human Waste Composting Facility Held Invalid**.**

***Tomlinson v. County of Alameda*, (2010) 188 Cal.App.4th 1406:** Public Resources Code section 21177 requiring exhaustion of administrative remedies does not apply to exemption determinations.

COSTS AND ATTORNEY's FEES

***Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection* (2010) 187 Cal.App.4th 376:** Although the case resulted in an opinion from the Supreme Court clarifying the California Department of Forestry and Fire Protections' duties in relation to timber harvest plans, such a result was insufficient to qualify the unsuccessful petitioner as the prevailing party for the purposes of the private attorney general doctrine under Code of Civil Procedure section 1021.5. See Are 1021.5 Attorneys Fees All or Nothing?

***California Oak Foundation v. The Regents of the University of California* (2010) 188 Cal.App.4th 227:** The trial court approved the costs associated with preparing the record, but reduced the charge for the paralegal, and adjusted the recovery to reflect the Regents' degree of success on the merits (85%). Generally, the appellate court will not

disturb the trial court's determination absent a clear abuse of discretion, and the appellate court found no basis for modifying or reversing the award.

***Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2010) 190 Cal.App.4th 217:** The Court enunciated three principles: (1) under the element of "necessity of private enforcement," exhaustion of administrative remedies does not satisfy any prelitigation settlement requirement; (2) attempts at prelitigation settlement must be considered when evaluating whether private enforcement was necessary, but it is not dispositive; and (3) in evaluating whether a petitioner had limited success warranting a reduction in attorney's fees, the fact that all of the causes of action are based on the same administrative record does not mean that all of the claims are necessarily related for purposes of Section 1021.5.