California Environmental Quality Act Compliance

A Practical Guidance® Practice Note by
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This practice note provides practical guidance on the California Environmental Quality Act (CEQA, pronounced "see-kwa"), California's broadest environmental law. CEQA requires state and local governmental agencies that carry out or approve discretionary projects to evaluate, disclose, and mitigate environmental effects of those projects before taking action. CEQA does not establish regulatory environmental standards, but rather establishes broad environmental policies for the purpose of informing governmental decisionmakers and the public about the significant environmental effects of proposed projects and feasible ways to mitigate these effects. CEQA does not grant state or local agencies new powers to mitigate environmental effects of proposed projects. However, agencies may use powers granted by other laws to require project mitigation or deny or modify projects with significant adverse environmental effects.

This practice note includes:

- Sources of CEQA Requirements
- Players in the CEQA Process
- Overview and Timing of the CEQA Process
- Practical Considerations before Starting the CEQA Process
- The Initial Study and Negative Declaration
- Preparing the Environmental Impact Report (EIR)
- EIR Contents
- Integrating CEQA with Other Environmental Laws
- Streamlining CEQA for Housing and Infill Projects
- Judicial Review

This note also provides practical advice for CEQA compliance geared towards project applicants and state and local government agencies. For more information on CEQA, visit the California Natural Resources Agency Natural Resources Agency website at http://resources.ca.gov/ceqa/ and the Governor's Office of Planning and Research (OPR) website at http://opr.ca.gov/ceqa/.

Reader Alert

The COVID-19 emergency has caused temporary changes to a number of CEQA timelines and procedures. Readers are advised to research the most recent developments. As of November 2020, the following changes were in effect:

- On May 22, 2020, California Judicial Council amended Emergency Rule 9(b). This rule stays/tolls statutes of limitations for all CEQA actions from April 6, 2020 to

August 3, 2020. The Circulating Order Memorandum accompanying the revisions to Emergency Rule 9 also provides that "[t]olling stops or suspends the running of time in statutes of limitations; when the tolling period ends, the time to bring an action in court (or be barred from doing so) will begin to run again."

- On April 23, 2020 Governor Newsom issued Executive Order (EO) N-54-20, which among other things included two 60-day suspensions of certain CEQA timelines. Item 8 of the EO suspended for 60 days certain CEQA requirements for the lead agency to file with the county clerk, and for the county clerk to post, certain notices. Item 9 of the EO suspended for 60 days certain AB 52 tribal consultation deadlines.
- On September 23, 2020, Governor Newsom issued EO N-80-20 which conditionally suspended requirements for noticing and posting with the County Clerk, and provided optional alternative requirements. In lieu of filing with the County Clerk, a lead agency, responsible agency, or project applicant that complies with all of the following conditions shall be deemed to have fully satisfied its noticing obligations by: (1) posting notices on the agency's website for the same length of time that would be required for physical posting, (2) submitting all notices listed above to the State Clearinghouse's CEQAnet Web Portal, and (3) engaging in outreach too known interested individuals and entities. With exception to the provisions that have been suspended, lead and responsible agencies and project applicants must perform public noticing and outreach to all interested parties as allowed and required by CEQA and the CEQA Guidelines; for example, as required by CEQA Guidelines section 15087(a), agencies and applicants must continue to give notice to all entities who have requested notice.
- EO N-80-20 affects Notices of Preparation (Pub. Res. Code §§ 21080.4, 21092, and 21092.3), Notices of Determination (Pub. Res. Code § 21152, Cal. Code Regs. tit. 14, § 15075, 15094), Notices of Exemption (Cal. Code Regs. tit. 14, § 15062(c)(2), (c)(4)), Notice of Intent to Adopt a Negative Declaration (Cal. Code Regs. tit. 14, § 15072(d)), and Notice of Availability of Draft EIR (Cal. Code Regs. tit. 14, § 15087(d)). For more information visit https://opr.ca.gov/clearinghouse/ceqa/document-submission.html.

Sources of CEQA Requirements

Statute and Guidelines

CEQA requirements are established by the California Public Resources Code (Cal. Pub. Res. Code § 21000 et seq.) and the CEQA Guidelines contained in Title 14 of the California Code of Regulations (Cal. Code Regs. Tit. 14, § 15000 et seq.) (also referred to as the Guidelines). CEQA was originally enacted in 1970 and was modeled after the National Environmental Policy Act (NEPA), which had been enacted a year earlier. 91 P.L. 190, 83 Stat. 852. NEPA can be used as an aid in interpreting CEQA. Friends of the College of San Mateo Gardens v. San Mateo County Community College District, 1 Cal. 5th 937, 952, n.2 (2016). CEQA and the CEQA Guidelines are amended frequently.

The CEQA Guidelines are authorized by Cal. Publ. Res. Code § 21083 and are the official administrative interpretation of CEQA; they are relied upon heavily by both agencies and by courts. (Requirements of the CEQA statute are often duplicated in the CEQA Guidelines. For ease of reference, when requirements are duplicated, this practice note often focuses upon the Guidelines for authority.) Although the courts have yet to definitively decide whether the Guidelines are regulatory mandates or only aids in interpreting CEQA, courts afford "great weight" to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA. See Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 391, n.2 (1988). CEQA document preparers should note that some Guidelines provisions are written with mandatory language ("shall"), in which case it is recommended they be treated as mandatory; other provisions are advisory ("should" or "may"). See Cal. Code Regs. tit. 14, § 15005. However, some courts have found a Guidelines provision permissive despite mandatory language. See Meridian Ocean Sys. v. State Lands Comm'n, 222 Cal. App. 3d 153, 168 (1990).

Lead Agencies (as defined in Players in the CEQA Process) are also authorized to adopt local CEQA procedures, Cal. Pub. Res. Code § 21082; Cal. Code Regs. tit. 14, §§ 15022, 15061(e), 15074(f), 15090(b), although they too can be invalidated for exceeding their statutory authority. Cal. Code Regs. tit. 14, § 15022(c); Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 2 Cal. App. 5th 1067, 1081 (2016). Any amendments to the CEQA Guidelines are applicable to a Lead Agency, regardless of whether the Agency has revised its formally adopted local CEQA procedures. Cal. Code Regs. tit. 14, § 15022(c). Many public agencies incorporate by reference the state CEQA Guidelines as their local guidance; however, there is a growing trend for public agencies adopting local CEQA appeal procedures. See Mount Shasta Bioregional Ecology Ctr. v. Cty. of Siskiyou, 210 Cal. App. 4th 184, 201-202 (2012). It is recommended that Lead Agency staff and applicants review these local procedures before initiating the CEQA process. Such procedures may be incorporated

into the municipal/county code or may be contained in a separate guidance document.

OPR drafts amendments to the CEQA Guidelines which are ultimately adopted by the Natural Resources Agency and the Office of Administrative Law in compliance with the California Administrative Procedure Act (Cal. Cal. Gov't Code § 11340 et seq.). On December 28, 2018, the Office of Administrative Law provided final approval of amendments that contain a comprehensive update to the CEQA Guidelines. The Natural Resources Agency also issues a Statement of Reasons for Regulatory Action whenever the Guidelines are amended, which provides useful interpretative guidance for the CEQA Guidelines amendments, including those adopted in 2018. While CEQA Guidelines amendments were adopted on December 28, 2018, several provisions related to transportation analysis may not become mandatory until July 1, 2020. Cal. Code Regs. tit. 14, § 15064.3(c). Lead Agencies are required to comply with the new amendments either when they amend their CEQA procedures to conform, or 120 days after the effective date of the amendments, whichever is earlier. Cal. Code Regs. tit. 14, § 15007(d).

Judicial Opinions

The courts have played a major role in interpreting CEQA's requirements and judicial interpretations are periodically integrated into the CEQA Guidelines. In recent times, upwards of 20 appellate CEQA decisions are published every year. The courts have historically tended to expand CEQA's applicability and effect, guided by the supreme court's early instruction that CEQA is to be interpreted "to afford the fullest possible protection of the environment within the reasonable scope of the statutory language." Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 259 (1972). Applicants and their counsel should stay well versed in major developments in CEQA case law, as such case law will likely be included in any legal challenges to the project's CEQA documents. See Judicial Review for more on the importance of judicial interpretations of CEQA.

Players in the CEQA Process

There are five categories of participants in the CEQA process:

1. The Natural Resource Agency and the OPR
2. Lead Agencies and Responsible Agencies (as defined below)
3. Project Applicants
4. Consultants –and–
5. Public/Interested Parties

Each category and their respective roles in the process are discussed below.

Natural Resources Agency and OPR

The Natural Resources Agency's CEQA responsibilities include formal rulemaking and adoption of CEQA Guidelines amendments and certification of state regulatory programs as CEQA equivalents OPR's major CEQA responsibilities include recommending changes to the CEQA Guidelines, publishing CEQA notices, publishing technical advisories on CEQA compliance, maintaining the CEQAnet database (www.ceqanet.ca.gov) to assist Lead Agencies in CEQA implementation, and operating the State Clearinghouse. The State Clearinghouse is the single state point of contact for coordinating state agency review of CEQA documents.

Effective November 3, 2020, the State Clearinghouse discontinued accepting hard copies and emailed copies of CEQA notices and environmental documents. All agencies are required to first register to submit online documents, and then submit all documents online to OPR's CEQA Database. See CEQA Submit User Guide.

Lead and Responsible Agencies

A state or local agency typically plays one of two roles in CEQA implementation: Lead Agency or Responsible Agency. A Lead Agency has the principal responsibility for carrying out or approving a project, and, therefore, has the lead responsibility for implementing the CEQA process and preparing the CEQA document for that project. Cal. Code Regs. tit. 14, § 15050. For a private project requiring multiple governmental approvals, the agency with greatest responsibility for supervising or approving the project as a whole is typically the Lead Agency. Cal. Code Regs. tit. 14, § 15051.

A Responsible Agency is an agency other than the Lead Agency with responsibility for carrying out or approving a project. For example, if a development project requires an air pollution control district (APCD) permit, a county may be the Lead Agency and the APCD, the Responsible Agency. However, if an agency only has permitting authority over a mitigation measure, it may not be considered a Responsible Agency. Lexington Hills Ass'n v. California, 200 Cal. App. 3d 415, 433 (1988). A Responsible Agency participates in the Lead Agency's CEQA process and must use the Lead Agency's CEQA document in its decision-making. Cal. Code Regs. tit. 14, § 15096.

CEQA also requires Lead Agencies to consult with relevant so-called trustee agencies and agencies with jurisdiction by law when preparing CEQA documents. Cal. Code Regs. tit. 14, § 15086. Trustee agencies, such as the Department of Fish and Wildlife (DFW), have jurisdiction over resources held in trust for California. Cal. Code Regs. tit. 14, § 15386. Agencies with jurisdiction by law include agencies exercising authority over the resources affected by a project, as well as Responsible Agencies. Cal. Code Regs. tit. 14, § 15366.

Project Applicants

Applicants for development and other private projects should be knowledgeable about CEQA requirements and retain counsel early in the approval process to form compliance strategies and to identify potential issues that will minimize time and cost added by the CEQA process and CEQA litigation.

Project applicants typically pay the costs of CEQA document preparation, either directly, by retaining an environmental consultant to prepare administrative draft documents, or indirectly, through third-party agreements with the Lead Agency. Applicants or their attorneys also often testify during public hearings on their projects before planning commissions, city councils, or county boards of supervisors. Applicants also are usually asked to indemnify the Lead Agency in the event their CEQA documents are judicially challenged.

Consultants

Environmental consultants are typically retained to prepare CEQA documents. Some Lead Agencies allow project applicants to directly contract with consultants to prepare administrative draft CEQA documents. See Cal. Code Regs. tit. 14, § 15084(d)(3) and Friends of La Vina v. Cty. of L.A., 232 Cal. App. 3d 1446, 1454 (1991). Other Lead Agencies retain consultants directly and require applicants to pay consultant costs. Applicants or Lead Agencies should choose environmental consultants with CEQA expertise and experience (including qualified project managers and staff, with good references). It is strongly recommended that the CEQA document contain a record of the expertise and experience of all of the individual consultants and sub-consultants (e.g., degrees, years of experience, etc.), as such evidence of expertise will likely be relied upon and cited if the matter is litigated.

Public/Interested Parties

Member of the public and any interested parties are allowed to participate in the CEQA process, typically by submitting comments on the environmental document. The public and interested parties are invited to submit comments on Negative Declarations and Mitigated Negative Declarations. Cal. Code Regs. tit. 14, § 15073. This participation is broader during the EIR process and includes (1) participation in the comment period on the Notice of Preparation/Initial Study, also referenced as "Scoping" (Cal. Code Regs. tit. 14, §§ 15063, 15082. 15083); (2) participation in the Draft EIR comment period on significant environmental issues (Cal. Code Regs. tit. 14, §15088(a)); and (3) participation prior to the close of the public hearing on the project (i.e., comments on the Final EIR). While there is no formal comment period on the Final EIR, the public is allowed to submit comments before the close of the public hearing on the project, provided that they have been fairly presented to the Lead Agency, although formal responses are not required. Pub. Res. Code § 21177(a). While this process often involves concerned citizens and environmental groups, it may also include competing business interests and labor organizations. Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal. 4th 155 (2011).

Overview and Timing of the CEQA Process

The CEQA process typically consists of three phases:

- Preliminary review to determine whether a project is subject to CEQA or exempt
- Preparation of an Initial Study (see The Initial Study and Negative Declaration for a definition) to determine whether the project may have a significant environmental effect, if the project is not exempt –and–
- Preparation of a CEQA document, which may include one of the following:
    - A Negative Declaration (see The Initial Study and Negative Declaration for a definition) if no significant effects would occur
    - A Mitigated Negative Declaration, as defined below, if the applicant agrees to implement mitigation measures to reduce all impacts to less than significant –or–
    - An Environmental Impact Report (EIR) (see Preparing the Environmental Impact Report (EIR) for a definition) if the project may have a significant environmental effect

A comprehensive illustration of the CEQA process may be found in Appendix A to the CEQA Guidelines.

The CEQA process must start early in the planning process to allow environmental considerations to influence project

design, but late enough to provide meaningful information for environmental assessment. Cal. Code Regs. tit. 14, § 15004(b). For public projects, prior to completing the CEQA process, Lead Agencies may not take actions that foreclose alternatives or mitigation measures, except they may designate a preferred site for CEQA review and enter into land acquisition agreements for future use contingent on CEQA compliance. However, the legislature has created some statutory exemptions for certain types of land acquisitions, such as the acquisition of land intended for park space. Cal. Pub. Res. Code § 21080.28. Also, Lead Agencies may enter into preliminary agreements regarding a project prior to approval, but the agreement should be (1) conditioned on CEQA compliance, (2) not commit to a definite course of action prior to CEQA compliance, and (3) not foreclose feasible mitigation measures or alternatives. Cal. Code Regs. tit. 14, § 15004(b)(4) and Save Tara v. City of W. Hollywood, 45 Cal. 4th 116, 136-37 (2008); Saltonstall v. City of Sacramento, 234 Cal. App. 4th 549, 566-72 (2015).

Preliminary Review

Prior to starting the CEQA process, a two-step review must take place in order to determine whether the activity is subject to CEQA requirements. First, the activity must qualify as a project and second, the activity must not fall under one of the statutory exemptions. This preliminary review is discussed below.

Is the Activity a Project?

During preliminary review, the Lead Agency first determines whether an activity is considered to be a project under CEQA. A project is defined as any of the following pursuant to Cal. Code Regs. tit. 14, § 15378:

- An activity directly undertaken by a public agency, such as a public works project or enactment of ordinances or general plans
- An activity supported by a public agency through contracts, financial assistance, or other assistance –or–
- A public or private activity involving the issuance of a public agency permit or other entitlement (e.g., a rezoning or conditional use permit for a development project)

A project includes the whole of an action with the potential for direct or indirect environmental effects. Zoning ordinances are not projects as a matter of law, but may be projects if they are theoretically capable of causing environmental effects without considering the specific circumstances. Union of Medical Marijuana Patients, Inc. v. City of San Diego, 7 Cal. 5th 1171 (2019). The failure to act is not a project subject to CEQA, even if there are environmental consequences from that inactivity. The Lake Norconian Club Foundation v. Department of Correction and Rehabilitation, 39 Cal. App. 5th 1044, 1051 (2019). Similarly, declining to renew existing permits is not considered a project under CEQA. Sunset Sky Ranch Pilots Ass'n v. County of Sacramento, 47 Cal. 4th 902, 906 (2009).

In general, an agency is not allowed to piecemeal a large project into smaller pieces to evade environmental review. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376 (1988). However, related activities that are similar in nature are separate projects (as opposed to a single project) if they will be independently considered for approval and one activity is not a foreseeable consequence of the other. See Aptos Council v. Cty. of Santa Cruz, 10 Cal. App. 5th 266, 282 (2017).

Non-projects which are exempt from CEQA include, but are not limited to, the adoption or submission of a voter-sponsored initiative and certain continuing administrative or maintenance activities. See Integrating CEQA with Other Environmental Laws further information on CEQA compliance for initiatives. Cal. Code Regs. tit. 14, § 15378.

Is the Project Exempt?

CEQA has four major types of exemptions: statutory exemptions, categorical exemptions, the "common sense" exemption, and certified regulatory programs (a partial exemption, which normally replaces aspects of CEQA's review process with a similar environmental review process specific to the controlling agency), as well as several other partial exemptions. If a project applicant believes its activity falls under one or more exemptions, the Lead Agency may file a Notice of Exemption (NOE). A NOE filing is voluntary but advisable since it shortens the statute of limitations for CEQA challenges to 35 days as opposed to 180 days (see Judicial Review below). Cal. Code Regs. tit. 14, § 15062(a). Where possible, project applicants should design projects to fit within CEQA exemptions to avoid the time, cost, and legal exposure otherwise associated with preparation of documentation required for CEQA compliance, including a Negative Declaration or an EIR (see The Initial Study and Negative Declaration and Preparing the Environmental Impact Report (EIR)). Although not required by CEQA, it is good practice for Lead Agencies to create an administrative record documenting why a proposed activity fits within an exemption category, and that for a categorical exemption, why no exceptions apply.

Statutory Exemptions

Statutory exemptions are found in CEQA and other statutes (most are listed in CEQA Guidelines Sections 15260–

15285), but practitioners should also research other likely codes, such as the Government Code (Cal. Gov't Code § 1 et seq.). If a project is statutorily exempt, no CEQA compliance is needed. Common statutory exemptions include ministerial projects, emergency projects, projects that are disapproved, and feasibility or planning studies. Cal. Code Regs. tit. 14, § 15260 et seq.

The most common statutory exemption is for ministerial projects, which are those requiring little exercise of judgment or deliberation by the decisionmaker because fixed standards are applied, such as approval of final subdivision maps or approval of some types of demolition permits. Friends of Juana Briones House v. City of Palo Alto, 190 Cal. App. 4th 286 (2010). Whether issuance of a permit is discretionary or ministerial depends on the circumstances. As a result, agencies may not categorically classify an entire group of projects, such as well permits, as ministerial when the permitting ordinance requires discretion to be exercised for a subgroup of permits. Protecting Our Water and Environmental Resources v. County of Stanislaus, 10 Cal. 5th 479 (2020). A Lead Agency action may be found to be ministerial and thus exempt from CEQA when the Lead Agency has no discretion to avoid or mitigate impacts associated with the action. McCorkle Eastside Neighborhood Grp. v. City of St. Helena, 31 Cal. App. 5th 80 (2018). Cases similar to *McCorkle* will likely continue to expand as the legislature limits public agencies' authority to deny housing projects. Cal. Gov. Code §§ 65589.5(d), 65863(b). CEQA applies only to discretionary projects, which are those that require the exercise of subjective judgment to decide whether and how to approve the project. Cal. Code Regs. tit. 14, §§ 15268, 15357.

Cal. Gov't Code § 65913.4 provides a ministerial approval process for multifamily housing projects that meet several additional statutory criteria, in a city or county that has fulfilled less than its share of the regional housing need allocation (RHNA) by income category. In such a city or county, approval of a qualifying housing development on a qualifying site is ministerial, and therefore not subject to CEQA review.

Categorical Exemptions

Categorical exemptions are qualified exemptions adopted by the Natural Resources Agency and found in the CEQA Guidelines. Cal. Code Regs. tit. 14, § 15300 et seq. Common categorical exemptions include those for existing facilities, construction of small facilities, and certain projects responding to an emergency. Categorical exemptions generally do not result in significant environmental effects. However, certain exceptions to a categorical exemption may make a categorical exemption inapplicable to a particular project. Cal. Code Regs. tit. 14, § 15300.2. In particular, a categorical exemption does not apply if, due to unusual circumstances, there is a reasonable possibility of a significant impact. In Berkeley Hillside Pres. v. City of Berkeley, 60 Cal. 4th 1086, 1115-116 (2015), the supreme court ruled that the deferential substantial evidence standard of review applies to whether unusual circumstances exist, but the less deferential fair argument standard applies to whether there is a reasonable possibility of significant impact.

Dicta in one appellate decision suggested courts should assume that unusual circumstances exist if an agency fails to make explicit findings about the lack of unusual circumstances. Respect Life South San Francisco v. City of South San Francisco, 15 Cal. App. 5th 449, 458 (2017). In our opinion, this dicta is inconsistent with well-established CEQA law. While EIRs are required to include explicit findings (Cal. Code Regs. tit. 14, § 15091), no similar requirement is imposed by Cal. Code Regs. tit. 14, § 15300.2; consequently, the courts may not interpret CEQA to require such a finding. Cal. Pub. Res. Code § 21083.1. Instead, when a Lead Agency establishes the project is facially subject to a categorical exemption, the burden shifts to the party challenging the exemption to show that the project is not exempt under Cal. Code Regs. tit. 14, § 15300.2. Berkeley Hillside Pres. v. City of Berkeley, 60 Cal. 4th 1086, 1105 (2015). It is recommended that project applicants and public agencies document the presence of comparable facilities/projects in the immediate area to support explicit findings that there are no unusual circumstances. Bloom v. McGurk, 26 Cal. App. 4th 1307, 1316 (1994).

Common Sense Exemption

Under the common sense exemption, an activity is exempt from CEQA when it can be seen with certainty that there is no possibility it may have a significant environmental effect. Cal. Code Regs. tit. 14, § 15061(b)(3). The common sense exemption should be used sparingly because it is very narrowly defined, and the Lead Agency has the burden of demonstrating that it applies. Muzzy Ranch Co. v. Solano Cty. Airport Land Use Com., 41 Cal. 4th 372, 387 (2007).

Certified Regulatory Programs

The Natural Resources Agency has certified certain state regulatory programs, which exempt them from CEQA's procedural requirement to prepare EIRs and Negative Declarations. However, a certified regulatory program must still comply with other CEQA policies, and preparation of a substitute document that is the functional equivalent of

a Negative Declaration or EIR is required. Common state-certified regulatory programs include Coastal Commission certification of local coastal programs, and state regulation of timber harvesting. Cal. Code Regs. tit. 14, § 15250 et seq.

Other Partial Exemptions

There are many other "partial" exemptions to CEQA requirements. For example, environmental review of projects consistent with existing zoning, community plans, or general plans for which an EIR was prepared are limited to project-specific impacts that are peculiar to the project or site. Cal. Code Regs. tit. 14, § 15183. Also, for residential, mixed use, or employment center projects proposed on infill sites that are within transit priority areas, aesthetic and parking impacts are not to be considered significant environmental effects in project CEQA documents. Cal. Pub. Res. Code §§ 21099(d), 21064.3.

CEQA Time Limits and the Permit Streamlining Act

CEQA incorporates time limits for processing development applications requiring purely adjudicative approvals (known as development projects). The following time limits were adopted concurrently with the Permit Streamlining Act (Cal. Gov't Code § 65920 et seq.):

- Acceptance of application as complete (30 days from submittal of a development project application) Cal. Code Regs. tit. 14, § 15060.
- Completion of Negative Declaration (180 days from acceptance of application as complete) Cal. Code Regs. tit. 14, § 15107; Cal. Pub. Res. Code §§ 21100.2 and 21151.5.
- Completion of EIR (one year from acceptance of application as complete) Cal. Code Regs. tit. 14, § 15108; Cal. Pub. Res. Code §§ 21100.2 and 21151.5.

While CEQA incorporates specific time limits for preparation of environmental documents for development projects, many CEQA documents are not prepared within these time frames due to project modifications and changes to CEQA, including legislative amendments and new case law. Failure to comply with these limits is not grounds for a project being deemed approved (Land Waste Mgmt. v. Contra Costa Cty. Bd. of Supervisors, 222 Cal. App. 3d 950, 961 (1990)), but the public agency may potentially be subject to a writ directing completion of the CEQA document. Sunset Drive Corp. v. City of Redlands, 73 Cal. App. 4th 215, 223 (1999). However, these time periods can be relaxed or tolled where an applicant participates in a process which results in project modifications, or where the applicant fails to provide information requested by the agency in a timely manner. Schellinger Bros. v. City of Sebastopol, 179 Cal. App. 4th 1245, 1261 (2009); Cal. Code Regs. tit. 14, § 15109.

After approval/certification of the CEQA document, the Lead Agency has specific time limits to act upon the project's development permits, or they may be deemed approved. Examples include 60 days from exemption decision or adoption of Negative Declaration, and 180 days from date of EIR certification. Cal. Gov't Code §§ 65956 and 65950. See Riverwatch v. Cty. of San Diego, 76 Cal. App. 4th 1428, 1538-39 (1999). The time periods for project approval following EIR certification have been shortened for certain housing and mixed-use projects (90 days), and still further shortened for certain affordable housing projects (60 days). Cal. Gov't Code § 65950.

Practical Considerations before Starting the CEQA Process

Project applicants should consider the following recommendations before starting the CEQA process for Negative Declarations and EIRs.

Define the Project Carefully

CEQA provides that even if your development project involves legislative amendments (e.g., general plans, specific plans, or zoning amendments), the CEQA project should be described as the underlying physical development. Cal. Code Regs. tit. 14, § 15378(d). However, applicants should be wary of potential inconsistencies between maximum theoretical development allowed by plans or plan amendments (e.g., maximum theoretical buildout under the floor area ratios, population density (du/acre), lot coverage, or height limits), versus what is actually proposed. For larger development projects, project opponents often assert inconsistencies between what is actually being proposed, versus what is theoretically allowed. CEQA documents are not required to assume maximum theoretical development. Save Round Valley All. v. Cty. of Inyo, 157 Cal. App. 4th 1437, 1450, 1451 (2007); San Diego Citizenry Grp. v. Cty. of San Diego, 129 Cal. App. 4th 1, 20-22 (2013); High Sierra Rural All. v. Cty. of Plumas, 29 Cal. App. 5th 102, 124-25 (2018). Development assumptions should be well supported, including assumptions based upon historic growth rates and questionnaires. Applicants should also ensure that any supporting infrastructure improvements have been disclosed and analyzed that are a reasonably foreseeable consequence of the project.

Properly Classify Measures That Reduce Impacts

Carefully consider how to classify measures that reduce environmental impacts (i.e., project design feature versus a mitigation measure). Misidentification of a measure as a project design feature rather than a mitigation measure may invalidate the use of a CEQA exemption or may require revisions to the CEQA document's environmental analysis. Project components that are part of project "from its inception" are generally not treated as a mitigation measure. Save the Plastic Bag Coal. v. City & Cty. of S.F., 222 Cal. App. 4th 863, 882–83 (2013). These measures are often called project design features, which are typically called out in the project description. However, carefully distinguish such measures that really are part of the project description from the outset from mitigation measures that are developed later to reduce environmental impacts; the latter may not be incorporated into the project description or the pre-mitigation significance conclusions. See Lotus v. Dep't of Transp., 223 Cal. App. 4th 645, 655-56 (2014). If a project design feature or measure can be tied to an existing applicable regulatory requirement (e.g., MS4 stormwater permit, air district rule, building code, or municipal/county code), then it may be relied upon as part of the pre-mitigation impact analysis. See S.F. Beautiful v. City & Cty. of S.F., 226 Cal. App. 4th 1012, 1033 (2014); Citizens for Envtl. Responsibility v. State ex rel. 14th Dist. Ag. Ass'n, 242 Cal. App. 4th 555, 574 (2015).

Establish an Accurate Baseline

Applicants should document the history of the project site to establish a baseline. If the site is already built out or contains existing operations, there may be some utility to continuing these operations until an EIR Notice of Preparation (NOP) has been published. Because the baseline for impact analysis is typically the time of NOP publication (see EIR Contents), a "higher" baseline reflecting an operating site may mean that a proposed project's impacts are lower.

Joint Defense and Common Interest Agreements

Project applicants should consider entering into a joint defense and common interest agreement with a Lead Agency. Such agreements may allow Lead Agencies to share privileged documents with an applicant's counsel without waiving the attorney-client privilege. Cal. Oak Found. v. Cty. of Tehama, 174 Cal. App. 4th 1217, 1222 (2009). However, one case found that applicants and public agencies cannot be considered to have a common interest at the pre-approval stage in the CEQA process, and therefore any pre-approval communications waive any privilege. Citizens for Ceres v. Superior Court, 217 Cal. App. 4th 889, 914–22 (2013). The court in *Citizens for Ceres* disagreed with *California Oaks Foundation*, reasoning that applicants' and Lead Agencies' interests are fundamentally at odds with one another at the pre-approval stage, citing concerns about significance conclusions and mitigation measure feasibility. In the authors' opinion, the *Citizens for Ceres* case likely went too far in its holding; there are numerous aspects of the CEQA process which do not implicate divergent interests, such as reviewing the CEQA document for consistency with the project application, internal consistency, and applicable regulations. Indeed, project applicants are allowed to prepare the Draft EIR in its entirety, subject to Lead Agency independent review and certification. Cal. Code Regs. tit. 14, § 15084(d)(3). It is recommended that any joint defense and common interest agreement intended to be effective during the pre-approval stage be drafted narrowly to avoid the conflicts of interest raised by the *Court in Citizens for Ceres*. Until this case law conflict has been resolved, many applicants have elected to communicate their concerns orally to those preparing CEQA documents.

Review Internal EIR Drafts

If permitted by the Lead Agency, project applicants should review internal drafts (i.e., administrative screen check drafts) of EIRs for accuracy. Although not all Lead Agencies allow this, at a minimum, applicants should request to review the project description for accuracy and the EIR alternatives for potential feasibility.

Reimbursement and Indemnification Agreements

Many Lead Agencies seek reimbursement and indemnification from project applicants in return for application processing and CEQA document preparation. Cal. Pub. Res. Code §§ 21089(a), 21157(c); Cal. Code Regs. tit. 14, § 15045(a); Cal. Gov't Code §§ 65104, 66474.9(b)(1). Such agreements may include payment for environmental consultants, application processing, Public Records Act requests associated with the project, outside legal counsel, and indemnification for lawsuits associated with the project. Counsel for applicants should review the scope of proposed reimbursement and indemnification agreements.

Study Local Concerns

It is recommended that project applicants familiarize themselves with local environmental, political, and related development concerns. This may include reviewing:

- Recent CEQA documents prepared by the Lead Agency and any associated comments, which are typically included in the Final EIR or staff reports
- Planning commission and city council/county board meeting videos and minutes for similar projects
- Local neighborhood social media sites –and–
- Articles in the local newspaper, and any comments made thereto

This review will potentially allow project applicants to address sensitive issues before submitting an application and should continue throughout the project's entitlement process.

The Initial Study and Negative Declaration

After an activity is classified as a project and no CEQA exemptions apply, the Lead Agency usually prepares an Initial Study in order to determine whether to prepare an EIR (when a project has a significant environmental impact), a Negative Declaration (when a project is determined not to have a significant environmental impact), or a Mitigated Negative Declaration (when the applicant agrees to revisions to a project which would mitigate any effects to a point where clearly no significant effects would occur). However, a Lead Agency has the discretion to decide to prepare an EIR without first preparing an Initial Study. Cal. Code Regs. tit. 14, § 15063(a). Even if the Lead Agency has determined an EIR is necessary, such documentation may still be beneficial, as it allows the EIR to eliminate some resource areas or significance thresholds from additional detailed environmental review. Cal. Code Regs. tit. 14, §§ 15063(c)(3)(A) and 15128. The following sections examine the Initial Study and how a Lead Agency decides whether to prepare an EIR or a Negative Declaration.

Initial Study

An Initial Study is a short document containing a project description, environmental setting, potential environmental impacts, and mitigation measures for any significant effects. If the Initial Study concludes that the project will not have a significant effect, the Lead Agency adopts a Negative Declaration. If mitigation is needed to reduce any significant effects to less than significant levels, the Lead Agency adopts a Negative Declaration that includes mitigation measures (Mitigated Negative Declaration). Cal. Code Regs. tit. 14, § 15063.

The Initial Study generally uses a checklist format modelled after Appendix G of the CEQA Guidelines, although this checklist is not mandatory. Cal. Code Regs. tit. 14, Div. 6. Chap. 3, Appendix G; Cal. Code Regs. tit. 14, § 15063(f). Each checklist answer requires a fact-based explanation to support conclusions that an impact is not significant. In December 2018, Appendix G was extensively revised, including adding new questions concerning transportation, energy, and wildfire impacts.

Decision to Prepare an EIR versus Negative Declaration

Negative Declarations and Mitigated Negative Declarations are reviewed by the courts under the fair argument standard. Under this standard, an EIR must be prepared when the Lead Agency determines that it can be fairly argued, based on substantial evidence, that a project may have a significant environmental effect. The non-deferential fair argument standard means that if project opponents have provided substantial evidence that a project may have a significant environmental effect, the use of a Negative Declaration is improper, and an EIR must be prepared, even if the Lead Agency's substantial evidence indicates lack of significant environmental effect. See also Judicial Review section below. Cal. Code Regs. tit. 14, § 15064. However, an EIR receives a more deferential standard of judicial review under the traditional substantial evidence test. Under the traditional substantial evidence test, pointing to evidence of a disagreement with other agencies or experts is not enough to invalidate an EIR. California Native Plant Society v. City of Rancho Cordova, 172 Cal. App. 4th 603, 626 (2009).

Substantial evidence includes facts, fact-based assumptions, and expert opinion. It does not include argument, speculation, or unsubstantiated opinion. Public controversy about a project alone is not substantial evidence but may be used to require an EIR in marginal cases when substantial evidence of a significant environmental impact is unclear. Cal. Code Regs. tit. 14, §§ 15064(f)(4), 15384.

However, courts may allow personal observations by citizens to be considered substantial evidence for resource areas the courts view as requiring less expertise, such as aesthetics and noise. Georgetown Pres. Soc'y v. Cty. of El Dorado, 30 Cal. App. 5th 358, 375–76 (2018). Consequently, if an applicant believes they are likely to receive public opposition or a lawsuit on their project, they may consider requesting that the public agency prepare an EIR rather than a Negative Declaration to receive a more favorable and deferential standard of judicial review, and to avoid additional delays and challenges if the Lead Agency decides to prepare an EIR late in the Negative Declaration process.

Determining Whether Impacts Are Significant

In General

CEQA requires that both direct and indirect (secondary) impacts of a project be evaluated for significance. Several tools exist for determining whether an environmental effect is significant, including CEQA Guidelines Appendix G, agency thresholds of significance, special Guidelines rules for certain resources, and mandatory findings of significance.

CEQA Guidelines Appendix G sets forth questions for each environmental resource area (e.g., aesthetics, biological resources) to determine whether a project's environmental effects are potentially significant at the initial study phase. However, in practice, many public agencies use the Appendix G criteria as EIR significance thresholds, although this approach is not required by CEQA. Save Cuyama Valley v. County of Santa Barbara, 213 Cal. App. 4th 1059, 1067–70 (2013). A project may still have a significant environmental effect even if the effect is not included in Appendix G. Protect the Historic Amador Waterways v. Amador Water Agency, 116 Cal. App. 4th 1099, 1109 (2004).

The Guidelines establish special requirements and/or guidance for determining the significance of impacts on transportation, greenhouse gases, historical resources, energy, and water supply. Cal. Code Regs. tit. 14, §§ 15064.3, 15064.4, 15064.5, 15126.2(b), and 15155. These are discussed in EIR Contents below.

The Guidelines set forth several mandatory findings of significance, requiring an EIR to be prepared when these findings are made. Cal. Code Regs. tit. 14, § 15065. These include substantially reducing the habitat of a fish or wildlife species, substantially reducing the number or restricting the range of an endangered or threatened species or causing cumulatively considerable effects.

Thresholds of Significance

A threshold of significance is an identifiable quantitative, qualitative, or performance level of a particular environmental effect that would normally be significant. Environmental standards (e.g., air or water quality standards) meeting certain requirements can be used as thresholds of significance. Cal. Code Regs. tit. 14, § 15064.7. Thresholds of significance are used in both Initial Studies and EIRs to determine whether a proposed project's impacts are significant.

The CEQA Guidelines encourage Lead Agencies to voluntarily adopt thresholds of significance. Agency thresholds developed for general use must be adopted through a public review process and supported by substantial evidence. However, most Lead Agencies establish thresholds of significance on a project-by-project basis, rather than formally adopting them in advance. In either event, Lead Agencies should explicitly disclose which thresholds they are utilizing and briefly explain how compliance with the threshold means that project's impacts are less than significant, particularly for greenhouse gas thresholds. See Ctr. for Biological Diversity v. Dep't of Fish & Wildlife, 62 Cal. 4th 204, 261–66 (2015). Also, the Lead Agency must still consider any substantial evidence indicating a project's environmental effects may be significant notwithstanding compliance with the threshold. Cal. Code Regs. tit. 14, § 15064(b)(2).

Non-CEQA Impacts

Several categories of impacts are not considered physical environmental impacts within the scope of CEQA. An economic or social impact is not considered a significant environmental effect, but if a physical change (e.g., urban blight) is caused by an economic impact, the physical change must be evaluated for significance. Cal. Code Regs. tit. 14, §§ 15064(d), (e), 15131; Chico Advocates for a Responsible Economy v. City of Chico, 40 Cal. App. 5th 839, 847 (2019). Effects outside the scope of CEQA include impacts on:

- **Property values.** Reductions or increases in property values are socio-economic impacts outside the scope of CEQA, unless they can be traced to physical environmental impacts. See Cal. Code Regs. tit. 14, § 15131.
- **Taxes.** Reductions or increases in taxes are socio-economic impacts outside the scope of CEQA, unless they can be traced to physical environmental impacts. See Cal. Code Regs. tit. 14, § 15131.
- **Parking supply.** Parking impacts of a residential, mixed use residential, or employment center projects on an infill site within a transit priority area are not considered significant impacts on the environment. Cal. Pub. Res. Code § 21099(d). In December 2009, the Office of Planning and Research (OPR) eliminated parking from the CEQA Guidelines Appendix G environmental checklist, stating ". . . inadequate parking is a social impact . . ." (California Natural Resources Agency, Final Statement of Reasons for Regulatory Action, p. 97, (2009).) However, subsequent case law has created a split of authority on this issue for projects and locations which do not meet the specific statutory definition of Cal. Pub. Res. Code § 21099(d). Covina Residents for Responsible Dev. v. City of Covina, 21 Cal. App. 5th 712, 724–30 (2018).

- **Aesthetics in limited circumstances.** Aesthetic impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area are not considered significant impacts on the environment. Cal. Pub. Res. Code § 21099(d).
- **Private views.** Courts have held that when a supplemental EIR adequately analyzes a project's impact on a plaintiff's property, assessment of the impact on the plaintiff's view is not required. Mira Mar Mobile Cmty. v. City of Oceanside, 119 Cal. App. 4th 477, 492–95 (2004).
- **Housing supply.** Pursuant to Cal. Code Regs. tit. 14, § 15126.2(e), "[I]t must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment." The purpose behind looking at growth inducement is to determine whether "Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects." See also Citizens for Responsible & Open Gov't v. City of Grand Terrace, 160 Cal. App. 4th 1323, 1334 (2008) "There is no question the Project will increase the population density. The issue is whether there is a fair argument the increase will cause a significant impact."
- **Public service levels.** Increases in the demand for public service levels, such as fire, police, and other public services are typically not considered a physical environmental impact under CEQA. Courts have found that "[T]he need for additional fire protection services is not an environmental impact that CEQA requires a project proponent to mitigate" and instead upheld an analysis focused upon whether the CEQA document adequately considered the physical environmental impacts which would result from providing those public services (e.g., physical environmental impacts associated with the construction of a new fire station). See City of Hayward v. Trs. of Cal. State Univ., 242 Cal. App. 4th 833, 843 (2015).
- **Community character.** When there is substantial evidence that redevelopment of a property would affect the community's character in a psychological and social way, but not an environmental way, an EIR is not necessary and is outside the scope of CEQA. Pres. Poway v. City of Poway, 245 Cal. App. 4th 560, 576–82 (2016).
- **Automobile delay.** Cal. Pub. Res Code § 21099(b)(2) provides that upon certification of implementing CEQA Guidelines, automobile delay, as described solely by level of service (LOS) or similar measures of vehicular capacity or traffic congestion shall not be considered a significant impact. Pub. Res. Code § 21099(b)(2). This provision became effective upon certification of the CEQA Guidelines amendments modifying transportation impact metrics, which occurred in December 2018. Any current challenges to previously adopted LOS traffic studies are now moot. Citizens for Positive Growth & Preservation v. City of Sacramento, 43 Cal. App. 5th 609, 625 (2019).
- **Impacts of the environment on the project.** Generally, CEQA is concerned about the impacts of the project on the environment, not the impacts of preexisting environmental conditions (e.g., earthquake hazards) on a project or its residents. However, an EIR must consider the effects of the environment by a proposed project if required by specific statutory provisions governing school, airport, and certain housing projects, or if the project "risks exacerbating" these effects. Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 62 Cal. 4th 369 (2015).
- **Environmental changes that do not affect the public at large.** Parker Shattuck Neighbors v. Berkeley City Council, 222 Cal. App. 4th 768, 782 (2013).
- **Public controversy.** The existence of a public controversy by itself is insufficient evidence of a significant environmental impact. Cal. Code Regs. tit. 14, § 15064(f)(4).

Negative Declaration Process

A Negative Declaration documents the decision not to prepare an EIR. The considerations in preparing a defensible Negative Declaration or Mitigated Negative Declaration are discussed below.

The Negative Declaration and the Mitigated Negative Declaration

The Negative Declaration document itself includes a brief project description and a proposed finding of no significant impact with the Initial Study as an attachment. Cal. Code Regs. tit. 14, §§ 15071(d), 15371. A Mitigated Negative Declaration (MND) must also describe mitigation measures included in the project to avoid significant effects. Before proceeding with the use of an MND, the applicant must agree with the project revisions and mitigation measures. Cal. Code Regs. tit. 14, § 15074(b)(1). Some Lead Agencies require a formal mitigation agreement, spelling out the specific measures to be incorporated into the project, if approved.

Public Notice and Review

Public notice of a proposed (i.e., draft) Negative Declaration starts a 20- or 30-day public review period; the 30-day review period is required if a project requires State Clearinghouse review. Cal. Code Regs. tit. 14, § 15073. State Clearinghouse review is required if a state agency is a

Lead or Responsible Agency, a trustee agency, or an agency with jurisdiction by law, or if the project is of statewide, regional, or areawide significance, as defined by Cal. Code Regs. tit. 14, § 15206. The Lead Agency must consider comments received on the proposed Negative Declaration before adopting it and approving the project but need not respond to comments in writing (although it is often advisable to prepare written responses).

For an MND, the Lead Agency may substitute equally or more effective mitigation measures, provided this substitution is considered at a public hearing (it is recommended that such substitution be called out in the agenda/public hearing notice and that the Lead Agency adopt findings that the new measure is equivalent or more effective). Cal. Code Regs. tit. 14, § 15074.1(b). If a Negative Declaration is substantially revised after public review, the Lead Agency must recirculate it for an additional round of public review. Cal. Code Regs. tit. 14, §§ 15073.5, 15074, 15074.1. When approving an MND, the Lead Agency also must adopt a Mitigation Monitoring and Reporting Program (see description under Preparing the Environmental Impact Report (EIR)).

Notice of Determination

After approving a Negative Declaration or MND, the Lead Agency files a Notice of Determination (NOD) with OPR or the county clerk and pays applicable DFW environmental review fees. Cal. Code Regs. tit. 14, § 15075. Applicants should be prepared to provide the Lead Agency with a check for both the county clerk and the DFW immediately after project approval, to ensure the NOD is filed as expeditiously as possible, as the NOD filing and posting start the statute of limitations for a CEQA challenge. Applicants should also confirm that the Lead Agency has filed the NOD, and that the NOD was posted at the county clerk's office.

Defensibility of Negative Declarations

Because Negative Declarations are judicially reviewed using the non-deferential fair argument standard, it is especially important that all conclusions and findings in a Negative Declaration, especially the attached Initial Study, be supported with facts and reasons. If project opposition exists, particularly from frequent CEQA litigants such as environmental groups or labor unions, to avoid delay, it may be preferable to prepare an EIR from the outset rather than delaying this decision until an Initial Study is competed or until a draft Negative Declaration has been circulated and receives adverse comments.

Preparing the Environmental Impact Report (EIR)

Successful preparation of an EIR requires an understanding of the types of EIRs that are available under the CEQA Guidelines so that the EIR best fits the project type and Lead Agency decision-making process. Once the type of EIR is determined, the EIR process typically involves the following steps:

- NOP / Initial Study / Scoping
- Draft EIR
- Final EIR
- The Decision-Making Process
- Post-project Approval CEQA Documents (if necessary)

Types of EIRs

The CEQA Guidelines (Cal. Code Regs. tit. 14, § 15160 et seq.) recognize several types of EIRs:

- **Project EIRs.** This is the most common type of EIR, which focuses on the environmental impacts of a specific project. Cal. Code Regs. tit. 14, § 15161.
- **General Plan EIRs.** A local general plan (or element) document may be used as the EIR if it satisfies the requirements of Cal. Code Regs. tit. 14, § 15166.
- **Staged EIRs.** A staged EIR is used when a large project requires numerous governmental approvals over a period of more than two years after construction commences. Cal. Code Regs. tit. 14, § 15166.
- **Program EIRs.** A Program EIR is an EIR prepared on a series of related actions consisting of one project. Cal. Code Regs. tit. 14, § 15168. Following preparation of the Program EIR, the Lead Agency will determine if a subsequent activity has effects that are within its scope (consistent with allowable land use types, overall planned density and building intensity, geographic area for analyzing environmental impacts, and covered infrastructure) no new CEQA document is required for subsequent activities within the scope of a Program EIR. However, a Program EIR may also serve as a first-tier document if subsequent activities that are not within the scope of the Program EIR and require an additional (or second-tier) EIR or Negative Declaration, as provided in Cal. Code Regs. tit. 14, § 15152.
- **Joint EIR/Environmental Impact Statements (EIR/EIS).** A Lead Agency may prepare a joint document with a federal agency that meets both CEQA and NEPA requirements. Cal. Code Regs. tit. 14, §§ 15170, 15220 et seq.

- **Master EIR.** The Master EIR procedure is used for certain projects to create the basis for later decision- making. The procedure streamlines the later environmental review of projects or approvals included within the project, plan, or program analyzed in the Master EIR by evaluating the cumulative, growth-inducing, and irreversible impacts of subsequent projects. Cal. Code Regs. tit. 14, § 15175. The Master EIR process functions similarly, but is procedurally more complex, than a Program EIR, with either a Negative Declaration or focused EIR prepared for subsequent activities outside the Master EIR's scope. Cal. Code Regs. tit. 14, § 15175 et seq.
- **Post-project Approval EIRs.** After an EIR has been certified or a Negative Declaration has been adopted and a project has been approved, a subsequent EIR may be prepared upon findings by the Lead Agency described in Cal. Code Regs. tit. 14, § 15162. Sierra Club v. City of Orange, 163 Cal. App. 4th 523, 541–46 (2008). Under certain circumstances, a supplemental EIR (Cal. Code Regs. tit. 14, § 15163) or an addendum to a certified EIR (Cal. Code Regs. tit. 14, § 15164) may be prepared instead of a subsequent EIR.

As described in Appendix J of the CEQA Guidelines, Program EIRs, general plan EIRs, and Master EIRs may be tiered if subsequent development activities are not within the scope of the original EIR. Tiering refers to preparation of environmental documents using a multi-layered approach. In tiering, a first-tier EIR examines broad alternatives, mitigation criteria, and cumulative impacts, and a second-tier CEQA document focuses on project-specific impacts, alternatives, and mitigation measures. For example, a first-tier general plan EIR can analyze jurisdiction-wide alternatives, and regional impacts and mitigation measures. A second-tier EIR prepared for approval of a specific plan and rezoning can then be limited to project-specific alternatives and impacts. Cal. Code Regs. tit. 14, § 15152.

EIR Process

The process of completing an EIR from start to finish can take many months or even years. It is often difficult to predict how long the process can take because of factors such as the uncertain nature of scoping comments and Draft EIR comments, the possible need to recirculate the Draft EIR, and project opponent delay tactics. The process is described below.

Scoping

The EIR process starts with scoping, which is a process to determine the scope of environmental impacts, mitigation, and alternatives to be examined in the EIR. Scoping includes issuance of a Notice of Preparation (NOP) that describes the proposed project and typically includes a copy of the Initial Study. The NOP requests responses from reviewing agencies. Responses to the NOP must be sent to the Lead Agency within 30 days of issuance, and the Lead Agency must consider these comments when preparing the EIR. Cal. Code Regs. tit. 14, § 15082. A scoping meeting is also required for projects of statewide, regional, or areawide significance.

Draft Environmental Impact Report

An administrative Draft EIR (sometimes called a screen check draft EIR) is typically prepared for internal Lead Agency review, followed by publication and distribution of the public Draft EIR. While some project applicants may be under tremendous time pressure and push for early release of the Draft EIR, applicants are advised against pushing for release of a document without thorough vetting and a stable project description. If an EIR is released prematurely, it may be subject to recirculation and attendant procedural delays (typically several months).

The Draft EIR may be prepared by Lead Agency staff, another public or private entity, the project applicant, or a consultant hired by the Lead Agency or applicant. The Lead Agency is ultimately responsible for Draft EIR content and must independently review the document prior to release. Cal. Code Regs. tit. 14, § 15084.

Public Notice of Availability of the Draft EIR (NOA) starts a minimum 30- or 45-day public review period, although errors in calculating such time periods may not be considered prejudicial. Rominger v. County of Colusa, 229 Cal. App. 4th 690, 705, 709 (2014). The 45-day review period is required if a project requires State Clearinghouse review. The public review period should be no longer than 60 days except in unusual circumstances. Cal. Code Regs. tit. 14, §15105(a). The Lead Agency files a Notice of Completion (NOC) with the State Clearinghouse at the same time it provides public notice of Draft EIR availability. Many Lead Agencies hold a public hearing on the Draft EIR to receive public comments, although CEQA does not require a public hearing. Cal. Code Regs. tit. 14, §§ 15085–15087. If a public hearing is held during the comment period, it is recommended that transcripts or minutes be prepared concurrently to assist in preparation of the Final EIR.

The COVID-19 emergency raised many legal questions, including public participation in the CEQA process. During the COVID-19 emergency many individuals were subject to stay at home orders, and could not obtain physical access to CEQA documents at public locations. Draft EIR document availability is generally controlled by CEQA

Guidelines (Cal. Code Regs. tit. 14, § 15087(c)(5)), which requires the Lead Agency to specify "the address where copies of the EIR and all documents . . . will be available for public review. This location shall be readily accessible to the public during the Lead Agency's normal working hours." While some individuals may assert that "address" implies a physical location, this section must be read in conjunction with § 15087(g), which states that lead agencies "should" make the EIR available at public libraries and offices of the Lead Agency. Use of the word "should" here is not considered mandatory. Cal. Code Regs. tit. 14, § 15005. Therefore, lead agencies may be able to make CEQA documents available exclusively by electronic means, rather than a physical public location. To address this concern, the Governor issued Executive Order N-80-20 on September 23, 2020, which conditionally suspended requirements for noticing and posting with the County Clerk, and provided optional alternative requirements. See Reader Alert.

Recirculation of Draft EIR

If significant new information is added to a Draft EIR, the Lead Agency must recirculate the Draft EIR and provide a second public review period. Under Cal. Code Regs. tit. 14, § 15088.5, "significant new information" requiring recirculation includes (1) a new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented, (2) a substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance, (3) a feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project proponent declines to adopt it, or (4) the Draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. See also EIR Contents for additional information on project modifications/alternatives after release of the Draft EIR. Lead Agencies and applicants should make sure that Draft EIRs are ready for public review (e.g., have an accurate and stable project description, have all required analysis and are internally consistent) to avoid the time and costs associated with Draft EIR recirculation.

Final EIR

Following receipt of comments on the Draft EIR, the Lead Agency proceeds to prepare the Final EIR. The Final EIR contains comments on the Draft EIR, a list of commenters, responses to comments, and any necessary revisions to the Draft EIR. Cal. Code Regs. tit. 14, §§ 15089, 15132, and 15362. Project opponents frequently allege that a Final EIR contains significant new information requiring Draft EIR recirculation. Beverly Hills Unified School District v. Los Angeles County, 241 Cal. App. 4th 627, 659–63 (2015). Lead Agencies should anticipate this and provide explanations in the Final EIR or record as to why Draft EIR recirculation is not triggered (e.g., there are no new or substantially worse impacts, and no considerably different alternatives or mitigation which are not proposed for adoption). Cal. Code Regs. tit. 14, § 15088.5.

Decision-Making Process

It is recommended that the applicant and the Lead Agency prepare a chart outlining the procedures for all of the project's various entitlements, which may require recommendations and approvals from various bodies of the Lead Agency. Bodies which make a formal "recommendation" on a project entitlement are required to review and consider the EIR in draft or final form (e.g., planning commission recommendation on a general plan amendment). Cal. Code Regs. tit. 14, § 15025(c).

Prior to the approval hearing, the Lead Agency should ensure that the Final EIR is current, internally consistent, and ready for hearing. As appropriate, staff and Lead Agency counsel may meet with the decision-making body chair in advance to go over required project approval resolutions, and procedures for how to receive and respond to public comments. Lead Agencies should arrange for the EIR project consultant manager, and if possible key technical staff, to attend the hearings; include in the staff report or elsewhere in the record the consultant or staff responses to all "late" comments received after Final EIR publication; and be prepared to respond to last-minute "document drops" by project opponents on the day of the hearing, including continuing the hearing if adequate responses to these last-minute comments cannot be read into the record.

The Lead Agency's decision-making body (i.e., the individual or Lead Agency body with approval authority of one of the project's entitlements) must certify that the Final EIR complies with CEQA, was presented, reviewed, and considered by the decision-making body, and represents the Lead Agency's independent judgment and analysis. Cal. Code Regs. tit. 14, § 15090(a). Decision-makers are presumed to have reviewed and considered the EIR as part of the certification process and do not normally need to provide independent evidence beyond the certification. Cal. Evid. Code § 664; El Morro Community Association v. California Department of Parks and Recreation, 122 Cal. App. 4th 1341, 1351 (2004).

If the EIR is certified by a non-elected decision-making body, it may be appealed to the elected decision-making body of the Lead Agency, if one exists. Cal. Code Regs. tit. 14, § 15090(b). Applicants should be prepared for such procedural delays and familiar with any locally adopted appeal procedures, as they may provide additional procedural defenses. See Mount Shasta Bioregional Ecology Ctr. v. Cty. of Siskiyou, 210 Cal. App. 4th 184, 201–02 (2012); Tahoe Vista Concerned Citizens v. Cty. of Placer, 81 Cal. App. 4th 577, 592 (2000). Generally, in such appeal proceedings, appellants are only entitled to reasonable notice and a reasonable opportunity to be heard. CREED-21 v. City of San Diego, 234 Cal. App. 4th 488, 518 (2015); Horn v. Cty. of Ventura, 24 Cal. 3d 605, 616 (1979). However, applicants may be entitled to a greater level of due process, and public agencies should avoid potential bias against applicants on the part of the decisionmakers. Nasha v. City of L.A., 125 Cal. App. 4th 470, 482 (2004); Petrovich Development Co., LLC v. City of Sacramento, 48 Cal. App. 5th 963 (2020).

CEQA also requires findings of fact, supported by substantial evidence, to be adopted prior to project approval. Cal. Code Regs. tit. 14, § 15091. For each significant impact disclosed in the Final EIR, the Lead Agency must make of the following findings:

- Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the Final EIR.
- Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and should be adopted by such other agency.
- Specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the Final EIR.

A Lead Agency may approve the project with significant unavoidable impacts only if it adopts a Statement of Overriding Considerations. This Statement, which must be supported by substantial evidence, must set forth the specific overriding economic, legal, social, or technological, or other benefits, including regionwide or statewide environmental benefits, overriding the project's significant environmental effects. Cal. Code Regs. tit. 14, § 15093. Typically, benefits to the local economy, housing, or the environment are used as project benefits to override significant adverse environmental impacts. In preparing such statements, the Lead Agency should consider the broad statewide and regional consequences associated with denial of the project, as such themes are interwoven into CEQA and related state law. See Cal. Gov't Code § 65589.5(a); City of Long Beach v. City of L.A., 19 Cal. App. 5th 465, 492 (2018).

When adopting CEQA findings of fact on the Final EIR, the Lead Agency also must adopt a mitigation monitoring and reporting program (MMRP) that sets forth roles and responsibilities to assure mitigation measures are implemented. Monitoring refers to oversight of project implementation for complex mitigation measures such as wetland restoration or cultural resources recovery. Reporting refers to written mitigation measure compliance reviews. Cal. Code Regs. tit. 14, § 15097. While some Lead Agencies will release the MMRP with the Draft or Final EIR, this document is not subject to a formal public review period and will often only be released as part of the staff report for the hearing on project approval. Consequently, project applicants should carefully review the proposed MMRP for feasibility, as it will likely contain additional details on mitigation measure implementation which have not been previously released.

After project approval, the Lead Agency files a NOD with OPR or the county clerk and pays applicable DFW environmental review fees. Cal. Code Regs. tit. 14, § 15094.

Post-project Approval CEQA Documents

After the initial project approval, the interests of finality are favored over the policy of encouraging public comment. Chaparral Greens v. City of Chula Vista, 50 Cal. App. 4th 1134, 1151 (1996). Following project approval, if circumstances change and the Lead Agency still has discretionary authority over the project, preparation of a Subsequent or Supplemental EIR may be required. However, the act of requesting approvals from other agencies may not be considered an "approval" of a project triggering supplemental review. Willow Glen Trestle Conservancy v. City of San Jose, 49 Cal. App. 5th 127 (2020). Similarly, an agency's post approval choice to not abandon its project is not an "approval" necessitating supplemental environmental review. Id. Cal. Code Regs. tit. 14, § 15162 limits supplemental and subsequent review to situations where there are:

- Substantial changes in the project cause new or substantially increased significant impacts
- Substantial changes in project circumstances cause new or substantially increased significant impacts
- New information of substantial importance shows the project will have a new or substantially increased

significant impact, or mitigation measures or alternatives that were unknown or thought to be infeasible are now feasible, and the project proponent declines to adopt them

A Subsequent EIR must be prepared if the previous EIR requires substantial changes, whereas a Supplemental EIR may be prepared if changes are not major. However, supplemental environmental review is not required for information that was known or could have been known with the exercise of reasonable diligence at the time the original CEQA document was approved. Cal. Pub. Res. Code § 21166(c); Cal. Code Regs. tit. 14, § 15162(a)(3); Citizens for Responsible Equitable Envtl. Dev. v. City of San Diego, 196 Cal. App. 4th 515, 530–32 (2011). If changes in the project or circumstances do not require a Subsequent or Supplemental EIR, the Lead Agency may prepare an EIR Addendum, an internal agency document explaining the minor technical EIR changes. Cal. Code Regs. tit. 14, §§ 15162, 15163, 15164. Although not required, Lead Agencies should consider filing a NOD when using an Addendum to support project approval and to shorten the CEQA statute of limitations to 30 days. Such a subsequent NOD should include language regarding the Lead Agency's supplemental findings (e.g., "there has been no change to the project or substantial changes in circumstances or new information that would warrant subsequent environmental analysis in accordance with CEQA."). Citizens for a Megaplex-Free Alameda v. City of Alameda, 149 Cal. App. 4th 91, 99 (2007).

EIR Contents

Required EIR contents include the executive summary, project description, environmental setting, significant environmental impacts, alternatives, and mitigation measures. The Lead Agency may present these and other required content in any format. The EIR's summary should generally be no longer than 15 pages; should summarize the project's significant effects, mitigation measures, and alternatives; and should identify areas of controversy and unresolved issues. Cal. Code Regs. tit. 14, § 15120 et seq.

CEQA does not require technical perfection in an EIR, but rather adequacy, completeness, and a good faith effort at full disclosure. Courts do not judge correctness of an EIR's conclusion, but only the EIR's sufficiency as an informative document for decisionmakers and the public. Disagreement among experts regarding conclusions in an EIR is acceptable, as long as the Lead Agency recognizes the disagreement and explains its choice of conclusions. Cal. Code Regs. tit. 14, §§ 15003(i), 15151. However, disagreements raised on the eve of a project approval do not require a summary of the disagreement. Chico Citizens for a Responsible Economy v. City of Chico, 40 Cal. App. 5th 839, 852, n.9 (2019).

Project Description

The project description must include the project objectives, project location, and project characteristics. The project description "should not supply extensive detail beyond that needed for evaluation and review of the environmental impact." Cal. Code Regs. tit. 14, § 15124. See Cal. Pub. Res. Code § 21003(c); Citizens for a Sustainable Treasure Island v. City & Cty. of S.F., 227 Cal. App. 4th 1036, 1053–55 (2014). The CEQA process is often required to start early in the development process, and consequently detailed project information is not always known. Therefore, if flexibility or project options must be incorporated into the project description, the EIR should ensure that such options are disclosed and fully considered in the environmental analysis. South of Market Community Action Network v. City and County of San Francisco, 33 Cal. App. 5th 321 (2019); Beverly Hills Unified School District, 241 Cal. App. 4th 627, 638 (2015).

The project description should focus upon the underlying physical changes, even where the project includes planning or regulatory amendments. Cal. Code Regs. tit. 14, § 15378(d). CEQA documents are not required to assume maximum theoretical development allowed by applicable development standards (e.g., maximum theoretical buildout under the floor area ratios, population density, lot coverage, or height limits). High Sierra Rural All. v. Cty. of Plumas, 29 Cal. App. 5th 102 (2018); see also Practical Considerations before Starting the CEQA Process. However, development assumptions should be well supported, which may include reliance upon historic growth rates or questionnaires. For amendments to broader planning documents, it is often also helpful to define the physical location where development is anticipated to occur. Black Prop. Owners Ass'n v. City of Berkeley, 22 Cal. App. 4th 974, 985.(1994) Where an existing Plan is amended "the agency will not be required to assess the environmental effects of the entire plan or preexisting land use designations. Instead the question is the potential impact on the existing environment of changes in the plan which are embodied in the amendment."

Project opponents sometimes assert that a singular project has been impermissibly split into several smaller projects (referred to as piecemealing). E. Sacramento Partnerships for a Livable City v. City of Sacramento, 5 Cal. App. 5th 281, 293 (2016). The project description should therefore be sure to include any reasonably foreseeable development that is anticipated to occur as a result of the project as

described in entitlement applications, or other materials or statements released by the project applicant (e.g., roadway widening, tunnels, sewer lift stations, new water sources, and other infrastructure, as well as future project phases).

Similarly, project opponents are increasingly faulting project descriptions for not guaranteeing their phasing or land use assumptions, particularly those associated with mixed use developments. However, the Courts have held that "[a] public agency can make reasonable assumptions based on substantial evidence about future conditions without guaranteeing that those assumptions will remain true." Environmental Council of Sacramento v. City of Sacramento, 142 Cal. App. 4th 1018, 1036 (2006); Environmental Council of Sacramento v. County of Sacramento, 45 Cal. App. 5th 1020, 1038 (2020).

While the project description is also required to include a list of permits and approvals, to the extent known, the overall focus should be upon the project's physical changes. Comm. for a Progressive Gilroy v. State Water Res. Control Bd., 192 Cal. App. 3d 847, 863 (1987). Project opponents routinely demand additional detail regarding a project's entitlement process; however, this information is not required by CEQA. See E. Sacramento Partnerships for a Livable City v. City of Sacramento, 5 Cal. App. 5th 281, 290–92 (2016). The project description must also include a list of related environmental review and consultation requirements. See Banning Ranch Conservancy v. City of Newport Beach, 2 Cal. 5th 918, 936 (2017).

Project opponents often also assert that the EIR contains an unstable and inaccurate project description. However, such assertions often mistake project description flexibility (e.g., option of replacing commercial uses with office uses), for an unstable project description (e.g., internal inconsistencies between EIR chapters). Generally, each of these issues has been addressed by two separate lines of case law. Project description flexibility cases have generally turned upon the controlling language of Cal. Code Regs. tit. 14, § 15124, which explains that the project description "should not supply extensive detail beyond that needed for evaluation and review of the environmental impact." Dry Creek Citizens Coalition v. County of Tulare, 70 Cal. App. 4th 20, 27–28 (1999) (rejecting argument that project description was invalid because it provided a conceptual description of dam diversion structures). Similar cases have turned upon whether it was feasible to obtain the level of detail demanded by petitioners and whether the information was relevant to the environmental analysis. Cases involving project description instability have generally focused upon whether the CEQA document contained internally inconsistent descriptions of a project. County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 190–91 (1977). However, one recent case conflates these two concepts. Stopthemillenniumhollywood.com v. City of Los Angeles, 39 Cal. App. 5th 1 (2019).

In *Stopthemillenniumhollywood.com*, the project description provided conceptual buildout scenarios for land use regulations, consistent withCal. Code Regs. tit. 14, § 15378(d). The project description was held invalid because it failed "to describe the siting, size, mass, or appearance of any buildings proposed to be built at the project site." This case has been strongly criticized as the court omitted any discussion the controlling language from Cal. Code Regs. tit. 14, § 15124 and failed to explain how the siting, size, mass, or appearance of any buildings "was needed for evaluation and review of the environmental impact." Additionally, it is difficult to align this case with South of Market Community Action Network v. City and County of San Francisco, 33 Cal. App. 5th 321 (2019), which generally rejected the assertions raised in Stopthemillenniumhollywood.com, and a later decision, which acknowledged the authority of public agencies to adopt vague land use standards to avoid paralyzing the legislative process. Sacramentans for Fair Planning v. City of Sacramento, 37 Cal. App. 5th 698, 708, 713 (2019). For additional information see the League of California Cities Stopthemillenniumhollywood.com de-publication request.

Lead Agencies and project applicants should carefully review the entirety of the EIR to ensure that all chapters contain internally consistent statements and assumptions on all issues (e.g., assuring that the EIR air quality modeling assumptions are consistent with the transportation analysis). If the EIR must provide "conceptual" project description information, it is recommended that the EIR explain why a greater level of detail was not feasible, or why that level of uncertainty is necessary from a policy perspective. San Diego Citizenry Group v. County of San Diego, 219 Cal. App. 4th 1, 13–15 (2013) ("CEQA does not restrict an agency's discretion to identify and pursue a particular project designed to meet a particular set of objectives.").

The statement of project objectives should be carefully crafted to help later define a reasonable range of alternatives that could feasibly achieve them and may contain an underlying fundamental purpose. In re Bay-Delta, 43 Cal. 4th 1143, 1164–67 (2008). While applicants may submit a statement of their project objectives, the EIR should ultimately reflect the Lead Agency's goals and objectives. There is little CEQA case law on the distinction between an applicant's objectives versus the Lead Agency's objectives; however, this issue has arisen in the context of the National Environmental Policy Act, which

can be used as guidance under CEQA. See Nat'l Parks & Conservation Ass'n v. BLM, 606 F.3d 1058,1070 (9th Cir. 2010). Generally, the project description need not disclose the identity of the end user, unless the end user's identity creates unique environmental impacts. Am. Canyon Cmty. United for Responsible Growth v. City of Am. Canyon, 145 Cal. App. 4th 1062, 1074 (2006).

Environmental Setting (Baseline)

The EIR must contain an environmental setting (i.e., a baseline), consisting of a description of the physical environmental conditions in the project vicinity, from both local and regional perspectives, generally at the time of NOP publication, or for Negative Declarations when the environmental analysis commences. See, e.g., Hollywoodians Encouraging Rental Opportunities v. City of Los Angeles, 37 Cal. App. 5th 768 (2019). The environmental setting must be no longer than is necessary to provide an understanding of the significant effects of the proposed project and its alternatives. The environmental setting normally constitutes the baseline by which the Lead Agency determines whether an impact is significant. The purpose of this requirement is to provide the most accurate and understandable picture practically possible about the proposed project's impacts. The Guidelines related to the environmental setting were significantly amended at the end of 2018 to incorporate rules created by decades of CEQA case law. See Cal. Code Regs. tit. 14, § 15125(a).

To provide a more accurate picture of a proposed project's impacts, a baseline based on historical conditions may be used for fluctuating environmental resources (e.g., water consumption over several prior years), or a baseline based on conditions expected when the project becomes operational (i.e., an opening day baseline) may be used. See N. Cty. Advocates v. City of Carlsbad, 241 Cal. App. 4th 94, 102–03 (2015); Save Our Peninsula Comm'n v. Monterey Cty. Bd. of Supervisors, 87 Cal. App. 4th 99, 125 (2001). Also, a future baseline, if supported by reliable projections based on substantial evidence, may also be used in addition to the existing environmental setting. However, a future baseline (i.e., beyond the opening date of project operations) cannot be the sole baseline unless substantial evidence shows that use of the existing environmental setting would be either misleading or without informative value. See Cal. Code Regs. tit. 14, § 15125(a)(2) and Neighbors for Smart Rail v. Exposition Metro Line Construction Authority 57 Cal. 4th 439 (2013). Future baselines are most informative when future incremental changes would clearly occur whether or not a proposed project is adopted. See San Franciscans for Livable Neighborhoods v. City & Cty. of S.F., 26 Cal. App. 5th 596, 619–20 (2018). Many cases litigated under CEQA involve a challenge to the EIR's baseline, consequently applicants should ensure the EIR's baseline assumptions are well documented and supported.

The Guidelines state that environmental setting also must describe inconsistencies between the proposed project and applicable general and regional plans. Cal. Code Regs. tit. 14, § 15125(d). However, plan inconsistency ipso facto is not a significant environmental impact, rather it is a legal conclusion. Appendix G of the CEQA Guidelines (Question XI (b)) was amended in 2018 to recognize this distinction between a project's consistency conclusions and its physical environmental impacts, asking whether the project would "cause a significant environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect." See also Lighthouse Field Beach Rescue v. City of Santa Cruz, 131 Cal. App. 4th 1170, 1207 (2005). The primary purpose of CEQA is to analyze and disclose physical environmental impacts. Furthermore, such consistency conclusions are often subject to a more deferential standard of judicial review. Sierra Club v. Cty. of Napa, 121 Cal. App. 4th 1490 (2004).

The individual resource chapters in the EIR often include a regulatory setting sub-section. Regulatory settings, if drafted properly, can provide useful information on how laws, regulations, and policies shape the project description to reduce or avoid environmental impacts. See also Practical Considerations before Starting the CEQA Process. However, they should be reviewed carefully for accuracy and applicability, and like the rest of the environmental setting section, focus on information that is actually relevant to the project and the impact analyses.

Significant Environmental Impacts

CEQA defines the term "environment" as physical conditions including land, air, water, mineral, flora, fauna, ambient noise, and objects of historic or aesthetic significance. Cal. Code Regs. tit. 14, § 15360. CEQA requires EIRs to evaluate several types of physical environmental impacts (Cal. Code Regs. tit. 14, § 15126.2):

- **Direct impacts.** Direct impacts are those caused by the project that occur at the same time and place.
- **Indirect impacts.** Indirect impacts are caused by the project, but do not occur at the same time or place.
- **Irreversible environmental changes.** If an impact on resources is so extensive or severe that removal or nonuse thereafter is not likely, an irreversible environmental change has occurred (e.g., use of nonrenewable resources).

- **Growth-inducing impacts.** Growth-inducing impacts occur when the project directly or indirectly fosters growth, removes an obstacle to growth, taxes community services and facilities, or facilitates other activities causing significant environmental effects.
- **Cumulative impacts.** Cumulative impacts are incremental impacts of the proposed project when added to other closely related past, present, or reasonably foreseeable future projects.

CEQA also requires consideration of effects on human beings. Cal. Pub. Res. Code § 21083(b)(3); Cal. Code Regs. tit. 14, § 15065(a)(4); Sierra Club v. Cty. of Fresno, 6 Cal. 5th 502, 519 (2018).

EIRs must also disclose which environmental impacts are significant, which is typically done using thresholds of significance. Although many EIR preparers default to Appendix G Initial Study questions for significance thresholds, it is better practice to tailor the EIR's thresholds to the circumstances of each project.

Also, impacts in EIRs should be based upon "evidence establishing both the requisite causal link as well as the requisite physical change in the environment." Wal-Mart Stores, Inc. v. City of Turlock, 138 Cal. App. 4th 273, 286, n.7 (2006) (overruled on other grounds in Hernandez v. City of Hanford, 41 Cal. 4th 279, 295 (2007)). Project opponents routinely raise concerns about existing environmental issues; however, it is not the purposes of CEQA to fix existing environmental issues, if such impacts are not caused or exacerbated by the project. Watsonville Pilots Ass'n v. City of Watsonville, 183 Cal. App. 4th 1059, 1094 (2010).

Particular Resources

CEQA sets forth special rules for analyzing impacts on particular resources, including:

- Transportation impacts
- Greenhouse gas emissions
- Historical resources
- Tribal cultural resources
- Water supply
- Cumulative impacts
- Impacts of the environment on the project

Transportation Impacts

The CEQA Guidelines were amended in December 2018 (Cal. Code Regs. tit. 14, § 15064.3) to add transportation impact metrics that eliminate vehicle delay (e.g., as measured by level of service) as a significant impact under CEQA. The Guidelines set forth vehicle miles traveled (VMT) as the preferred metric to measure both development project impacts and transportation project impacts, although for roadway capacity projects, agencies have discretion to use another appropriate metric. Generally, projects within one-half mile of certain transit facilities are presumed to cause a less-than-significant transportation impact, as are projects that decrease VMT. The amended CEQA Guidelines related to transportation became mandatory on July 1, 2020. Citizens for Positive Growth & Preservation v. City of Sacramento, 43 Cal. App. 5th 609, 625 (2019). An OPR technical advisory addresses in detail how to analyze transportation impacts under CEQA after the 2018 amendments. See Technical Advisory on Evaluating Transportation Impacts in CEQA at http://opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf.

Greenhouse Gas (GHG) Emissions

A Lead Agency must make a good-faith effort, based on scientific and factual data, to describe or estimate a project's GHG impacts, using a quantitative or qualitative approach, or performance standards. Cal. Code Regs. tit. 14, § 15064.4(a); City of Long Beach v. City of L.A., 19 Cal. App. 5th 465, 491–94 (2018). The focus of such GHG analyses has traditionally been upon the scope of the project's GHG emissions, rather than a detailed analysis of the consequences of climate change. (This approach is consistent with the 2009 Statement of Reasons for Regulatory Action in Implementing SB 97, which explain that "[S]ome comments submitted to OPR during its public workshops indicated that the Guidelines should be addressed to 'Climate Change' rather than just the effects of GHG emissions. The focus in the Guidelines on GHG emissions is appropriate." See California Natural Resources Agency, Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions at http://resources.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf.) Nevertheless, it is recommended that such analyses provide an overview of such consequences. An overview of the environmental consequences of climate change is included under Cal. Health & Safety Code § 38501. GHG analysis must reflect "evolving scientific knowledge and state regulatory schemes." Cal. Code Regs. tit. 14, § 15064.4(b). Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 3 Cal. 5th 497, 519 (2017).

The choice of GHG models or methodologies must be supported by substantial evidence. The GHG impact analysis is essentially a cumulative analysis, in that the Lead Agency must focus on the project's "reasonably foreseeable

incremental contribution" to the effects of climate change. Cal. Code Regs. tit. 14, § 15064.4(b). The choice of GHG thresholds of significance is an especially challenging part of CEQA practice given the unique nature of climate change impacts, as well as unclear case law. The California Supreme Court has acknowledged that "efficiency" thresholds (e.g., expressed as emissions per capita) can be appropriate for assessing GHG impacts. Ctr. for Biological Diversity v. Dep't of Fish & Wildlife, 62 Cal. 4th 205 (2015). However, in practice, defending such thresholds has proven difficult. Golden Door Props., LLC v. Cty. of San Diego, 27 Cal. App. 5th 892, 898–906 (2018). Consequently, some EIR preparers have utilized more traditional thresholds (i.e., increased GHG emissions above baseline) or have considered the ability of their project to displace more GHG intensive activities elsewhere, thereby providing regional GHG benefits. Ass'n of Irritated Residents v. Kern Cty. Bd. of Supervisors, 17 Cal. App. 5th 708 (2017).

For more information, please see OPR's December 2018 draft Technical Advisory on CEQA and climate change analysis at http://opr.ca.gov/docs/20181228-Discussion_Draft_Climate_Change_Adivsory.pdf.

Historical Resources

Projects that cause a substantial adverse change in the significance of an historical resource generally have a significant impact. CEQA-defined historical resources are generally resources that are listed or eligible for listing on the California Register of Historical Resources (California Register) or a local register of historical resources. The Lead Agency's decision regarding the historic nature of a resource is subject to the traditional substantive evidence test, even when an MND is prepared. Friends of Willow Glen Trestle v. City of San Jose, 2 Cal. App. 5th 457, 473 (2016). A substantial adverse change includes demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired. Cal. Code Regs. tit. 14, § 15064.5.

Tribal Cultural Resources

A significant impact occurs if the project causes a substantial adverse change in the significance of a tribal cultural resource. A tribal cultural resource is a resource with cultural value to a Native American tribe that is either listed or eligible for listing on the California Register or a local register or determined by a Lead Agency to be significant. Cal. Pub. Res. Code §§ 21074, 21084.2. These provisions, as well as requirements for tribal consultation during the CEQA process, were added by AB 52 (2014 Cal ALS 532, 2014 Cal AB 52, 2014 Cal Stats. ch. 532). Such consultation typically addresses mitigation measures capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource. Cal. Pub. Res. Code § 21080.3.2(a). This consultation process should be started early to avoid delays, as it must begin prior to the release of the CEQA document. Cal. Pub. Res. Code § 21080.3.1. Ideally, consultation should be concluded before release of the draft CEQA document to avoid tribes identifying a new significant impact and potentially triggering recirculation.

Water Supply

A water supply analysis must evaluate the proposed project's water supply and demand, the impacts of supplying water to the project, and the likelihood of water supply availability. For certain large projects, a water supply assessment (WSA) must be incorporated into the CEQA process, which analyzes water supplies during normal, single, and multiple dry water years, as well as water supply reliability, and the potential need to consider alternative sources of water. Cal. Code Regs. tit. 14, § 15360; Cal. Water Code § 10910 et seq.; Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412, 433–49 (2007). Projects requiring WSAs include but are not limited to residential development of 500 dwelling units or more, or projects with equivalent water consumption, commercial/office projects employing 1,000 or more, 250,000 sq. ft. or more of office space, 500,000 sq. ft. of commercial retail, hotels of 500 rooms or more, and other criteria including manufacturing facilities. Cal. Water Code § 10912(a). Preparation should begin earlier in the CEQA process, as this analysis may be prepared or revised by an agency which differs from the CEQA Lead Agency. Cal. Water Code § 10910(b).

Cumulative Impacts

A cumulative impact refers to two or more individual effects which, when considered together, are considerable or compound or increase other environmental impacts. Cal. Code Regs. tit. 14, § 15355. Two general methods, or a hybrid of these methods can be used for EIR cumulative impact analysis. Cal. Code Regs. tit. 14, § 15130. In the list approach, the Lead Agency identifies related projects that could add to the proposed project's environmental impacts. In the projections approach, the Lead Agency relies on projections contained in an adopted planning document (e.g., a general plan EIR) or prior environmental document, and should make that document available for public review. Gray v. Cty. of Madera, 167 Cal. App. 4th 1099, 1128 (2008). Such projections may also be supplemented with additional information, such as a regional modelling program. Rialto Citizens for Responsible Growth v. City of Rialto, 208 Cal. App. 4th 899, 928–31 (2012). A CEQA

document may utilize different approaches depending upon the specific resource area.

Using either approach, the Lead Agency must consider whether the proposed project's contribution to significant cumulative impacts is "cumulatively considerable," and if so, discuss feasible mitigation measures to reduce the incremental effect. Normally, if a project's direct impact is significant, it is also cumulatively considerable, but less-than-significant direct impacts can also be cumulatively considerable. The cumulative analysis need not provide as great detail as is provided for the effects attributable to the project alone. 14 Cal. Code Regs § 15130(b).

Impacts of the Environment on the Project

Generally, CEQA is concerned about the impacts of the project on the environment, not the impacts of preexisting environmental conditions (e.g., earthquake hazards) on a project or its residents. However, an EIR must consider the effects of the environment by a proposed project if required by specific statutory provisions governing school, airport, and certain housing projects, or if the project "risks exacerbating" these effects. Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 62 Cal. 4th 369 (2015). Since the supreme court's decision, several cases have arisen which provide helpful guidance for CEQA practitioners related to the definition of exacerbation. Mission Bay All. v. Office of Cmty. Inv. & Infrastructure, 6 Cal. App. 5th 160, 197 (2016); Clews Land & Livestock, LLC v. City of San Diego, 19 Cal. App. 5th 161, 193–95 (2017); E. Sacramento Partnerships for a Livable City v. City of Sacramento, 5 Cal. App. 5th 281, 295–97 (2016); Pres. Poway v. City of Poway, 245 Cal. App. 4th 560, 582–84 (2016).

Alternatives

An EIR must describe a reasonable range of alternatives that could feasibly attain most of the basic project objectives and that would avoid or substantially lessen the proposed project's significant effects. An alternative (or mitigation measure) is feasible when it is capable of being accomplished successfully within a reasonable time, taking into account economic, environmental, legal, social, and technological factors. The EIR must include enough information about each alternative to allow meaningful evaluation, analysis, and comparison. Alternatives do not need to include detailed conceptual design information. South of Market Community Action Network v. City and County of San Francisco, 33 Cal. App. 5th 321, 334 (2019). The EIR must also discuss alternatives that were considered but not selected for detailed analysis, and the reasons for their rejection. Cal. Code Regs. tit. 14, § 15126.6. If broader programmatic alternatives were previously considered in a prior environmental document, it is helpful to provide an historic overview of that process because reconsideration of such alternatives is not required. Citizens of Goleta Valley v. Bd. of Supervisors, 52 Cal. 3d 553, 573 (1990).

There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason. The EIR should select alternatives which reduce or avoid at least one significant impact, even if all impacts have been reduced to less than significant with mitigation. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376 (1988). An EIR is only required to provide a reasonable range of alternatives sufficient to permit a reasoned choice; however, those alternatives should consider other regulatory factors applicable to the project. An EIR is not required to analyze multiple variations of an existing alternatives (Vill. Laguna of Laguna Beach, Inc. v. Bd. of Supervisors, 134 Cal. App. 3d 1022 (1982)) and is not required to provide alternatives to individual project components; rather, alternatives are provided to the project as a whole. Big Rock Mesas Prop. Owners Ass'n v. Bd. of Supervisors, 73 Cal. App. 3d 218 (1977). However, where project can be divided into separate and distinct components, Lead Agencies have the option of utilizing a "mix and match" approach to the alternatives analysis. Cal. Oak Found. v. Regents of Univ. of Cal., 88 Cal. App. 4th 227, 274–77 (2010).

Modified Alternatives

Inclusion of new or modified alternatives after release of the EIR (e.g., in the Final EIR) is often used by project opponents in arguing for recirculation. While inclusion of new or modified alternatives is not a de facto trigger for recirculation, inclusion in the Draft EIR eliminates this procedural argument. S. Cty. Citizens for Smart Growth v. Cty. of Nev., 221 Cal. App. 4th 316, 326–35 (2013). If a new or modified alternative is added after release of the EIR, the Lead Agency should determine if it is within the scope of EIR's environmental analysis (i.e., whether it causes any new or increased significant environmental impacts) and explain whether it is "considerably different" from the alternatives analyzed in the EIR. Residents Against Specific Plan 380 v. Cty. of Riverside, 216 Cal. Rptr. 3d 36, 55 (2017). Such analysis may be accomplished in the Final EIR, or additional environmental analysis before project approval.

The No-Project Alternative

The EIR must also evaluate the "no-project alternative" regardless of feasibility. The purpose of the no-project alternative is to allow decisionmakers to compare the

impacts of approving versus not approving the proposed project. When the proposed project is a development project at a specific location, the no-project alternative is usually the project site remaining in its existing state, unless future uses of the land are predictable. When the proposed project has revised a plan or ongoing operation, the no-project alternative is usually continuation of the existing plan or operation. Some EIRs may include both types of no-project alternatives. The no-project analysis should also consider the broader regional and statewide implications associated with project denial. Cal. Gov't Code § 65589.5(a)(1).

The Environmentally Superior Alternative

The alternatives analysis is also required to identify the environmentally superior alternative. However, there is no precise methodology for this analysis. Some alternatives may only reduce or avoid a significant impact in one resource area and may result in greater impacts for other resource areas. Sierra Club v. City of Orange, 163 Cal. App. 4th 523, 545–49 (2008). An EIR should acknowledge such trade-offs and should make a conclusion based upon the environmental priorities of the Lead Agency, while acknowledging that other individuals or decisionmakers may balance these competing environmental issues differently. If the no project alternative is environmentally superior, the EIR must identify a different alternative that is considered environmentally superior. Cal. Code Regs. tit. 14, § 15152.6(e).

Alternative Project Sites

Alternative project sites need to be evaluated when they are feasible and would avoid or substantially lessen the proposed project's significant environmental effects. Several factors are used to determine whether off-site alternatives are feasible, including site suitability, economic viability, infrastructure availability, general plan consistency, regulatory limitations, jurisdictional boundaries, and the applicant's control over alternative sites. Adopted regional and local plans should be used to guide the selection of feasible alternative sites. Cal. Code Regs. tit. 14, § 15126(f).

Mitigation Measures

The EIR must discuss feasible mitigation measures for each significant environmental effect that avoid or substantially lessen the impact or compensate for the impact by providing substitute resources. The inclusion of mitigation measures that partially reduce significant impacts does not violate CEQA. Sierra Club v. County of Fresno, 6 Cal. 5th 502, 524 (2018). However, it is not the obligation of the public agency to discuss every infeasible mitigation measure. Cal. Code Regs. tit. 14, § 15126.4(a); San Diego Citizenry Grp. v. Cty. of San Diego, 219 Cal. App. 4th 1, 15–17 (2013). The EIR must identify responsibilities for implementing each mitigation measure, disclose any significant side effects of implementing a mitigation measure, and explain why a particular mitigation measure was selected when several were available. Mitigation measures must be full enforceable. Cal. Code Regs. tit. 14, § 15126.4(a)(2). See Golden Door Properties, LLC v. County of San Diego, 50 Cal. App. 5th 467, 506–25 (2020) (carbon offsets used to mitigate GHG impacts were unenforceable and improperly deferred); Cal. Code Regs. tit. 14, § 15126.4(a). At the time of project approval, the Lead Agency must also adopt a MMRP. Cal. Code Regs. tit. 14, § 15097.

CEQA does not give Lead Agencies independent authority to require mitigation, so Lead Agencies must use other regulatory authorities such as the police power. Cal. Pub. Res. Code § 21004. To avoid "regulatory taking" challenges, there must be a clear nexus between an impact and a mitigation measure, and rough proportionality between the extent of the impact and the mitigation measure imposed. Cal. Code Regs. tit. 14, § 15126.4(a)(4).

Mitigation measure development cannot be improperly deferred to the results of future studies, lead agency, or regulatory agency actions. However, the specific details of measures may be developed after project approval when it is impractical or infeasible to include those details in the EIR, provided that the Lead Agency commits to the mitigation, adopts performance standards the mitigation would achieve, and identifies feasible actions to achieve the performance standard that will be considered. Cal. Code Regs. tit. 14, § 15126.5(a)(1)(B). Agencies may also incorporate a menu of mitigation options to achieve performance standards and may incorporate substitution clauses for equal or more efficient technology. Cal. Code Regs. tit. 14, § 15126.4(a)(1)(B); Sacramento Old City Ass'n v. City Council, 229 Cal. App. 3d 1011, 1021–30 (1991); Sierra Club v. Cty. of Fresno, 6 Cal. 5th 502, 524 (2018). Compliance with a regulatory program may be acceptable mitigation if it would result in measures that reduce the significant impact to the specified performance standards. Cal. Code Regs. tit. 14, § 15126.4(a)(1)(B).

Specific limitations or requirements exist for certain types of mitigation measures, as follows:

- **Historical and archeological resources.** CEQA establishes cost limitations on fees, and the CEQA Guidelines define examples of adequate mitigation. Cal. Pub. Res. Code § 21082.2, Cal. Code Regs. tit. 14, § 15126.4(b).

- **Schools.** Lead Agencies may not impose fees higher than those designated by statute. Cal. Gov't Code § 65995.
- **Housing.** Lead Agencies may not reduce housing density as a mitigation measure unless the project has a significant impact on health or safety, and there are no feasible alternative mitigation measures. Cal. Gov't Code § 65589.5.
- **Trip Reduction Programs.** Lead Agencies may not mandate carpooling, ridesharing, or vanpooling, although measures can be implemented which promote these modes of transportation. Cal. Health & Safety Code §§ 40717.9 and 40716.

Project opponents may suggest mitigation measures throughout the CEQA process. When Draft EIR comments propose potentially feasible mitigation measures that the lead agency has not adopted that would reduce a significant impact, the Final EIR responses to comments must explain why they are infeasible or ineffective. Covington v. Great Basin Unified Air Pollution Control Dist., 43 Cal. App. 5th 867 (2019). However, when opponents suggest mitigation measures immediately before project approval, lead agencies are not required to draft responses to these last-minute suggestions, but it is better practice to ensure that the feasibility and effectiveness of such suggestions have been analyzed and specific evidence added to the record regarding feasibility. Residents Against Specific Plan 380 v. Cty. of Riverside, 9 Cal. App. 5th 941, 972 (2017). If suggestions arise immediately before project approval, it is recommended that public agencies take a short recess to provide the EIR preparers or staff time to address their feasibility and effectiveness. However, public agencies are not required (1) to adopt every "nickel and dime" mitigation suggestion, Concerned Citizens of S. Cent. L.A. v. L.A. Unified Sch. Dist., 24 Cal. App. 4th 826, 841 (1994); (2) to address the feasibility of a generic list of mitigation options, Santa Clarita Org. for Planning the Env't v. City of Santa Clarita, 197 Cal. App. 4th 1042, 1052–56 (2011); or (3) to adopt mitigation as complex as the project itself, Concerned Citizens of S. Cent. L.A. v. L.A. Unified Sch. Dist., 24 Cal. App. 4th 826, 842 (1994). Project opponents may also fault mitigation measures for being permissive rather than mandatory; the little published case law on this issue suggests that mitigation measures can be permissive as long as substantial evidence supports their efficacy. Ass'n of Irritated Residents v. State Air Res. Bd., 206 Cal. App. 4th 1487, 1502 (2012); DeVita v. County of Napa, 9 Cal. 4th 763, 818 (1995).

Final EIR Contents

The Final EIR prepared after public review of the Draft EIR, includes the Draft EIR, any revisions to the Draft EIR, Draft EIR public comments or comment summaries, and Lead Agency responses to public comments. The responses must demonstrate good faith and be well-reasoned and may not be conclusory. Cal. Code Regs. tit. 14, § 15132. Responses to comments should match the level of detail of the comments. Detailed comments require detailed, fine-grained responses, but general responses are appropriate for general comments. Cal. Code Regs. tit. 14, § 15088(c).

Integrating CEQA with Other Environmental Laws

To promote efficiency and reduce redundant duplicative environmental reviews, Lead Agencies are required to integrate CEQA, to the extent feasible, with other federal, state, and local environmental review requirements pursuant to Cal. Code Regs. tit. 14, § 15124(d), including the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and other environmental laws.

NEPA

State and local agencies are encouraged to prepare joint CEQA/NEPA environmental documents. When CEQA and NEPA requirements differ, the most stringent requirement of the two laws should be followed. Cal. Code Regs. tit. 14, §§ 15221, 15222.

NEPA is similar to CEQA but applies only to federal agencies. NEPA's action-forcing mechanism is the requirement for federal agencies to prepare an Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the human environment. The President's Council on Environmental Quality (CEQ) regulations (40 C.F.R. § 1500.1 et seq.) provide the basic general framework for NEPA implementation. Federal agencies each have adopted their own more detailed NEPA procedures. Although NEPA uses different terminology, its three-step environmental review process is analogous to CEQA's.

A major difference between CEQA and NEPA is their substantive effect. CEQA requires state and local agencies to mitigate significant environmental impacts when feasible. Cal. Code Regs. tit. 14, §§ 15021, 15091. NEPA does not require mitigation, but rather is essentially procedural. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Another major difference between the laws is the treatment of alternatives. Under CEQA, alternatives included in an EIR may be evaluated in less detail than the proposed project, but under NEPA, EIS alternatives must be evaluated at an equivalent level of detail. Cal. Code Regs. tit. 14, § 15126.6, 40 C.F.R. § 1502.14.

Other Environmental Laws

CEQA document preparation often is integrated with a host of other federal, state, and local environmental laws. At the federal level, these include the Endangered Species Act (16 U.S.C. § 1531 et seq.) and Section 404 of the Clean Water Act (33 U.S.C. § 4321 et seq.). At the state level, these include General Plan Law (Cal. Gov't Code § 65100 et seq.), zoning law (Cal. Gov't Code § 65800 et seq.), the California Coastal Act (Cal. Pub. Res. Code § 30000 et seq.), the California Endangered Species Act (Fish & Game Code § 2050 et seq.), laws requiring water supply assessments and verifications for certain large projects (Water Code § 10910 et seq.; Cal. Gov't Code § 66473.7), the Seismic Hazards Mapping Act (Cal. Pub. Res. Code § 2690 et seq.), and the State Aeronautics Act (Pub. Util. Code § 21001 et seq.). Such requirements should be considered when defining the range of the project alternatives. Banning Ranch Conservancy v. City of Newport Beach, 2 Cal. 5th 918, 935–42 (2017). Aside from integration into the CEQA process, applicants should also ensure they have initiated review under these regulatory programs such that compliance occurs concurrently with the CEQA process, if feasible.

CEQA and California Election Law

Voter-sponsored initiative measures are exempt from CEQA. Under the Election Code Sections 9214 and 9215, voter-sponsored initiative measures can be either adopted outright by the city council or board of supervisors or placed on the ballot for a public vote (assuming that they do not contain a city charter amendment or development agreement). Cal. Elec. Code § 9255; Ctr. for Cmty. Action & Envtl. Justice v. City of Moreno Valley, 26 Cal. App. 5th 689, 712 (2018). Both actions are exempt from CEQA for a voter-sponsored initiative measure. Cal. Code Regs. tit. 14, § 15378(b)(3); Tuolumne Jobs & Small Bus. All. v. Superior Court, 59 Cal. 4th 1029, 1043 (2014). Applicants may take advantage of this exemption by implementing regulations which make approval of their project ministerial and exempt from CEQA, but should be aware that, developer-sponsored initiatives adopted by a Lead Agency may still be subject to referendum. However, a Lead Agency's decision to place its own measure on the ballot is a discretionary act and thus not exempt from CEQA. Friends of Sierra Madre v. City of Sierra Madre, 25 Cal. 4th 165, 190 (2001).

Applicants should be aware that certain local agency entitlements (legislative acts) make their projects subject to referendum. These include development agreements, as well as general plan, specific plan, zoning amendments, as well as some lease agreements involving public agencies. San Diegans for Open Gov't v. City of San Diego, 245 Cal. App. 4th 736, 739–41 (2016); San Diegans for Open Gov't v. City of San Diego, 31 Cal. App. 5th 349 (2018).

Streamlining CEQA for Housing and Infill Projects

CEQA lawsuits challenging infill and affordable housing projects have become particularly controversial. As a result, the California Legislature over the years has enacted a number of CEQA exemptions and streamlining tools to promote infill and affordable housing projects. Some (e.g., CEQA's categorical exemption for infill) are used more often than others (e.g., CEQA's narrower statutory housing exemptions). Cal. Pub. Res. Code § 21159.22 (statutory exemption for agricultural employee housing); Cal. Pub. Res. Code § 21159.23 (statutory exemption for low-income housing); Cal. Pub. Res. Code § 21159.24 (statutory exemption for infill housing). Exemptions and streamlining options are reviewed in the Technical Advisory on CEQA Review of Housing Projects at http://opr.ca.gov/docs/20181010-TechAdvisory-Review_of_Housing_Exemptions.pdf.

Judicial Review

The following discussion of CEQA litigation focuses on a few selected topics project applicants and Lead Agencies engaged in the CEQA administrative process should know about CEQA litigation. It does not provide an in-depth overview of CEQA litigation, nor does it address judicial remedies if a CEQA violation is found.

Parties

CEQA is enforced mainly through lawsuits filed by citizens, environmental and other organizations, or public agencies. Petitioners must exhaust administrative remedies as a prerequisite to filing a CEQA lawsuit (Cal. Pub. Res. Code § 21777). The California Attorney General also has discretionary authority to file CEQA lawsuits and need not exhaust administrative remedies.

The Lead Agency is normally the respondent in an action challenging CEQA documents or procedures. Project applicants named in the NOD must be joined as a real party in interest. Cal. Pub. Res. Code § 21167.6.5(a).

Standards of Review

Courts follow the established principle that there is no presumption that error is prejudicial. Cal. Pub. Res. Code § 21005(b); Rominger v. Cty. of Colusa, 229 Cal. App. 4th 690, 705, 709 (2014); see also Cal. Gov't Code § 65010(b).

Courts in deciding whether a CEQA violation has occurred must determine whether a public agency has committed a prejudicial abuse of discretion, which is established if it did not proceed in the manner required by law or if its findings are not supported by substantial evidence in light of the whole record. Cal. Pub. Res. Code §§ 21168, 21168.5. Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. Cal. Pub. Res. Code § 21082.2(c). Argument, speculation, unsubstantiated opinion, or narrative is not considered substantial evidence. Cal. Pub. Res. Code §§ 21080(e)(1), 21082.2(c); Save Cuyama Valley v. Cty. of Santa Barbara, 213 Cal. App. 4th 1059, 1069–70 (2013).

Courts independently review procedural errors (i.e., failure to proceed in the manner required by law, de novo). When applying the substantial evidence standard, courts use either the traditional substantial evidence standard or the fair argument standard of review, depending upon the type of case, as discussed below.

Traditional Substantial Evidence Standard

Courts typically, but not always, review the adequacy of EIR technical analyses and factual determinations using the traditional, and deferential, substantial evidence standard of review. For an exception to this rule, see Sierra Club v. Cty. of Fresno, 6 Cal. 5th 502, 516 (2018) (in determining whether an EIR's impact discussion is inadequate, the ultimate inquiry is whether the EIR includes enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. The inquiry presents a mixed question of law and fact."). In applying the traditional substantial evidence standard of review, a reviewing court will resolve reasonable doubts in favor of the administrative decision and will not set aside a Lead Agency's determination on the ground that the opposite conclusion would have been equally or more reasonable. Cty. of Amador v. El Dorado Cty. Water Agency, 76 Cal. App. 4th 931, 945–46 (1999). Under the traditional substantial evidence standard, showing evidence of disagreement among experts does not undermine the validity of the CEQA document. Cal. Code Regs. Tit. 14, § 15151; Ass'n of Irritated Residents v. Cty. of Madera, 107 Cal. App. 4th 1383, 1397 (2003).

Fair Argument Standard

The fair argument standard of review is a unique version of the substantial evidence standard and is applied to Negative Declaration decisions and aspects of categorical exemptions decisions. Cal. Code Regs. tit. 14, § 15064(f)(1); Berkeley Hillside Pres. v. City of Berkeley, 60 Cal. 4th 1086, 1115 (2015). The fair argument standard favors CEQA petitioners more than the traditional substantial evidence standard, which is typically applied to EIR adequacy. Under the fair argument standard, if project opponents have substantial evidence supporting a fair argument that a project may have a significant environmental effect, an EIR must be prepared, even if the Lead Agency's substantial evidence indicates lack of significant environmental effect. See 14 Cal. Code Regs § 15064(a)(1). Under the more deferential traditional substantial evidence standard of review typically applied to EIR contents, a Lead Agency analysis will be upheld as long as it supported by substantial evidence, even if project opponents have substantial evidence that would lead to a different conclusion. Because of these different standards of review, applicants and Lead Agencies often default to preparing EIRs if there is any controversy or opposition to a proposed project, even if it would otherwise qualify for a Negative Declaration. Even when the fair argument standard generally applies to a CEQA document, it may not apply to all aspects the lead agency's decisions. Friends of Willow Glen Trestle v. City of San Jose, 2 Cal. App. 5th 457, 473–74 (2016) (MND's determination of whether a resource is historic is subject to traditional substantial evidence test).

Time Limits for Judicial Challenges

CEQA has unusually short statutes of limitation. Cal. Code Regs. tit. 14, § 15112(c). A CEQA lawsuit must be filed within:

- 35 days after filing and posting of a NOE
- 30 days after filing and posting of a NOD for either a Negative Declaration or an EIR
- 180 days after the decision to carry out, approve, or start project, if no NOE or NOD has been filed

The 30-day statute of limitations also applies when a Lead Agency files an NOD after determining that no additional CEQA review is needed for a subsequent project approval of activities studied in a prior EIR. Comm'n for Green Foothills v. Santa Clara Cty. Bd. of Supervisors, 48 Cal. 4th 32 (2010). Lead Agencies should proactively file NODs in this fact situation to shorten the CEQA statute of limitations to 30 days. However, filing a NOD with errors is not grounds for overturning the underlying CEQA decision. Residents Against Specific Plan 380 v. Cty. of Riverside, 9 Cal. App. 5th 941, 962–64 (2017). If an error was made in the original NOD, the agency should label any re-filed NOD as a corrected notice to avoid extending the statute of limitations. Sierra Club v. City of Orange, 163 Cal. App. 4th 523, 531–32 (2008). NODs which are filed for subsequent project approvals which utilize an Addendum should include language regarding the agency's supplemental environmental findings (e.g., "there has been no change to

the project or substantial changes in circumstances or new information that would warrant subsequent environmental analysis in accordance with CEQA.").

Under Emergency Rule 9(b) of the California Rules of Court, adopted May 22, 2020, the statutes of limitation for all civil causes of action are tolled from April 6, 2020 to August 3, 2020. See Reader Alert. This emergency rule applies to CEQA statutes of limitations.

Administrative Record (Record of Proceedings)

Judicial review is almost always limited to evidence and documentation in the Lead Agency's files at the time the CEQA document is initially approved, with limited exceptions. Cal. Pub. Res. Code §§ 21167.6, 21177; Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 574–79 (1995). Where petitioners file amended pleadings that challenge both initial and subsequent project approvals, it is advisable for the record index to note those aspects of the record that post-date the initial CEQA action, as such materials typically cannot be used to challenge the initial CEQA document. Cal. Pub. Res. Code §§ 21166, 21177(a); Citizens for Responsible Equitable Envtl. Dev. v. City of San Diego, 196 Cal. App. 4th 515, 529–32 (2011).

Concurrent with the adoption of CEQA findings, the Lead Agency is required to identify the location and custodian of documents which constitute the administrative record. Cal. Pub. Res. Code § 21081.6(a)(2); Cal. Code Regs. tit. 14, § 15091(e). However, this finding requirement should not be interpreted to require preparation and organization of the administrative record at the time of project approval. Preparation and creation of the administrative record is governed by separate statutory requirements contained in Cal. Pub. Res. Code § 21167 and occurs 60 days after filing the request to prepare the administrative record after initiation of litigation. Such time periods may be extended by stipulation or court order. Cal. Pub. Res. Code § 21167.6(c). A recent appellate decision ruled that Cal. Pub. Res. Code § 21167.6 not only sets the contents of the administrative record, but in effect affirmatively creates a document retention policy, including emails, regardless of whether it conflicts with any agency-wide document retention policy. Golden Door Properties LLC v. Superior Court of San Diego County, 53 Cal. App. 5th 733 (2020). The California Supreme Court did not accept review of this case, however the authors would not be surprised if a split of authority arises between the appellate districts on this issue. For more information, CEQA practitioners should analyze the arguments raised in the petitions for review submitted to the court by the County of San Diego and Real Party in Interest.

The administrative record typically includes all documents, including emails, related to the Lead Agency decision-making process in complying with CEQA. See Cal. Pub. Res. Code § 21167.6(e). Agencies may exclude certain privileged documents from the administrative record, such as attorney-client communications or documents generated during internal deliberations. See Cal. Pub. Res. Code § 21167.6.2(a)(2); Cal. Code Regs. tit. 14, § 15120(d); Cal. Oak Found. v. Cty. of Tehama, 174 Cal. App. 4th 1217 (2009). Internal administrative drafts of CEQA documents which have not been released for public review or which were not relied upon may also be excluded. See Cal. Pub. Res. Code § 21167.6(e)(10). The parties may also jointly agree to a smaller administrative record which focuses upon records related to the issues raised by petitioners or defenses relied upon by respondents. Cal. Pub. Res. Code § 21167.6(b)(2); Coal. for Adequate Review v. City & Cty. of S.F., 229 Cal. App. 4th 1043, 1056 (2014). If parties are seeking to contain administrative record costs, limitations on the scope of emails can prove useful. In such situations, it is advisable for the parties to agree upon a procedure to augment the record if necessary.

Petitioners may elect to prepare the administrative record or may ask the public agency to prepare the record. Cal. Pub. Res. Code § 21167.6(a). Petitioners often elect to prepare the administrative record while filing a concurrent Public Record Act request for the documents that comprise the administrative record. However, the party preparing the record still has an obligation to do so at a reasonable cost. Cal. Pub. Res. Code § 21167(f). Consequently, continuing unreasonable Public Records Act demands may place the burden on petitioners to reimburse the public agency, regardless of petitioner's election to prepare the record. St. Vincent's Sch. for Boys, Catholic Charities CYO v. City of San Rafael, 161 Cal. App. 4th 989, 1014–19 (2008). The public agency should keep track of any staff or attorney time in correcting the record prepared by petitioners, as such costs may be reimbursable. The Otay Ranch, L.P. v. Cty. of San Diego, 230 Cal. App. 4th 60, 67–72 (2014). If the agency prepares the record, it may request payment for its costs immediately, prior to a decision on the merits. Cal. Pub. Res. Code § 21167.6(b)(1); Black Historical Soc'y v. City of San Diego, 134 Cal. App. 4th 670, 677–78 (2005). Regardless of the party preparing the record, the Lead Agency still has the obligation to certify it for accuracy. Cal. Pub. Res. Code § 21167.6(b)(2).

Preparation of the administrative record can be one of the most time-consuming components of CEQA litigation. To reduce litigation delays, Lead Agencies and consultants should consider compiling electronic administrative records at the same time that CEQA documents are

being prepared and making those documents available on the Lead Agency's website. At a minimum, the authors recommend that the applicant or the agency concurrently compile copies of reference documents relied upon in preparing the CEQA documents. Such documents can be difficult and time-consuming to locate months after the CEQA document has been prepared. Additionally, some documents, such as weblinks, can change after the time of project approval making it difficult to recreate these materials, although some options, such as the Internet Archive, may be used to resurrect these documents at the time of project approval. This guidance is advisory, as there is no requirement to make generic reference materials available as part of the public review process. Cal. Code Regs. tit. 14, § 15148 (although documents "incorporated by reference" must be made available per Cal. Code Regs. tit. 14, § 15150(b)).

When a Public Records Act request is submitted for the materials, the Lead Agency can refer petitioners to its website for the majority of the request. Cal. Gov't Code § 6253(f). Alternatively, real parties can request formal concurrent preparation of the record pursuant to Cal. Pub. Res. Code § 21167.6. Lead Agency attorneys should consider providing advice to staff and consultants early in the CEQA process on how to avoid waiving the attorney client privilege (e.g., by sharing privileged communications with third parties), and how to organize the administrative record.

Project applicants, particularly during project approval hearings, should consider supplementing the record before the close of the public hearing with further information responding to environmental issues raised in public comments on the EIR and project, including the feasibility of newly proposed alternatives and mitigation measures. Project applicants or their attorneys should also be careful to watch for and rebut any false or misleading statements made by commenters about the project or its environmental analysis.

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R. Tyson Sohagi's practice focuses upon environmental law, land use and planning law, the Coastal Act, the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), the Public Trust Doctrine, and Election Law. Mr. Sohagi received a B.S. in Mechanical Engineering from UC Berkeley that assists in reviewing issues involving complex legal and technical issues. He advises public clients on complex matters such as infrastructure projects (transmission lines, port facilities, airport facilities, intermodal and on dock railroad facilities, utility plants), mass transit fees, general plans and specific plans, specific development proposals, and other land use issues. Many of his projects have involved complicated issues pertaining to historic resources, water supply, sea water intrusion, groundwater, water quality, stormwater, wastewater, cultural resources, air quality, greenhouse gases, hazardous materials, noise, and geology. Mr. Sohagi also has substantial experience related to transportation analysis, including operational analysis involving airports (including internal airport circulation), intermodal railways facilities, development projects, construction work, county and city-wide programmatic analysis, as well as non-vehicular analysis including multi-modal analysis utilizing new Vehicle Miles Traveled (VMT) metrics.

Mr. Sohagi has been involved in numerous litigation matters in the California Superior and Appellate Courts involving issues pertaining to CEQA compliance, Coastal Act compliance, zoning compliance, the Public Trust Doctrine, election law and ballot measures, hydrology and water quality, water supply, geology, traffic and circulation, historic and archaeological resources, and biological resources. Mr. Sohagi is also involved with the League of California Cities and the California State Association of Counties, including preparation of several amicus briefs in the California Supreme Court and numerous publication requests.

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Prior to his current position, Mr. Herson was a leader at Jones & Stokes (where he was also legal counsel), SAIC, and SWCA. At these consulting firms, he served as principal-in-charge or project manager for hundreds of CEQA and NEPA documents.

Mr. Herson has led CEQA and environmental law courses at several University of California campuses, as well as in-house environmental law training courses for federal and state agencies. He is co-chair of CLE International's Annual CEQA conference, currently in its fifteenth year and recognized as the state's leading CEQA legal conference. Also, Mr. Herson is co-author of California Environmental Law and Policy: A Practical Guide, (2nd edition) the CEQA Deskbook (2nd edition), and The NEPA Book, as well as CEQA and wetlands chapters in Matthew Bender's California Environmental Law and Land Use Practice treatise.