Case No. S213478

IN THE SUPREME COURT OF CALIFORNIA

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CALIFORNIA BUILDING INDUSTRY ASSOCIATION
Plaintiff and Respondent

vs.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
Defendant and Appellant

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# CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S OPENING BRIEF

After a Decision by the Court of Appeal in a Published Opinion
First Appellate District, No. A135335 & A136212

On Appeal from a Judgment
Alameda County Superior Court, No. RG10548693
Honorable Frank Roesch, Judge of the Superior Court

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## I. STATEMENT OF THE ISSUE

This Court granted review on the following issue: "Under what circumstances, if any, does the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?"

## II. INTRODUCTION

The general rule is that CEQA requires an analysis of the project's impacts on the environment. It does not require analysis of the environment's impacts on the project, including the future users (receptors) of the project. The whole thrust of the statute is to inform the public and decision makers about the project's potential impacts on the environment, and to avoid or mitigate those impacts. (*See* Pub. Res. Code § 21002 [agencies should not approve projects as proposed if there are feasible means to "substantially lessen the significant environmental effects of such projects; 21002.1(a) ["The purpose of an environmental impact report is to identify the significant effects on the environment of a project . . . and to indicate the manner in which those significant effects can be mitigated or avoided"]; 21002.1(b) ["Each public agency shall mitigate or avoid the significant effects on the environment of projects . . ."] 21002.1(e) [an EIR should focus on "the potential [significant] effects on the environment of a proposed project"]; 21003 [CEQA should be implemented in a way to

conserve financial and other resources "with the objective that those resources may be applied toward the mitigation of actual significant effects on the environment"]; 21003.1 [objectives of comments on "the environmental effects of a project"]; 21004 [restrictions on lead agencies in "mitigating or avoiding a significant effect of a project on the environment]".) Public Resources Code section 21060.5 defines the "environment" 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, objects or historic or aesthetic significance."

The Legislature knows how to craft exceptions to the general rule, and has chosen to do so sparingly. The exceptions demonstrate that, absent specific legislation, the general rule applies. Specific exceptions include school siting, where the Legislature has mandated analysis of the impact of the environment on future school users (Pub. Res. Code § 21151.8); and airports, where the Legislature has mandated analysis of noise and safety issues for persons residing or working in a project area near an airport. (Pub. Res. Code § 21096.)

The Legislature may choose to amend CEQA to create more exceptions or to consider requiring reverse analysis in all cases, but has declined to do so. In fact, two bills were introduced in the 2013 legislative session to amend CEQA to require that an EIR include a discussion of "any significant effects that may result from locating the proposed project near,

or attracting people to, existing or reasonably foreseeable natural hazards or adverse environmental conditions." Neither was adopted. Barring amendment, CEQA should continue to be interpreted according to the plain meaning of its terms—it requires analysis of the impact of the project on the environment, not the reverse. This is the only interpretation honoring the Legislature's explicit rule that courts are not to expand CEQA beyond the terms of the statute. (Pub. Res. Code § 21083.1.)

Four published opinions in the court of appeal have examined this issue and each concluded that CEQA does not require reverse analysis. The controversy in this arena stems not from any ambiguity in the statute or confusion over the Legislature's intent. Instead, it arises largely as the result of one subsection of one CEQA Guideline adopted by the Natural Resources Agency, which exceeds the scope of the statute by purporting to require a reverse analysis. (14 C.C.R. § 15126.2(a).) In addition, the CEQA Guidelines include an environmental checklist known as "Appendix G," which includes some provisions that instruct lead agencies to analyze the potential impact of the existing environment on the project, again beyond the scope of the CEQA statute. Notably, these administrative overreaches occurred 28 years after CEQA was enacted, three years after the first published decision disavowing reverse application, and without citation to any intervening statutory amendments or authorization. In other words, the

Natural Resources Agency created the controversial language from whole cloth without any direction from the Legislature.

The Bay Area Air Quality Management District ("District") relied on the discredited language in Guideline Section 15126.2(a) to craft and adopt its Toxic Air Contaminant (TAC) Receptor Thresholds at issue in this case. The TAC Receptor Thresholds are a perfect example of what is wrong with applying CEQA in reverse. The TAC Receptor Thresholds are designed to discourage development in many urban infill and transit-oriented locations, and to require project applicants to mitigate for the existing air quality issues caused by others.

If building in an area affected by air quality issues triggers CEQA because future residents who will be attracted to live there may be exposed to degraded air quality, what principled distinction prevents CEQA from invading every aspect of project development? Applying CEQA in reverse is especially overbearing when evaluating urban infill projects, which by definition, are surrounded by existing development. Urban sites can be impacted not just by surrounding air quality issues, but also odor, light, shadow, vibration, and soil issues – indeed even communicable disease. If the existing effects of surrounding development, or the existing natural environment alone, is enough to require a new project to conduct environmental impact analysis and propose mitigation, CEQA is truly turned on its head.

If the societal goal is to avoid the risk of polluted air, the law should be aiming to clean up the air. Imposing CEQA "mitigation" on the new development does nothing to clean up the ambient air, and does nothing for any existing residents who already suffer from ambient air pollution. If the substantive environmental laws currently enacted do not adequately address an impact on a future occupant of a project, the Legislature can correct that deficiency.

If the societal goal is disclosure of the condition of property, including ambient conditions, to potential new inhabitants, the robust real estate disclosure laws address this issue. Those laws could be examined for possible further amendment if the Legislature concluded that more disclosure is desirable. Expanding the reach of agencies and regulation by stretching the plain meaning of CEQA is not the answer and is expressly prohibited by the statute itself, as noted above.

Resolving the question presented should lead to the Natural Resources Agency appropriately conforming its CEQA Guidelines, including the Appendix G checklist. More directly, it should result in a writ commanding that the District set aside its Thresholds that rely on a reverse application of CEQA.

## III. SUMMARY OF FACTS

### A. THE THRESHOLDS

On June 2, 2010, the District approved Resolution No. 2010-06 (AR

1:00004[1]) by which it adopted its new CEQA Thresholds. (AR 1:00003.) The District's Executive Officer then adopted accompanying policies and guidelines directing how the District expects the Thresholds to be implemented (the "Guidelines," together with the new CEQA Thresholds, collectively, the "Thresholds").[2] (The District's June 1, 2010 Guidelines are found at AR 9:2048-2264.) Most of the Thresholds address the District's jurisdictional bailiwick of regulating *sources* of air pollution. The Thresholds address new sources of criteria air pollutants and precursors such as $NO_x$ and $PM_{10}$, carbon monoxide, greenhouse gasses, toxic air contaminants, and odors. (AR 1:00006-7; 9:02063-64.) These Thresholds are used to determine whether a project would have a significant effect on the environment. For example, the thresholds "for operational-related criteria air pollutant and precursor emissions . . . represent the levels at which a project's individual emissions of criteria air pollutants or

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1 Cites to the Administrative Record, Clerk's Transcript and Joint Appendix take the format of "[AR/CT/JA] [*Volume*]:[*Page Number*]".

2 The District's extensive Guidelines incorporate and seek to implement the CEQA Thresholds. (9 AR 02062-69.) For example, the Guidelines state "The Thresholds of Significance for local community risk and hazard impacts are identified below, which apply to both the siting of a new source and to the siting of a new receptor. Local community risk and hazard impacts are associated with TACs and PM2.5 because emissions of these pollutants can have significant health impacts at the local level. If emissions of TACs or PM2.5 exceed any of the thresholds listed below, the proposed project would result in a significant impact. (9 AR 02065-66.)

precursors would result in a cumulatively considerable contribution to the [air basin's] existing air quality conditions." (AR 9:02064.) The District explains in the Thresholds that "[o]perational emissions typically represent the majority of a project's air quality impacts . . . Operational-related activities, such as driving, use of landscape equipment, and wood burning, could generate emissions or criteria air pollutants and their precursors, GHG, TACs, and PM." (AR 9:02076.)

However, the Thresholds also encompass impacts that the existing environment may have on future occupants of a project. The District did not rely on any of its statutory powers to attempt to affect the siting and design of receptor projects, but instead relied solely on CEQA Guideline 15064.7, which authorizes the promulgation of generally applicable thresholds. (AR 1:00001.) Thus, the District attempted to indirectly regulate such projects through CEQA to effectuate its vision of how land-use planning should occur in the Bay Area. To do so, the District adopted Toxic Air Contaminant ("TAC") thresholds, also called risk and hazard thresholds, applicable to "new receptor" projects—*e.g.*, new residential projects, hospitals, schools, daycare centers, parks, and nursing homes (the "TAC Receptor Thresholds"). (AR 1:00006-7, 3:00708.) The TAC Receptor Thresholds are intended to address impacts associated with TACs and fine particulates. (AR 9:2065.) The TAC Receptor Thresholds and Guidelines generally provide that a project will have potentially significant

impact for CEQA purposes if it is located within an area that the District's data predicts will cause an increase in certain health risks due to emissions sources surrounding a project site. (AR 9:2063.) These receptor thresholds shift the burden of addressing existing ambient air pollution away from the source of air pollution and place it on developers of projects that will be built in areas affected by the existing air pollution. For example, developing near major roadways or heavily urbanized areas will require the developer to mitigate the existing environment. (AR 9:2104; 2112-2113 [receptor mitigation includes "1. Increase project distance from freeways and/or major roadways. 2. Redesign the site layout to locate sensitive receptors as far as possible from any freeways, major roadways, or other non-permitted TAC sources . . . 3. In some cases, BAAQMD may recommend site redesign. BAAQMD will work closely with the local jurisdiction and project consultant in developing a design that is more appropriate for the site"].)

The District has also created what amount to "EIR Only Zones" in urbanized areas. Projects proposed in these areas might otherwise take advantage of SB 375's CEQA streamlining or other CEQA exemptions. But under the District's TAC Receptor Thresholds, pre-existing air quality issues can create a "fair argument" that development will cause a

significant impact by being located within that area.[3] In other words, a project that might otherwise be exempted from CEQA review, or might be subjected to a negative declaration, would now be required to have an EIR prepared prior to project approval solely because of the District's adopted TAC Receptor Thresholds, calling for CEQA examination of impact of the environment on the project.

Similarly, the District's TAC Receptor Thresholds establish that a city's general plan update or new specific plan will trigger a significant impact unless the plan designates "overlay zones" around existing and planned TAC sources and within 500 feet of all freeways. (AR 1:00007.) While the Thresholds are silent as to what this overlay zone should require, earlier drafts of the Guidelines referred to the overlay as a "buffer" (AR 9:02043) and the District's guidance explains that buffers between receptors and sources would "prevent many high-risk projects from being

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[3] The Governor's Office and Planning Research explains "If another agency's more stringent thresholds are based upon substantial evidence of environmental effects, then the fair argument test would seem to require preparation of an EIR even though the project does not exceed the Lead Agency's threshold . . . Although there is no absolute means of avoiding this problem, the agency preparing the thresholds may minimize it by consulting with other agencies during the drafting process and working out inconsistencies before adoption." (Office of Planning and Research, "Thresholds of Significance," 1994, available at http://ceres.ca.gov/ceqa/more/tas/Threshold.html; See also *County Sanitation Dist. v. County of Kern* (2005) 127 Cal.App.4th 1544, 1588-89 (exceedance of air district threshold requires preparation of EIR)

considered or proposed in the first place, thereby eliminating the necessity for project-level mitigation." (AR 16:3337.) The District's label of "high risk" projects would include transit-oriented development, urban infill mixed use projects, and affordable housing – in other words, the very type of smart growth development that the region (and state) are actively promoting to reduce automobile use and greenhouse gas emissions as it seeks to meet the requirements of AB 32 and SB 375. (*See, e.g.*, AR 27:06092-093.)

Thus, if a project is proposed within an overlay zone it will be subject to heightened CEQA review for exposing people to the existing environment. Even the District recognized that its receptor thresholds were "unique and without precedent." (AR 27:06052; *see also* AR 7:01518 [District's Director of Planning, Rules and Research (AR 9:02049) stating Thresholds go "far beyond what any other air district has."])

The Thresholds also require reverse CEQA analyses when they require an analysis of whether a project includes exposing a new receptor "to existing or planned odor sources." (AR 9:02066, 2121.) If a project would locate receptors within a specified distance of an existing odor source with a history of at least 5 odor complaints per year, a potentially significant impact would exist. (AR 9:02066, 2121.) The District's proposed mitigation for the existing odor sources impacts on new receptors is quite simple: do not build a project near an odor source. (AR 9:02122

[projects should plan to "avoid siting receptors near odor sources"].) If relocating a project is not feasible, the District recommends technological mitigation be added to the source of the smells. (AR 9:2122-2123.)

## B. THE PLANNING COMMUNITY'S RESPONSE

The Bay Area's professional planning community reacted strongly to the TAC Receptor Thresholds. (*See, e.g.*, AR 1:0258-62; AR 3:00609-10 (Association of Bay Area Governments ("ABAG") comments "it would be counter productive if [the District's] proposed threshold changes act as a deterrent to growth in these [infill] areas and push development to greenfield sites in the outer suburbs, where the amount of driving required would be greater"); AR 3:00771-77 (San Francisco Planning Department comments); AR 27:06050 (Santa Clara Valley Transportation Authority comments [costs of additional studies required by Thresholds "may further drive away development in areas where it is needed"]); AR 27:06092-093 (BART) comments that TAC Thresholds would "limit or preclude" transit oriented development); AR 27:06098-99 (City of Walnut Creek Comments); AR 28:06210-11 (City of Oakland comments); AR 28:06230-31 (additional ABAG comments); AR 27:6066-67 (Bay Area Planning Director's Association [whose members include planners from 118 jurisdictions] comments that Thresholds will inhibit infill; AR 5:01087 (Center for Creative Land Recycling states Thresholds will be used by project opponents to stop affordable housing projects); AR 5:01091 (Bay

Area Council informs District the TAC Thresholds "will impact negatively transit oriented infill development...").

The City and County of San Francisco Planning Department informed the District that the proposed TAC Receptor Thresholds "represent a step backward rather than forward in terms of changing land use patterns" and stated the "overlay zone" threshold represented a "wasteland buffers" mandate. (AR 3:00771, 00774.) BART commented that the overlay zone threshold would "limit or preclude development adjacent to existing and planned sources of TAC and PM2.5" and that the Thresholds "will severely undermine the significant public investment in public transit and TOD [Transit Oriented Development] in the Bay Area." (AR 27:06092.) BART urged the District to revise its approach to deal with the sources of pollution rather than foreclosing development adjacent to existing sources. (AR 27:06093.)

As to the precise issue before this Court, local agencies informed the District that the proposed Thresholds were "completely opposite" to CEQA's purpose because they required an "evaluation of the *environment's* impacts on the project." (AR 27:06098; *see also* AR 27:06089.) The District disagreed. (AR 27:06087; *see also* AR 8:01893.) This litigation ensued.

## IV. SUMMARY OF PROCEDURAL HISTORY

### A. TRIAL COURT PROCEEDINGS AND RULING

CBIA timely petitioned the superior court for review of the District's Thresholds. Following demurrers and merits briefing, the trial court entered a judgment and issued a peremptory writ of mandate ordering the District to rescind its approval of the Thresholds. (CT 8:2252-2256.) In its statement of decision, the trial court explained the District's "promulgation of the Thresholds is a 'project' under CEQA and, as such, [the District] is obligated by CEQA to evaluate the potential impact on the environment consequent to the project." (CT 8:2243.) The trial court explained that there was sufficient evidence in the record to support the claim that the "Thresholds might discourage urban infill development, encourage suburban development or change land use patterns . . . ." (CT 8:2243-2245.) The trial court did not reach CBIA's remaining claims including the issue of the reverse application of CEQA. (CT 8:2246; JA 2:369.)

### B. FIRST DISTRICT COURT OF APPEAL'S OPINION

The District appealed the judgment. On August 13, 2013, the Court of Appeal filed its opinion (the "Opinion") reversing the trial court's order granting CBIA's petition for writ of mandate.[4]

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[4] The trial court had also awarded CBIA reasonable attorneys' fees pursuant to Code of Civil Procedure section 1021.5. The District separately appealed the fee award and the parties agreed to consolidate the

The Opinion held that the "Thresholds were not subject to CEQA review" because CEQA Guideline[5] 15064.7, which encourages local agencies to adopt general thresholds of significance, does not state that local agencies may be required to evaluate whether the thresholds themselves could lead to potentially significant environmental impacts. (Opinion at 12.) Moreover, requiring CEQA review in addition to the District's non-CEQA public process would have "resulted in a duplication of effort, at taxpayer expense and too little if any purpose." (Opinion at 11-14.) As a separate basis for reversal the Opinion held that the Thresholds are not a CEQA project because any environmental effects from the Thresholds are too speculative. (Opinion at 14-20.)

The Court of Appeal did reach the central issue not reached by the trial court—CBIA's claim that several of the receptor Thresholds violate CEQA by requiring analysis of the impacts of the environment on the project. While the Opinion purports to rest on the standard of review for a constitutional challenge to a statute (Opinion at 25), the Opinion is also the first case to express disagreement with the unbroken line of cases *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464 (*"Baird"*), *City of*

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briefing. The Court of Appeal reversed the award of attorneys' fees based on its determination that CBIA was no longer the prevailing party. (Opinion at 29.)

5 The "CEQA Guidelines" are found in Title 14, Chapter 3 of the California Code of Regulations.

*Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889 ("*Long Beach*"), *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1617 ("*SOCWA*"]) and *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 474 ("*Ballona*") that hold CEQA does not require analysis of the existing environment on projects – or in the *SOCWA* court's words "make CEQA work in reverse." (*SOCWA*, 196 Cal.App.4th at 1617.)

CBIA timely petitioned this Court for review on three issues. This Court granted review on the single issue of "[u]nder what circumstances, if any, does the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?"

## V. STANDARD OF REVIEW

Whether CEQA requires an analysis of the existing environment's impact on a project presents a pure question of statutory interpretation.

When construing a statute, the Court begins with "the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" (*Moyer v. Workmen' Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645.) "An equally basic rule of statutory construction is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." (*Rich v.*

*State Board of Optometry* (1965) 235 Cal. App.2d 591, 604; *Moyer*, 10 Cal.3d at 230.) Although a court may properly rely on extrinsic aids, it should first turn to the words of the statute to determine the intent of the Legislature. (*People v. Knowles* (1950) 35 Cal.2d 175, 182; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 764.) "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Knowles*, 35 Cal.2d at 183.)

Principles of statutory construction related specifically to CEQA reinforce the courts' obligation to heed the plain meaning of the statute and to interpret CEQA to protect the environment, not to protect proposed projects from the environment. This Court has held that the Legislature intended CEQA "to be interpreted as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 390.) Similarly, the Legislature has taken the (perhaps unique) step of expressly providing that the courts are not to interpret CEQA "in a manner which imposes procedural or substantive requirements beyond those explicitly stated in" CEQA or the CEQA Guidelines. (Pub. Res. Code § 21083.1; *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1515, 1523["the literal, i.e., explicit, approach to statutory construction is mandatory under CEQA" and

rejecting claim that duty to "request a hearing" also included implicit duty to set a hearing date].)

The issue presented will also require this Court to determine what weight it will afford certain regulations promulgated by the Natural Resources Agency that are commonly referred to as the CEQA Guidelines.

Government Code section 11342.2 provides the general standard of review for determining the validity of administrative regulations. That section states that "[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code § 11342.2.) "The question is whether the regulation alters or amends the governing statute or case law, or enlarges or impairs its scope. In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void. This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency." (*Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 [footnotes omitted].)

## VI. ARGUMENT

### A. THE PURPOSE OF CEQA IS TO PROTECT THE ENVIRONMENT, NOT TO PROTECT PROJECTS FROM THE ENVIRONMENT

CEQA is concerned with the potential of new development to impact the physical environment, not the potential of the environment to impact new development. For example, the "purpose of an environmental impact report is to identify the significant effects on the environment of a project . . . and to indicate the manner in which those significant effects can be mitigated or avoided."[6] (Pub. Res. Code § 21002.1(a); *see also* Pub. Res. Code §§ 21002.1(b); 21002.1(e); 21004; 21100(a) [CEQA requires an EIR when a project "may have a significant effect on the environment"].) CEQA defines "environment" as "the physical conditions which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historical or aesthetic significance. (Pub. Res. Code § 21060.5.)

This Court has recognized CEQA's intent to protect the physical environment from its earliest decisions interpreting the statute. "In an era of commercial and industrial expansion in which the environment has been

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6 Since 1976, CEQA defines "significant effect on the environment" as "a substantial, or potentially substantial, adverse change in the environment." (Pub. Res. Code § 21068.)

repeatedly violated by those that are oblivious to the ecological well-being of society" the Court recognized that CEQA served the important purpose of forcing agencies to "consider the possible adverse consequences *to the environment of the proposed activity* and to record such impacts in writing." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 254-255 [emphasis added] [disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888]; *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 112 ["In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties."]

CEQA cannot fairly be read to support the notion that the Legislature intended CEQA to protect projects (including the future inhabitants of the projects) from the existing environment. The whole thrust of the statute is to inform the public and decision makers about the project's potential impacts *on the environment*, and to avoid or mitigate those impacts. (Pub. Res. Code §§ 21002.1(b); 21002.1(e); 21004; 21100(a).) As one Court of Appeal explained when examining the reach of CEQA: "The major statutory emphasis is on matters that can be seen, felt, heard, or smelled, i.e., consequences resulting from physical impacts on the environment. (*Martin v. City and County of San* Francisco (2005) 135 Cal.App.4th 392, 403 [citing *Cathay Mortuary, Inc. v. San Francisco*

*Planning Com.* (1989) 207 Cal.App.3d 275, 279 [rejecting a claim that shadow affecting proposed park location required CEQA analysis and noting that "CEQA will come into play only [with] a disruption of the physical environment."].)

No action by the Legislature since the original adoption of CEQA indicates an intention to expand the statute to generally require an analysis and mitigation of the existing environment's impact on a project and its future users. Indeed, the Legislature has allowed only narrowly tailored exceptions requiring reverse analysis. As discussed further below, the Legislature has recently declined to pass bills which would have imposed a new state mandate for reverse CEQA analysis. The Legislature is aware how to require the analysis that the District has attempted to require through its odor and TAC Receptor Thresholds, and has chosen not to require it. This Court should respect the Legislature's policy choices.

## B. AN UNBROKEN LINE OF CASES HAS HELD THAT A LEAD AGENCY DOES NOT NEED TO ANALYZE THE IMPACTS OF THE ENVIRONMENT ON A PROJECT OR ITS USERS

The published decisions that have considered whether CEQA requires analysis of environment on the project have uniformly rejected that proposition. A close examination of these cases reveals the strength of their analysis across a broad spectrum of fact patterns, from impacted soil, to air

quality, to odor, to the global threat of sea level rise. This analysis should be affirmed.

The first case to directly address whether CEQA requires an analysis of the impacts of the existing environment on a project and its users was *Baird*. In *Baird* the Court held that CEQA does not require an EIR for a project that "might be affected by preexisting conditions but will not change those conditions or otherwise have a significant effect on the environment." (*Baird*, 32 Cal.App.4th at 1466.) The petitioners in that case argued in opposition to a proposed addiction treatment center that "*preexisting* physical conditions, consisting of the various forms of purported contamination, will have *an adverse effect on the proposed facility and its residents*." (*Id.* at 1468 [original emphasis].)

The Court of Appeal concluded that "[a]ny such effect is beyond the scope of CEQA and its requirement of an EIR. The purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment. CEQA is implicated only by adverse *changes* in the environment." (*Id.* [original emphasis].) The *Baird* court concluded that "[t]o require an EIR in the present context, where the proposed project is challenged on the basis of preexisting environmental conditions rather than an adverse change in the environment, would impose a requirement beyond those stated in CEQA or its guidelines, and is thus prohibited." (*Id.* at 1469.)

The next case to address whether CEQA should be applied in reverse is *Long Beach*. In *Long Beach*, the petitioners argued that the proposed construction of a school intended to serve over 1,800 students was insufficient because it failed to discuss the project's cumulative impacts on air quality and traffic on staff and student health due to already existing air pollution from nearby freeways. (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 895, 905.) The Court of Appeal concluded that "generally, '[t]he purpose of an [EIR] is to identify the significant effects on the environment of a project . . .' [citations], *not the impact of the environment on the project*, such as the school's students and staff . . . Accordingly, [petitioner's] criticism of LAUSD's analysis for failure to consider the cumulative effects of air quality 'on staff and student health' is not the aim of the cumulative impacts analysis." (*Id.* at 905 [original emphasis].) The school district in *Long Beach* did analyze the non-cumulative risks of existing air contamination on students because it was specifically required to do so by CEQA section 21151.8. (*Id.* at 903-904; *see also* Section VI.D, below.)

The *Long Beach* court's careful distinction between the specific duty to conduct reverse analysis pursuant to section 21151.8, versus the absence of any such duty under CEQA generally, is instructive. Pursuant to section 21151.8, analysis of the impacts of existing air quality issues on future students and teachers would be required. But such analysis was not required

under CEQA generally, so petitioner's allegation that the school failed to perform an adequate cumulative impact analysis failed.

The most in-depth analysis of why CEQA does not require reverse CEQA analyses is found in *SOCWA*. There, the agency managing a sewage treatment plant argued that the proponents of a residential development project should be required to mitigate for existing odors emanating from the sewage plant to protect the future residents from the impacts of those odors. (*SOCWA*, 196 Cal.App.4th at 1614.) The court soundly rejected the agency's attempt to use CEQA to protect a proposed project and its residents from the existing environment. The court explained that the "unmistakable" Legislative intent was that CEQA is intended to protect the environment. (*Id.* at 1613.)

The *SOCWA* court walked through the legislative intent of CEQA, including sections 21000 and 21001, and concluded that even that broad language expressing legislative intent to "protect environmental quality" did not transform CEQA into "a weapon to be deployed against all development ills." (*Id.* at 1613-1614.)

The court noted that CEQA requires an EIR for any project that "may have a significant effect on the environment" and that CEQA defines the "environment" 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, objects of historical or aesthetic significance."

(*Id.* at 1614 [citing Pub. Res. Code §§ 21060.5, 21100(a), 21101, 21151(a) [original emphasis].) Thus, because the proposed residential development would not make changes to the sewage plant or its odor producing operations, the agency failed to identify any potential effects of the project that would require the preparation of an EIR. (*Id.* at 1615.)

The *SOCWA* court next turned to CEQA Guideline section 15126.2 and Appendix G, which the petitioner had relied on to assert that CEQA required analysis of odor impacts. The Court quickly dispensed with Appendix G: "A few questions on a suggested checklist in an appendix to the guidelines do not seem to us to provide a strong enough foundation on which to base a reversal of the entire purpose of CEQA." (*Id.* at 1616.) And as to Guideline 15126.2, the court concluded that the examples within the Guideline such as risks from wildfires and active faults "are not examples of environmental effects wrought by development." (*Id.*) The court concluded "A true example with respect to, say, wildfires would be increasing the risk in a fire-prone area by people using their fireplaces or their backyard barbeques or by children playing with matches. The guidelines are entitled to great weight, except when they are inconsistent with controlling law." (*Id.*)

The Court of Appeal stated that, to the extent CEQA Guidelines could be read to require an analysis of the environment's effect on a project, the Guidelines would be unauthorized because "[t]he Legislature

has expressly forbidden courts to interpret CEQA or the regulatory guidelines to impose procedural or substantive requirements beyond those explicitly stated in the act or in the guidelines.[]. This prohibition would encompass expanding CEQA to cover situations in which the project, not the environment, is alleged to be at risk." (*Id.* at 1617 [internal citations and quotations omitted]; *see also Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1218-1219 [guidelines invalid if they exceed statutory scope].)

The court concluded that odor from existing facilities was not properly addressed through CEQA, but instead through the relevant air district's regulations that governed the sewage treatment plant. (*Id.* at 1617-1618.)

The *Ballona* decision which followed *SOCWA*, should have closed the door on any argument about whether CEQA mandated analysis of the impact of the environment on the project. *Ballona* rejected the language in Guideline 15126.2(a) that purported to mandate reverse application of CEQA.

In *Ballona*, the petitioners claimed, among other things, that an EIR for a mixed-use development project did not contain an adequate discussion of the impacts of sea-level rise on the project. (*Ballona*, 201 Cal.App.4th at 464, 472) The *Ballona* court explained 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 . . . Contrary to Guidelines section 15126.2, subdivision (a) [which has been interpreted to require an analysis of the impacts of the environment on a project], we hold that an EIR need not identify or analyze such effects." (*Ballona*, 201 Cal.App.4th at 474.)

The *Ballona* court also concluded that Guideline 15162.2(a) was only valid to the extent it would require analysis of "impacts on the environment caused by the development rather than impacts on the project caused by the environment." (*Id.* at 474 n. 9.) As to Appendix G, the court explained that:

> a few of the questions on the form concern the exposure of people or structures to environmental hazards and could be construed to refer to not only the project's exacerbation of environmental hazards but also the effect on users of the project and structures in the project of preexisting environmental hazards . . . to the extent that such questions may encompass the latter effects, the questions do not relate to environmental impacts under CEQA and cannot support an argument that the effects of the environment on the project must be analyzed in an EIR.

(*Id.* at 474.)

In contrast to the careful statutory construction set forth in the *Baird* line of cases, the Opinion below offers no colorable statutory basis to require reverse analysis, other than the notion that CEQA is concerned with human health. Construing CEQA as applicable to all that affects human

health essentially confers upon it boundless application. That interpretation cannot stand.

This Court should affirm the reasoning and holdings of *Baird*, *Long Beach*, *SOCWA*, and *Ballona* that the statutory text of CEQA only requires an analysis of the adverse impacts of a project on the existing environment, not the reverse. As discussed below, the only exceptions to this rule would be where the Legislature expressly so provides. Neither a state nor local agency is permitted to expand CEQA beyond its statutory purpose and meaning.

## C. ONE SECTION OF THE CEQA GUIDELINES HAS DISTORTED THE PURPOSE OF CEQA AND SHOULD BE REJECTED

### 1. CEQA Guideline 15126.2 (a) Includes Unauthorized Requirements for EIRs

Despite the clear language of CEQA and the published case law dating back to *Baird*, the CEQA Guidelines continue to include language in section 15126.2(a) that distorts the intent of the statute. CEQA requires the Office of Planning and Research to "prepare and develop proposed guidelines" to implement the statute, and the Natural Resources Agency (formerly the "Resources Agency") to certify and adopt those "guidelines" through formal public rulemaking procedures (Pub. Res. Code § 21083(a), (e).)

Like all other state agencies, the Natural Resources Agency has no authority to promulgate regulations that exceed their authorizing statute. (Gov. Code § 11342.2.) Yet that is precisely what has occurred. The unauthorized language in CEQA Guideline 15126.2(a), identified in *SOCWA* and *Ballona,* is what the District relies on to justify requiring reverse CEQA analyses. (AR 27:06087 ["This approach to evaluating risks to new occupants of a project from existing sources of risk has been endorsed by the Resources Agency in Section 15126.2(a) of the State CEQA Guidelines"].)

Subsection (a) of that Guideline, originally adopted in 1998 (California Register 98, No. 44, October 26, 1998), begins by restating that CEQA requires an EIR to analyze the impacts of a project on the environment:

> (a) The Significant Environmental Effects of the Proposed Project. An EIR shall identify and focus on the significant environmental effects of the proposed project. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of

> the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services.
>
> (14 C.C.R. § 15126.2(a).)

The Guideline then departs from the plain meaning of CEQA, including the statutory definition of the "environment" (section 21060.5) and "significant effect on the environment" (section 21068), and without statutory authority, adds the following:

> The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. For example, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there. Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.
>
> (14 C.C.R. § 15126.2(a).)

In 2005, pursuant to CEQA section 20183, the Office of Planning and Research (OPR) prepared and the Natural Resources Agency certified and adopted the last sentence of Guideline 15126.2(a) quoted above. (Final Statement of Reasons for Regulatory Actions, December 2009, pp. 41-42, available online at ceres.ca.gov/ceqa/docs/ Final_Statement_of_Reasons.pdf.). The Natural Resources Agency argued that "the decision in *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, does not preclude this analysis," reasoning that the Guideline was limited to "hazards which the presence of a project could exacerbate (i.e., potential upset of hazardous materials in a flood, increased need for firefighting services, etc.)." (Final Statement of Reasons for Regulatory Actions, December 2009, p. 43, available online at ceres.ca.gov/ceqa/docs/ Final_Statement_of_Reasons.pdf.).

The CEQA Guidelines' requirement, not found in the statute, that lead agencies analyze the effect of the existing environment on the users of a project, has led to expensive, unnecessary expansion of CEQA analysis statewide. Despite the caveat in the Natural Resources Agency's Final Statement of Reasons, which at least acknowledges *Baird*, the Guidelines themselves contain no limitation on the demand for reverse CEQA analysis. To restore the interpretation of CEQA to its intended purpose, the above

expansion of 15126.2(a) should be rejected as unauthorized.[7]

2. Appendix G to the Guidelines Calls for Unauthorized Application of CEQA.

The contents of Appendix G to the CEQA Guidelines provides the most direct explanation of why CEQA is sometimes misinterpreted to require analysis of the impacts of the environment on the project. Appendix G consists of a sample "Environmental Checklist Form," which according to the CEQA Guidelines, "may be used to meet the requirements for an initial study." (14 C.C.R. Ch. 3, Appendix G; 14 C.C.R. § 15063(f).) Typically, Appendix G is where a lead agency begins its evaluation of whether CEQA applies to a proposed project, and is also used to frame the scope of analysis in an EIR. Appendix G, while not binding on any lead agency, is the de facto starting point for CEQA analysis statewide.

One Court of Appeal summarized the role of Appendix G as follows:

> The initial study is largely a creature of the Guidelines (see discussion to Guidelines, § 15063); CEQA refers to it only glancingly (e.g., § 21080, subd. (c)(2)). The Guidelines require the lead agency to "conduct an Initial Study to determine if the project may have a significant effect on the environment." (Guidelines, § 15063, subd. (a).) The initial study must

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[7] The Governor's Office of Planning and Research has declined to make any revisions to Guideline 15126.2 in response to the *Baird* line of cases pending this Court's review of the issue presented. (MJN Ex. F, p.7 § IV.)

> include, among other things, a description of the project (Guidelines, § 15063, subd. (d)(1)); an identification of its environmental effects "by use of a checklist, matrix, or other method" (Guidelines, § 15063, subd. (d)(3)); "[a] discussion of ways to mitigate the significant effects identified, if any" (Guidelines, § 15063, subd. (d)(4)); and "[a]n examination of whether the project would be consistent with existing zoning, plans, and other applicable land use controls." (Guidelines, § 15063, subd. (d)(5).)

(*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1376.)

Appendix G suggests that lead agencies should analyze the impacts of the environment on a project. For example, Appendix G states:

> A "No Impact" answer is adequately supported if the referenced information sources show that the impact simply does not apply to projects like the one involved (e.g., the project falls outside a fault rupture zone). A "No Impact" answer should be explained where it is based on project-specific factors as well as general standards (e.g., the project will not expose sensitive receptors to pollutants, based on a project-specific screening analysis).

Appendix G also asks questions such as "Would the project . . . [e]xpose people or structures to potential substantial adverse effects, including the risk of loss, injury or death involving . . . rupture of a known earthquake fault . . . ."

Without any analysis of whether impacts of the existing environment on future users of a project is proper, certain lead agencies have routinely

applied Appendix G and Guideline section 15126.2(a) and have analyzed the impact of the existing environment on the future users of the project as part of the CEQA process.

Because lead agencies, and even project applicants, have felt bound by the CEQA Guidelines' overreaching interpretation of CEQA, the issue is sometimes presented to the courts as a question of adequacy of the analysis, not the more fundamental question of whether the analysis was required in the first place. Courts that have the matter presented in that fashion have taken the case at face value and evaluated whether lead agencies had substantial evidence to support their conclusions about impacts of the environment on a project. For example, the opinion in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884 contains an analysis of whether a city properly addressed whether the project "would expose people or structures to 'substantial risk of loss, injury or death' which is, in substance, the language of appendix G . . . ." (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896.) Of course, because the parties did not argue whether such an analysis was beyond the scope of CEQA, any holding from that case, or similar cases, would be irrelevant to the issue presented to this Court because it is "axiomatic that an opinion is not authority for an issue not considered therein." (*Santa Clara County Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 243 [*citing People v. Banks* (1993) 6 Cal.4th 926, 945 and

cases cited therein]; *Cal. Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 632.)

*SOCWA* and *Ballona* correctly identified how the CEQA Guidelines improperly attempt to expand the scope of CEQA and this Court should affirm that the CEQA Guidelines are only consistent with CEQA to the extent that they require analysis of "impacts on the environment caused by the development rather than impacts on the project caused by the environment." (*Ballona*, 201 Cal.App.4th at 474 n. 9; *See also Id.* at 474 analysis of "effects on users of the project and structures in the project of preexisting environmental hazards" not required by CEQA].)

## D. THE IMPACTS OF THE EXISTING ENVIRONMENT ON A PROJECT SHOULD ONLY BE ANALYZED UNDER CEQA WHEN REQUIRED BY THE CEQA STATUE

There is currently no general mandate in CEQA to analyze the impacts of the existing environment on a project and its future users. It is the prerogative of the Legislature to create one if it chooses. The District has relied on CEQA's specific statutory requirement, that selecting a new school site requires analysis of the health impacts on future pupils from existing environmental hazards, as if that were evidence that analysis of the environment's effect on a project is within the scope of CEQA generally. (*See* Pub. Res. Code § 21151.8(a)(2)(A); (a)(3)(B)(i) [requiring an analysis

of all sources of hazardous emissions within a quarter mile of a school site].)

Section 21151.8 demonstrates the high level of focus the Legislature put on the safety of students as a policy matter. The section, which effectively restates the requirements found in Education Code section 17213, imposes specific procedural requirements that must be met prior to an environmental impact report being certified or a negative declaration being approved for a project involving the purchase of a schoolsite or the construction of a school. The environmental document must disclose the status of any hazardous waste on the project site, whether there are any pipelines on the project site, and whether a site is within 500 feet of a freeway of busy traffic corridor. (Pub. Res. Code § 21151.8(a)(1).) The school district is required to consult with the relevant air districts regarding sites within a quarter mile of the project that might reasonably be anticipated to emit hazardous emissions or waste. (Pub. Res. Code § 21151.8(a)(2).) Further, the lead agency is required to make specific findings prior to project approval including that the health risks from the facilities identified by an air district "do not and will not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school" or that such risks would be reduced through corrective measures imposed by another agency with jurisdiction prior to school occupancy. (Pub. Res. Code § 21151.8(a)(3).)

For freeways and busy roadways, a school district must undertake an analysis consistent with Health & Safety Code section 44360 (which requires health risk assessments be prepared in accordance with the Office of Environmental Health Hazard Assessment's guidelines) that concludes that the air quality at the school site does not pose "significant health risks to pupils." (Pub. Res. Code § 21151.8(a)(3)(iii).) The extreme specificity of Section 21151.8 lends no support to the proposition that there is a general obligation to conduct reverse CEQA analyses.

Likewise, the District has previously relied on cases such as *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, where the impacts of the environment on future users of a project are analyzed. However in that case, there was also a statutory duty to analyze the impacts of an existing airport on new surrounding development. (*Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1081 [CEQA § 21096 required city to address airport-related safety hazard and noise problems in EIR].)

These specific requirements to analyze impacts on a project rather than impacts on the environment demonstrate that the Legislature is well aware how to expand CEQA when that is its intent. The implication from sections 21096 and 21151.8 is not that CEQA generally requires an analysis of all the existing environments potential impacts on a project and its users. Instead, these provisions evidence that, in response to specific public policy

concerns, the Legislature has expanded the scope of CEQA to include specific provisions for reverse analyses in two particular circumstances. Expanding these narrow statutory exceptions to be a generally applicable CEQA requirement would violate CEQA's mandate that the courts are statutorily prohibited from interpreting CEQA "in a manner which imposes procedural or substantive requirements beyond those explicitly stated in" CEQA or its Guidelines. (Pub. Res. Code § 21083.1.)

If the Legislature determines that the analyses advocated by the District should be included within CEQA's mandate, the Legislature may amend CEQA to abrogate the holdings of *Baird, Long Beach, SOCWA, and Ballona.* It is noteworthy that two bills to abrogate those cases were circulated in 2013, but were not adopted.[8] AB 953 and SB 617 would have imposed a new state mandate that an EIR include a discussion of "any significant effects that may result from locating the proposed project near, or attracting people to, existing or reasonably foreseeable natural hazards or adverse environmental conditions" and would amend the definition of the "environment" and a "significant effect on the environment" to include the health and safety of people affected by the physical conditions located on a

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[8] In *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 571, fn.9, this Court took judicial notice of the Legislature's failure to adopt bills that would have amended the scope of the Unfair Competition Law as an aid in its interpretation of the statute.

project site. (CBIA's Motion for Judicial Notice ["MJN"] [9] Ex. A [Assem. Bill No. 953 (2013-2014 Reg. Sess.)]; MJN Ex. B [Sen. Bill No. 617 (2013-2014 Reg. Sess.) §§ 1, 2 (Legislative Counsel's digest states, "[t]his bill would *additionally require* the lead agency to include in the EIR a detailed statement on any significant effects that may result from locating development near, or attracting people to, existing or reasonably foreseeable natural hazards or adverse environmental conditions. Because the lead agency would be required to undertake this additional consideration, this bill would impose a state-mandated local program.")]; see also MJN Ex. C, p.7 [Senate Committee on Environmental Quality, Analysis of Senate Bill No. 617 (2013-2014 Reg. Sess.) ("SB 617 addresses *Ballona Wetlands*" by requiring an EIR to analyze reverse CEQA impacts.)]; MJN Ex. D, p. 2 [Senate Appropriations Committee, Analysis of Senate Bill No. 617 (2013-2014 Reg. Sess.) ("This bill potentially increases the workload for a lead agency to review a project as this bill would require that lead agency *to also* consider the impact of natural hazards or adverse environmental conditions on the project . . . However, staff notes that this analysis is currently required by the current CEQA Guidelines §15126.2(a), which are adopted regulations, despite recent litigation. Because this analysis is currently in the CEQA guidelines, it is

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[9] The MJN will be filed concurrently with this Opening Brief.

reasonable to assume that at least some agencies may already be doing this analysis.") [(emphasis added)].)

Thus, the Legislature's evaluation of the bills recognizes that reverse CEQA analysis is "not explicitly required by statute" and further evidences that the Legislature knows how to "override a line of appellate court cases that invalidates provisions in the CEQA Guidelines requiring consideration of the effects of hazardous or adverse environmental conditions on a proposed project" if it so desires. (MJN Ex. E, p. 3 [Assembly Committee on Natural Resources, Analysis of Assembly Bill No. 953 (2013-2014 Reg. Sess.].) This Court should affirm the plain meaning of the statute and leave to the Legislature the policy decision of whether to expand the scope and reach of CEQA.

## E. THE THRESHOLDS IMPERMISSIBLY REQUIRE AN ANALYSIS OF THE IMPACTS IF THE EXISTING ENVIRONMENT ON FUTURE USERS OF A PROJECT

### 1. The Thresholds Require an Analysis of the Existing Environment on a Project

The District is explicit in its intent that its TAC Receptor Thresholds will be used for reverse application of CEQA: The Staff Report states: "For new receptors – sensitive populations or the general public – thresholds of significance are designed to identify levels of contributed risk or hazards *from existing local sources* that pose a significant risk to the receptors."

(AR 1:00056 [emphasis added]; *see also* AR 27:06087 ["cities and counties must also recognize the health impacts of siting residents immediately adjacent to freeways and busy roadways . . . The proposed CEQA thresholds recognize the potential for significant impacts adjacent to *existing* sources of pollution"] [emphasis added]; Appellants' Opening Brief on Appeal at 12 [TAC Receptor Thresholds intended to address concern "that projects developed in areas near existing TAC sources will expose new residents and employees to unhealthy air pollution"].) And the District explicitly relies on Guideline 15126.2(a) for the exact purpose rejected by *Ballona*. (AR 27:06087) ["evaluating risks to new occupants of a project from existing sources of risk has been endorsed by the Resources Agency in Section 15126.2(a)"]; *compare with Ballona*, 201 Cal.App.4th at 474 [Guideline 15126.2 inconsistent with CEQA because "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"].)

Likewise, the District's odor threshold is on all fours with the contention rejected in *SOCWA*. The Thresholds require an analysis of whether a project includes exposing a new receptor "to existing or planned odor sources." (AR 9:02066.) If a project would locate receptors within a specified distance of an existing odor source with a history of at least 5 odor complaints per year, a potentially significant impact would exist. (AR

9:02066, 2121.) If moving a project is not feasible, the Thresholds recommend technological mitigation be added to the *source* of the pollution. (AR 9:2122-2123.) This is exactly the type of mitigation that offended the *SOCWA* court. (*SOCWA*, 196 Cal.App.4th at 1614-1615 ["SOCWA wants to protect itself from nuisance complaints by potential neighbors based on bad smells from the plant, while sticking [the residential developer] with the bill [for aeration tank improvements]. The statutory definition of 'environment' – 'the physical conditions ... which will be affected by a proposed project' (§ 21060.5) – precludes any such application of CEQA"].)

2. The Opinion Erred by Upholding the Thresholds

The Thresholds should be overturned if "clearly unauthorized or erroneous under CEQA." (*Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109.) The final interpretation of the law rests with the courts. (*Id.*) Thus, when an action taken by an agency "is inconsistent with controlling CEQA law" it is invalid. (*Id.* at 114.) Here, the stated intent of the Thresholds to misapply CEQA to have local agencies analyze, and require mitigation for, the impact of existing air quality and odor on new development projects "is inconsistent with controlling CEQA law," and should be overturned on that

basis alone. [10] (AR 1:00056; AR 9:02066, 2121; *CBE*, 103 Cal.App.4th at 114.)

Despite the inconsistency of the Thresholds with *Baird* and its progeny, the Opinion upheld the Thresholds against CBIA's claim based on its conclusion that "the case law cited by CBIA does not bar their application in all or even most cases." (Opinion at 25.) This is clear error.

The Opinion provides three examples of how the TAC Receptor Thresholds could purportedly be used: (1) when a project "would itself increase TACs or PM 2.5 to a cumulatively considerable level;" (2) to analyze impacts to students and personnel under Public Resources Code section 21151.8; and (3) to determine whether a project is consistent with a City's general plan or specific plan. (Opinion at 25.) None of the three purported examples is a legitimate use of the TAC Receptor Thresholds.

First, whether a project "would itself increase TACs or PM 2.5 to a cumulatively considerable level" is not a *receptor* issue, it is a *source* issue. (AR 1:00006.) The District's Thresholds already include separate source standards so would not rely on a *receptor* threshold for *source* analysis. (*See* AR 1:00006.)

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[10] Requiring new receptor projects to mitigate for impacts they have not contributed to could violate the constitutional restrictions placed on lead agencies when imposing mitigation. (*See Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463, 1470, 1477; 14 C.C.R. §§ 15041(a); 15126.4(a)(4).)

Next, the TAC Receptor Thresholds could not be properly used to analyze the impacts to students and teachers as required by Public Resources Code section 21151.8. The TAC Receptor Thresholds require an analysis out to 1,000 feet. (AR 1:00006; 9:2103.) Public Resources Code section 21151.8 requires an analysis of all sources of hazardous emissions within a quarter mile of a school site. (Pub. Res. Code § 21151.8(a)(2)(A); (a)(3)(B)(i).) The unique and detailed statutory requirements for school siting contain their own standards and cannot rely on the Thresholds. Thus, the Opinion's second example fails.

Finally, the Opinion's third example of using the Thresholds to determine if a project is consistent with a general plan or specific plan employs circular reasoning. Inconsistency with a general plan or specific plan would only be a significant environmental impact under CEQA if such inconsistency implicates a physical impact on the environment. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170) Thus, if the *Ballona* line of cases is correct that the existing environment's impact on the project would not be a significant impact on the environment under CEQA, any inconsistency with a general plan or specific plan policy that required such an analysis would also not be a CEQA impact.

If a lead agency adopted an overlay zone or buffer as suggested by the District, the agency would test the consistency of any future project against its own plan, not against the District Thresholds. It would not be a

CEQA issue, it would be a question of consistency with a general plan. (Gov. Code §§ 65860; 66473.5). In other words, the incorporation of the Thresholds into another law would not result in a proper use of the Thresholds *under CEQA*.

The Opinion's statement that "the case law cited by CBIA does not bar their application in all or even most cases" is just wrong. (Opinion at 25.)

## F. OTHER LAWS ADDRESS THE CONCERN OF THE IMPACTS OF THE ENVIRONMENT ON A PROJECT

The issues that the District seeks to address through its TAC Receptor Thresholds are important. To date, however, the Legislature has made the reasonable policy choice that CEQA is not the proper vehicle to address those concerns. The federal government and the State of California have adopted a plethora of laws to address human health, safety, and nuisance. As to the compatibility of uses, cities and counties have immense powers to restrict the uses of property through their police powers, planning and zoning law (Government Code §§ 65000, et seq.), and the Subdivision Map Act (Government Code §§ 66410 et seq.). These laws confer great power on local agencies to select and regulate land uses (including the project siting issues implicated by the TAC Receptor Thresholds), and allow agencies broad discretion to disapprove a proposed project deemed

undesirable, or alternatively, to impose conditions on projects up to the limits of the state and federal constitutions.

In order to ensure that buildings constructed will be safe and habitable, laws such as the California Building Code and the Alquist-Priolo Earthquake Fault Zoning Act, (Public Resources Code §§ 2621, et seq.) demand it. The Alquist-Priolo Earthquake Fault Zoning Act is intended to "prohibit the location of developments and structures for human occupancy across the trace of active faults" and to "to minimize the loss of life during and immediately following earthquakes . . . ." (Pub. Res. Code § 2621.5(a).) Among other things, it requires a seller to disclose to any prospective buyer if a property is within a delineated earthquake fault zone. (Pub. Res. Code § 2621.9(a).) As a practical matter, a property disclosure has a far higher likelihood of being read by a future occupant of a project than an EIR potentially approved years before construction even begins. Alquist-Priolo also requires any land use approval to be consistent with the guidance of the State Mining and Geology Board and requires that a geologic report delineating any hazard of surface fault rupture be prepared (Pub. Res. Code § 2623(a).) Likewise, the regulations implementing the Seismic Hazards Mapping Act (Public Resources Code §§ 2690, et seq.) mandate that a "project shall be approved only when the nature and severity of the seismic hazards at the site have been evaluated in a geotechnical

report and appropriate mitigation measures have been proposed." (14 C.C.R. § 3724(a).)

Ambient noise impacts on new construction is addressed through Government Code section 65302 in the Planning and Zoning Law. That section mandates that every general plan include a noise element that identifies and appraises noise problems in a community. (Gov. Code § 65302(f).) The noise element must include noise counters which "shall be used as a guide for establishing a pattern of land uses in the land use element that minimizes the exposure of community residents to excessive noise." (Gov. Code § 65302(f)(2)-(3).) The noise element must also "include implementation measures and possible solutions that address existing and foreseeable noise problems, if any." (Gov. Code § 65302(f)(4).)

The State also imposes noise insulation standards that require new construction to meet performance standards through design and building materials that would offset any noise source in the vicinity of a receptor and establish an interior standard of 45 dBA Ldn in any habitable room with all doors and windows closed. (24 C.C.R. Part 2 [the California Building Code], Appendix chapters 12, 12A.)

Protecting future users of a project from environmental contamination is addressed through a host of laws. The following list is not

all-inclusive, but represents a broad cross-section of existing, substantive law. If additional laws are desirable, the Legislature can adopt them.

Air pollution control starts with the federal Clean Air Act (42 U.S.C. Sec. 7401 et seq.). California laws designed in whole or in part to protect air quality include at least the following: Division 26 (commencing with Section 39000) of the Health and Safety Code, the Protect California Air Act of 2003 (Chapter 4.5 commencing with Section 42500) of Part 4 of Division 26 of the Health and Safety Code), the Carl Moyer Memorial Air Quality Standards Attainment Program (Chapter 9 (commencing with Section 44275) of Part 5 of Division 26 of the Health and Safety Code), the California Port Community Air Quality Program (Chapter 9.8 (commencing with Section 44299.80) of Part 5 of Division 26 of the Health and Safety Code), the California Clean Schoolbus Program (Chapter 10 (commencing with Section 44299.90) of Part 5 of Division 26 of the Health and Safety Code), and the California air pollution control laws, including the Air Toxics "Hot Spots" Information and Assessment Act of 1987 (Part 6 (commencing with Section 44300) of Division 26 of the Health and Safety Code), the Atmospheric Acidity Protection Act of 1988 (Chapter 6 (commencing with Section 39900) of Part 2 of Division 26 of the Health and Safety Code), the Connelly-Areias-Chandler Rice Straw Burning Reduction Act of 1991 (Section 41865 of the Health and Safety Code), and the Lewis-Presley Air Quality Management Act (Chapter 5.5 (commencing

with Section 40400) of Part 3 of Division 26 of the Health and Safety Code).

Many other hazards are addressed through the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. Sec. 9601 et seq.), the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. Sec. 6901 et seq.), the federal Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. Sec. 11001 et seq.), the federal Pollution Prevention Act of 1990 (42 U.S.C. Sec. 13101 et seq.), the federal Oil Pollution Act of 1990 (33 U.S.C. Sec. 2701 et seq.), the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136 et seq.), the federal Toxic Substances Control Act (15 U.S.C. Sec. 2601 et seq.), the federal Asbestos Hazard Emergency Response Act of 1986 (15 U.S.C. Sec. 2641 *et seq.*), the federal Lead-Based Paint Exposure Reduction Act (15 U.S.C. Sec. 2681 et seq.), the federal Low-Level Radioactive Waste Policy Act (42 U.S.C. Sec. 2121b et seq.), the federal Lead Contamination Control Act of 1988 (42 U.S.C. Sec. 300j-21 et seq.), the Hazardous Waste Control Law Chapter 6.5 (commencing with Section 25100) of Division 20 of the Health and Safety Code), Chapter 6.7 (commencing with Section 25280) of Division 20 of the Health and Safety Code, Sections 25356.1.5 and 25395.94 of the Health and Safety Code, Chapter 6.95 (commencing with Section 25500) of Division 20 of the Health and Safety Code, the Elder California Pipeline

Safety Act of 1981 (Chapter 5.5 (commencing with Section 51010) of Part 1 of Division 1 of Title 5 of the Government Code), and the Natural Gas Pipeline Safety Act of 2011 (Article 2 (commencing with Section 955) of Chapter 4.5 of Part 1 of Division 1 of the Public Utilities Code).

In short, regulatory agencies and local jurisdictions are required to, and do, consider the environment's impact on projects and users outside of CEQA, and without the omnipresent threat of CEQA litigation being injected into non-CEQA processes. *Baird* and *SOCWA* are correct that the important concerns regarding the well-being of future occupants is addressed through laws other than CEQA. (*SOCWA*, 196 Cal.App.4th at 1617; *Baird*, 32 Cal.App.4th at 1469 [noting that petitioner's concern that residential development could be built over toxic waste sites if CEQA not applied in reverse was addressed through Health and Safety Code section 25220 et seq., "which prescribe procedures for precluding the construction of residences on or within 2,000 feet of property containing hazardous waste"].) This Court should heed the mandate in CEQA section 21083.1 to not expand the procedural or substantive requirements of CEQA beyond those explicitly stated in the statute.

## VII. CONCLUSION

For the foregoing reasons, CBIA asks that this Court determine that CEQA does not require an analysis of the existing environment on a project or its users, unless specifically required in the statute, as in the case for new

school sites, and hold that any of the District's Thresholds that are inconsistent with this rule of law are void. CBIA also requests that this matter be remanded to the trial court, which did not reach this issue, to issue a writ or other order, and for further proceedings consistent with the Court's decision.

Dated: January 10, 2014

Respectfully submitted,
Cox, Castle & Nicholson LLP

By: _____
Andrew B. Sabey
Attorneys for Plaintiff and Respondent California Building Industry Association

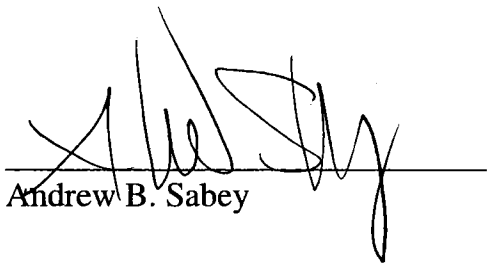
## CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(1))

I, Andrew B. Sabey, hereby certify that the word count in OPENING BRIEF is 11,323 words.

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

Executed this 10th day of January 2014 in San Francisco, California.



Andrew B. Sabey

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 California Street, 10th Floor, San Francisco, California 94104-1513.

On **January 10, 2014**, I served the foregoing document(s) described as **CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S OPENING BRIEF** on ALL INTERESTED PARTIES in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**Please see attached Service List**

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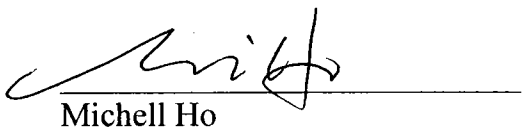

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*CALIFORNIA BUILDING INDUSTRY ASSOCIATION, et al. v. BAY AREA QUALITY MANAGEMENT DISTRICT*
APPELLATE CASE NOS. A135335 & A136212

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