



# CEQA News You Can Use

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Welcome to the first edition of CEQA News You Can Use, a quarterly publication of **Brownstein Hyatt Farber Schreck's Natural Resources lawyers**. This resource will provide quick, useful bites of CEQA news that we hope can be a resource to your real-time business decisions. That said, it is not and cannot be construed to be legal advice. Enjoy!

## 1. Partying like it's 2006 . . . CA adopts new GHG thresholds 10 years after the adoption of AB 32

As you may have read, California just adopted **SB 32** and **AB 197**, which establish a new greenhouse gas (GHG) target for the state — 40 percent below 1990 levels by 2030. When California enacted the Global Warming Solutions Act of 2006 (AB 32), CEQA practitioners were some of the first to wrestle with how to account for the new GHG targets imposed by AB 32. The California Air Resources Board, in its infinite wisdom, declined to provide a statewide CEQA significance threshold that all could use, leaving applicants and government agencies to their own devices. And who can forget the years of discomfort as various methods for analyzing GHG emissions under CEQA were tested in cities and counties across the state? (Some would say recent California Supreme Court actions indicate that discomfort has never ended!) While we are further along now than we were in 2006 in how we analyze GHG emissions, expect the new 2030 GHG targets to cause similar “discomfort” in the near future. To read more about the new 2030 GHG targets, [please click here](#).

## 2. Legislature extends CEQA litigation streamlining for large projects

During the Great Recession, California passed the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (AB 900), which provides CEQA litigation streamlining

benefits to large-scale projects (i.e., more than \$100 million) that could satisfy certain criteria. To date, the Apple II campus, several large solar projects and the new Golden State Warriors stadium are examples of projects that have taken advantage of AB 900's CEQA litigation streamlining provisions. [SB 734](#) extends AB 900 for two more years. To qualify, a project must obtain the governor's approval no later than Jan. 1, 2018, and EIR certification no later than Jan. 1, 2019.

### 3. Want to shave time off a CEQA lawsuit? Ask your lead agency to prepare the administrative record contemporaneously with your CEQA document

Preparing the administrative record (AR) is one of the first steps in any CEQA lawsuit. Ask a CEQA litigator and they'll tell you it is also one of the biggest sources of delay. That's because CEQA allows the petitioner to elect to prepare the AR, or to ask the lead agency to do it. It often takes months to prepare the AR, a process that can be further delayed by disputes about what belongs and what does not belong in the record. [SB 122](#) now allows a project applicant to address this delay head-on by asking the lead agency to contemporaneously prepare the AR along with the project's CEQA document. If the lead agency agrees, all AR documents must be posted on the internet, so that the public benefits from getting access to the AR in real time. [SB 122](#) also requires the lead agency to certify the AR within 30 days of filing of the notice of determination on the project, so that the AR will be ready when the CEQA statute of limitations to file suit has run. While this approach may increase upfront costs, we expect it to significantly accelerate adjudication of CEQA litigation by eliminating the AR preparation step, which may in turn provide significant cost savings in time and legal costs.

### 4. What's an historic resource? The lead agency's decision stands if supported by substantial evidence

When a lead agency makes a determination that a structure is or is not an "historic resource" under Public Resources Code Section 21084.1, what standard of review should be applied to review that decision? In [Friends of The Willow Glen Trestle v. City of San Jose \(Friends\), No. H041563](#), the court held that the "substantial evidence" standard of review was the correct standard when reviewing a lead agency's determination. This decision reversed a prior decision by the same court (see *Architectural Heritage Ass'n v. County of Monterey*, 122 Cal. App. 4th 1095 (2004)), which conflicted with another decision by a different circuit court of appeals (see *Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039 (2008)). The *Friends* decision now aligns the Fifth and Sixth District Courts of Appeal on which standard of review applies to decisions regarding what is and is not an historic resource, and makes it more difficult to

challenge a lead agency's decision due to the deferential nature of the substantial evidence standard of review.

5. Show me the money! How a real party in interest can be reimbursed for paying a lead agency's costs to prepare the administrative record

Generally speaking, a real party in interest that prevails in CEQA litigation cannot be reimbursed for preparing the administrative record (AR) unless the petitioner agrees to have the real party prepare the AR in advance. (*Hayward Area Planning Assn. v. City of Hayward* (2004) 128 Cal. App. 4th 176 (*Hayward*)) In ***Citizens for Ceres v. City of Ceres (Ceres), No. F070988***, however, the Fifth District Court of Appeal allowed Wal-Mart to seek recovery from petitioners of the amount Wal-Mart paid to reimburse the city for preparing the AR. In *Ceres*, the petitioner asked the city to prepare the AR, the city delegated this task to its outside counsel, and Wal-Mart reimbursed the city for its costs under a reimbursement agreement. The *Ceres* court held that nothing in CEQA or the Civil Code prohibited Wal-Mart from seeking those AR reimbursement costs because the city had prepared the AR, as requested, and the trial court could tax the amount if it felt the AR preparation costs were excessive.

*This document is intended to provide you with information regarding CEQA. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact one of the attorneys listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

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