

Honoring Justice Kathryn Werdegar for

LANDMARK DECISIONS INTERPRETING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

SUSAN BRANDT-HAWLEY AND JAN CHATTEN-BROWN*

We celebrate the legacy of Justice Werdegar on the California Supreme Court with gratitude. As each of her authored opinions interpreting the California Environmental Quality Act (CEQA) has issued, we — along with our colleagues practicing on all sides of California’s environmental bar — have marveled at their depth and breadth.

In 1970, the Legislature declared that California agencies shall “take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.”¹ Justice Werdegar’s comprehensive opinions impart in elegant and exacting prose an overarching respect for the mandates of CEQA combined with a pragmatic approach to its interpretation. Along with her leadership on a court that has issued many landmark environmental rulings, Justice Werdegar has authored an

* Jan Chatten-Brown, Chatten-Brown and Carstens, and Susan Brandt-Hawley, Brandt-Hawley Law Group, are CEQA practitioners in all California courts including the Supreme Court. Jan was lead counsel in the *Save Tara* case and co-counsel in the *Center for Biological Diversity* case, discussed here. Susan is vice-president of the California Academy of Appellate Lawyers.

¹ CAL. PUB. RESOURCES CODE, § 21001, subd. (b).

unprecedented number of CEQA opinions, addressing a wide range of environmental issues affecting water supply, rapid transit, oil refineries, historic resources, airports, university expansion, and, most recently, control of greenhouse gases. None of these topics are simple.

Many of Justice Werdegar's decisions address the varying standards of review in CEQA cases. The opinions also illuminate the act's substantive mandate, markedly different from the federal National Environmental Policy Act (NEPA), as CEQA requires California's public agencies not only to study projects' significant environmental impacts but to mitigate those impacts to the extent feasible.

Justice Werdegar's opinions also emphasize the Supreme Court's commitment to judicial enforcement of CEQA's mandates despite acknowledged costs. Recently, *Center for Biological Diversity v. Department of Fish and Wildlife (CBD)*² held that CEQA documents addressing Southern California's Newhall Ranch project were gravely flawed. In reversing the judgment, the *CBD* opinion held that the scope of the court's review "does not turn on our independent assessment of the project's environmental merits. . . . CEQA's requirements for informing the public and decision makers of adverse impacts, and [imposing] feasible mitigation measures, *still need to be enforced.*"³ As discussed below, Judge Werdegar's ruling led to a settlement of the Newhall Ranch project accomplishing significant environmental protections.

Beyond an unparalleled body of landmark CEQA rulings with direct effects on the cases at hand and enduring precedent shaping countless other projects, Justice Werdegar has contributed to environmental legal practice in seminars such as the 2010 State Bar Environmental Section's annual Yosemite Environmental Law Conference. In a panel convened in honor of the Act's 40th anniversary, Justice Werdegar reviewed CEQA's legacy and challenges with grace and warmth, to the delight of hundreds of environmental attorneys.⁴

While we will discuss some of Justice Werdegar's opinions, we can only hint at their substance and import in enforcing the mandates of CEQA

² 62 Cal.4th 204 (2015).

³ *Id.* at 204, 240 (emphasis added).

⁴ [Editor's note: see Kathryn Mickle Werdegar, *The California Environmental Quality Act at 40*, 13 CAL. LEGAL HIST. 3 (2018).]

to the great benefit of California's citizens and landscapes. On behalf of the environmental bar, and, if we may, on behalf of our environment, we honor and thank her.

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MITIGATION AND CEQA'S SUBSTANTIVE MANDATE

Justice Werdegar authored two opinions addressing the duty of the California State University (CSU) to mitigate off-campus impacts of its significant expansion projects. The first was a unanimous opinion in *City of Marina v. Board of Trustees of the California State University*,⁵ with Justice Chin concurring. The ruling required CSU to mitigate the off-campus environmental impacts of campus expansions. The decision contributes to CEQA jurisprudence in many ways, addressing the standard of review for adjudicating EIR adequacy, the assessment of legal feasibility of project mitigation measures, and CEQA's substantive mandate that agencies adopt feasible mitigations *before* considering project approval based on considerations of public benefit.

The Fort Ord Reuse Authority (FORA) in Monterey County approved a capital improvement plan identifying roadways, utilities, and other infrastructure improvements for long-term development of the closed army base. The Army had transferred over a thousand acres to CSU for use as a new Monterey Bay (CSUMB) campus. FORA's capital improvement plan included infrastructure for the expanded CSU campus.

CSU prepared an EIR analyzing the impacts of adopting a Master Plan to substantially increase enrollment at CSUMB. The EIR concluded that expanding the campus would result in significant environmental impacts including: 1) drainage impacts from increased development-related runoff, 2) increased water supply demand, 3) increased traffic on off-campus roads, 4) increased sewage flows, and 5) need for increased fire protection. Identified mitigation measures called for improvement of the Fort Ord base infrastructure.

FORA contended that CSU should contribute \$20 million for its share for roads and fire protection. CSU refused to pay, asserting it was exempt

⁵ 39 Cal.4th 341 (2006).

from paying for road improvements or fire protection services and that any payment to FORA that was not specifically authorized by the Government Code was prohibited by the Constitution, would be an illegal gift of public funds, and was thus legally infeasible.

Acknowledging that environmental impacts would be significant and unavoidable, CSU approved the Master Plan based on a CEQA statement of overriding considerations, finding that off-campus environmental impacts would be outweighed by public benefits provided by the expanded university. CSU agreed to pay for water, sewer, and drainage improvements, but since CSU and FORA did not agree on the amounts for that infrastructure, CSU adopted a statement of overriding considerations as to those costs as well.

The nearby City of Marina joined with FORA in challenging CSU's actions in court, seeking contribution for the off-campus infrastructure costs of the campus expansion project. The Monterey County Superior Court granted the petition. The Court of Appeal reversed. FORA's petition for review was granted by the Supreme Court.

Justice Werdegar's opinion addressed the standard of review for considering the adequacy of an EIR: a question of law. "An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document."⁶ Underscoring CEQA's substantive mandate that projects with significant impacts cannot be approved without adoption of identified feasible mitigations and alternatives, the *City of Marina* opinion held — in a subsequently much-cited passage — that CSU had unlawfully adopted the statement of overriding considerations without first making findings as to whether the Master Plan's significant environmental impacts could be feasibly mitigated.⁷ The court stated:

⁶ *City of Marina*, 39 Cal.4th 341, at 366.

⁷ An earlier unanimous Supreme Court opinion authored by Justice Werdegar had also focused on CEQA findings for a statement of overriding considerations, on an ancillary procedural issue of whether appellants failed to exhaust remedies when they did not request reconsideration of an agency's findings at the administrative level. (*Sierra Club v. San Joaquin LAFCO*, 21 Cal.4th 489 (1999).) The Supreme Court reversed the Court of Appeal judgment, ruling that a petitioner need not request reconsideration to present "for the second time the same evidence and legal arguments one has previously raised solely to

CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute [citation] would tend to displace the fundamental obligation of "[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves . . . whenever it is feasible to do so' [citation]."⁸

The CSU Trustees abused their discretion in determining that the project's infrastructure effects could not feasibly be mitigated, as discussed below, and it necessarily followed that their statement of overriding considerations was invalid.

The *City of Marina* opinion ruled *as a matter of law* that CSU incorrectly treated mitigation of off-campus environmental impacts caused by its proposed expansion as legally infeasible. "CEQA requires the Trustees to avoid or mitigate, if feasible, the significant environmental effects of their project (Pub. Resources Code, § 21002.1, subd. (b)), and . . . payments to FORA may represent a feasible form of mitigation."⁹ As the lead agency, CSU had discretion to fix the appropriate amount of payments to FORA in light of CEQA's requirement that mitigation measures be "roughly proportional."¹⁰

CSU argued that mitigation payments were legally infeasible because there was no way to guarantee that FORA would implement the infrastructure improvements, particularly in light of "dispute[s]" regarding the implementation of this "regional mitigation."¹¹ As the EIR explained, the payments sought from CSU represented only a fraction of the money required to build the infrastructure called for by FORA's own capital improvement plan. But while paying a fee is not adequate mitigation unless accompanied by a reasonable mitigation plan, the record contained

exhaust administrative remedies . . ." (*Id.* at 510.) The case overruled the court's contrary decision in *Alexander v. State Personnel Board*, 22 Cal.2d 198 (1943). (*Id.*)

⁸ *City of Marina*, 39 Cal.4th 341, at 368–369.

⁹ *Id.* at 369.

¹⁰ CEQA GUIDELINES, § 15126.4, subd. (a)(4)(B).

¹¹ *City of Marina*, 39 Cal.4th 341, at 363.

evidence that FORA had in fact adopted such a plan and could implement it. The *City of Marina* opinion held that CSU committed an error of law by contending that CEQA requires more. While CSU's ability to make payments to FORA might be infeasible if the Legislature failed to appropriate money for that purpose, CSU was required to specifically seek such funding.

City of San Diego v. Board of Trustees of California State University,¹² another unanimous opinion authored by Justice Werdegar, is a successor to *City of Marina*. The CSU Trustees approved a significant expansion of the campus at San Diego State University that would contribute to significant off-campus traffic impacts. The City of San Diego sued CSU for refusing to reimburse the city for its share of the impacts.

As noted in the *City of San Diego* opinion, the primary issue in *City of Marina* was CSU's assumption that campus geographical boundaries define the extent of the CSU Board's duty to mitigate.¹³ At San Diego State, CSU refused to contribute to off-campus traffic mitigation based on language in *City of Marina*:

Fair-share mitigation is recommended that would reduce the identified impacts to a level below significant. However, the university's fair-share funding commitment is necessarily conditioned up[on] requesting and obtaining funds from the California Legislature. If the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable.¹⁴

Anticipating that the Legislature might not make an earmarked appropriation for mitigation, given the resources already budgeted for campus expansion, the CSU Board found that off-campus mitigation for San Diego State traffic would be infeasible. It certified the expansion of the EIR based on a statement of overriding considerations that the project's benefits would outweigh its unmitigated significant impacts. The Supreme Court granted review. It ruled that the language being relied upon by CSU from its earlier decision in *City of Marina* was dictum that:

¹² 61 Cal.4th 945 (2015).

¹³ *Id.* at 957.

¹⁴ *City of Marina*, 39 Cal.4th 341, at 367.

does not justify the Board's assumption that a state agency may contribute funds for off-site environmental mitigation only through earmarked appropriations, to the exclusion of other available sources of funding. The erroneous assumption invalidates both the Board's finding that mitigation is infeasible and its statement of overriding considerations. Accordingly, we will affirm the Court of Appeal's decision directing the Board to vacate its certification of the EIR.¹⁵

The opinion thus held that the lack of a legislatively earmarked appropriation does not make mitigation costs legally infeasible and thus cannot satisfy CSU's duty to adopt feasible mitigation measures to address off-campus impacts.

STANDARD OF REVIEW FOR EIR ADEQUACY; REVIEW OF LONG-TERM WATER SUPPLY

Justice Werdegar's opinion in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*¹⁶ is among the most influential CEQA decisions issued by the court since CEQA was codified in 1970. Its clarification of procedural mandates that enforce CEQA's environmental protections has to date been relied upon in eight of the court's subsequent decisions and hundreds of appellate rulings. The opinion addresses CEQA's dual standards of review for EIR adequacy and the appropriate level of environmental review for a project's near-term and long-term water supplies. Justice Baxter concurred and dissented.

The court held that the EIR's analysis of the long-term water supply that would serve a 6,000-acre community plan was inadequate as a matter of law. The EIR improperly claimed to tier from a future regional water planning environmental document, failed to explicitly incorporate and/or tier from the discussion in another relevant EIR, and relied on a mitigation measure that would curtail development if an adequate water supply did not materialize without first analyzing the environmental impacts of such action.

¹⁵ *City of San Diego*, 61 Cal.4th 945, at 950.

¹⁶ 40 Cal.4th 412 (2007).

While CEQA does not require “assurances of certainty regarding long term future water supplies at an early phase of planning for large land development projects,”¹⁷ an agency cannot simply ignore or assume a solution to a water supply problem, but must provide enough information for decision makers to consider pros and cons of supplying water.¹⁸ EIR analysis must address both short- and long-term water supply, and the supplies identified cannot be “paper water” but must be reasonably likely to be available.¹⁹ Finally, if ultimately the availability of long-term water supplies is uncertain, the EIR must address the environmental impacts of securing possible replacement sources or alternatives to use of water.²⁰ The *Vineyard* opinion describes CEQA’s dual standards of review in detail. An adequate EIR requires strict compliance with law:

[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) *Judicial review of these two types of error differs significantly* In evaluating an EIR . . . a reviewing court must adjust its scrutiny to the nature of the alleged defect For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency “failed to proceed in the manner required by CEQA.” [Citations.] In contrast, in a factual dispute over “whether adverse effects have been mitigated or could be better mitigated” [citation] the agency’s conclusion would be reviewed only for substantial evidence.²¹

Under *Vineyard*, adequacy of an EIR analysis presents a question of law. However, once an adequate EIR is certified, an agency’s fact-based conclusions and CEQA findings as to the significance of environmental impacts and the feasibility of alternatives and mitigations are deferentially reviewed for substantial evidence.²² Here, the EIR’s analysis of the project’s

¹⁷ *Id.* at 432.

¹⁸ *Id.* at 431.

¹⁹ *Id.* at 432.

²⁰ *Id.*

²¹ *Id.* at 427 (emphasis added).

²² *Id.* at 435.

long-term water supply was not missing, but was held by the court to be insufficient as a matter of law.

STANDARD OF REVIEW FOR EIR ADEQUACY; PRECOMMITMENT

A community group filed *Save Tara v. City of West Hollywood*²³ to apply CEQA protections to a large white colonial-style home in an intensely developed part of West Hollywood. The facts were colorful and intriguing. The name Tara had long been associated with the house, both because of its appearance and because the owner, Mrs. Weismann, loved the movie *Gone with the Wind* and was reported to have died at 101 while watching it in the home where she had lived since she was a child. By that time, the home was a city-designated cultural monument and had been divided into four apartments. Her friends who lived in the other units helped take care of her.

During her lifetime, Mrs. Weismann willed Tara to the city. While she reportedly wanted the lush gardens around the home to be maintained and recommended that the property become a city park and the house used for public purposes, no such conditions were included in her grant to the city.

Upon acquiring possession of Tara after Mrs. Weismann's death, the city accepted a proposal by a private developer to develop thirty-five units of senior housing. The proposal called for demolition of an existing structure, removal of many of the mature trees, and construction of thirty-five of the units in a three- or four-story building that would wrap around the historic house. Such construction would have changed the context of the historic site and eliminate much of the verdant landscaping that was a treasured community oasis.

Area residents began a campaign to save the house and its surrounding urban forest, organizing themselves as Save Tara. At a hearing before the City Council, the group argued that the historic property should become a community center or library that would protect its monument status. They lost in a close vote before the City Council. Without conducting any CEQA review, the city entered into a development agreement with the private developer for a senior housing project to be called "Laurel Place." As part

²³ 45 Cal.4th 116 (2008).

of the agreement, the city committed to give the developer the land and financial support if it obtained HUD funding.

Save Tara's lawsuit challenged the city's approval of the agreement without first preparing an EIR and conducting a CEQA process. Save Tara lost in the trial court, but the Court of Appeal reversed, holding it unlawful for the city to enter into the agreement for the development of Tara prior to conducting CEQA review. A dissent argued that the case was moot because an EIR was prepared for the project while the litigation was pending.

The Supreme Court granted the city's petition for review. Justice Werdegard authored the now-landmark case for a unanimous court, holding that the proper timing of CEQA review is a question of law subject to independent judicial review, rather than a factual question entitled to agency deference. This important distinction between an agency's duty to follow the procedures required by CEQA versus its discretion to make factual determinations to be accorded deference built upon Justice Werdegard's directly referenced earlier decision in *Vineyard Area Citizens* that underscored CEQA's dual standards of review.

The *Save Tara* opinion then addressed whether the subsequent preparation of an EIR had mooted the appeal, and concluded that it had not because nothing irreversible had happened with the property.

The primary focus of the *Save Tara* opinion was whether the city had erred in approving a development agreement without first preparing and certifying an EIR. The opinion examined CEQA's statutory mandate that agencies must certify an EIR for any project that they intend to carry out or approve which may have a significant environmental effect. The opinion also considered CEQA's implementing regulations, the CEQA Guidelines, prepared by the Governor's Office of Planning and Research. The Supreme Court has repeatedly held that the Guidelines are entitled to great weight except where they are clearly unauthorized or erroneous. Guidelines section 15352 defines what constitutes an approval for purposes of CEQA, providing that for a private project an approval occurs "upon the earliest commitment to the issue by the public agency . . ." ²⁴ Guidelines section 15004 states that "EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental

²⁴ *Save Tara*, 45 Cal.4th 116, at 129.

considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.”²⁵

In reaching its decision that environmental review should have occurred before approval of agreements between the city and the developer, the *Save Tara* opinion disapproved three appellate cases that had allowed certain commitments to projects to be made before preparation of environmental review documents. The Supreme Court stated in prior decisions that the timing of environmental review required a delicate balance between having enough information and yet assuring that EIRs are not reduced to post hoc rationalizations to support action already taken. *Save Tara* holds that, “[w]hile an agency may certainly adjust its rules as to ‘the exact date of approval,’ an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR.”²⁶

Save Tara emphasized the importance of avoiding “bureaucratic and financial momentum” when environmental analysis is postponed.²⁷ Importantly, “[i]f, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has ‘approved’ the project.”²⁸ In holding that a formal project approval is not needed to prove violation of CEQA, the opinion protects the integrity of CEQA that is threatened when EIRs become meaningless post hoc rationalizations for agency decisions that are already manifest.

Despite strong language regarding the need for timely environmental review, *Save Tara* also recognized certain exceptions to the general rule that development decisions having the potential to significantly affect the environment must be preceded rather than followed by CEQA review, focusing on CEQA’s reference to “commitment” in defining project approval. As the Court noted, CEQA was not “intended to place unneeded obstacles in the path of project formation and development.”²⁹ The *Save Tara* opinion noted the impossibility of establishing a “bright line” rule distinguishing between reasonable project planning and unlawful precommitment

²⁵ *Id.*

²⁶ *Id.* at 132.

²⁷ *Id.* at 135.

²⁸ *Id.* at 139.

²⁹ *Id.* at 137.

but made clear that exceptions to requiring early preparation of EIRs must not be allowed to swallow the rule.³⁰

Under the facts of the case, the city had sent a letter to HUD supporting the developers' application for funding and confirmed that it would give the applicant the land, then worth \$1.5 million, and invest up to \$1 million in additional support for the development. Without environmental review, eviction notices had been served upon tenants who shared the house with Mrs. Weismann. These were primary facts evidencing precommitment as a matter of law.

Beyond the beneficial impacts of the *Save Tara* decision on CEQA practice statewide, its impact on Tara itself was also significant. After the develop-

ment agreements were set aside, the city reapproved the project. However, the combination of changed project economics and escalating efforts by the community led to Tara's preservation. Today, it sits in a city park and its beautiful trees remain standing.



TARA HOUSE PARK, CITY OF
WEST HOLLYWOOD, CALIFORNIA

ANALYSIS OF GREENHOUSE GASES, THE “TAKING” OF FULLY PROTECTED FISH, AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

The final CEQA decision authored by Justice Werdegar, *Center for Biological Diversity, et al. v. Department of Fish and Wildlife*,³¹ addressed the Newhall Land and Farm project in the Santa Clarita Valley. The Newhall Ranch project has long been proposed as the largest new city in California, with 58,000 residents as well as commercial and business uses, all planned for 12,000 acres along the Santa Clara River. There have been many legal

³⁰ *Id.* at 138.

³¹ 62 Cal.4th 204 (2015).

challenges to the proposed project over many years. The Supreme Court's review involved approvals of a Resource Management and Development Plan and a Spineflower Conservation Plan by the California Department of Fish and Wildlife, challenged by the Center for Biological Diversity (CBD) and other environmental groups.

The decision involved three complex issues: 1) the adequacy of the Newhall Ranch EIR's analysis of greenhouse gases (GHGs); 2) application of state law to the three-spined stickleback, an endangered and fully protected species of fish in the Santa Clara River; and 3) application of CEQA's requirement to exhaust administrative remedies.

INADEQUACY OF GHG ANALYSIS

In 2006, California passed the landmark California Global Warming Solutions Act, commonly referred to as AB 32. The act calls for reduced GHG emissions to 1990 levels by 2020. AB 32 required the Air Resources Board (ARB) to prepare a "Scoping Plan" to determine maximum feasible and cost-effective reductions by 2020. It adopted a Scoping Plan in 2008 that established a "business as usual" model and calculated the percentage by which emissions would need to be reduced below that level.

The EIR calculated that the Newhall Ranch project would achieve a 31 percent reduction below "business as usual" GHG emissions, while the ARB Plan projected the need for a 29 percent reduction by 2020. While the EIR projected an increase in GHGs because of the project, it declined to determine what levels of emissions would be significant "because of the absence of scientific and factual information regarding when particular quantities of [GHGs] become significant."³² CBD challenged the GHG analysis for a variety of reasons, including the propriety of using the Scoping Plan model and what they believed to be inflated emission reductions that the project was expected to achieve. As to the use of the Scoping Plan, they argued that it was intended to demonstrate the extent to which existing sources would have to be reduced, and not what new emission sources would be acceptable without interfering with the state's climate objectives. CBD argued for some numerical threshold rather than compliance with the state's Scoping Plan.

³² *CBD*, 62 Cal.4th 204, at 222.

Justice Werdegar authored the Supreme Court's decision, rejecting CBD's argument that it was inappropriate to utilize the Scoping Plan's required reductions as a criterion for determining significance. But the opinion concluded that the EIR failed to support by substantial evidence its contention that project emissions would be reduced below the level of significance. Further, the Scoping Plan for reducing GHG levels statewide did not explicitly apply to what emission levels should be allowed from individual new projects without being considered significant. New sources *may* have to be more efficient than what can be achieved by the retrofit of existing sources, and it may be more cost-effective to achieve emission reductions from new rather than existing sources.

The *CBD* opinion footnoted legislation since passed to require the state to slash greenhouse gas emissions to 40 percent below 1990 levels by 2030. The opinion also notes the existence of the executive orders signed by both Governors Schwarzenegger and Brown. These orders set the goal of reducing GHG emissions to 80 percent below 1990 levels by 2050.

The opinion's rejection of DFW's GHG emission analysis challenges agencies to carefully consider how to prepare adequate EIRs, but the court gives substantial guidance to agencies and EIR preparers. Particularly helpful is the opinion's explication of "potential pathways to compliance." By way of example, an agency may determine significance by: 1) determining what level of reduction from "business as usual" a new development must achieve to comply with statewide GHG reduction goals; 2) assessing consistency with AB 32's goals by looking at compliance with regulatory programs with performance standards; 3) complying with locally adopted Climate Action Plans or Sustainable Community Strategies; or 4) relying on existing numerical thresholds of significance, rather than determining significance anew.

The *CBD* opinion also makes clear that even if an agency finds significant cumulative GHG impacts, it may still approve a project *if* it adopts feasible alternatives and mitigations.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Court of Appeal ruled that two challenges to the EIR were not preserved under Public Resources Code section 21177, which sets forth the exhaustion of administrative remedies doctrine under CEQA. Subdivision (a)

provides that before an alleged ground for noncompliance may be brought it must have been “presented to the public agency orally or in writing by any person during the public comment period . . . or prior to the close of the public hearing on the project . . .” DFW held no public hearing. However, here a joint EIR/EIS was prepared by the DFW and the Army Corps of Engineers. National Environmental Policy Act (NEPA) regulations allow public comment on a final EIS at any time before the agency’s decision. During the Corps’ comment period, plaintiffs submitted comments on cultural resources and steelhead impacts.

DFW stated in the EIR that comments during the Corps’ comment period on the FEIS/EIR were given to Newhall and responses were prepared. The lead agencies then jointly prepared an addendum to the FEIS/FEIR, and the addendum was included in the revised FEIS/FEIR. The *CBD* opinion held that the court “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(a).” Here, the comments were adequate to exhaust remedies under CEQA because DFW treated the comment period as applying to CEQA issues. The *CBD* opinion underscored the purpose of the exhaustion doctrine, which is to lighten the load on the judiciary by providing a remedy at the administrative level. That occurred in this case.

THE INTERFACE BETWEEN THE FISH AND GAME CODE AND CEQA

DFW and Newhall argued that the capture and relocation of the unarmored three-spined stickleback was an appropriate mitigation measure. The *CBD* opinion concluded that such capture and relocation is not permitted by Fish and Game Code section 5515, which prohibits the taking or possession of the fish. DFG can collect and relocate endangered and special status species as a conservation measure, but not as a project mitigation measure. The opinion relied upon Fish and Game Code section 5515(a)’s provision that scientific research does not include any action taken as mitigation for a CEQA project as well as the definition of “take” in section 86 of the code as including pursue, catch and capture.

Of the ten CEQA decisions authored by Justice Werdegard during her twenty-three years on the Supreme Court, six decisions were unanimous.

In the *CBD* case, Justice Corrigan concurred and dissented and Justice Chin dissented.

Justice Corrigan agreed with the majority opinion as to the protection afforded by California law on the stickleback and the conclusion that use of AB 32 as a standard for determining significance of GHG impacts was proper. The justice disagreed that the decision that GHG impacts were not significant was not supported by substantial evidence. The majority opinion rejected Justice Corrigan's assertion that the court's analysis *required* greater GHG efficiency and noted that DFW failed to substantiate its assumption that the Scoping Plan's statewide emissions reduction target can also serve as the criterion for an individual land use project.

Justice Chin dissented both as to the GHG analysis and as to the protections for the three-spined stickleback. Regarding GHG emissions, he was especially concerned with the majority opinion's suggestion that agencies might have to look beyond compliance with GHG reduction goals for 2020. (It is worth noting that since the time of the decision, the Legislature has passed SB 32, which sets a GHG reduction goal for 2030 based upon achievement of the 2050 reduction goal.)

Justice Chin particularly expressed concern regarding what he characterized as an "inordinate delay of project." Writing for the majority, Justice Werdegar responded that appellate review of lower court CEQA rulings cannot turn on a court's "independent assessment of the project's environmental merits. Even if Newhall Ranch offered the environmentally best means of housing this part of California's growing population, CEQA's requirements for informing the public and decision makers of adverse impacts, and for imposition of valid, feasible mitigation measures, would still have to be enforced."³³

In September 2017, most of the petitioners in the *CBD* case entered into a settlement with Newhall that would surely be pleasing to Justice Werdegar. The project was dramatically revised in many ways to protect natural resources and reduce impacts. It sets a new standard for residential development by requiring that the project be a zero net GHG emitter, via a series of extremely stringent on-site emission strategies. Solar energy and electric charging stations and subsidies for electric vehicles will be a big part of

³³ *Id.* at 240.

the development. The project-related emissions will be offset by Newhall, with a preference for local, then state, and then national offsets. In addition to GHG emission reductions, the project was redesigned to preserve the stickleback without relocation, thus also reducing the impacts on the Santa Clara River. While the Court of Appeal on remand reaffirmed its decision on issues relating to steelhead trout and cultural resources, further protections of cultural and natural resources were built into the settlement and the project redesign will also aid the steelhead.

How was settlement achieved? The willingness of the Supreme Court to take a hard look at the adequacy of an agency's environmental analysis, and its attention to enforcement of the state's GHG reduction goals and species protection laws were powerful forces. The outcome of this case is a dramatic example of how enforcing CEQA's requirements for full disclosure — a hallmark of Justice Werdegar's tenure — is of great and lasting benefit to California.

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These brief discussions of some of Justice Werdegar's CEQA opinions cannot do justice to them. These are landmark cases in every sense of the word, earning the admiration of California citizens and CEQA lawyers statewide. Statements of but a few are included here:

“Always nuanced and written with care, Justice Werdegar's environmental opinions have had — and will long have — sweeping relevance in environmental law.”

— Jim Arnone, global Chair of the Environment, Land & Resources Department at Latham & Watkins.

“Justice Werdegar's CEQA opinions provided the roadmap I followed in bringing the San Diego State University case to the Supreme Court and ultimately led to environmental protection for municipalities and communities alike.”

— Christine M. Leone, City of San Diego Deputy City Attorney.

“Just as U.S. Supreme Court Justice John Paul Stevens emerged as that Court's most influential environmental voice over the course of his thirty-five-year tenure on the High Court, California Supreme

Court Justice Kathryn Werdegar has been this state's most commanding environmental law presence over the past twenty-three years. Her numerous, authoritative opinions on CEQA, preemption and many other key environmental law issues will influence lower courts, environmental lawyers and California's environment far into the future."

— Richard Frank, UC Davis Professor of Environmental Practice.

"Our firm has greatly appreciated Justice Werdegar's careful, thoughtful opinions in the environmental arena, and particularly her mastery of the California Environmental Quality Act. She has made a true and lasting contribution to our understanding of that law."

— Rachel Hooper, partner, Shute, Mihaly and Weinberger.

"The towering impact Justice Werdegar will have on California environmental jurisprudence for decades to come would be hard to understate. The fundamental power and strength of her writing will inevitably stand the test of time. California is the better for having had Justice Werdegar on the Supreme Court."

— Doug Carstens, partner, Chatten-Brown & Carstens.

"Justice Werdegar has authored some of the most significant and oft-cited decisions addressing California environmental law, particularly with respect to CEQA. Her decisions address such basic issues as determining when CEQA applies and identifying the appropriate standard of judicial review. Her writing is clear and graceful. Justice Werdegar's decisions show that she has made a genuine effort to strike a delicate balance between agency discretion and protection of the environment. We will all continue to look to her work for many years."

— Jim Moose and Whit Manley, Remy Moose Manley.

Thank you, Justice Werdegar. We wish you many years of enjoyable walks and hikes in the beautiful state that you have played such a significant role in preserving.