2016 Update for the *CEQA Deskbook, 3rd Edition*

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Amend the second paragraph under "Exceptions to Categorical Exemptions" on page 47 as follows:

A categorical exemption does not apply if "unusual circumstances" create a reasonable possibility that the activity may have a significant environmental impact. The California Supreme Court has opined that determining whether there are unusual circumstances is a two-part test. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086)

- First: The lead agency will determine whether there are unusual circumstances about the project or its site. These would be something different about the project when it is viewed in the context of similar activities in the area. The lead agency's "unusual circumstances" determination is subject to the substantial evidence test -- meaning that a reviewing court will defer to the agency's determination when supported by substantial evidence. If there are no unusual circumstances, then the exception does not apply and the agency can use the categorical exemption.

- Second: If there are unusual circumstances, then the agency must apply the fair argument standard to determine whether there is substantial evidence that the project may result in a significant effect. A reviewing court will not defer to the agency's determination if there is substantial evidence that the project may have a significant effect. Unusual circumstances and a fair argument for a potential environmental impact preclude the use of the categorical exemption.

This decision creates greater certainty for agencies over when a categorical exemption can be used. The key question will now be whether there are unusual circumstances present, not whether there is a fair argument for a significant impact. A potentially significant environmental effect itself does not constitute an unusual circumstance.

The California Supreme Court did not provide specific guidance as to what may constitute unusual circumstances, stating only that "[a] party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location." Subsequent cases from the Courts of Appeal have held that unusual circumstances did not exist where a large new home would have practically the same floor-area-to-lot-area ratio as numerous existing homes in the area (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943), and where a rodeo was proposed at a county fairground that typically hosted two dozen similar equestrian and/or livestock events each year

(*Citizens for Environmental Responsibility v. State of California ex rel. 14th District Agricultural Association* (2015) 242 Cal.App.4th 555).

In addition, a categorical exemption does not apply where the action would cause a considerable contribution to a significant cumulative impact. (Guidelines § 15300.2(b))

Amend the second paragraph on page 49 to read:

The lead agency is not required by CEQA to write findings support the use of a categorical exemption or to explain why the exceptions to the exemption do not apply. It is recommended, however, that the lead agency prepare enough information within the administrative record to support the use of a categorical exemption and explain why none of the exceptions under section 15300.2 arise in this particular instance. Some agencies prepare a "mini-initial study" for that purpose.

Amend the first paragraph under "Thresholds of Significance" on page 69 to read:

Each public agency is encouraged to develop and publish thresholds of significance to aid that agency in determining the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative, or performance level of a particular environmental effect. Noncompliance with this performance level would normally be determined to be significant by the agency, and compliance would normally be determined to be considered less than significant (Guidelines § 15064.7). Keep in mind that compliance with a threshold of significance does not preclude application of the fair argument standard in determining whether an impact may be significant. A fair argument that the project may result in a significant impact can be raised even when a project's impacts fall below the threshold. (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322; *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714)

Amend the first paragraph under "Relationship to Adopted Regulatory Standards" on page 69 as follows:

Regulatory standards adopted by agencies with jurisdiction over particular resources based on other laws or regulations (e.g., Regional Water Quality Control Board Basin Plan standards) may be used as one basis for determining the significance of a project impact to the extent they reduce the project's impact. The same is true for compliance with development standards such as the California Building Code (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal. App. 4th 884). However, if there is a fair argument that the project's compliance with the standard would still not reduce its impacts to a less-than-significant level, then an EIR is required. The Court in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98 made this issue clear in overturning an amendment to the State CEQA Guidelines. The Natural Resources Agency had adopted a language in Section 15064(h) of the State CEQA Guidelines to state that a "change in the environment is not significant if the change complies with a standard (defined as a regulatory standard adopted by a public

agency to protect the environment)." The court overturned this language as being contrary to the fair argument standard. The court stated that, in effect, the Guideline language would have a lead agency ignore substantial evidence that shows there is still the potential for a significant impact, notwithstanding the projects compliance with a "regulatory standard." Similarly, in *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714 the Court of Appeal found that a wedding reception venue that met County noise ordinance requirements nonetheless had a significant effect on the environment because of the extent of change from existing very quiet conditions. Evidence that neighbors could hear the noise from weddings, including music, cheering, and clapping, satisfied the Court as sufficient to support a fair argument for a significant noise impact.

Add the following entries to the bottom of *Table 3-2 Selected Environmental Setting (e.g., "Baseline") Court Decisions* on page 76.

North County Advocates v. City of Carlsbad (2015) 241 Cal.App.4th 94	Substantial evidence supported the City's reliance on historic occupancy rates as the traffic baseline for a project in a permitted shopping center, despite the center being partially vacant at the present.
San Francisco Baykeeper v. California State Lands Commission (2015) 242 Cal.App.4th 202	The California Supreme Court's holdings regarding baseline in its *Neighbors for Smart Rail* and *South Coast Air Quality Management District* decisions authorize using an average for the baseline when supported by the record. The Court found that the EIR for a sand mining project sufficiently documented the validity of using a 5-year average of prior mining activity as the baseline.
CREED-21 v. City of San Diego (2015) 234 Cal.App.4th 488	The baseline for a permit where previous repairs had been done under a statutory exemption for emergency work is existing conditions, not conditions prior to the emergency work.

Delete the first paragraph of page 141:

Delete the paragraph beginning with "An EIR should also analyze…" This conflicts with the California Supreme Court's holding in *California Building Industry Assoc. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369 that, in general, CEQA does not apply to the impacts of the environment on a project.

The following is to replace the discussion of Impact of the Environment on Projects beginning on page 143 and ending on page 145 (keep the discussion under "Short- and Long-term Impacts"):

The California Supreme Court has held that "CEQA generally does not require an analysis of how existing environmental conditions will impact a project's future users or residents." (*California Building Industry Assoc. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369). As a general rule, CEQA is

intended to focus on the impacts of the project on the environment, not the impact of the environment on the project. For example, CEQA does not require consideration of the effects of existing levels of toxic air contaminants on new development. Nor does it require consideration of the effects of locating a subdivision astride an active fault line.

The Court identified two exceptions to this rule:

- A situation where "a project could exacerbate hazards that are already present." The Court cited the example of a new residential development that disturbed existing subsurface contamination. It also upheld the following sentences in Guidelines Section 15126.2(a): "The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. … Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas."

- Those situations where the Legislature has specifically required consideration of impacts of the environment on the project. The Court identified the following:

    - Noise and safety considerations for projects located near airports (Public Resources Code Section 21096);

    - Safety, health risk, and other concerns related to school construction projects (Public Resources Code Section 21151.8);

    - Hazard-related and other concerns limiting the use of statutory exemptions for certain housing projects (Public Resources Code Sections 21159.21, 21159.22, 21159.23, and 21159.24) and

    - Hazard-related and other concerns limiting the use of the statutory exemption for transit priority projects (Public Resources Code Section 21151.1).

The Court is silent on whether existing environmental conditions would need to be considered in cases where the existence of such conditions precludes the use of a statutory exemption. The Court's reasoning suggests that existing conditions would not need to be analyzed in a negative declaration or EIR under those circumstances unless the project would exacerbate the existing conditions.

A footnote in this decision explained that CEQA does not prohibit an agency from considering how existing conditions might impact a project's future users or residents. However, unless the project would exacerbate such conditions the existing conditions would not be evaluated for significance. And, as a result, no mitigation measures could be applied.

The CEQA Guidelines do not currently reflect this holding. Absent future legislation reversing or limiting the Supreme Court's interpretation, any statements in the Guidelines applying CEQA to the impacts of the environment on the project should be considered invalid (e.g., Section 15126.2(a)'s statement on

locating a subdivision on a fault line). Future revisions to the Guidelines can be expected to remove these statements and explain when a project may exacerbate an existing hazard.

Revise the paragraph under "Economic and Social Effects" on page 150 as follows:

Effects analyzed under CEQA must be related to a physical change in the environment (Guidelines § 15358(b)). Economic and social effects are not considered environmental effects under CEQA unless they relate to physical changes. For example, school overcrowding is a social effect and is not a CEQA impact (*Goleta Union School District v. Regents of the University of California* (1995) 37 Cal. App. 4th 1025), while school construction that is a reasonably foreseeable effect of new development is a subject for CEQA analysis (*Chawanakee Unified School District v. County of Madera* (June 20, 2011) 196 Cal.App.4th 1016). Similarly, "[t]he need for additional fire protection services is not an *environmental* impact that CEQA requires a project proponent to mitigate" (emphasis in original). (*City of Hayward v. Board of Trustees of the California State University* (Nov. 30, 2015) 242 Cal.App.4th 833).

Economic and social effects need to be considered in EIRs only if they would lead to an environmental effect. For example, an EIR is required to analyze the economic effect on existing businesses from construction of a large shopping mall if the mall would result in "urban decay," as manifested in long-term vacancies and the physical deterioration of structures (*see*, for example, *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184). When not related to a physical change in the environment, the evaluation of economic or social effects is generally treated as optional; agencies may, but are not required to, evaluate them, and sometimes do include an analysis of economic or social effects of the proposed project (Guidelines § 15131).

Revise the discussion after "Baseline" on page 164, as follows:

- **Baseline**—what is the appropriate baseline for impact analysis and for making significance determinations? Although the CEQA Guidelines indicate that existing conditions should normally be the baseline, some agencies are using a future scenario referred to as the "business as usual" baseline under which no future reductions of GHGs are achieved. The California Supreme Court implied in its *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204 opinion that business as usual may reflect a hypothetical situation of the sort disallowed under its *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 decision. Existing conditions should be seen as the preferred baseline for GHG analysis. If a lead agency uses business as usual as the baseline it should explain why that is appropriate in light of the *Communities for a Better Environment* decision.

Revise the first paragraph under "GHG Impacts of Climate Change on the Project" on page 166, as follows:

In addition to evaluating and mitigating a project's GHG impacts, CEQA documents should evaluate the effects of climate change on a project when the project would exacerbate those effects (Pub. Res. Code§ 21083.05; *California Building Industry Assoc. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369). In such cases, CEQA documents should include mitigation measures, sometimes referred to

as “adaptation” measures for such impacts. The impacts of climate change include, but are not limited to:

- Sea level rise and its effects on ecosystems and human settlements
- Changes in rainfall and snow pack
- Frequency and severity of extreme weather events, including flooding
- Drought and the effects on agriculture
- Frequency/severity of air quality problems
- Habitat change, species migration, and extinctions
- Increased potential for wildfire

Note that these are not impacts for CEQA purposes unless the lead agency finds that they are specifically exacerbated by the project based on substantial evidence in the record. If the lead agency cannot make that determination, then it is not required to consider these as impacts and it cannot require mitigation.

Modify the discussion under “GHG Reduction Threshold Target” that was added to page 166 by the 2015 update of the CEQA Deskbook, as follows:

GHG Reduction Threshold Target

The CEQA Guidelines do not specify the target date for the analysis of GHG reductions. AB 32, the California Global Warming Solutions Act of 2006, sets a statewide goal of reducing GHG emissions to 1990 levels by the year 2020. Many GHG impact analyses have used the AB 32 target as the horizon year for their discussion of project impacts and the reduction of GHG emissions to 1990 levels as the threshold of significance. The 2012 update of the California Air Resources Board’s (CARB’s) AB 32 Scoping Plan uses the 2020 horizon. Given that 2020 is rapidly approaching, it would make sense to now model emissions beyond that year. Providing impetus for pushing the horizon farther into the future, CARB is integrating Governor Brown’s Executive Order (EO) B-30-15 into its next update of the AB 32 Scoping Plan. EO B-30-15 calls for statewide GHG emissions to be reduced to 40 percent below 1990 levels by 2030.

EO S-3-05, issued by Governor Schwarzenegger in 2005, identifies a long-term reduction goal for statewide GHG emissions reductions of 80% of 1990 emissions by 2050. CARB is not including that goal in its updated Scoping Plan. However, the California Supreme Court will consider the question of whether an EIR must evaluate emissions on the basis of EO S-3-05 in the appeal of *Cleveland National Forest Foundation v. San Diego Association of Governments* [EIR invalidated for failure to evaluate the compliance of a regional transportation plan’s GHG emissions with EO S-3-05]. The Court’s decision is expected to clarify the horizon for emissions projections.

The California Supreme Court has held that a lead agency may rely on the SB 32 Scoping Plan's expected reduction of emissions from "business as usual" (BAU) as a threshold of significance for statewide GHG emissions. (*Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204, also known as Newhall Ranch) Unfortunately, the Court has limited this to situations where the lead agency's GHG analysis includes sufficient adjustments to correlate project-specific residential density, traffic generation, and other factors with the statewide assumptions in the AB 32 Scoping Plan. The Supreme Court expressed concern over "taking a quantitative comparison method developed by the Scoping Plan as a measure of the greenhouse gas emissions reduction effort required by the state as a whole, and attempting to use that method, without consideration of any changes or adjustments, for a purpose very different from its original design: To measure that efficiency and conservation measures incorporated in a specific land use development proposed for a specific location." This limitation prevents an agency from simply determining that the project would meet or exceed the current AB 32 Scoping Plan's reduction goal of 29 percent below BAU to determine whether the project's emissions would be significant.

California Supreme Court suggests three "potential options" for evaluating the significance of project-specific GHG emissions:

> "First, … a business-as-usual comparison based on the Scoping Plan's methodology may be possible. On an examination of the data behind the Scoping Plan's business-as-usual model, a lead agency might be able to determine what level of reduction from business as usual a new land use development at the proposed location must contribute in order to comply with statewide goals.
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> "Second, a lead agency might assess consistency with A.B. 32's goal in whole or part by looking to compliance with regulatory programs designed to reduce greenhouse gas emissions from particular activities. (See Final Statement of Reasons, *supra*, at p. 64 [greenhouse gas emissions "may be best analyzed and mitigated at a programmatic level."].) To the extent a project's design features comply with or exceed the regulations outlined in the Scoping Plan and adopted by the Air Board or other state agencies, a lead agency could appropriately rely on their use as showing compliance with "performance based standards" adopted to fulfill "a statewide ... plan for the reduction or mitigation of greenhouse gas emissions." (Guidelines, § 15064.4, subds. (a)(2), (b)(3); see also *id.*, § 15064, subd. (h)(3), [further citation deleted])
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> "A significance analysis based on compliance with such statewide regulations, however, only goes to impacts within the area governed by the regulations. That a project is designed to meet high building efficiency and conservation standards, for example, does not establish that its greenhouse gas emissions from transportation activities lack significant impacts…
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> "Third, a lead agency may rely on existing numerical thresholds of significance for greenhouse gas emissions, though as we have explained (*ante*, p. 14), use of such thresholds is not required. (Guidelines, § 15064.4, subd. (b)(2); see, e.g., Bay Area Air Quality Management Dist. (BAAQMD), CEQA Guidelines Update: Proposed Thresholds of Significance (May 3, 2010), pp. 8–

> 21 [regional air quality district for the San Francisco Bay Area proposes a threshold of 1100 $MTCO_2E$ in annual emissions as one alternative agencies may use in determining CEQA significance for new land use projects].) [footnote deleted] Thresholds, it should be noted, only define the level at which an environmental effect "normally" is considered significant; they do not relieve the lead agency of its duty to determine the significance of an impact independently. [citations deleted]"

Until the Supreme Court's decision, the AB 32 Scoping Plan's statewide 29 percent reduction target had been widely accepted by CEQA practitioners as a reasonable threshold for gauging the significance of a project's GHG emissions and as a target for project GHG reductions. Lead agencies will now need to take a different approach when examining project-level GHG emissions.

Further, agencies that have adopted climate action plans (i.e., plans for the reduction of greenhouse gases) for their jurisdiction should examine their plans to make sure that they do not rely on the AB 32 Scoping Plan's target without making the localized "changes or adjustments" called for in this decision. Plans that rely on the Scoping Plan's statewide target without local change or adjustment risk invalidation if they are challenged when applied to specific projects. Plans that do not meet the standard set by the Supreme Court should not be relied upon for CEQA purposes until updated.

Nonetheless, this decision should not discourage agencies from adopting climate action plans that meet the requirements of a "plan for the reduction of greenhouse gases" (as defined under Section 15183.5) when such plans are attuned to the specific GHG emissions of the community and do not rely directly on the Scoping Plan's reduction goal. Thresholds adopted as part of such a plan would be in keeping with the third of the Supreme Court's options. The plan could also identify the relative reductions provided by "compliance with regulatory programs," consistent with the Supreme Court's second option.

Revise the discussion under "Limitations on Mitigation" on page 185 as follows:

Limitations on Mitigation. CEQA contains both general and specific limitations on an agency's authority to mitigate impacts. As discussed in chapter 4, in mitigating a project's significant environmental effects, an agency may exercise only those express or implied powers provided by law, aside from those provided by CEQA. Where another law grants an agency discretionary powers, CEQA authorizes its use (Guidelines § 15040). However, if under other law, an agency lacks the legal authority to impose those mitigation measures for a significant environmental impact, CEQA does not provide that authority. This does not mean that an agency can only mitigate the impacts of a public project when funding has been earmarked for mitigation. If there is a source of funding that may be used for mitigation, then that level of mitigation is considered feasible. (*City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945 ["In mitigating the effects of its projects, a public agency has access to all of its discretionary powers and not just the power to spend appropriations. (Pub. Resources Code, § 21004.) (footnote omitted) Those discretionary powers include such actions as adopting changes to proposed projects, imposing conditions on their approval, adopting plans or ordinances to control a broad class of projects, and choosing alternative projects. (See CEQA Guidelines, § 15002, subd. (h).) Moreover, some agencies such as CSU enjoy some discretion over the use of appropriations (see, e.g., Ed. Code,

§§ 89770, 89771, 89773, 90083 [CSU may use part of general support appropriation for capital projects]) and access to non-state funds (see *ante*, at p. 3 & fn. 2).”])

If the lead agency determines that a mitigation measure cannot be legally imposed, the measure may be screened out as infeasible. The EIR should reference that fact and briefly explain the reasons underlying the lead agency’s determination (Guidelines § 15126.4(a)). However if the measure can and should be legally imposed by another agency, the lead agency should identify this in the EIR and make its findings accordingly. Mitigation is not infeasible because it is off-site or the responsibility of another agency to implement. (*City of Marina et al. v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341; *City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945)

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

Berkeley Hillside Preservation v. City of Berkeley **(2015) 60 Cal.4th 1086.** At issue was the City's issuance of a permit to build a 10,000 square foot home (including garage) in the Berkeley hills on the basis of Class 3 and Class 31 categorical exemptions. The Court of Appeal had invalidated the city's exemptions, holding that under Guidelines Section 15300.2(c) a fair argument for potential impact was "unusual circumstances" that precluded use of the exemptions. This subsection reads: “A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”

The Supreme Court reversed and set out a two-part test for determining whether the exception listed in Section 15300.2 apply:

> (1) There must be unusual circumstances present. These would be something different about the project when it is viewed in the context of similar activities in the area. The lead agency determines whether "unusual circumstances" are present, subject to the substantial evidence test -- meaning that a reviewing court will defer to the agency's determination when supported by substantial evidence.
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> (2) If there are unusual circumstances, then the agency must apply the fair argument standard to determine whether there is substantial evidence that the project may result in a significant effect. A reviewing court will not defer to the agency's determination if there is substantial evidence that the project may have a significant effect.

California Building Industry Assoc. v. Bay Area Air Quality Management District **(2015) 62 Cal.4th 369.** The Supreme Court limited its examination of this case to the question of whether CEQA requires “an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project.” In other words, does CEQA apply to the impacts of the environment on the project? After reviewing the CEQA statute and Section 15126.2(a) of the CEQA Guidelines [“An EIR shall identify and focus on the significant environmental effects of the proposed project. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes

in the existing physical conditions in the affected area…"], the Court concluded that "CEQA generally does not require an analysis of how existing environmental conditions will impact a project's future users or residents."

The Court however, did not exclude all consideration of existing conditions from CEQA. An agency must "evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present." In addition, in footnote, the Court explained that CEQA does not prohibit an agency from considering as part of an environmental review how existing conditions might impact a project's future users or residents. However, it stopped short of suggesting that the agency should determine the significance of such impacts and require mitigation.

In light of its conclusion, the Court invalidated the following portion of CEQA Guidelines Section 15126.2(a) that offered an example of an effect subject to CEQA: "[A]n EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there."

The Court identified several exceptions to this "general rule" that CEQA does not apply to impacts of the environment on the project. All of them are statutory provisions in CEQA that specifically require consideration of impacts of the environment. They include consideration of noise and safety at projects near airports (Section 21096), safety and health risk for school construction projects (Section 21151.8), and various environmental conditions for statutory exemptions for housing projects (Sections 21159.21, 21159.22, 21159.23, and 21159.24) and transit priority projects (Section 21151.1).

***Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204**. This case involved the joint EIR/EIS certified in 2010 for the Resource Management and Development Plan and Spineflower Conservation Plan for the Newhall Ranch development in northern Los Angeles County. Although DFW has direct authority only over biological resource impacts, its EIR examined all environmental impacts from the resource plans and the Newhall Ranch development that would be facilitated by their approval. The EIR/EIS found that the development's GHG emissions would be less than significant because they would be 31% less than business as usual (BAU) and that mitigation for impacts to a fully protected fish species would reduce the development's impact to a less than significant level.

The California Supreme Court, in a 5-2 decision, invalidated the EIR and sent it back to the Court of Appeal for re-consideration. CBD presented three claims to the Supreme Court: the greenhouse gas (GHG) emissions analysis incorrectly used BAU as the baseline for analysis and the 29% emissions reductions goal in the Air Resources Board AB 32 Scoping Plan as a significance threshold; the EIR's mitigation measure to relocate members of a fully protected species (unarmored three-spine stickleback fish) violated the species "fully protected" status under California law; and the comments on Native American cultural resources and steelhead smolt impacts submitted after the close of the draft EIR review period should be admissible claims in CEQA litigation.

The Court denied part of the first claim: BAU is not being used as the baseline, the EIR disclosed existing GHG emissions as the baseline. The Court held that emissions reduction below BAU may be employed as a non-numerical threshold. However, it invalidated the GHG analysis in this EIR because the analysis failed to demonstrate how this project-specific 31 percent reduction in emissions is consistent with the Scoping Plan's state-wide 29 percent reduction goal. In other words, the Scoping Plan does not establish a threshold unless the GHG analysis includes sufficient adjustments to correlate project-specific circumstances with the Scoping Plan. The Court suggested the following "potential options" for evaluating the significance of project-specific GHG emissions:

> "First, … a business-as-usual comparison based on the Scoping Plan's methodology may be possible. On an examination of the data behind the Scoping Plan's business-as-usual model, a lead agency might be able to determine what level of reduction from business as usual a new land use development at the proposed location must contribute in order to comply with statewide goals.
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> "Second, a lead agency might assess consistency with A.B. 32's goal in whole or part by looking to compliance with regulatory programs designed to reduce greenhouse gas emissions from particular activities. (See Final Statement of Reasons, *supra*, at p. 64 [greenhouse gas emissions "may be best analyzed and mitigated at a programmatic level."].) To the extent a project's design features comply with or exceed the regulations outlined in the Scoping Plan and adopted by the Air Board or other state agencies, a lead agency could appropriately rely on their use as showing compliance with "performance based standards" adopted to fulfill "a statewide . . . plan for the reduction or mitigation of greenhouse gas emissions." (citation deleted)
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> "A significance analysis based on compliance with such statewide regulations, however, only goes to impacts within the area governed by the regulations. That a project is designed to meet high building efficiency and conservation standards, for example, does not establish that its greenhouse gas emissions from transportation activities lack significant impacts…
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> "Third, a lead agency may rely on existing numerical thresholds of significance for greenhouse gas emissions, though as we have explained (*ante*, p. 14), use of such thresholds is not required. (Guidelines, § 15064.4, subd. (b)(2); see, e.g., Bay Area Air Quality Management Dist. (BAAQMD), CEQA Guidelines Update: Proposed Thresholds of Significance (May 3, 2010), pp. 8–21 [regional air quality district for the San Francisco Bay Area proposes a threshold of 1100 $MTCO_2E$ in annual emissions as one alternative agencies may use in determining CEQA significance for new land use projects].)[footnote deleted] Thresholds, it should be noted, only define the level at which an environmental effect "normally" is considered significant; they do not relieve the lead agency of its duty to determine the significance of an impact independently. [citations deleted]"

Regarding the second claim, the Court opined that specifying collection and relocation of fully protected fish as mitigation in an EIR violates Fish and Game Code section 5515(a)'s specific prohibition on the taking or possession of fully protected fish for that purpose. The Court noted that: "DFW may conduct or

authorize capture and relocation of the stickleback "as part of a species recovery program" to protect the fish and aid in its recovery, but the agency may not rely in a CEQA document on the prospect of capture and relocation as mitigating a project's adverse impacts."

On the third claim, that comments submitted after the end of the draft EIR public comment period can still preserve claims that may be raised in CEQA litigation, the Court similarly held in favor of CBD. Public Resources Code Section 21177(a) provides that an alleged ground for noncompliance with CEQA must be "presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination" if it is to be brought up in later litigation. DFW does not hold public hearings on its approval of projects such as the one at issue, so a plaintiff would be limited to comments submitted during the public review period. DFW and the U.S. Army Corps of Engineers prepared a joint EIR/EIS for this project. As part of the NEPA process, the Final EIS was circulated for a 30-day comment period prior to its approval by the Corps of Engineers. The comment letters were submitted during that period and DFW coordinated with the Corps of Engineers on responses to those comments contained in a jointly prepared addendum that modified portions of the final EIR/EIS prior to its certification and adoption. The Court found that this preserved those comments as litigation claims:

> "We need not decide whether every federally mandated comment period on a final combined EIS/EIR also constitutes a CEQA comment period for purposes of section 21177, subdivision (a). In this case, the lead state agency, DFW, participated fully in the post-final EIS/EIR process, helping to prepare responses to the comments received and including those comments and responsive changes in the version of the final EIR it certified as compliant with CEQA when approving the project. Where the lead agency under CEQA has treated a federal comment period on a final EIS/EIR as an opportunity to receive additional comments on CEQA issues as well and has responded to those comments and included the responses in its final decision document, the lead agency has effectively treated the federal period as an optional comment period on the final EIR under Guidelines section 15089, subdivision (b). Such an optional comment period is "provided by" CEQA for purposes of section 21177. [citations deleted]"

City of San Diego v. Board of Trustees of the California State University **(2015) 61 Cal.4th 945.** In 2005, San Diego State (CSU) certified an EIR for a major expansion of the campus, finding that mitigation for the significant off-site traffic impacts identified in the EIR was infeasible because the Legislature had not allocated funds for that purpose. The approved master plan provided for, among other things, an enrollment increase of almost 50%, an additional 2976 beds of on-campus housing, between 172 and 348 units of faculty and staff housing, a 120-room hotel, a conference center, and various other campus facilities.

The Court invalidated the EIR. The lack of funds earmarked for mitigation did not make mitigation infeasible when other discretionary funding is available. Further, nothing in CEQA or case law limits mitigation obligations to on-site mitigation when a project will also result in off-site impacts. This decision reaffirms the Court's prior decision in *City of Marina v. Board of Trustees of the California State University* that (1) mitigation is mandatory unless infeasible; (2) unallocated funds can be used for

mitigation (i.e., not limited to funds earmarked for mitigation); (3) if you have funds to pay for mitigation it isn't infeasible, and (4) there is no difference under CEQA between the responsibility to undertake on-site mitigation versus off-site mitigation.