Recommendations for Complying With *Ballona Wetlands*' Definitive Rejection of "Converse-CEQA" Analysis

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On March 21, 2012, the California Supreme Court denied the petition for review and requests for depublication of the Second District Court of Appeal's opinion in *Ballona Wetlands Land Trust et al. v. City of Los Angeles* (*Ballona Wetlands*).[1] *Ballona Wetlands* held that the environment's effects on a proposed project do *not* have to be analyzed under the California Environmental Quality Act (CEQA), thereby creating the likelihood that a wide range of impacts previously analyzed in CEQA documents will now be considered outside the CEQA's statutory authority.[2] *Ballona Wetlands* gained considerable attention with several organizations requesting depublication, including the Planning and Conservation League, the Natural Resources Defense Council, the Center for Biological Diversity, the Environmental Defense Center, and the Bay Area Air Quality Management District.

While the Supreme Court's denial of review cannot be afforded any legal significance,[3] the court's denial leaves the opinion intact as controlling appellate law on all superior courts throughout the state.[4] This Article analyzes the *Ballona Wetlands* opinion and suggests practical recommendations for addressing impacts of the environment on projects under the CEQA.

I. The *Ballona Wetlands* Opinion Unequivocally Rejects CEQA Guidelines §15126.2(a) and Some Appendix G Threshold Questions as Beyond the CEQA's Statutory Authority

Prior decisions holding that the purpose of the CEQA is to identify the significant effects of a project on the environment—not the significant effects of the environment on a project—did not make much of a ripple in the sea of CEQA documents including "converse-CEQA" analysis. This type of analysis has been particularly prevalent in the area of air quality and hazardous conditions analysis, e.g., analyzing the extent to which existing environmental conditions such as contaminants or earthquake fault lines could affect the safety of a proposed project; it was beginning to emerge in the area of climate change analysis, e.g., considering the extent to which sea-level rise, reduced water supply, or increased wildfire risk could affect proposed projects.

The *Ballona Wetlands* court evaluated in the most detail the issue of whether the CEQA required an analysis of the environmental impact of sea-level rise on a proposed mixed-use development project. The court held:

> We believe that identifying the environmental effects of attracting development and people to an area is consistent with CEQA's legislative purpose and statutory requirements, but identifying the effects on the project and its users of locating the project in a particular environmental setting is neither consistent with CEQA's legislative purpose nor required by the CEQA statutes.

The *Ballona Wetlands* court cited three decisions in support of its holding rejecting converse-CEQA analysis:

1. 201 Cal. App. 4th 455 (2011).
2. *See* the Holland & Knight Environment alert, *CEQA Update: Court of Appeal Concludes That the Environment's Effect on a Project Need Not Be Analyzed Under CEQA,* Jan. 13, 2012, *available at* http://www.hklaw.com/publications/CEQA-Update-Court-of-Appeal-Concludes-That-the-Environments-Effect-on-a-Project-Need-Not-Be-Analyzed-Under-CEQA-01-13-2012/.
3. Trapz v. Katz, 11 Cal. App. 4th 274, 287 (1995) (denial of review should not be construed as an expression of opinion by the Supreme Court on the correctness of the court of appeal's opinion).
4. Cuccia v. Superior Court, 153 Cal. App. 4th 347, 353 (2007) (decisions of every division of the district court of appeal are binding on all superior courts of this state).

- In *Baird v. County of Contra Costa (Baird)*,[5] the court held that an environmental impact report (EIR) was not required to evaluate the impact of a site's toxic contamination on future patients of a proposed addiction treatment facility expansion project since the expansion project itself was not anticipated to affect the surrounding environment.
- Similarly, in *City of Long Beach v. Los Angeles Unified School District (Long Beach)*,[6] the court concluded that an EIR was not required to analyze the impact of emissions from nearby freeways on future staff and students of a proposed high school.
- Finally, in *South Orange County Wastewater Authority v. City of Dana Point (SOCWA)*,[7] the court rejected a challenge to a mitigated negative declaration for a proposed residential development, concluding that the impact of noxious odors from an existing wastewater treatment facility on future residents was not a significant effect on the environment.

The *SOCWA* court was the first to expressly address whether Guidelines §15126.2(a), requiring that CEQA analysis of any significant effects the project might cause "by bringing development and people into the area affected," is consistent with the statute. The Guidelines section then includes examples of significant impacts of locating development in areas susceptible to hazardous conditions, e.g., fault lines, floodplains, coastlines, and wildfire risk areas. The *SOCWA* court noted: "[w]hile identifying the environmental effects of attracting people to an area certainly comports with CEQA's legislative intent and statutory framework, we cannot help but notice that the 'examples' given in [the Guidelines] are not examples of environmental effects wrought by development."[8]

The *Ballona Wetlands* court picked up where *SOCWA* left off, first agreeing that the "examples" given in subdivision (a) are not examples of environmental effects caused by development, and then explicitly rejecting these examples as inconsistent with the CEQA. Further, the *Ballona Wetlands* court expressly addressed and declined to defer to the environmental significance threshold questions set forth in Appendix G of the CEQA Guidelines, including the threshold addressing the exposure of people or structures to existing environmental hazards, e.g., "would the project . . . [e]xpose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving . . . [r]upture of a known earthquake fault . . . .". The court appeared to approve the use of Appendix G questions to the extent that they refer to the project's exacerbation of existing environmental hazards. However, the court disapproved the use of Appendix G questions to the extent they refer to the effects on users of the project and structures in the project to preexisting environmental hazards, concluding that such questions "do not relate to environmental impacts under the CEQA and cannot support an argument that the effects of the environment must be analyzed in an EIR."

Prior cases cited as requiring converse-CEQA analysis have not directly addressed Guidelines §15126.2(a). For example, the Second District Court of Appeal held in 1997 that an EIR for a proposed specific plan was invalid because it had not evaluated whether the project's contribution of traffic noise "should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools" located within the specific plan boundaries.[9] This opinion did not directly address Guidelines §15126.2(a) or the Appendix G Environmental Checklist. Further, the case appears to focus more on the question of what increment of contribution to an existing impact should be considered significant, sometimes referred to as the "ratio theory," rather than the issue of converse-CEQA analysis.[10]

II. The *Ballona Wetlands* Precedent Stands Until More Definitive Action Occurs

Accordingly, the *Ballona Wetlands* precedent stands as controlling law on all superior courts throughout the state.[11] The legal effect of this case remains murky, however, among CEQA practitioners. For example, in a recent document addressing the issue of environmental justice in CEQA analysis that was issued after *Ballona Wetlands*, the California attorney general's office opined that Guidelines §15126.2(a) generally, and the need to evaluate existing environmental conditions such as ambient air pollution levels in the vicinity of the project, are required by the CEQA and are a critical component of a legally required environmental justice evaluation.[12]

It is possible that more definitive action could occur to either support or rebuke converse-CEQA analysis. Such action could include any of the following scenarios:

1. The Secretary of Natural Resources could repeal the rejected Guidelines section and Appendix G threshold questions (if recommended by the Office of Planning and Research (OPR)), thereby confirming the rejection of converse-CEQA analysis.

5. 32 Cal. App. 4th 1464, 1469 (1995).
6. 176 Cal. App. 4th 889, 905 (2009).
7. 196 Cal. App. 4th 1604 (2011).
8. *Id.* at 1616.
9. Los Angeles Unified School District v. City of Los Angeles (LAUSD), 58 Cal. App. 4th 1019, 1024 (1997).
10. The *LAUSD* court explained that *Baird,* the first opinion rejecting converse-CEQA analysis, was not relevant to the facts at issue: "*Baird* would only be relevant to the present case if a motorist claimed the noise from the schools would have a significant effect on traffic flowing through [the specific plan]" or, in other words, if the concerns were related to the impacts from the existing environment on the proposed project.
11. Cuccia v. Superior Court, 153 Cal. App. 4th 347, 353 (2007) (decisions of every division of the district court of appeal are binding on all superior courts of this state).
12. Cleveland National Forest Foundation et al. v. San Diego Ass'n of Governments et al. (S.D. Sup. Ct., Jan. 20, 2012), People's Petition for Writ of Mandate in Intervention (No. 37-2001-00101593-CU-TT-CTL); *see also* Office of the California Attorney General, "Environmental Justice at the Local and Regional Level—Legal Background," May 8, 2012.

2. The legislature could address the issue, for example, by explicitly affirming the requirement for converse-CEQA analysis in the CEQA statute itself (rather than solely in the implementing Guidelines), thereafter requiring converse-CEQA analysis.

3. The Supreme Court could review another case that either requires or again rebukes converse-CEQA analysis, providing a definitive answer either way.

Which, if any, of these scenarios will actually occur is presently speculative. For example, the OPR is obligated to review the Guidelines at least once every two years and recommend changes to the Secretary of Natural Resources.[13] The Guidelines are to be afforded "great weight . . . except when a provision is clearly unauthorized or erroneous under CEQA."[14] It would appear difficult for the OPR to ignore the *Ballona Wetlands*' decree that the contested language in §15126.2(a) is "neither consistent with CEQA's legislative purpose nor required by the CEQA statutes." Interestingly, the Guidelines section was amended in 2010 to add the language providing that an "EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, or wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas." While this language was added subsequent to the *Baird* and *Long Beach* court's rejection of converse-CEQA analysis, it was before the *SOCWA* and *Ballona Wetlands* courts questioned and then definitively rejected the Guidelines section as inconsistent with the CEQA, respectively. Nevertheless, the OPR is not currently planning on repealing the challenged language and appears to be relying on footnote 9 in *Ballona Wetlands* to support its position. The footnote provides:

> the statement in Guidelines section 15126.2, subdivision (a) that "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 hazard areas" is consistent with CEQA only to the extent that such impacts constitute impacts on the environment caused by the development rather than impacts on the project caused by the environment.

It seems that this footnote does not shed any new light on the question of the Guidelines section's consistency with the statute. Instead, it merely expands upon the court's reiteration of the principle that the CEQA requires that an EIR identify the significant effects of a project on the environment—not the significant effects of the environment on a project.

On the legislative front (the second scenario), an OPR staff member indicated that the OPR is monitoring legislative efforts to address the opinion. While several organizations considered whether to sponsor legislation requiring converse-CEQA analysis, no legislation was introduced during the 2012 legislative session.

Supreme Court review (the third scenario) is least likely in the near term, since the Supreme Court expressly declined to review *Ballona Wetlands* earlier this year.[15]

III. Recommendations Following *Ballona Wetlands*

Specific recommendations for addressing the *Ballona Wetlands* precedent include:

- It remains advisable to continue to conduct the converse-CEQA analysis set forth in Appendix G of the Guidelines, but to expressly note in the CEQA documentation prepared for these topics, e.g., in a text box at the beginning of the analysis of converse-CEQA thresholds, that the analysis is provided for informational purposes only and is not required by the CEQA.

- Lead agencies retain authority under laws other than the CEQA, e.g., police powers, to establish project approval conditions that have an appropriate nexus to the project, and "mitigation" for converse-CEQA issues may, under appropriate conditions, continue to be required as project approval conditions—and such proposed project approval conditions may be included for informational purposes in the CEQA documents. Additionally, many converse-CEQA issues are also independently regulated under other environmental or planning laws, e.g., seismic hazard mapping regulations and building code standards addressing earthquake risks, and information about these laws and applicable compliance standards that must be met independent of the CEQA can be disclosed for informational purposes in the CEQA document prepared for the project.

- CEQA-specific mandates, such as requiring feasible mitigation measures or alternatives to mitigate CEQA impacts, and the need for a statement of overriding considerations for CEQA impacts, are not required for non-CEQA impacts, e.g., the converse-CEQA impacts identified in the *Ballona Wetlands* decision.

- Because *Ballona Wetlands* did not address all potential converse-CEQA impacts, there is also uncertainty about which of the Appendix G thresholds should be considered outside the scope of the CEQA. Based on language in *Ballona Wetlands*, to the extent that analysis of the Appendix G questions encompass the effects of preexisting environmental hazard

13. Pub. Res. Code §21083(f); 14 Cal. Code Regs. §15023(a). The Secretary of Natural Resources adopts and amends the Guidelines. Pub. Res. Code §21083(e)-(f); 14 Cal. Code Regs. §15024(a).

14. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 391 (1988).

15. The grounds for Supreme Court review are prescribed by California Rule of Court §8.500(b).

on future users and structures of a proposed project (rather than a project's exacerbation of environmental hazards), the analysis of the following questions should be included for informational purposes only:

- Air Quality: "Would the project . . . [e]xpose sensitive receptors to substantial pollutant concentrations?"[16]
- Air Quality: "Would the project . . . [c]reate objectionable odors affecting a substantial number of people?"[17]
- Geology and Soils: "Would the project . . . [e]xpose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:
  - (i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.
  - (ii) Strong seismic ground shaking?
  - (iii) Seismic-related ground failure, including liquefaction?
  - (iv) Landslides?"[18]
- Geology and Soils: "Would the project . . . [b]e located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?"[19]
- Geology and Soils: "Would the project . . . [b] e located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial risks to life or property?"[20]
- Hazards and Hazardous Materials: "Would the project . . . [b]e located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Section 65962.5 and, as a result, would it create a significant hazard to the public or the environment?"[21]
- Hazards and Hazardous Materials: "For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard for people residing or working in a project area?"[22]
- Hazards and Hazardous Materials: "For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in a project area?"[23]
- Hazards and Hazardous Materials: "Would the project . . . [e]xpose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands?"[24]
- Hydrology and Water Quality: "Would the project . . . [p]lace housing within a 100-year flood area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map?"[25]
- Hydrology and Water Quality: "Would the project . . . [e]xpose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?"[26]
- Hydrology and Water Quality: "Would the project . . . [expose people or structures to [i]nundation by seiche, tsunami, or mudflow?"[27]
- Noise: "Would the project result in . . . [e]xposure of persons to or generation of noise levels in excess of standards established in the general plan or noise ordinance or applicable standards of other agencies?"[28]
- Noise: "Would the project result in . . . [e]xposure of persons to or generation of excessive groundborne vibration or groundborne noise levels?"[29]
- Noise: "For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels?"[30]
- Noise: "For a project located within the vicinity of a private airstrip, would the project expose people residing or working in a project area to excessive noise levels?"[31]

16. App. G, III(d).
17. App. G, III(e).
18. App. G, VI(a)(i)-(iv).
19. App. G, VI(c).
20. App. G, VI(d).
21. App. G, VIII(d).
22. App. G, VIII(e).
23. App. G, VIII(f).
24. App. G, VIII(h).
25. App. G, IX(g).
26. App. G, IX(i).
27. App. G, IX(j).
28. App. G, XII(a).
29. App. G, XII(b).
30. App. G, XII(e).
31. App. G, XII(f).

- The *Ballona Wetlands* decision also made clear that where a project could *exacerbate* a preexisting environmental hazard, it should still be analyzed. For example, if a project is proposed on a brownfields site and would require pile driving, groundwater extraction, or other disturbances to preexisting soil or groundwater contamination, the extent to which the project would affect the existing contamination, thereby creating impacts to surrounding residents or employees, should be analyzed.
- The attorney general's rejection of the holding in *Ballona Wetlands* further confuses the CEQA's compliance standards when the number of pending CEQA lawsuits has continued to increase, and the appellate courts continue to routinely invalidate negative declarations and EIRs. In one recent study, appellate courts determined that negative declarations were legally deficient in 70% of the cases (applying the fair argument standard), and that EIRs were invalid 50% of the time (applying the substantial evidence standard).[32] Even when an issue does appear definitively resolved by the courts, such as the converse-CEQA issue addressed by *Ballona Wetlands*, project opponents are not legally barred from relitigating these issues for future projects under the CEQA, and attempting to seek a modified or contrary ruling in future court decisions.

IV. Looking Forward

Although the holding of *Ballona Wetlands* requires significant changes to CEQA practice by eliminating converse-CEQA analysis, parties such as the California attorney general appear to expressly reject the holding of this case. It will take time for agencies, planners, and applicants to acclimate to the new paradigm—and more litigation on this point is certain.

32. Thomas Law Group, CEQA Litigation History, *available at* http://thomaslaw.com/wp-content/uploads/2012/03/CEQA-Lit-History.pdf.