

Case No. S213478

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

CALIFORNIA BUILDING INDUSTRY ASSOCIATION

Plaintiff and Respondent,

v.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT

Defendant and Appellant.

On Review From The Court Of Appeal For the First Appellate District,
Division One, 1st Civil No. A135335 & A136212

After An Appeal From the Superior Court For The State of California,
County of Alameda, Case Number RG10548693, Hon. Frank Roesch

**APPLICATION OF LEAGUE OF CALIFORNIA CITIES AND COUNTIES OF
TULARE, KINGS, AND SOLANO TO FILE AMICI CURIAE BRIEF
IN SUPPORT OF NEITHER PARTY**

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To the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme Court of California:

Pursuant to Rule 8.520(f) of the California Rules of Court, the League of California Cities (the “League”) and the Counties of Tulare, Kings, and Solano (“Counties”) (collectively, “Amici”) hereby respectfully submit this application for leave to file a brief as amici curiae in this proceeding in support of neither Plaintiff and Respondent California Building Industry Association (“CBIA” or “Respondent”) nor Defendant and Appellant Bay Area Air Quality Management District (“District” or “Appellant”).

Interest of Amici

The League is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance. The League has served as amicus curiae in dozens of matters before this Court and the Courts of Appeal, as well as the United States Supreme Court and the Ninth Circuit Court of Appeals.

The Counties are public entities organized under the laws of the State of California. Where appropriate, the Counties will seek to present their perspective as amici curiae on matters of common concern being litigated in both the California and federal courts.

As is relevant to the instant application, the League and Counties have a direct interest in the outcome of this case as they are or represent entities that serve as “local agencies” and “public agencies,” and most frequently as “lead agencies” with respect to proposed projects under the California Environmental Quality Act (“CEQA”; Pub. Resources Code, § 21000 et seq.). (*See* Pub. Resources Code, §§ 21062, 21063(c), 21165.) As such, Amici and their constituents are tasked with compliance with and implementation of CEQA and its environmental review procedures and requirements. (*See, e.g.*, Pub. Resources Code, § 21151(a) [“All local agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project that they intend to carry out or approve which may have a significant effect on the environment.”].) The scope of review and analysis required under CEQA is thus of direct and significant interest to Amici.

Moreover, as entities that routinely deal with CEQA matters as lead agencies, Amici are well-positioned to offer perspective on the question facing the Court. Furthermore, Amici, in submitting this application in support of neither party, can provide a perspective that is focused primarily

on CEQA's requirements and its broader role in California's legal landscape, rather than solely on the merits of the particular case before this Court.

For these reasons, Amici believe that the attached brief will assist the Court in deciding this matter, and respectfully request that this application to appear as amici curiae be granted.

Dated: April 15, 2014

MILLER STARR REGALIA

By:

A handwritten signature in black ink, appearing to read 'A. Coon', written over a horizontal line.

ARTHUR F. COON

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I. INTRODUCTION

CEQA's plain language, structure, purpose, and operational logic all demonstrate that it does not operate "in reverse." It is well settled that CEQA measures a proposed project's predicted environmental effects as changes in the *currently existing* physical conditions comprising the environmental setting where it is to be located; the proposed future project and its human receptors are not part of the existing environment. Thus, to answer the specific question on which this Court granted review, CEQA does not as part of its standard analysis require the study of impacts *from* existing background physical conditions (i.e., the environment) *on* the proposed project and its predicted future residents and users (receptors).¹

If "CEQA-in-reverse" analysis were to be required as the norm, the statute would effectively be rewritten and expanded in ways that would increase its expense, diminish its efficiency, render current CEQA jurisprudence obsolete, and potentially violate constitutional limitations on mitigation requirements. Accordingly, for reasons articulated in more detail below, this Court should not transmute CEQA so as to require in all

¹ In the two specific and limited areas (schools and airports) where CEQA does so deviate from its standard analysis, it is explicit in defining and confining the scope of the exceptions. (See CBIA Opening Br. at 34-37; CBIA Reply Br. at 16-18.)

cases a “CEQA-in-reverse” analysis, i.e., an analysis of the existing environment’s impacts on the proposed project.

This Court did not grant review of the issue whether the Court of Appeal correctly ruled that, in any event, the District’s challenged TAC Receptor Thresholds are not invalid in all of their potential applications. Accordingly, and because that ruling is correct, this Court should let stand that portion of the Court of Appeal’s judgment declining to invalidate the Receptor Thresholds on the basis of CBIA’s purely facial challenge.

II. FACTUAL AND PROCEDURAL BACKGROUND

Amici hereby adopt, and do not repeat, the summaries of facts and procedural history contained at pages 5 through 15 of Plaintiff and Respondent CBIA’s Opening Brief.

III. LEGAL DISCUSSION

A. The Text, Structure, Purpose, And Logic Of CEQA All Demonstrate That It Does Not Operate “In Reverse” Except Where It Provides An Express And Limited Exception.

Originally enacted in 1970 and modeled after the National Environmental Policy Act of 1969 (“NEPA”), CEQA is interpreted “so as to afford the fullest protection of the environment within the reasonable scope of the statutory language.” (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) However, “CEQA is not to be stretched beyond ‘the reasonable scope of the statutory language’” (*Martin*

v. City and County of San Francisco (2005) 135 Cal.App.4th 392, 402), and may not be interpreted to impose either substantive or procedural requirements beyond those explicitly stated in the statutory language. (Pub. Resources Code, § 21082.1.) It should also be implemented so as to reduce needless delay and paperwork. (Pub. Resources Code, §§ 21003, 21003.1; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 567, 576.)

CEQA's explicit text thus determines, demarcates, and limits its scope of application. In that regard, CEQA's textual structure has a coherent and consistent logic that defines and accordingly limits its reach. As explained below, that logic implements CEQA's purpose of fully protecting the *existing* environment from a proposed project's adverse physical changes. It clearly does *not* extend to requiring analysis of how that existing environment would impact *future* residents or users of a proposed project.

1. CEQA's Key Definitional Sections Confirm CEQA Does Not Operate "In Reverse" As They Expressly Require Analysis And Mitigation Only Of Adverse Changes To Existing Physical Conditions, Not Impacts On A Proposed Future Project Or Its Users.

CEQA's basic logic requires analysis of a proposed project's potential impacts on the *existing* physical environment. A proposed project

and its hypothetical or predicted future users are not part of the existing physical environment as CEQA defines it. Therefore, CEQA does not require analysis of any potential impacts on a proposed project and its hypothetical or predicted future users. This logical syllogism flows directly and necessarily from CEQA's key statutory definitions and operative provisions, and is reinforced by numerous of its corollary rules as well as by common sense.

CEQA's definition of the "environment" is plain and clear. The "environment" is defined as "the *physical conditions which exist* within the area which *will be affected* by a proposed project, including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance." (Pub. Resources Code, § 21060.5, *emph. added.*) Thus, to be part of the "environment" for purposes of CEQA analysis, a particular "condition" must have three attributes: (1) it must be "physical"; (2) it must "exist"; and (3) it must exist within the geographic area that "will be affected" by the proposed project. If a proposed project may have a significant impact or effect on such an environmental condition – i.e., *physically change* the condition in an adverse way – CEQA requires analysis and mitigation, where feasible, for that effect.

CEQA is clear that a proposed project and its hypothesized or predicted future occupants and users (i.e., receptors) are *not* part of the existing "environment" for CEQA purposes. Most fundamentally, they are

not “physical conditions which exist” and which the proposed project “will affect.” Rather, the *proposed* project and its *future* residents and users *do not* currently “exist” as physical conditions within the potentially affected area; they are merely proposed or predicted to exist at some future point in time should the proposed project be approved, constructed, and successfully operated. To paraphrase this Court, they are part of a predicted future project whose existence is entirely “counterfactual,” in contradistinction to the existing environment on which they will operate and may adversely affect. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 452.)

While the Legislature might conceivably have defined the CEQA “environment” differently – e.g., as the physical conditions which exist *or are proposed to exist* within the area which will be affected by a proposed project – it did not choose to do so.² To interpret the statute to

² It bears mention that there are sound reasons for not defining the baseline “environment” in such a manner for CEQA purposes. Conflating the existing environment with a hypothesized future environment altered by the addition of the proposed project under review would blur CEQA’s intended focus on the nature, magnitude, and significance of the project’s harmful externalities -- i.e., the *changes* to the existing environment of persons in general that will be *caused by* the project, and for which it therefore can and should bear responsibility to mitigate. (See Hodas, “The Role of Law In Defining Sustainable Development: NEPA Reconsidered,” (1998) 3 Widener L. Symp. J. 1, 5 [consensus on meaning of “sustainable development” appears, described “in economic terms, [to be] that the externality of each activity must be internalized” and “polluter should ... bear the cost of pollution”].) In any event, for present purposes it will

contain non-existent terms would expand its reach beyond the reasonable scope of its language and is not required by CEQA. Moreover, to do so would violate CEQA's clear proscription against imposing substantive or procedural requirements not explicitly stated in the statute. (Pub. Resources Code, § 21083.1.)

The statute's definition of the environment as limited to currently "exist[ing]" physical conditions" is reinforced by its illustrative list of physical conditions comprising the existing environment -- a list that, significantly, does *not* include any mention of proposed projects or the future human "receptors" that will construct, operate or reside within such projects. Rather, the list includes both elements of the natural environment (e.g., "land, air, water, minerals, flora, fauna, noise") and also man-made physical conditions (e.g., "noise, objects of historic or aesthetic significance"). All are subject to the express limitation that they must "exist" within the area in which the proposed project's impacts will occur. (Pub. Resources Code, § 21060.5.)

Logically interrelated with CEQA's definition of the "environment" are its definitions of "project" (Pub. Resources Code,

suffice to observe that the Legislature did *not*, in fact, define the "environment" in CEQA to include the project, and further that it consistently focused on identifying and mitigating the impacts to the existing environment that would be caused by the project as CEQA's fundamental purpose.

§ 21065) and “significant effect on the environment.” (Pub. Resources Code, § 21068.) A “project,” for CEQA purposes, is distinct from the “environment” in which it is proposed to occur. A “project” is defined not as part of, but by reference to its potential impacts on, that environment. It is “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment[.]” (Pub. Resources Code, § 21065.) A “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.” (Pub. Resources Code, § 21068.)

Reading CEQA’s fundamental definitional sections together, it is evident that to cause a “significant effect on the environment,” as defined by CEQA, a proposed project must *cause a change* in the existing physical conditions that constitute the “environment” (e.g., “land, air, water, minerals, flora, fauna, noise”) that is substantial and adverse. (Pub. Resources Code, §§ 21060.5, 21065, 21068; 14 Cal. Code Regs., § 15064(a) [in determining whether project’s effects are significant, agency considers direct or indirect “physical changes in the environment which may be caused by the project”].)

As a threshold matter, it is a proposed project’s potential to cause such changes in the existing physical environment which brings it within CEQA’s ambit. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com’n* (2007) 41 Cal.4th 372, 380 [activity is not subject to CEQA

“[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment”].) If it has such potential, the significance of the changes in the existing environment which it may cause determines whether approval of the project will require an EIR. Generally, if a lead agency determines a proposed, non-exempt discretionary “project may have a significant effect on the environment,” an EIR is required. (Pub. Resources Code, § 21080(d)); conversely, if it determines such a project “would not have a significant effect on the environment” a negative declaration is required. (Pub. Resources Code, § 21080(c).) As can be seen from the key provisions which define CEQA’s fundamental scope, a proposed project that will not cause an adverse change in existing physical conditions is simply outside CEQA’s purview. This is so regardless of whether preexisting adverse physical conditions which the proposed project will not change could negatively affect the project or its predicted future residents or users.

Against the solid logic established by CEQA’s key definitional and operational provisions, the District argues that bringing a predicted project and its future human receptors into an area with existing degraded environmental conditions *not* caused by the project, and which may harm the future receptors, constitutes a significant environmental effect of the project which must be analyzed and mitigated under CEQA. The only statute the District cites in support of its contention that CEQA

generally operates “in reverse” in this manner is Public Resources Code section 21083(b)(3), which requires a finding that a project may have a significant effect on the environment -- thus requiring preparation of an EIR – if “[t]he *environmental effects of a project* will cause substantial adverse effects on human beings, either directly or indirectly.” (Pub. Resources Code, § 21083(b)(3), *emph. added.*) The District effectively reads out of the statute the key words “environmental effects *of*”³ and construes the language as a broad mandate requiring an EIR and project-specific “mitigation” any time the mere location of a project in a particular area would be a “but for” cause of adverse effects on the relocated humans occupying it. (*Compare, Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 474 [holding that “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 District’s position is at odds with the law. Following that logic would broadly expand CEQA’s requirements beyond simply accounting for and mitigating each proposed project’s own significant environmental externalities; each project could now be required by CEQA

³ The word “of” is in this context clearly is “used as a function word to indicate the cause, motive, or reason.” (Webster’s Ninth New Collegiate Dictionary (1991), p. 819.)

to account for and mitigate for externalities of other projects and preexisting harmful or degraded environmental conditions which it had no role in creating or exacerbating. For example, CEQA review for a new indoor urban or outdoor rural rock music venue would have to analyze and mitigate not only for noise impacts to existing neighboring uses and receptors, but potentially also for injuries to the ears and hearing faculties of its future patrons and performers. Closer to the facts of the instant case, any new development -- even one contributing “net zero” or no pollutant emissions, such as, perhaps, a LEED Platinum-certified building or an electric vehicle recharging station -- proposed to be located in a “nonattainment” air basin or toxic air contaminant (TAC) “hot spot” area would have to analyze and mitigate for adverse air quality health impacts to its future residents and/or users. Requiring such reverse analyses is not required by CEQA and at the same time would expand its scope.

2. CEQA’s Environmental “Baseline” Rules

Confirm CEQA Does Not Operate “In Reverse” And Is Generally Concerned Only With The Effects Of A Project’s Adverse Changes to “Existing Conditions” Present When Environmental Review Commences.

“CEQA-in-reverse” would also upend and render obsolete the extensive, extant jurisprudence on setting the “environmental baseline” under CEQA. The environmental baseline against which a proposed

project's impacts are to be measured is "normally" the "existing conditions" baseline. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 445; 14 Cal. Code Regs., § 15125(a).) "[T]he California Supreme Court has made it clear [that] the baseline for a CEQA analysis must reflect current conditions at a project site[.]" (*Citizens for East Shore Parks v. California State Lands Commission* (2012) 202 Cal.App.4th 549, 558, citing *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320-322, 323.) Thus, "a CEQA baseline must reflect ... the "real conditions on the ground"" at the time environmental analysis begins. (*Citizens For East Shore Parks, supra*, 202 Cal.App.4th at 558-559.)

As recently stated by this Court:

The fundamental goal of an EIR is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment. [Citations.] To make such an assessment, an EIR must delineate environmental conditions prevailing absent the project, defining a "baseline" against which [the project's] predicted effects can be described and quantified. [Citation.]

(*Neighbors for Smart Rail, supra*, 57 Cal.4th at 447, citations omitted.)

The "environmental setting" -- defined as "a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation [of the EIR] is published, or if no

notice of preparation is published, at the time environmental analysis is commenced ... [--] *will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.*” (*Id.* at 448, *emph. in orig., quoting 14 Cal. Code Regs., § 15125(a).*)

Significantly, while an agency has some discretion to “adjust” an “existing conditions” baseline, such a baseline cannot be adjusted to encompass the *project itself*. “An agency may, where appropriate, adjust its existing conditions baseline to account for a major change in environmental conditions that is expected to occur *before project implementation*. In so adjusting its existing conditions baseline, an agency exercises its discretion on how best to define such a baseline under the circumstance of *rapidly changing environmental conditions*.” (*Id.* at 452, *emph. added, citing Communities for a Better Environment, supra, 48 Cal.4th at 328.*) This allows a “sound exercise of agency discretion” to determine “the exact method of measuring the *existing environmental conditions upon which the project will operate*.” (*Id.* at 452-453, *emph. added, citing Communities for a Better Environment, supra, 48 Cal.4th at 328.*) Because this permissible “adjustment” of the existing conditions baseline incorporates only environmental changes “expected to occur before project implementation” and “conditions *upon which the project will operate*” (*id.* at 452-453), it

does *not* include conditions that are part of the project itself or that will, conversely, operate upon the project.⁴

Also instructive with regard to CEQA's strict conceptual separation of the proposed project under review from the existing background environment upon which it will operate is this Court's "clarif[ication of] some potentially confusing aspects of the standard analysis, in which the project's impacts are assessed against existing environmental conditions." (*Neighbors for Smart Rail, supra*, 57 Cal.4th at 452.) As observed by this Court, an EIR's "standard" impacts analysis "attempts to *predict* the impacts a [proposed] project would have *on the existing environment* if approved and implemented. CEQA's wording reflects the fact that projects generally are not yet operating when an EIR is prepared ... and the "environment" referred to is the set of physical conditions in the area "which will be affected" by the project. (§ 21060.6.)." (*Id.* at 452, citations omitted, second emph. added.)

CEQA's rules governing the "existing conditions" analytical baseline required as the "norm" in its "standard analysis," and those

⁴ Only under rare circumstances where "analysis of a project's impacts on existing environmental conditions ... would be uninformative or misleading to decision makers and the public" may an agency substitute a "future conditions" analysis -- i.e., one using background conditions predicted to prevail well beyond the date of project operation -- for the "norm" of the "existing conditions" baseline required by CEQA. (*Id.* at 453-454.)

defining the “environmental setting,” reaffirm that CEQA’s central focus is analyzing the impacts *of* a proposed project *on* the *existing environment*, and not the impacts of the existing environment on the proposed project or of those of the proposed project on itself. Requiring a “CEQA-in-reverse” analysis would upset these settled rules and create a new paradigm for environmental analysis that is ungrounded in CEQA’s purpose, text or logical structure.

3. CEQA’s Rules Governing Analysis Of Cumulative Impacts, Comparison Of A Project To An Adopted Plan, And Analysis Of The “No Project” Alternative Likewise Reaffirm That CEQA Does Not Generally Operate “In Reverse.”

Similarly, while various of CEQA’s required analyses require consideration of projected changed and future environmental conditions that must be forecasted under various scenarios, it is clear that none require a generally applicable “CEQA-in-reverse” analysis of the existing (or future) environment’s effects on a proposed project or its future receptors.

Thus, where an EIR compares a proposed project to an existing land use plan, both existing conditions as well as potential future conditions discussed in the plan must be examined (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1381, disapproved on another ground in *Neighbors for Smart Rail*, *supra*, 57 Cal.4th at 457, citing 14 Cal. Code Regs., §15125(e)),

but there is no requirement that the analysis treat potential future conditions under the plan as significant effects caused by the project. The same is true of the “no project” analysis required by CEQA, which analyzes for comparison purposes how the area that would be affected by the project would likely develop without implementation of the project. (*Id.* at 1382, citing 14 Cal. Code Regs., § 15126.6(e).)

The same is true of the “cumulative impacts” analysis required by CEQA. In fact, the rules regarding CEQA’s cumulative impact analysis emphatically confirm that CEQA does not operate in reverse to require a project to analyze and mitigate for the existing (or even the predicted future) environment’s impacts on the proposed project and its predicted users/receptors. While an EIR is required to “discuss cumulative impacts of a project when the project’s incremental effect is cumulatively considerable,” i.e., when the incremental effect is “significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects” (*id.* at 1381, citing 14 Cal. Code Regs., §§ 15130(a), 15065(a)(3), Pub. Resources Code, § 21083(b)(2)), there is no requirement to “discuss impacts which do not result in part from the project evaluated in the EIR.” (*Id.* at 1382, citing 14 Cal. Code Regs., § 15130(a)(1).) In other words, as with all of CEQA’s other key definitions and provisions, the proposed project must at least be a *cause* of the anticipated adverse environmental effect to require analysis of

and mitigation for the effect – such analysis and mitigation are not required by CEQA where the proposed project will merely be a passive receptor of an existing effect resulting from other causes. By its very nature, as the case law has clarified, a “cumulative impact of a project is an impact to which that project contributes and to which other projects contribute as well. [¶] *The project must make some contribution to the impact; otherwise, it cannot be characterized as a cumulative impact of that project.*” (*Santa Monica Bay Keeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1559 [water quality project that discharged nothing to groundwater made no contribution to cumulative groundwater impacts of other projects], *emph. added*, quoting *Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, 700.)

4. CEQA’s Concern With The Environment Of Persons In General, Rather Than That Of Particular Persons, Underscores That It Does Not Operate “In Reverse” To Require Analysis Of The Existing Environment’s Impacts On Hypothetical Future Project Users/Receptors.

Under CEQA, “the question is whether a project [would] affect the environment of persons in general, not whether a project [would] affect particular persons.” (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 782, quoting *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492.) That a

project's environmental effects must affect the "environment of persons in general" to be considered significant environmental impacts has been held to be a "sine qua non of CEQA." (*Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 292, 404 [modification of interior of private residence in area not visible to public could not constitute physical impact on the environment within the ambit of CEQA].) Thus, even changes in localized physical conditions actually caused by a project do not constitute significant environmental impacts under CEQA where their adverse effects are confined solely to the project and its users because such changes do not affect the "environment of persons in general" – a "sine qua non of CEQA." (*Parker Shattuck Neighbors, supra*, 222 Cal.App.4th at 782-783; *Martin v. City and County of San Francisco, supra*, 135 Cal.App.4th at 404-405.)

A fortiori, effects of the existing environment *not caused by the project* cannot constitute a significant environmental impact of the project under CEQA. (See also, e.g., *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 474 ["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."].)

5. Constitutional Limitations On Mitigation Requirements Cannot Be Squared With "CEQA-In-Reverse" Analysis.

Where CEQA review identifies significant environmental effects of a proposed project, feasible mitigation measures must be analyzed and imposed in a binding manner as conditions of project approval. (*See, e.g.*, 14 Cal. Code Regs, § 15126.4(a)(1), (2).)

As recognized by the CEQA Guidelines:

Mitigation measures must be consistent with all applicable constitutional requirements, including the following:

(A) There must be an essential nexus (i.e., connection) between the mitigation measure and a legitimate governmental interest. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and

(B) The mitigation measure must be "roughly proportional" to the impacts of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Where the mitigation measure is an ad hoc exaction, it must be "roughly proportional" to the impacts of the project. *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

(14 Cal. Code Regs., § 15126.4(a)(4)(A), (B); *see id.*, § 15041(a).)

Indeed, "[i]f the lead agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed." (*Id.*, § 15126.4(a)(5).)

These constitutional limitations on the imposition of mitigation obligations on a project proponent cannot be squared with a construction of CEQA that treats the effects of preexisting environmental conditions on future project receptors as significant effects of the proposed project under review. Under the “CEQA-in-reverse” scenario, a project proponent will be required to analyze and mitigate for existing environmental conditions not caused by his or her project, and that would exist and affect the environment of persons in general to the same extent with or without the proposed project -- i.e., impacts with no nexus or relation to the project. Construing CEQA to operate “in reverse” as a general matter could thus render its operation unconstitutional as a matter of course. “An interpretation which gives effect is preferred to one which makes void.” (Civ. Code, §3541.)

6. Nothing In CEQA’s Legislative Purpose Or Policy Findings Mandates A “CEQA-In-Reverse” Analysis.

CEQA contains many general legislative policy findings. (See, e.g., Pub. Resources Code, §§ 21000(b) [“It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man.”]; 21000(c) [“there is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people... .”]; 21000(d) [“The capacity of the environment is limited, and ... the state [should] take immediate steps to

identify any critical thresholds for the health and safety of the people ... and take all coordinated actions necessary to prevent those thresholds from being reached.”]; 21000(g) [“... all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”]; 21001(a) [state policy to “[d]evelop and maintain a high quality environment ...”]; 21001(b) [state policy to take “action necessary to provide the people ... with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities”]; 21001(d) [state policy to “[e]nsure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.”]; 21001(e) [state policy to “[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.”].)

To further these profoundly important policies, CEQA declares “that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen *the significant environmental effects of*

such projects, and that [its] procedures ... are intended to assist public agencies in systematically identifying both the *significant effects of proposed projects* and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen *such significant effects*.” (Pub. Resources Code, § 21002, *emph. added*.) CEQA’s policy sections’ plain language repeatedly reflects its fundamental focus on identifying and mitigating the “significant effects *on the environment of a [proposed] project*.” (Pub. Resources Code, § 21002.1(a), (b), (c), (e), *emph. added*.)

Thus, none of CEQA’s legislative policy findings require “reverse CEQA” as a standard analysis. To the contrary, and as the line of well-reasoned court of appeal decisions has recognized, “CEQA-in-reverse” analysis “is neither consistent with CEQA’s legislative purpose nor required by the CEQA statutes.” (*Ballona Wetlands Land Trust, supra*, 201 Cal.App.4th at 474.)⁵

⁵ The line of published Court of Appeal precedents squarely holding that CEQA does not operate in reverse is thoroughly discussed and analyzed in the parties’ briefing. (See CBIA Opening Br. at 20-23, Reply Br. at 22-27.) Amici will therefore not repeat that analysis, which fully supports their own analysis of CEQA’s plain language and well established principles.

**B. Local Agencies Can Address The Risks To Or
Impacts On Future Receptors of Proposed Projects Through Other
Tools Available To Them.**

Concluding that a reverse analysis is not required by CEQA does not leave local agencies powerless to protect future receptors from existing environmental harms. As CBIA's opening brief sets forth, there are other federal and state laws that address risks to and environmental hazards for future receptors of a proposed project. (CBIA Opening Br. at 44-49.) The *Baird* and *SOCWA* opinions also support this point, observing that schemes other than CEQA may apply to remediate preexisting pollution and other hazards potentially affecting but not caused by a proposed project. (*Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1469; *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1617-1618.) The respective roles of CEQA and other environmental laws are distinct and complementary, not overlapping and duplicative. CEQA exists to inform decisionmakers of the potential environmental impacts of proposed projects and require that they be mitigated to the extent feasible. (See Pub. Resources Code, §§ 21000, 21001; *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392; 14 Cal. Code Regs., § 15002(a).) Accordingly, as discussed above, with limited exceptions CEQA does not address preexisting hazards or environmental risks. These are the subject

of a litany of other laws that require action, whether remedial or prophylactic, to alleviate the problems to which they are addressed. (*See* CBIA Opening Br. at 44-49.)

One excellent example is the comprehensive body of California planning and zoning laws. Every California city's and county's general plan must include a safety element that requires the planning body to account for a variety of potential hazards to its residents, including flood, fire, earthquakes, and other geologic hazards. (Gov. Code, § 65302(g).) Local governments are also free to include within their general plans any other subject relating to future development, which would include risks from pollution and other environmental issues. (Gov. Code, § 65303; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 783.) Because a general plan serves as a charter for future development, all other land use and zoning determinations must generally be consistent with its terms, including restrictions based on existing hazards or risk assessments. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540-541.) Accordingly, if a city or other planning agency includes in its general plan development restrictions based on air pollution or other risks to health and safety, those restrictions will be binding on all future development.

More fundamentally, local governments and agencies have the clear constitutional authority to exercise their *police power* to avoid or

remediate harm to their citizenry, including from environmental hazards, such as through adoption of preventive local ordinances and resolutions and nuisance abatement authority.

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. Apart from this limitation, the police power of a county or city under this provision is as broad as the police power exercisable by the Legislature itself.

(*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885, citation and internal punctuation omitted.) Protection of the population's health and safety is classically within the ambit of the local police power. (Cal. Const., art. XI, § 7; *City of San Jose v. Department of Health Services* (1998) 66 Cal.App.4th 35, 47.) Local governments must be allowed the flexibility and authority pursuant to the police power to address existing problems and hazards within their own jurisdictions as they find necessary. The police power provides a balanced and efficient means of dealing with these existing problems and hazards; injecting them and their effect on future project receptors into the CEQA review matrix is not supported by the statute itself or by the case law.

**C. The Court Of Appeal's Ruling That The
Thresholds Should Not Be Invalidated On Their Face Is Not Under
Review And Should Stand.**

As is clear from the above discussion, CEQA simply does not apply in reverse. That does not mean, however, that the District's TAC Receptor Thresholds at issue in this case are per se invalid in all possible applications. Indeed, this Court has not granted review of the issue whether the Court of Appeal correctly upheld the facial validity of the Thresholds, on the ground that they may be utilized for purposes other than requiring a CEQA-in-reverse analysis. Because CBIA mounted only a facial challenge to the Thresholds, it assumed the burden of demonstrating that they cannot be appropriately applied in *any* CEQA context. (*T.H. v. San Diego Unified School District* (2004) 122 Cal.App.4th 1267, 1281.) The Court of Appeal's holding that CBIA has not carried this burden is not under review and therefore should stand.

The District's brief sets forth various ways in which the Thresholds may be used in the CEQA context without application of a reverse CEQA analysis. (Ans. Br. at 53-61.) Perhaps the simplest answer to CBIA's assertion of the Thresholds' total invalidity is to observe that it essentially argues that receptor impacts cannot ever be considered under CEQA. This is mistaken. A project's significant TAC impacts on the existing environment and receptors outside of the area of the project itself –

i.e., on the environment of persons in general — would be within the proper bounds of CEQA analysis. That is to say, if a project itself were found to cause TAC impacts on the environment of persons in general under the standard CEQA analysis, then the Thresholds could potentially be applied to assist in determining whether or not such impacts are significant for purposes of CEQA. CEQA requires environmental review “whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.” (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.)

The Court of Appeal has held CBIA cannot conclusively demonstrate that the Thresholds could *never* provide the basis for such a determination. It may well be, for example, that a project does not emit sufficient pollution to give rise to a significant impact when considered under the District’s existing “source” regulations, but nonetheless does cause significant TAC effects on existing receptors outside the project itself. The Court of Appeal’s holding in this regard is reasonable and is not under review here. Accordingly, its refusal to invalidate the Thresholds on their face and in their entirety based on CBIA’s facial challenge should not be disturbed.

IV. CONCLUSION

For all the reasons set forth above, CEQA does not mandate a “CEQA-in-reverse” analysis requiring all proposed projects to analyze and

mitigate for the impacts of existing environmental conditions on such projects and their future receptors. Moreover, requiring such analysis would be unnecessary as a policy matter because such effects are effectively addressed through other laws, including the exercise of local public agency police power and land use regulation. Finally, the Court of Appeal's ruling that District's TAC Receptor Thresholds do have potentially valid applications, and thus should not be invalidated through the CBIA's facial challenge, is correct, not under review, and should stand.

Dated: April 15, 2014

Respectfully submitted,

MILLER STARR REGALIA

By: 

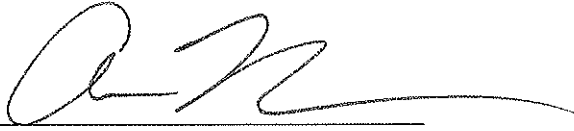
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Solano

WORD COUNT CERTIFICATION

This brief's line spacing is double-spaced, except for footnotes, headings and indented quotations. The brief is proportionately spaced using GC Times 13-point typeface. According to the computer program used to prepare it, the brief contains 5,949 words, including footnotes, and excluding matters outside the body of the brief such as the title page, tables of contents and authorities, and this word certification count.

Dated: April 15, 2014



Arthur F. Coon

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

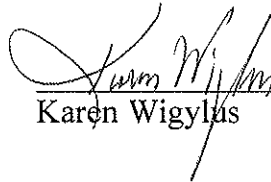
On April 15, 2014, I served true copies of the following document(s) described as **APPLICATION OF LEAGUE OF CALIFORNIA CITIES AND COUNTIES OF TULARE, KINGS, AND SOLANO TO FILE AMICI CURIAE BRIEF IN SUPPORT OF NEITHER PARTY; and AMICI CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES AND COUNTIES OF TULARE, KINGS, AND SOLANO IN SUPPORT OF NEITHER PARTY** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 15, 2014, at Walnut Creek, California.



Karen Wigylus

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(CBIA v. BAAQMD, California Supreme Court, Case No. S213478)

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