ARTICLE:
HILLTOP GROUP, INC. v. COUNTY OF SAN DIEGO: THROWING A JUDICIAL MONKEY WRENCH INTO THE SPIN CYCLE OF LOCAL AGENCY CEQA LAUNDERING?

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The California Environmental Quality Act (CEQA)[1] has long required a full analysis of a project's potential adverse effects on the environment. The environmental impact report (EIR)—known as the "heart of CEQA"[2]—is intended to further many laudable goals: to help inform governmental decisionmakers and the public about the potential significant environmental effects of their actions; to identify ways environmental damage can be avoided or reduced; to prevent significant, avoidable environmental damage by requiring the adoption of feasible alternatives and mitigation measures; and to disclose to the public the reasons why a governmental agency approved a project if significant environmental impacts will follow.[3]

However, the process of complying with CEQA can be lengthy and expensive.[4] Developers are often frustrated by the delay and cost associated with CEQA compliance, but this frustration is exacerbated when permitting authorities require unnecessary or duplicative environmental review or "slow roll" a decision in order to delay or dodge a vote on a politically controversial project. To avoid unnecessary analysis and repetitive discussions, and to help agencies focus on the issues ripe for decision at each level of review,[5] the Legislature and the courts have recognized the benefits of tiering, i.e., streamlining CEQA review by covering more general analysis in a program EIR,[6] followed by a narrower or site-specific environmental review.[7] In addition to avoiding preparation of multiple, duplicative EIRs and simplifying later review for program activities, a program EIR can sometimes allow an agency to dispense with further review of subsequent program activities already adequately covered by the program EIR.[8]

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Even though these tools are available, local permitting agencies sometimes demand more onerous CEQA review than is legally required (or permitted), perhaps with the hope that the added expense and delay will cause the developer to walk away from a politically unpopular project.[9] Often, developers feel they have no recourse when agencies impose unnecessary, duplicative, and burdensome requirements. However, at least one recent court of appeal decision proves otherwise. In *Hilltop Group, Inc. v. County of San Diego* (*Hilltop Group*),[10] the Fourth District Court of Appeal not only touted the benefits of streamlining but actually granted a project developer-plaintiff a writ remedy, finding the lead agency had overstepped its legal authority by ordering preparation of an unnecessary EIR for an exempt project. This article examines *Hilltop Group* and its implications for future projects attempting to take advantage of CEQA exemptions and tiering options.

Tiering Basics

CEQA provides that a lead agency must undertake environmental review before approving a project that could have adverse effects on the environment.[11] The EIR is considered the "heart of CEQA," the ultimate method of encouraging full environmental disclosure.[12] When no statutory or categorical exemption applies to a project and an EIR is required, the environmental review process can be lengthy and expensive—often taking years and hundreds of thousands of dollars to complete.

To alleviate the unnecessary burden from additional duplicative review, the Legislature has encouraged "tiering whenever it is feasible."[13] Tiering is a streamlining approach to the preparation of EIRs. CEQA defines tiering as "the coverage of general matters and environmental effects in an environmental impact report prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIRs] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR]."[14] For example, a program EIR may be prepared for a series of related actions that can be characterized as one large project.[15] The use of a program EIR allows for more exhaustive analysis of cumulative effects and alternatives than an EIR on an individual action, avoidance of duplicative policy analysis, and consideration of broad policy alternatives and program-wide mitigation at an early stage when flexibility exists to deal with basic problems or cumulative impacts.[16]

When a program EIR's analysis adequately covers future activities within the program, further review of a specific activity may be limited or even unnecessary. No new CEQA document is required if the agency finds a subsequent activity is within the scope of the project covered by the program EIR and no new effects could occur or no new mitigation would be required.[17] If the later activity would have effects not previously examined, an initial study must be prepared to determine the appropriate CEQA document.[18] To the extent portions of the program EIR covered the activity, subsequent review should be limited to those impacts that were not disclosed and examined in that prior EIR.

The Section 15183 Exemption[19]

Some CEQA exemptions are intended to promote goals similar to tiering, i.e., to streamline CEQA review and reduce the need to prepare repetitive environmental studies.[20] One example is the exemption at issue in the *Hilltop Group* case, the Section 15183 exemption. Guidelines section 15183 implements a statutory exemption for "projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified," "except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site."[21] Specifically, it implements Pub. Resources Code, § 21083.3, which similarly provides: "If a development project is consistent with the general plan of a local agency and an [EIR] was certified with respect to that general plan, the application of this division to the approval of that development project shall be limited to effects on the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior [EIR], or which substantial new information shows will be more significant than described in the prior [EIR]."[22]

The *Hilltop Group* decision focused, in part, on the relationship between the Section 15183 exemption and general tiering principles.

Hilltop Group, Inc. v. County of San Diego

Background

In 2011, the County of San Diego updated its general plan. The 2011 General Plan Update (GPU) was adopted "to serve as 'a blueprint for future land development in the unincorporated County' " and set forth land use designations, including "residential, commercial, and industrial" designations, among

others.[23] With the GPU adoption, the County certified a program environmental impact report (PEIR) to address the GPU's potential environmental impacts. The PEIR analyzed " 'potential future development' resulting from the build-out and implementation of the GPU," and was expressly intended to cover " 'subsequent projects, tiering, and/or streamlining future documentation to the maximum extent allowed by State law.' "[24] However, the PEIR also noted that the analysis was not site-specific, and " '[i]n most cases, future project-specific impact analyses would be required.' "[25] The PEIR found that the development resulting from future implementation of the GPU may cause significant environmental impacts and analyzed feasible mitigation measures intended to reduce or avoid the impacts, but concluded there would be significant and unavoidable impacts even with those mitigation measures.

In 2012, Hilltop Group, Inc. and ADJ Holdings, LLC (collectively, Hilltop Group) submitted a project proposal for the North County Environmental Resources Project (NCER Project), a facility that would process and recycle trees, logs, wood construction debris, asphalt, and other inert material from construction projects. Located in a steep valley directly west of Interstate 15, the proposed site was designated as "High Impact Industrial" in the 2011 GPU, with a zoning classification of "General Impact Industrial," but it is also near a number of residential communities as well as sensitive habitat, which resulted in strong public opposition to the project.[26]

With respect to CEQA compliance, Hilltop Group first asked the County to proceed through use of a mitigated negative declaration. The County conducted an initial study, concluded an EIR was required (apparently based on community opposition), and issued a notice of preparation. After Hilltop Group submitted an initial draft EIR in 2015 and later submitted numerous additional technical studies at the County's request, the County reconsidered its position and staff concluded that the Project qualified for the Guidelines section 15183 exemption because the proposed project was consistent with the development permitted by the GPU and analyzed in the PEIR, there were no project-specific impacts or new information that the PEIR failed to analyze, and the project would undertake feasible mitigation measures specified in the PEIR. The County prepared a Section 15183 checklist summarizing staff's findings and recommended that the Zoning Administrator issue the exemption, subject to conditions of approval requiring enclosure of processing operations and further limiting such operations to the hours of 7:00 a.m. to 7:00 p.m.[27]

At a public hearing in June 2020, several community groups and homeowners associations voiced opposition, while Hilltop Group asserted that all of the environmental studies concluded the proposed project would not result in any peculiar environmental impacts so there was " 'nothing left to study.' "[28] After considering the relevant reports and public testimony, the Zoning Administrator approved the exemption request, finding the NCER Project was consistent with the GPU, would not result in any peculiar environmental impacts, and would include feasible mitigation measures identified in the PEIR. County Planning and Development Services (PDS) thereafter approved the project site plan with 65 conditions of approval, including a requirement that the project's processing operations take place in an enclosed building.[29]

Community groups, homeowners associations, and the City of Escondido appealed the Zoning Administrator's approval of the exemption and the PDS approval of the site plan to the County's Planning Commission. County staff prepared a report responding to each of the issues raised and concluding the project qualified for a CEQA exemption. Following public testimony, the Planning Commission voted unanimously to deny the appeals and uphold the NCER project approval.[30]

Opponents then appealed to the Board of Supervisors. Staff again recommended that the appeals be denied, but after hearing significant public opposition, the Board of Supervisors disagreed, expressing general concern for the Project's potential impacts on air quality, noise, traffic, and GHG emissions but without identifying what specific project aspects created the potential for significant impacts and would not be mitigated by uniform policies and procedures.[31]

Trial Court Proceedings

Hilltop Group filed a petition for writ of mandate with the San Diego Superior Court, asking the court to set aside the Board of Supervisors' decision. The trial court noted that the County's own staff agreed the project qualified for an exemption and that the Board of Supervisors' decision to grant the appeals was inconsistent with the staff findings and the existing record. The court nonetheless denied the writ petition because it concluded there was a *fair argument* that the project may have significant and peculiar non-mitigable effects on the environment that were not addressed in the PEIR "and for which new information shows will be more significant than described in the [PEIR]."[32]

Hilltop Group appealed.

Court of Appeal Decision

The court of appeal first considered the appropriate standard of judicial review of the County's decision. Though the County advocated for, and the trial court applied, the fair argument standard, the court of appeal followed published decisions holding that the substantial evidence standard applies to findings concerning the use of a statutory exemption, including the exemption provided by Pub. Resources Code, § 21083.3, which Guidelines section 15183 effectuates.[33] The court saw no reason to apply different standards of review to agency decisions approving a Section 15183 exemption and those determining the exemption inapplicable, emphasizing that a project's eligibility for a Section 15183 exemption does not solely depend on whether the project will have environmental effects.[34]

Applying the substantial evidence standard, the court of appeal went on to hold that the County erred in requiring an EIR on the record before it.

In its multi-layered analysis, the court first concluded that Guidelines section 15183 applied because the project was consistent with the GPU for which the PEIR was certified.[35]

Next, the court considered the scope of further review, if any. The court explained that its review must be limited to whether there was substantial evidence in the record to support the Board of Supervisors' findings of peculiar effects, specifically effects that: "(1) Are peculiar to the project or the parcel on which the project would be located, (2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan or community plan with which the project is consistent, (3) Are potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action, or (4) Are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR."[36]

The court noted that even if such impacts were identified, the exemption would still apply. Although Pub. Resources Code, § 21083.3 and Guidelines section 15183 create a CEQA "exemption," they also function as a streamlining procedure. The results are "much like those of tiering."[37] If the new project has peculiar project-specific environmental impacts that were not addressed in the prior EIR, it may be appropriate to use tiering to streamline review of those

effects. Thus, Guidelines section 15183 may provide either a complete or partial exemption, depending on the relevant facts.[38]

The parties focused on whether there was evidence of impacts "peculiar" to the project. The court observed that Guidelines section 15183 does not define "peculiar" and turned to *Wal-Mart Stores, Inc. v. City of Turlock*[39] for guidance. The *Wal-Mart* court applied the dictionary definition of "peculiar" as "belong-[ing] exclusively or especially to the project or . . . characteristic of only the project," "belonging exclusively or esp. to a person or group," "tending to be a characteristic of one only: distinctive."[40]

Applying *Wal-Mart*'s interpretation, the court noted "the environmental effects of the NCER Project . . . are certainly 'peculiar' in the sense that they are unique to the project and the PEIR could not have possibly anticipated the project's specific impacts to the surrounding environment."[41] However, that was not the end of the court's inquiry as even a project-specific effect "shall not be considered peculiar to the project . . . if uniformly applied development policies or standards have been previously adopted by the city or county with a finding that the development policies or standards will substantially mitigate that environmental effect when applied to future projects, unless substantial new information shows that the policies or standards will not substantially mitigate the environmental effect."[42] Therefore, the court framed the issue before it as "whether substantial evidence in the record supports the Board of Supervisors' findings that there are project-specific impacts that will not be substantially mitigated by previously adopted and uniformly applied policies and procedures."[43]

The court noted that the Board of Supervisors had not identified the specific nature of the NCER Project's "peculiar" impacts except to point to broad environmental categories, nor had it addressed with specificity the effect of uniform policies and procedures in mitigating the purported impacts. The Board's brief and non-specific findings thus failed "to bridge the analytic gap between the raw evidence and ultimate decision or order."[44] The Board's ambiguous findings, and the fact that County staff's reports and technical environmental studies contradicted those findings, made review of the voluminous 48,000-page record for substantial evidence supporting the Board's decision a "challenging" and "daunting task" for both the court and the parties.[45]

In an attempt to demonstrate the project would have peculiar environmental

effects, the County repeatedly pointed to public comment opposing the project, which the court found consisted largely of speculation. "Although these comments discuss ways in which individuals and the broader community may be personally impacted by the NCER Project, they altogether fail to address whether the purported project-specific impacts will be substantially mitigated by uniform policies in the PEIR."[46]

More specifically, with respect to claimed *aesthetic* impacts, the public's "lay opinions and observations" opposing the Project failed to constitute substantial evidence that any impacts would not be substantially mitigated by the PEIR's uniform policies, and, to the extent they attacked Hilltop Group's technical view analysis studies, they lacked the requisite expertise to qualify as substantial evidence.[47] Similar flaws were inherent in the public comments addressing the Project's potential *noise* and *traffic* impacts.[48] Finally, the technical studies addressing the Project's *GHG* and *pollutant emissions* showed they were below the CAPCOA screening threshold of significance used by the County; the record contained no expert evidence concluding such emissions would be significant and peculiar; the 2018 judicial invalidation of the County's Climate Action Plan did not affect this analysis; and the lay public commentary lacked the requisite expertise to challenge the technical reports.[49]

Although mindful of the public opposition to the project, the court held, consistent with longstanding CEQA principles, that "[t]he existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment."[50]

Despite indulging all inferences in favor of the Board's decision as required under the substantial evidence standard of review, the court concluded the Board of Supervisors' findings of peculiar environmental effects were not supported by substantial evidence in the record, the Board of Supervisors did not proceed in a manner required by law when they denied the exemption and failed to limit further environmental review to those effects enumerated in Guidelines section 15183, subdivisions (b)(1) through (4), and the decision denying the CEQA exemption and requiring preparation of an EIR constituted a prejudicial abuse of discretion.[51]

The Implications of *Hilltop Group*: Is it a model of CEQA streamlining or the beginning of an endless loop of environmental review?

A cursory read of the *Hilltop Gro*up decision could lead one to believe the decision's significance is relatively limited and largely confined to its unique facts. The decision might be interpreted narrowly as one regarding a specific statutory exemption and turning solely on the nature of the public opposition and an insufficient technical record. Indeed, the court of appeal noted the Board of Supervisors had not identified the specific nature of the NCER Project's "peculiar" impacts except to point to broad environmental categories, nor had it addressed with specificity the effect of uniform policies and procedures on the purported impacts. And the court repeatedly emphasized the ambiguity of the Board's findings and the fact that they were contradicted by County staff reports and the technical environmental studies made meaningful review difficult.[52] If the case is restricted to its facts, future project opponents and lead agencies—or, as discussed below, possibly even the County on remand—might avoid the same fate by building (if possible) a better technical or evidentiary record. Some agencies might even skip right to disapproval of a disfavored project for "policy" reasons without undertaking or completing CEQA review, as CEQA itself does not require a lead agency to finalize an EIR before it *disapproves* a project.[53]

However, the good news for developers is that the decision's significance is arguably much broader. The case is the first published decision to impose a remedy for unlawfully requiring an EIR—ostensibly as a delay tactic for purely political reasons—when a project plainly qualifies for an exemption under CEQA's applicable standards and based on the administrative record made before the agency. Historically, developers have had little legal recourse when lead agencies use CEQA as a tool for delay in the hope the developer will abandon the project,[54] but *Hilltop Group* pointedly rejected the County's argument that "merely" subjecting a project to further CEQA review cannot constitute *prejudicial* error because the project may yet be approved after that review occurs.[55] Per the court of appeal: "The County cites to no authority that would support such an interpretation of the term 'prejudice,' and under their interpretation Hilltop Group could be subject to an indefinite review process without judicial recourse so long as the project application is not formally denied."[56]

At least some of the questions regarding the scope of the decision may be resolved sooner than later, as the court of appeal directed the trial court to enter

a judgment directing the County to set aside its decision but provided no further instruction on remand.[57] Among the remedies available for a CEQA violation, a court may also mandate that the County "take specific action as may be necessary to bring the determination . . . into compliance with [CEQA]."[58] However, on remand, the lead agency generally retains discretion regarding *how* to comply with CEQA.[59]

Because *Hilltop Group* is the first published case finding a lead agency unlawfully required an EIR as a delay tactic when a project qualified for an exemption, there is no direct precedent to provide instruction regarding the ultimate scope of remand here. Assuming the County is limited to the record that was created when it originally acted on the project, it would seem compelled to apply the Section 15183 exemption in taking any further action on the NCER project. However, if the County were allowed an opportunity to conduct additional proceedings, entertain additional evidence, and reconsider whether to require an EIR based on a potentially stronger administrative record that was augmented by additional technical evidence, it is conceivable that Hilltop Group's victory could be rendered a hollow one.

It is the authors' view, however, that the law will preclude the County from conducting a de novo hearing on remand and will limit the administrative record to that previously made before the Board. Allowing the County to take a "second bite" at the apple would undermine the purposes behind CEQA streamlining that were important to the court of appeal's reasoning. It would contravene the strict statutory limitations on the scope and contents of the administrative record in writ proceedings,[60] and could also conflict with the principles of judicial (and administrative) res judicata, which the CEQA Guidelines expressly acknowledge are applicable when a court finds portions of an environmental document comply with CEQA and others do not.[61]

Although not directly applicable because *Hilltop Group* was not a mixed result, Guideline section 15234(d), along with general principles of finality and fairness, should prevent the County from reconsidering the very question decided by the court of appeal. Were it otherwise, the court of appeal's decision could open an endless loop in which the County creates a record and decides the exemption does not apply and an EIR is required, the project applicant challenges that decision, the court sets it aside and remands, and the County starts again, never making a decision on the project. While CEQA does generally preserve a lead agency's discretion in deciding how to comply with CEQA,

that discretion should not extend to allow an agency unlimited "do-overs" to try to improperly expand the certified administrative record or to throw politically unpopular projects, *especially* those projects that are eligible for streamlining, into a quagmire of environmental review. Indeed, the court of appeal expressly voiced concern regarding the prospect of indefinite review in *Hilltop Group*.[62]

Regardless of what the outcome will be for Hilltop Group on remand, or whether this case will see further litigation, the decision demonstrates that developers do have some remedy when a lead agency is engaging in such delay to avoid making a politically difficult decision, and may signal a growing judicial trend of not tolerating CEQA abuse in the form of agencies requiring endless and dilatory pre-approval environmental review—a bad-faith tactic that has been referred to as CEQA "laundering."[63]

It also provides an excellent example of CEQA streamlining, which the Legislature clearly values. While CEQA is without doubt an invaluable tool that helps lead agencies make informed decisions and avoid, reduce, or prevent significant environmental effects when it is feasible to do so, the courts have long recognized its potential for abuse and obstruction and cautioned against such misuse.[64] CEQA Guidelines section 15183 is regularly used to strike a balance that furthers CEQA's core goals while avoiding onerous and duplicative review, both as a complete exemption (where there will be no peculiar project- or site-specific impacts) and as a partial exemption functioning as a streamlining tool. The more thorough and comprehensive the analysis in a program EIR, the stronger the case for the exemption.[65] For example, a thorough cumulative impacts analysis would almost certainly narrow the scope of any future review under Guidelines section 15183(b).

One issue that will surely be explored further in the wake of *Hilltop Group* is the scope of the phrase "peculiar impacts" for purposes of the Section 15183 exemption. Applying *Wal-Mart*'s definition, the court of appeal in *Hilltop Group* accepted that the NCER Project would have impacts peculiar to the project parcel, which notably included some areas of sensitive habitat, and focused its dispositive analysis on the uniform mitigation aspect of the term as further narrowed by the CEQA Guidelines. But consider another case, where a project fits within the uses, density, and intensity of a plan and/or zoning analyzed in a prior EIR, but is in a fairly urbanized area and the parcel does not contain sensitive habitat or any unusual features. The analysis of peculiar impacts could be

different, and the court might never reach the issue of uniformly applied mitigation measures that the *Hilltop Group* court found dispositive.[66]

Or consider another example: Imagine a program EIR is prepared for a specific or community plan "project" that sites land use designations allowing some light industrial development near residential areas. The program EIR analyzes all impacts from full build-out, and the lead agency finds and overrides significant effects. The program EIR's air quality analysis discusses only PM10 emissions, and no one challenges the findings or decision. When a later, site-specific project is proposed, a petitioner challenges the approval on the grounds that the PEIR only discussed PM10 and not PM2.5 emissions (which are a subset of PM10 emissions) and that the industrial project will allegedly have site-specific "peculiar" PM2.5 emission impacts—even though such impacts would actually be commonly associated with any industrial projects on any site designated to allow such projects in the area. In that case, are the alleged impacts actually "peculiar" to the later, site-specific project, or were they known, or knowable in the exercise of reasonable diligence, at the time of the PEIR certification, and are claims regarding them now barred because they could have been raised then? Under *Lucas v. City of Pomona*, another recent case involving the Section 15183 exemption, a case can be made that such a challenge could and should have been raised at the time the PEIR was certified and therefore the later challenge to the site-specific project should be barred.[67]

Beyond *Lucas* and *Hilltop Group*, there is plenty of room on the spectrum of peculiar impacts for other factual scenarios. Though the full reach of *Hilltop Group* remains to be seen, a few important messages are clear: the case affirms the value of tiering and that developers do have judicial recourse when lead agencies improperly use CEQA as a tool for delay or obstruction. Especially given the clear need for affordable housing in the state, streamlining efforts should be supported. *Hilltop Group* seems to be a step in the right direction—just how big a stride remains to be seen.

ENDNOTES:

[1]Pub. Resources Code, §§ 21000, et seq.

[2]*In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1162, 77 Cal. Rptr. 3d 578, 184 P.3d 709 (2008).

[3]Cal. Code Regs., tit. 14, § 15002. The State Office of Planning and

Research (OPR) has prepared guidelines for the implementation of CEQA, known as the "CEQA Guidelines." Cal. Code Regs., title 14, §§ 15000, et seq. (hereafter, Guidelines). " 'In interpreting CEQA, [courts] accord the CEQA Guidelines great weight except where they are clearly unauthorized or erroneous.' " *Lucas v. City of Pomona*, 92 Cal. App. 5th 508, 535-536, 309 Cal. Rptr. 3d 605 (2d Dist. 2023).

[4]When an EIR is required, the cost and delay associated with environmental review is often significant. See, e.g., Heimer & Hitchcock, *CEQA: California's Living Environmental Law, CEQA's Role in Housing, Environmental Justice & Climate Change* (Oct. 2021), pages 44-45 (discussing mixed-use development in Redwood City for which environmental review took 26 months and cost approximately $700,000). For large projects, post-approval litigation is common and can add years and hundreds of thousands of dollars to the process.

[5]Pub. Resources Code, §§ 21093, 21068.5; Guidelines, § 15385.

[6]A "program EIR" is one "prepared on a series of actions that can be characterized as one large project, and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) As individual activities to be carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways." Guidelines, § 15168(a); see also § 15168(b) (describing benefits of using program EIRs with subsequent EIRs and negative declarations).

[7]See, e.g., Pub. Resources Code, § 21068.5; Guidelines, §§ 15152(a), 15385.

[8]*Mission Bay Alliance v. Office of Community Investment & Infrastructure*, 6 Cal. App. 5th 160, 172-179, 211 Cal. Rptr. 3d 327 (1st Dist. 2016) (scoping out numerous impact areas based on initial study finding them adequately examined in prior EIR); *Center for Biological Diversity v. Department of Fish & Wildlife*, 234 Cal. App. 4th 214, 233-234, 183 Cal. Rptr. 3d 736 (3d Dist. 2015).

[9]As has been aptly observed by courts in the context of processing land use approvals: "Delay is the deadliest form of denial." *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 557, 7 Cal. Rptr. 2d 848 (4th Dist. 1992).

[10]*Hilltop Group, Inc. v. County of San Diego*, 99 Cal. App. 5th 890, 318 Cal. Rptr. 3d 336 (4th Dist. 2024).

[11]*POET, LLC v. State Air Resources Bd.*, 218 Cal. App. 4th 681, 160 Cal. Rptr. 3d 69 (5th Dist. 2013).

[12]*In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1162, 77 Cal. Rptr. 3d 578, 184 P.3d 709 (2008); *Emmington v. Solano County Redevelopment Agency*, 195 Cal. App. 3d 491, 502, 237 Cal. Rptr. 636 (1st Dist. 1987).

[13]Pub. Resources Code, § 21093, subd. (b); Cal. Code Regs., tit. 14,

§ 15152(b).

[14]Pub. Resources Code, § 21068.5.

[15]Guidelines, § 15168(a).

[16]Guidelines, § 15168(b), (d); *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal. App. 4th 314, 175 Cal. Rptr. 3d 145 (3d Dist. 2014) (explaining function of Program EIRs and tiering concept).

[17]Guidelines, § 15168(c)(2).

[18]Guidelines, § 15168(c)(1).

[19]The exemption set forth in Public Resources Code section 21083.3, subdivision (b) and Guidelines section 15183 will be referred to herein as the "Section 15183 exemption."

[20]Guidelines, § 15183(a).

[21]Guidelines, § 15183(a); *Lucas v. City of Pomona*, 92 Cal. App. 5th 508, 535-536, 309 Cal. Rptr. 3d 605 (2d Dist. 2023). There are two types of CEQA exemptions: statutory and categorical. There are several important distinctions between the two. Statutory exemptions are enacted for policy reasons and, unlike categorical exemptions, are absolute to the extent they apply; unlike categorical exemptions promulgated by the Secretary for Resources for classes of projects found not to have significant effects, statutory exemptions are not subject to an analysis for exceptions due to unusual circumstances. *Lucas*, 92 Cal. App. 5th at 534, n. 7. Also, the standard of judicial review is different. Statutory exemptions are reviewed for substantial evidence, while categorical exemptions are subject to the fair argument standard. *Lucas*, 92 Cal. App. 5th at 536, 538-539.

[22]Pub. Resources Code, § 21083.3, subd. (b).

[23]*Hilltop Group, Inc. v. County of San Diego*, 99 Cal. App. 5th 890, 898, 318 Cal. Rptr. 3d 336 (4th Dist. 2024).

[24]*Id.* at 898.

[25]*Id.* at 899 (alterations in original).

[26]*Id.* at 899.

[27]These conditions of approval were consistent with mitigation measures required in the GPU PEIR.

[28]*Hilltop Group, Inc. v. County of San Diego*, 99 Cal. App. 5th 890, 903, 318 Cal. Rptr. 3d 336 (4th Dist. 2024).

[29]*Id.* at 903.

[30]*Id.* at 904.

[31]*Id.* at 904, 907.

[32]*Id.* at 907.

[33]*Id.* at 910.

[34]*Id*. at 910.

[35]*Id*. at 911, 914.

[36]*Id*. at 913 (citing Guidelines, § 15183(b)).

[37]*Id*. at 912.

[38]*Id*. at 914.

[39]*Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 41 Cal. Rptr. 3d 420 (5th Dist. 2006) (disapproved in part on other grounds as stated in, *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 297, 59 Cal. Rptr. 3d 442, 159 P.3d 33 (2007)).

[40]*Hilltop Group, Inc. v. County of San Diego*, 99 Cal. App. 5th 890, 917, 318 Cal. Rptr. 3d 336 (4th Dist. 2024) (citing *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 294, 41 Cal. Rptr. 3d 420 (5th Dist. 2006) (disapproved of by, *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442, 159 P.3d 33 (2007)) & Webster's Third New International Dictionary (1986)).

[41]*Id*. at 917.

[42]*Id*. at 918 (citing Guidelines, § 15183(f)).

[43]*Id*. at 918.

[44]*Id*. at 918 (quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12 (1974)).

[45]*Id*. at 918, 919.

[46]*Id*. at 919.

[47]*Id*. at 920-922.

[48]*Id*. at 922-926.

[49]*Id*. at 927.

[50]*Id*. at 911 (internal quotation marks omitted).

[51]*Id*. at 927-928.

[52]*Id*. at 918-928.

[53]CEQA applies only to proposed project approvals, not to project disapprovals. Pub. Resources Code, § 21080, subd. (b)(5); Guidelines, § 15270. However, project disapprovals can be challenged by writ of mandate under Civ. Proc. Code, §§ 1094.5, 1085 on the bases provided in those statutes, e.g., findings are arbitrary and capricious, not supported by substantial evidence, etc. And, as a practical matter, for projects (like the NCER project) that are consistent with the governing general plan and zoning provisions, it will be inherently difficult for a lead agency to deny them for policy reasons without making findings that are vulnerable to challenges as arbitrary, capricious, and lacking in evidentiary support.

[54]See Coon and Nelson Rowan, *When Environmental Review Under CEQA*

Becomes "Groundhog Day": What's a Frustrated Developer to Do?, published in Vol. 20, No. 5, Miller & Starr Real Estate Newsalert (May 2010).

[55]*Hilltop Group, Inc. v. County of San Diego*, 99 Cal. App. 5th 890, 928, 318 Cal. Rptr. 3d 336 (4th Dist. 2024).

[56]*Id.* at 928.

[57]*Id.* at 928.

[58]Pub. Resources Code, § 21168.9, subd. (a); see also Guidelines, § 15234(a).

[59]Pub. Resources Code, § 21168.9, subd. (c); *John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.*, 20 Cal. App. 5th 77, 102-103, 230 Cal. Rptr. 3d 1 (5th Dist. 2018) (holding to extent trial court ordered preparation of EIR, it erred because writ cannot control lawful discretion retained by agency regarding how to comply with CEQA). See generally *Miller & Starr, California Real Estate,* 4th ed., § 26:25 (discussing CEQA remedies).

[60]See Civ. Proc. Code, § 1094.5, subd. (e) (allowing consideration of extra-record evidence in administrative mandamus actions only "[w]here the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent. . .").

[61]Guidelines, § 15234(d) ("As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall only be required by the court consistent with principles of res judicata. In general, the agency need not expand the scope of analysis on remand beyond that specified by the court").

[62]*Hilltop Group, Inc. v. County of San Diego*, 99 Cal. App. 5th 890, 928, 318 Cal. Rptr. 3d 336 (4th Dist. 2024).

[63]Elmendorf and Duncheon, *When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law*, Ecology Law Quarterly, vol. 49, issue 3, page 655, at 662 (2022) (referencing "CEQA-laundered denials") (internal alterations omitted).

[64]*Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 576, 276 Cal. Rptr. 410, 801 P.2d 1161 (1990) ("[CEQA] must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement"); *Tiburon Open Space Committee v. County of Marin*, 78 Cal. App. 5th 700, 782, 294 Cal. Rptr. 3d 56 (1st Dist. 2022) (noting perversion of CEQA's intended "noble purpose" of addressing truly significant environmental impacts through its manipulation into a "formidable tool of obstruction" aimed at blocking new housing projects).

[65]See Guidelines, § 15168(c)(5) ("With a good and detailed project description and analysis of the program, many later activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required").

[66]See, e.g., *Lucas v. City of Pomona*, 92 Cal. App. 5th 508, 535, 309 Cal.

Rptr. 3d 605 (2d Dist. 2023) (applying Section 15168 exemption where project-specific uses were sufficiently similar to existing uses and impacts discussed in earlier program EIR).

[67] *Id.* at 542.

