

California Supreme Court: CEQA Requires Study of Potential Impacts to ESHA

Lead agencies cannot ignore the Coastal Act's ESHA requirements in CEQA documents and defer analysis for later Coastal Commission review.

Key Points:

- CEQA requires an EIR to identify potential environmentally sensitive habitat areas and account for those areas in its analysis of project alternatives and mitigation measures.
- An EIR must lay out any competing views between agencies, and both the Coastal Commissioners and members of the public are entitled to understand disagreements between Commission staff and the local agency on the subject of ESHA.

In a unanimous decision that may have ramifications for projects along the California coast, the California Supreme Court held in *Banning Ranch Conservancy v. City of Newport Beach*, Cal. Supreme Court, Case No. S227473 (March 30, 2017), that the California Environmental Quality Act (CEQA) requires environmental impact reports (EIRs) to identify potential environmentally sensitive habitat areas (ESHA) and account for those areas in their analysis of project alternatives and mitigation measures.

The interplay between the California Coastal Commission and lead agencies evaluating projects within the coastal zone is often complex. For most development¹ in the coastal zone, approval of a coastal development permit is required before a project can be built. Generally, the Coastal Commission does not serve as a lead agency under CEQA but instead reviews projects as a responsible agency, after local land use approvals have been completed.² Under the California Coastal Act, the Coastal Commission retains jurisdiction over coastal development permit applications (i) if the local agency has not adopted a local coastal program (LCP) that has been certified by the Commission or (ii) when development is located within the Commission's retained jurisdiction (*i.e.*, on tidelands or submerged lands).³ Further, the Commission retains appellate jurisdiction over certain coastal development permits approved or denied by local agencies with certified LCPs.⁴ Coastal Commission staff often will participate in a local agency's CEQA review process to ensure that a project's CEQA document contains sufficient information and studies regarding potential impacts to Coastal Act resources such as ESHA. The Coastal Act has unique protections for ESHA⁵ that are designed to protect biological resources and to prevent impacts to habitat.⁶

Although under most circumstances the Coastal Commission has ultimate authority to make findings regarding a project's potential impacts to ESHA, the Supreme Court's decision now clarifies that a lead agency preparing a CEQA document for a project in the coastal zone must evaluate areas that may qualify as ESHA and their ramifications for mitigation measures and alternatives.

Background

Banning Ranch Project

Banning Ranch is a privately owned 400-acre tract of undeveloped property that lies in the coastal zone and falls under the City of Newport Beach (City)'s sphere of influence for zoning and planning purposes. The City has not finalized its LCP. Although it has a coastal land use plan (CLUP), the CLUP excluded the Banning Ranch property from its scope, and because the City had not adopted procedures for issuing coastal development permits, the Coastal Commission exercised permitting authority over development on Banning Ranch.

In August 2008, Newport Banning Ranch LLC (NBR) submitted a proposal for a residential and commercial village on Banning Ranch. The proposal included a report identifying potential ESHA and included a map identifying numerous potential ESHA throughout Banning Ranch. NBR later revised its plan to accommodate the City's requested road circulation network. NBR's biological consultant pointed out that the changes would significantly impact habitat considered ESHA pursuant to the City's CLUP and the Coastal Act.

Discovery of Potential ESHA

The City proceeded with preparation of a draft EIR for the Banning Ranch project, and in 2010, a Coastal Commission ecologist determined that two areas in Banning Ranch met the definition of ESHA. The City and NBR entered into a stipulation that the Commission staff's ESHA findings would be determinative only to two areas, and the Commission would undertake a separate analysis of other areas in future proceedings. The Coastal Commission adopted the staff findings, including a determination that certain unpermitted activity was inconsistent with policies in the City's CLUP.

In October 2011, Coastal Commission staff issued a report explaining that a proposed access road across the Banning Ranch property crossed ESHA. Staff identified an alternative to avoid impacts, but the City and NBR would not agree to conditions recommended by the Commission. Commission staff commented that the road proposed on the Banning Ranch property would directly affect the already identified ESHA and others that were likely to be determined. The Banning Ranch draft EIR did not identify potential ESHA or discuss the subject in any substantive detail, but simply noted that the project would require a coastal development permit from the Commission, and that the Commission itself would determine whether Banning Ranch contained ESHA.

Draft and Final EIR

Coastal Commission staff submitted a detailed comment letter on the draft EIR, which suggested the EIR needed to address whether the proposed development was consistent with policies in both the CLUP and the Coastal Act, and pointed out that development must avoid impacts to ESHA under the Coastal Act. Staff recommended that the EIR use the CLUP to evaluate ESHA and appropriate buffer zones, and determined the proposed development was inconsistent with the ESHA requirements of the Coastal Act due to the proposed 4-lane access road intersecting potential sensitive habitat.

In the final EIR, the City claimed it had "fulfilled its obligation under CEQA to analyze the significant impacts of a project on the physical environment," and maintained that ESHA findings were in the discretion of the Coastal Commission or local agency as part of its local coastal plan certification process.⁷ Further, the City argued that because Banning Ranch was excluded from its CLUP as a deferred certification area, the City's CLUP was inapplicable, and any consideration of a coastal development permit for the project would require findings of consistency with the Coastal Act. Therefore,

the final EIR concluded that “no conclusions of ESHA can and will be made by the City at this time as part of the EIR process.”⁸

Project Approval and Litigation

Banning Ranch Conservancy (BRC) challenged the City’s approval of the project, contending that the EIR did not adequately disclose or analyze environmental impacts and mitigation measures with respect to ESHA, instead deferring those critical functions. The trial court granted BRC’s petition in part, finding that although the City had failed to meet its obligations under the general plan, it had otherwise complied with CEQA.

The Court of Appeal reversed, concluding the general plan did not require the City to work with the Coastal Commission before project approval. On the CEQA issue regarding ESHA impacts, the Court of Appeal sided with the trial court, and found it sufficient for the EIR to note that the project was outside the scope of the CLUP and that the Coastal Commission would determine whether ESHA would be affected.

Discussion

The Supreme Court analyzed whether the Banning Ranch EIR was required to identify potential ESHA and analyze the impacts of the project on those areas.⁹ The City argued that CEQA imposes no duty to consider the Coastal Act’s ESHA requirements, and that it was sufficient for the Banning Ranch EIR to analyze the impacts of the project without accounting for potential ESHA.

Related Regulatory Regimes

The Court rejected the City’s position noting that the City may not ignore the fact that Banning Ranch is in the coastal zone. “CEQA sets out a fundamental policy requiring local agencies to ‘integrate the requirements of this division with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.’”¹⁰ The lead agency should integrate CEQA review with related environmental review and consultation requirements found in federal, state or local laws. The Court found the City ignored its obligation to integrate CEQA review with the requirements of the Coastal Act.

The Court noted that the CEQA Guidelines specifically call for consideration of related regulatory regimes such as the Coastal Act when discussing project alternatives.¹¹ Specifically, when conducting the feasibility analysis, an agency should consider the regional context if a project has a regionally significant impact.¹² “By definition, projects with substantial impacts in the coastal zone are regionally significant.”¹³ Thus, the Court concluded that the Coastal Act’s ESHA provisions should have been central to the Banning Ranch EIR’s alternatives and mitigation measures analysis. Instead, the EIR omitted analysis of the Coastal Act’s ESHA requirements, and did not discuss which areas might qualify as ESHA or consider impacts on two relevant ESHA delineated Coastal Commission consent orders. As a result, the Court concluded the EIR did not meaningfully address feasible alternatives or mitigation measures. Given the evidence before the City that ESHA were present, the Court noted that the decision to forego discussion of those areas was not reasonable.

Deferral of ESHA Analysis

Additionally, the Court found the City’s justifications for deferring the ESHA analysis to be unpersuasive. The City argued that it had no authority to designate ESHA on Banning Ranch because only the Coastal Commission could do so. The Court noted that a lead agency is not required to make a “legal” ESHA determination in an EIR, but must identify potential ESHA and analyze the impacts of the project on those areas. However, the California Supreme Court noted that a reviewing court should consider only the

sufficiency of the discussion and expressed no view as to whether ESHA impacts must be avoided as opposed to mitigated.

Analysis of Potential ESHA Was Not Speculative

The City also claimed that identification of potential ESHA would be merely speculative. The Court disagreed, noting that ESHA had already been identified on the project site and NBR's consultant had identified potential ESHA in other areas. Further, the City's CLUP provided guidelines for identifying ESHA, the Coastal Commission staff offered assistance in identifying ESHA and the City routinely applied its CLUP guidelines in other projects to identify ESHA impacts. Therefore, the Court found the City had ample bases for an informed discussion on the project's potential ESHA impacts, and the City did not use its best efforts to investigate and disclose what it discovered about ESHA on Banning Ranch, as required by CEQA.

Analysis of Potential ESHA Should Not Be Deferred Until Coastal Commission Permitting

Finally, the City argued that potential ESHA impacts would be considered during the Coastal Commission permitting phase of the project and therefore did not need to be included in the EIR. The Court concluded that deferring ESHA analysis would be inconsistent with CEQA's policy of integrated review,¹⁴ noting that "[l]ead agencies in particular must take a *comprehensive* view in an EIR."¹⁵

The Court rejected the supposition that the City would be required to accept the Commission staff's ESHA designations and related measures if it were required to identify potential ESHA. The Court noted that an EIR is an informational document and the lead agency may disagree with the opinions of other agencies. However, to serve its purposes as an informational document an EIR is required to explain other interested agencies' competing views.¹⁶ While the Coastal Commission will make the ultimate findings regarding ESHA on Banning Ranch, the Court noted that the public is entitled to understand disagreements between Commission staff and the City on potential ESHA: "Rather than sweep disagreements under the rug," the City is required to explain them in the EIR.¹⁷

The Court added that if the City's approach were to be adopted, lead agencies would be allowed to "perform truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim."¹⁸ Further, the Court concluded the City's handling of the Banning Ranch EIR ignored the practical reality that the project must pass muster under the Coastal Act.

Therefore, the Court concluded the City abused its discretion by certifying an inadequate EIR. The City's failure to account for related regulations substantially impaired the EIR's informational function, and amounted to prejudice requiring reversal of the Court of Appeal's decision.

Implications

The California Supreme Court decision in *Banning Ranch Conservancy* makes clear that EIRs for development projects in the coastal zone must address potential impacts to ESHA. Although review of ESHA is required under *Banning Ranch Conservancy*, the Court "express[ed] no view as to whether ESHA impacts must be avoided, as opposed to mitigated."¹⁹ Proponents of projects in California's coastal zone undergoing CEQA review by a lead agency other than the Coastal Commission should coordinate with that agency to ensure that the CEQA document addresses potential impacts to ESHA, and if significant impacts are identified, evaluates feasible alternatives and mitigation measures to address them.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Winston P. Stromberg

winston.stromberg@lw.com

+1.213.891.8983

Los Angeles

Lucas I. Quass

lucas.quass@lw.com

+1.213.891.8532

Los Angeles

Jennifer K. Roy

jennifer.roy@lw.com

+1.858.523.3984

San Diego

Samantha K. Seikkula

samantha.seikkula@lw.com

+1.858.509.8457

San Diego

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Endnotes

¹ The California Coastal Act defines "development" broadly, as "on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511)." Pub. Res. Code § 30106.

² See Cal. Code Regs., tit. 14, § 13052.

³ Pub. Res. Code §§ 30600(c), 30519(b).

⁴ Pub. Res. Code § 30603(a).

⁵ The California Coastal Act provides a definition of “environmentally sensitive area” as: “Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.” Pub. Res. Code § 30107.5.

⁶ *Id.* § 30240(b).

⁷ *Banning Ranch Conservancy* at p. 15.

⁸ *Id.* at p. 12.

⁹ Note: The Supreme Court ruled solely on the CEQA issues.

¹⁰ *Banning Ranch Conservancy* at pp. 18-19; citing Pub. Res. Code § 21003(a).

¹¹ *Id.* at p. 19, *citing* CEQA Guidelines § 15126.6(a).

¹² *Id.* [citing CEQA Guidelines § 15126.6(f)(1).]

¹³ *Banning Ranch Conservancy* at p. 19.

¹⁴ Pub. Res. Code § 21003(a).

¹⁵ *Banning Ranch Conservancy* at p. 23 (citing Pub. Res. Code § 21002.1, subd. (d) and *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1298-1299); see also *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433.

¹⁶ CEQA Guidelines § 15123(b)(2).

¹⁷ *Banning Ranch Conservancy* at p. 25.

¹⁸ *Id.* at p. 26.

¹⁹ *Id.* at p. 21, fn. 7.