Practical Guidance

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/. For more information on environmental considerations generally, see Environmental Considerations in Real Estate Transactions Resource Kit, Environmental Due Diligence in Real Estate Transactions, Environmental Impact Review in Real Estate Transactions, Solar Energy (CA), and Wind Energy (CA).

Sources of CEQA Requirements

Statute and Guidelines

CEQA requirements are established by the California Public Resources Code (Cal Pub Resources Code § 21000 et seq.) and the CEQA Guidelines contained in Title 14 of the California Code of Regulations (14 CCR 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 CEQA interpretation. 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 14 CCR 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 Resources Code § 21082; 14 CCR 15022, 15061(e), 15074(f), 15090(b), although they too can be invalidated for exceeding their statutory authority. 14 CCR 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. 14 CCR 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. 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 did not become mandatory until July 1, 2020. 14 CCR 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. 14 CCR 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. 14 CCR 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. 14 CCR 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. 14 CCR 15096. Note that nothing in CEQA prevents a responsible agency from exercising its independent authority under statutes other than CEQA. Cal Pub Resources Code § 21174; see Santa Clara Valley Water Dist. v. San Francisco Bay Regional Water Quality Control Bd. 59 Cal. App. 5th 199, 214 (2021).

CEQA also requires Lead Agencies to consult with relevant so-called trustee agencies and agencies with jurisdiction by law when preparing CEQA documents. 14 CCR 15086. Trustee agencies, such as the Department of Fish and Wildlife (DFW), have jurisdiction over resources held in trust for California. 14 CCR 15386. Agencies with jurisdiction by law include agencies exercising authority over the resources affected by a project, as well as Responsible Agencies. 14 CCR 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 14 CCR 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. 14 CCR 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" (14 CCR 15063, 15082, 15083); (2) participation in the Draft EIR comment period on significant environmental issues (14 CCR 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. Cal Pub Resources 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. 14 CCR 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 Resources 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. 14 CCR 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 14 CCR 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 for further information on CEQA compliance for initiatives. 14 CCR 15378. For further information on CEQA compliance for zoning ordinances, see Calif. Likely To Have More CEQA 'Projects' Following Ruling. For further information on CEQA compliance for historic properties, see Impact of New Housing Laws on Historic Preservation (CA). See generally Planning and Zoning.

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 Lead Agency believes its activity falls under one or more exemptions, it 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). 14 CCR 15062(a). A public agency does not waive the right to assert a CEQA exemption while defending a CEQA lawsuit, even if the exemption is not identified or adopted by the agency as part of the project approval process. California Farm Bureau Federation v. California Wildlife Conservation Bd., 143 Cal. App.4th 173, 190 (2006).

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. 14 CCR 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); 14 CCR 15268, 15357. 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), 65915(d)(1). At this time, such laws do not fully eliminate all discretion, and therefore housing developments are still probably not exempt from CEQA as a matter of law. California Renters Legal Advocacy and Education Fund v. City of San Mateo, 68 Cal.App.5th 820, 846 (2021). The Court in California Renters concluded that an agency can still apply subjective standards to housing, so long as it does not result in denial of housing units. However, public agencies should review the specific factual circumstances of each housing project to determine the scope of remaining discretion given these laws, and whether the specific project should be treated as ministerial and exempt from CEQA. Bankers Hill 150 v. City of San Diego, 74 Cal.App.5th 755, 783 (2022). For example, while the City may normally have general discretion to "modify the placement of a structure" under local zoning, such discretion may not exist as applied to a specific project which proposes to cover the entire parcel with housing.

The legislature has expressly made certain categories of housing projects ministerial and exempt from CEQA. For example, Cal. Gov Code § 65913.4 (also known as "SB 35") 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. Similarly, Cal. Gov Code § 65913.4 (also known as "SB 9") provides a ministerial approval process for approval of a proposed housing development containing no more than two residential units within a single-family residential zone, provided certain conditions are met. Also, Cal. Gov. Code § 65912.100 et seq. creates a ministerial, streamlined approval process for 100% affordable housing projects in commercial zones and for mixed-income housing projects along commercial corridors, provided certain conditions are met.

Categorical Exemptions

Categorical exemptions are qualified exemptions adopted by the Natural Resources Agency and found in the CEQA Guidelines. 14 CCR 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. 14 CCR 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 (14 CCR 15091), no similar requirement is imposed by 14 CCR 15300.2; consequently, the courts may not interpret CEQA to require such a finding. Cal Pub Resources 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 14 CCR 15300.2. Berkeley Hillside Pres. v. City of Berkeley, 60 Cal. 4th 1086, 1105 (2015). The dicta in Respect Life requiring the public agency to adopt these findings is inconsistent with that burden. Nevertheless, 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. 14 CCR 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. 14 CCR 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. 14 CCR 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 Resources 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 Code § 65920 et seq.):

- Acceptance of application as complete (30 days from submittal of a development project application) 14 CCR 15060.
- Completion of Negative Declaration (180 days from acceptance of application as complete) 14 CCR 15107; Cal Pub Resources Code §§ 21100.2 and 21151.5.
- Completion of EIR (one year from acceptance of application as complete) 14 CCR 15108; Cal Pub Resources 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); 14 CCR 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 Code §§ 65956, 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 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, i.e. reasonably foreseeable buildout of the amended portions of the plan. 14 CCR 15146(b), 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). Difficulties also arise when defining reasonably foreseeable uses for zoning amendments, which typically allow multiple land uses (e.g. retail, offices, restaurants, residential uses, etc.). Cal Gov Code §§ 65302(a), 65850(a). However, "a detailed environmental analysis of every precise use that may conceivable occur is not necessary…" Laurel Heights Association v. Regents of the University of California, 47 Cal.3d 376, 398 (1988); Residents Against Specific Plan 380 v. County of Riverside, 9 Cal.App.5th 941, 968 (2017). To the extent land use category is environmentally relevant, the agency should analyze the reasonably foreseeable use(s).

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. 14 CCR 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 or screencheck 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 Resources Code §§ 21089(a), 21157(c); 14 CCR 15045(a); Cal Gov 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. 14 CCR 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. 14 CCR 15063(c)(3)(A) and 15128. This includes resource areas which are mitigated to less than significant in the Initial Study. Ocean Street Extension Neighborhood Association v. City of Santa Cruz, 73 Cal.App.5th 985, 1006 (2022). 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). 14 CCR 15063.

The Initial Study generally uses a checklist format modelled after Appendix G of the CEQA Guidelines, although this checklist is not mandatory. 14 CCR 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. 14 CCR 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. 14 CCR 15064(f)(4), 15384; McCann v. City of San Diego, 70 Cal. App.5th 51, 86 (2021).

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. 14 CCR 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. 14 CCR 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. 14 CCR 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. 14 CCR 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. 14 CCR 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 14 CCR 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 14 CCR 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 Resources 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 Resources Code § 21099(d). Covina Residents for Responsible Dev. v. City of Covina, 21 Cal. App. 5th 712, 724–30 (2018). However, recent opinions appear more comfortable treating parking as a social convenience, in the absence of a showing of significant secondary impacts. Save Our Access San Gabriel Mountains v. Watershed Conservation Authority, 68 Cal. App.5th 8, 24 (2021).
- **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 Resources Code § 21099(d). Even outside CEQA's statutory exemptions, the courts generally question purely aesthetics arguments in urbanized areas. McCann v. City of San Diego, 70 Cal. App.5th 51, 90 (2021) As the Court explained, "[w]e do not believe that our Legislature in enacting CEQA ... intended to require an EIR where the sole environmental impact is the aesthetic merit of a building in a highly developed area.". Recognizing this fact, in 2018 OPR revised the aesthetics criteria under CEQA Guidelines Appendix G to minimize the subjectivity of such analyses. More specifically, OPR revised the aesthetics question in urbanized areas to ask whether "the project conflicts with applicable zoning and other regulations governing scenic quality."
- **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 14 CCR 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. Preserve Poway v. City of Poway, 245 Cal. App. 4th 560, 576–82 (2016).
- **Automobile delay.** Cal Pub Resources 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. Cal Pub Resources 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).

- **Increased Transit Use.** Historically, case law assumed that the increased use of transit unto itself would be a significant impact. City of San Diego v. Board of Trustees of California State University, 61 Cal.4th 945, 955 (2015). However, this assumption is no longer true. OPR's December 2018 Technical Advisory on Evaluating Transportation Impacts under CEQA explains "When evaluating impacts to multimodal transportation networks, lead agencies generally should not treat the addition of new transit users as an adverse impact" (OPR Technical Advisory, p. 19). As also discussed in OPR's SB 743 amendment package transmittal letter "Legislative findings in Senate Bill 743 plainly state that CEQA can no longer treat vibrant communities, transit, and active transportation options as adverse environmental outcomes."
- **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. 14 CCR 15064(f)(4); McCann v. City of San Diego, 70 Cal.App.5th 51, 86 (2021).

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. 14 CCR 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. 14 CCR 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

Lead Agencies must give public notice of the availability of a proposed (i.e., draft) Negative Declaration, and must submit all proposed Negative Declarations to the State Clearinghouse. Cal Pub Resources Code § 21082.1(c)(4). They must also post the proposed Negative Declaration on its website. Cal Pub Resources Code § 21082.1(d), Public notice of a proposed 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. 14 CCR 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 is of sufficient statewide, regional, or areawide significance, as defined by 14 CCR 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). 14 CCR 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. 14 CCR 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)). The Lead Agency must post the final Negative Declaration on its website. Cal Pub Resources Code § 21082.1(d),

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 CDFW environmental review fees. 14 CCR 15075. The Lead Agency must also post the NOD on its website. Cal Pub Resources Code § 21092(b)(3). Applicants should be prepared to provide the Lead Agency with a check for both the county clerk and the CDFW 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 posted it on its website, 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 (14 CCR 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. 14 CCR 15161.
- **General Plan EIRs.** A local general plan (or element) document may be used as the EIR if it satisfies the requirements of 14 CCR 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. 14 CCR 15166.
- **Program EIRs.** A Program EIR is an EIR prepared on a series of related actions consisting of one project. 14 CCR 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 14 CCR 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. 14 CCR 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. 14 CCR 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. 14 CCR 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 14 CCR 15162. Sierra Club v. City of Orange, 163 Cal. App. 4th 523, 541–46 (2008). Under certain circumstances, a Supplemental EIR (14 CCR 15163) or an addendum to a certified EIR (14 CCR 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. 14 CCR 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. 14 CCR 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. 14 CCR 15084.

Lead Agencies must give public Notice of the Availability (NOA) of Draft EIRs, and must all submit all Draft EIRs to the State Clearinghouse. Cal Pub Resources Code § 21082.1(c)(4). Public Notice of Availability of the Draft EIR (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 state agency is a Lead or Responsible Agency, a trustee agency, or an agency with jurisdiction by law, or if the project is of is of sufficient statewide, regional, or areawide significance . The public review period should be no longer than 60 days except in unusual circumstances. 14 CCR 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, and must post the NOC and Draft EIR on its website. Cal Pub Resources Code § 21082.1(d). Many Lead Agencies hold a public hearing on the Draft EIR to receive public comments, although CEQA does not require a public hearing. 14 CCR 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 (14 CCR 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. 14 CCR 15005. Therefore, lead agencies may be able to make CEQA documents available exclusively by electronic means, rather than a physical public location.

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 14 CCR 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. 14 CCR 15089, 15132, and 15362. The Final EIR must be posted on the Lead Agency's website. Cal Pub Resources Code § 21082.1(d). 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). 14 CCR 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). 14 CCR 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. 14 CCR 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 Assn. v. California Dept. of Parks & 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. 14 CCR 15090(b). Administrative appeals must be filed in compliance with local requirements. Tahoe Vista Concerned Citizens v. Cty. of Placer, 81 Cal. App. 4th 577, 592 (2000). Project opponents generally cannot rely upon generic statements of displeasure as a formal appeal. Muskan Food & Fuel, Inc. v. City of Fresno, 69 Cal.App.5th 372, 387-394 (2021). Applicants should be prepared for such procedural delays and familiar with any locally adopted appeal procedures, as they may provide additional procedural defenses, such as evidentiary submittal deadlines. See Mount Shasta Bioregional Ecology Ctr. v. Cty. of Siskiyou, 210 Cal. App. 4th 184, 201–02 (2012). Public agency appeal procedures may also require individuals to identify their specific grounds for appeal or risk waiver. Stop Syar Expansion v. County of Napa, 63 Cal.App.5th 444, 457 (2021).

Generally, in such appeal proceedings, appellants should be provided reasonable notice and a reasonable opportunity to be heard, and should comply with any applicable noticing procedures. 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 recent case law has suggested that such due process protections may not be applicable to all CEQA appeals. McCann v. City of San Diego, 70 Cal.App.5th 51, 79 (2021).

Applicants whose projects only involve adjudicatory actions (e.g., issuance of a Conditional Use Permit, Site Plan review, Design Review) 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). Projects which involve legislative or quasi-legislative actions (e.g., general plan, specific plan, zoning amendments) may not be subject to such heightened due process protections. Save Civita Because Sudberry Won't v. City of San Diego, 72 Cal. App. 5th 957, 989 (2021).

CEQA also requires findings of fact, supported by substantial evidence, to be adopted prior to project approval. 14 CCR 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.

Lead agencies also have the ability to adopt credibility findings for comments received during the public review process. If there are "legitimate issues regarding the credibility" of a commenter's opinions, then an agency can "deem them not substantial evidence." Joshua Tree Downtown Business Alliance v. County of San Bernardino, 1 Cal.App.5th 677, 692 (2016). If the agency elects to adopt credibility findings, then it is recommended that the agency identify the commenter's evidence or conclusions that lead to such findings, including factual or legal errors. For example, (1) does the commenter have a pattern and practice of falsifying information, (2) has the commenter based its opinion on altered data/photographs, or (3) has the commenter based its opinion on mistakes of law (e.g., basing its impact conclusions upon existing baseline conditions or impacts of the environment on the project).

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. 14 CCR 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 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. 14 CCR 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 CDFW environmental review fees, and must also post the NOD on its website. Cal Pub Resources Code § 21092.2(d). 14 CCR 15094.

A Responsible Agency must make findings for each significant effect identified in an EIR, and when it approves or carries out a project with unavoidable significant effects, a Responsible Agency must prepare a Statement of Overriding Considerations. 14 CCR 15096(h); see We Advocate Through Environmental Review v. City of Mount Shasta, 78 Cal.App.5th 629, 640 (2022). A Responsible Agency must file a Notice of Determination in the same manner as the Lead Agency, except that the Responsible Agency need not state that the EIR complies with CEQA. 14 CCR, § 15096(i).

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. 14 CCR 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 Resources Code § 21166(c); 14 CCR 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. 14 CCR 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. 14 CCR 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." 14 CCR 15124. See Cal Pub Resources Code § 21003(c); Citizens for a Sustainable Treasure Island v. City and County of San Francisco, 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 Dist. v. Los Angeles County Metropolitan Transportation Authority, 241 Cal. App. 4th 627, 638 (2015); Southwest Regional Council of Carpenters v. City of Los Angeles, 76 Cal. App. 5th 1154, 1173 (2022).

The project description should focus upon the underlying physical changes, even where the project includes planning or regulatory amendments. 14 CCR 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 Alliance v. County 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. San Diego Citizenry Group v. County of San Diego, 219 Cal. App.4th 1, 21 (2013). 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., conceptual project proposal or 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. Cases assessing the appropriate level of detail of a project description have generally turned upon the controlling language of 14 CCR 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). CEQA petitioners are more frequently conflating these two legal concepts because the project description instability argument provides opponents a more favorable standard of judicial review, which is less deferential to the public agency.

In *Stopthemillenniumhollywood.com*, the project description provided conceptual buildout scenarios for land use regulations, consistent with 14 CCR 15146(b) and 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 14 CCR 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). Subsequent decisions do not appear to be following Stopthemillenniumhollywood.com. See McCann v. City of San Diego, 70 Cal.App.5th 51, 86 (2021); see also Save the El Dorado Canal v. El Dorado Irrigation Dist., 75 Cal. App.5th 239, 256 (2022), Southwest Regional Council of Carpenters, 76 Cal.App.5th 1154, 1179 (2022); Buena Vista Water Storage District v. Kern Water Bank Authority, 76 Cal. App.5th 576, 590 (2022). 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 authors are seeing this issue commonly arise with projects which include Design/Build contracts; a process legislatively authorized by Cal. Pub. Cont. Code § 22160 et seq. Due to the nature of the Design/Build process, final design is unlikely to have been completed before the public agency's initial project approval. However, such contracts are legislatively authorized, and CEQA is not "a limitation or restriction on the power

or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted." Cal. Pub. Res. Code, § 21174.

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 14 CCR 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 14 CCR 15125(a)(2); 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 and County of San Francisco, 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 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.

Plan Consistency

The Guidelines state that environmental setting also must describe inconsistencies between the proposed project and applicable general and regional plans. 14 CCR 15125(d). If a project is consistent, then no analysis is required, but it is still recommended to avoid allegations of post-hoc rationalizations. Pfeiffer v. City of Sunnyvale City Council, 200 Cal. App. 4th 1552, 1566 (2011). Recent amendments to state law adopted by SB 330, the Housing Crisis Act of 2019, may complicate such conclusions for housing development projects. Public agencies only have a narrow 30-60 day window after an application is deemed complete to assert inconsistencies between a housing development project and an applicable plan, policy, or ordinance, otherwise the project is automatically "deemed consistent." Cal Gov Code § 65589.5(j)(2)(B).

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. County of Napa, 121 Cal. App. 4th 1490 (2004).

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. 14 CCR 15360. CEQA requires EIRs to evaluate several types of physical environmental impacts (14 CCR 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 Resources Code § 21083(b)(3); 14 CCR 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
- Energy impacts
- Cumulative impacts
- Impacts of the environment on the project

Transportation Impacts

The CEQA Guidelines were amended in December 2018 (14 CCR 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. 14 CCR 15064.4(a); City of Long Beach v. City of Los Angeles, 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 & Saf Code § 38501. GHG analysis must reflect "evolving scientific knowledge and state regulatory schemes." 14 CCR 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). Consistency with GHG reduction targets established by State legislation, for example targets set for 2030 (Cal. Health & Safety Code § 38566) and 2045 (Cal. Health & Safety Code § 38562.2), is often used as another GHG threshold of significance, provided those thresholds are translated and/or appropriate for use for the specific project. Center for Biological Diversity v. Department of Fish & Wildlife (2015) 62 Cal. 4th 204, 226–227.

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. 14 CCR 15064.5.

Recent amendments to state law adopted by SB 330, the Housing Crisis Act of 2019, may complicate historic resource findings for housing development projects. Government Code § 65913.10(a) now require public agencies to "determine whether the site of a proposed housing development project is a historic site ... at the time the application ... is deemed complete." This determination must remain valid throughout the entitlement process unless new resources are encountered during grading, site disturbance, or building alteration activities. Cal Gov Code § 65913.10(a). Other subsections of SB 330 state that "nothing in this section supersedes, limits, or otherwise modifies the requirements of ... [CEQA]." (Cal Gov Code § 65913.10(c)(1).) It is unclear whether the historic resource finding under Government Code § 65913.10(a) is intended to preempt some or all of the historic resource findings under CEQA.

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 Resource Code §§ 21074, 21084.2. These provisions, as well as requirements for tribal consultation during the CEQA process, were added by AB 52 (2014 Cal AB 52). Such consultation typically addresses mitigation measures capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource. Cal Pub Resource Code § 21080.3. This consultation process should be started early to avoid delays, as it must begin prior to the release of the CEQA document. Cal Pub Resource Code § 21080.3(a). 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. 14

CCR 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).

Energy

Public Resources Code § 21100(b)(3) requires an EIR to include "mitigation measures proposed to minimize the significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy." (Cal Pub Resources Code § 21100(b)(3); People v. County of Kern, 62 Cal. App.3d 761, 774 (1976).) However, this statutory "mitigation" requirement, has morphed over the years into an analysis of "energy impacts."

In 1978, shortly after the adoption of these energy provisions in CEQA, the California Building Standards Commission and the California Energy Commission was tasked with adopting regulations "[r]educing of wasteful, uneconomic, inefficient, or unnecessary consumption of energy." (Cal Pub Resources Code § 25402; Building Code Action v. Energy Resources Conservation & Dev. Com., 88 Cal.App.3d 913 (1979); California Energy Code (Title 24, California Code of Regulations, Part 6). These energy efficiency standards are regularly reviewed for feasibility and revised if necessary. (Cal Pub Resources Code § 25402(b)(1).) Historically, public agencies relied upon compliance with the State's Building Code and Energy Code to support the determination that the project would not result in a wasteful, inefficient, and unnecessary consumption of energy under CEQA. (See Tracy First v. City of Tracy, 177 Cal.App.4th 912, 933-934 (2009).) However, since this decision, there has been substantial modifications to this requirement from case law and revisions to the CEQA Guidelines. (Cal. Code Regs. tit. 14 §§ 15126.2(b), 15126.4(a)(1); CEQA Guidelines Appendix F).

Recent decisions have ruled that public agencies must consider more than the energy efficiency of structures. California Clean Energy Committee v. City of Woodland 225 Cal.App.4th 173, 180 (2014). The court required the EIR (1) to determine whether a building should be constructed at all, how large it should be, where it should be located, (2) investigation into renewable energy options, and (3) the project's projected transportation energy use requirements. In 2018 the State Office of Planning and Research, has incorporated these concepts into CEQA Guidelines Appendix F. Such analyses may be contained in other resource sections and cross referenced in the energy analysis. Cal. Code Regs. tit. 14 § 15126.2(b).

Recent case law has also faulted an EIR for not discussing "renewable energy options." League to Save Lake Tahoe Mountain etc. v. County of Placer, 75 Cal.App.5th 63 (2022). However, such issues may quickly become moot, given recent amendments to the California Energy Code that require renewable energy for new development. Starting in 2020, the California Energy Code was revised to require solar, and the 2022 Code now requires "All single-family residential buildings shall have a newly installed photovoltaic (PV) system or newly installed PV modules meeting the minimum qualification requirements specified in Joint Appendix JA11." (Cal. Code Regs., tit. 24, Part 6, § 150.1(c)(14).) The California Energy Code was further updated in 2022 to require solar for multifamily buildings, and energy storage for structures greater than three habitable stories. (Cal. Code Regs., tit. 24, Part 6, § 170.2(f), (g), (h).) Similarly, solar photovoltaics and energy storage are now required for grocery stores, offices, financial institutions, unleased tenant space, retail, schools, warehouses, auditoriums, convention centers, hotels/motels, libraries, medical office buildings/clinics, restaurants, theaters, and mixed-use buildings where one or more of these building types constitute at least 80 percent of the floor area. (Cal. Code Regs., tit. 24, Part 6, § 140.10(a).) Compliance with such regulatory requirements can be relied upon to reduce impacts if implementation is reasonably foreseeable. (Cal. Code Regs. tit. 14 § 15126.4(a)(1)(B); Tracy First v. City of Tracy, 177 Cal.App.4th 912, 933-934 (2009).)

Public comments routinely suggest that projects be required to obtain "LEED" efficiency certification. Such comments are implicitly suggesting modifications to the California Building Code (Cal. Code Regs., tit. 24, Part 1), or other similar regulations in Title 24. However, the Building Code is reviewed for feasibility every three years by the Building Standards Commission. Cal. Health & Safety Code § 18949.6; Building Code Action v. Energy Resources Conservation and Development Commission (1980) 102 Cal.App.3d 577. Given the stringent building code standards, the courts have not been receptive to such arguments. Residents Against Specific Plan 380 v. Cty. Of Riverside, 9 Cal.App.5th 941, 946 (2017). Vehicular fuel efficiency from construction equipment and passenger vehicles also typically arises in CEQA litigation. However, both of these areas have been heavily regulated by the federal and state governments, and public agencies should be able to rely upon these standards. Cal. Code Regs. tit. 14 § 15126.4(a)(1)(B); Residents Against Specific Plan 380 v. Cty. Of Riverside 9 Cal.App.5th 941, 949 (2017). Construction equipment fuel efficiency requirements are currently

referenced as "Tier 4" and regulated under 40 CFR Ch. I, Subch. U, Pt. 1039, 1065, and 1068, with similar provisions under the California Air Resources Board regulations such as 13 CCR 1956.8, 2025. Under California state law "Tier 4" is generally used interchangeably with "2010 model year engines or equivalent." (Cal. Code Regs., tit. 13, § 2025(d)(3)(F).) While states have some ability to modify passenger vehicle fuel efficiency standards, it is legally infeasible for individual municipalities to adopt more stringent fuel efficiency standards. 42 USC § 7543(a).

Similar public comments have suggested that projects develop or fund transit to improve transportation fuel efficiency. However, the Court's have similarly acknowledged that ["[P]roviding funds for transit is not usually considered feasible." South of Market Community Action Network v. City and County of San Francisco, 33 Cal.App.5th 321, 345 (2019). Public entities do not need "to consider a mitigation measure which itself may constitute a project at least as complex, ambitious, and costly as the [] project itself." Concerned Citizens of South Central LA v. Los Angeles Unified School District 24 Cal.App.4th 826, 842 (1994).

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. 14 CCR 15355. Two general methods, or a hybrid of these methods can be used for EIR cumulative impact analysis. 14 CCR 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. County 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.

Some impact analyses which are inherently cumulative in nature, such as air quality, greenhouse gases, and vehicle miles traveled (VMT), and may use the same project level and cumulative threshold. Id.; see also Citizens for Responsible Equitable Environmental Development v. City of Chula Vista, 197 Cal.App.4th 327, 334 (2011). As also discussed in OPR's VMT Technical Advisory "A project that falls below an efficiency-based threshold that is aligned with long-term environmental goals and relevant plans would have no cumulative impact distinct from the project impact. Accordingly, a finding of a less-than-significant project impact would imply a less than significant cumulative impact, and vice versa." (OPR SB 743 Technical Advisory p. 6.)

Using any of the approaches above, 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 CCR 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); League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer, 75 Cal. App.5th 63, 136-143 (2022).

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. 14 CCR 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. One of these most frequent modifications to a project or its alternatives is a change to the mix or location of land uses within the project site. Changes may be necessitated due to the lengthy entitlement process, which results in changes to economic demand. Sacramentans for Fair Planning v. City of Sacramento, 37 Cal. App. 5th 698, 708, 713 (2019). Consequently, many mixed-use developments may provide a modified alternative which changes the ratio or the precise location of residential, office, and retail uses in the Final EIR. Alternatively, public agencies may simply provide discretion to the applicant to allow swapping of such uses without subsequent project approvals.

Inclusion of new or modified alternatives is not a de facto trigger for recirculation, however 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). For example in Residents Against Specific Plan 380 the Court rejected an argument that recirculation was required where the project was modified after release of the DEIR to "swap[] commercial office development in the southern portion of the site with residential development in the center portion of the site" because these modifications would not "cause a significant increase in trip generation and related effects above those evaluated and disclosed in the EIR."

Such analysis may be accomplished in the Final EIR, or additional environmental analysis before project approval. Analysis of modified use alternatives has historically focused upon supplemental vehicular level of service (LOS) analysis, given that such calculations were geographically and use sensitive. However, with the replacement of LOS with Vehicle Miles VMT metrics, such modifications are less likely to yield a substantial increase in severity of VMT impacts because VMT is not as sensitive to such modifications as LOS.

The No-Project Alternative

The EIR must also evaluate the "no-project alternative" regardless of feasibility. 14 CCR 15126.6(e). 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. 14 CCR 15126.6(e)(3)(B). However, there are circumstances where denial of the project will lead to foreseeable changes which may be subject to dispute. The agency's decisions on such reasonably foreseeable actions should be upheld if they are supported by substantial evidence. Central Delta Water Agency v. Department of Water Resources 69 Cal.App.5th 170, 196 (2021). Under that standard the court's "task is extraordinarily limited and focus is narrow. Did the EIR adequately describe the existing conditions and offer a plausible vision of the foreseeable future." Id. at 196. 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 (e.g., denial of high density housing resulting in urban sprawl). Cal Gov Code § 65589.5(a)(1). As the California Supreme Court has explained, "future residents and occupants enabled by Project approval would exist and live somewhere else if [a] Project is not approved." Ctr. for Biological Diversity v. Dep't of Fish & Wildlife, 62 Cal. 4th 204, 257 (2015)

However, one recent case faulted an EIR for not evaluating the financial feasibility of conserving a project site zoned for housing, including the failure to consider amendments to the existing residential zoning. Save the Hill Group v. City of Livermore, 76 Cal. App. 5th 1092, 1113 (2022). Authors believe this decision is wrongly decided and inconsistent with existing law. The Guidelines expressly allow the no project alternative to assume continuation of "current plans," such as the residential zoning at issue. 14 CCR 15126.6(e). Furthermore, subsequently adopted laws in the Housing Crisis Act of 2019 would likely make reduced density residential zoning amendments legally infeasible. Cal. Gov. Code, § 66300(b)(l)(A) [SB 330]; Tiburon Open Space Committee v. County of Marin, 78 Cal.App.5th 700, 742 (2022) [concluding reduced residential density was legally infeasible].

Save the Hill Group also conflates the description and analysis of (1) the no-project alternative under 14 CCR 15126.6(d) and (e) with (2) findings of infeasibility under 14 CCR 15091(a). The no-project alternative must be included in the EIR as a matter of law, regardless of potential feasibility. 14 CCR 15126.6(e). There is no statutory authority cited in the Save the Hill Group which would necessitate analysis of the feasibility of the no-project alternative in the EIR. Indeed, existing case law, which was ignored by Save the Hill Group, reached the opposite conclusion. (See San Franciscans Upholding the Downtown Plan v. City & County of San Francisco, 102 Cal.App.4th 656, 689-690 (2002); Sierra Club v. County of Napa, 121 Cal.App.4th 1490 (2004); The Flanders Foundation v. City of Carme-by-the-Sea, 202 Cal.App.4th 603, 617-619 (2012). Save the Hill Group will likely be cited by petitioners in the short term, until these issues are resolved. For additional information see the League of California Cities Save the Hill Group de-publication request.

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. 14 CCR 15126.6(e)(2).

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. 14 CCR 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. 14 CCR 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. 14 CCR 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); 14 CCR 15126.4(a). At the time of project approval, the Lead Agency must also adopt a MMRP. 14 CCR 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 Resources 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. 14 CCR 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. 14 CCR 15126.4(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. 14 CCR 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. 14 CCR 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 Resources 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 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 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 & Saf 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. 14 CCR 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. 14 CCR 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 14 CCR 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. 14 CCR 15221, 15222. However, there may be legal and methodological differences between the CEQA and NEPA analyses, which result in different calculations and significance conclusions. This does not mean the documents are internally inconsistent. Center for Community Action and Environmental Justice v. Federal Aviation Administration, 18 F.4th 592, 605-609 (2021),

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 CFR § 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. 14 CCR 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. 14 CCR 15126.6, 40 CFR § 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 USC § 1531 et seq.) and Section 404 of the Clean Water Act (33 USC § 1344). At the state level, these include General Plan Law (Cal Gov Code § 65100 et seq.), zoning law (Cal Gov Code § 65800 et seq.), the California Coastal Act (Cal Pub Resources Code § 30000 et seq.), the California Endangered Species Act (Cal Fish & G Code § 2050 et seq.), laws requiring water supply assessments and verifications for certain large projects (Cal Wat Code § 10910 et seq.; Cal Gov Code § 66473.7), the Seismic Hazards Mapping Act (Cal Pub Resources Code § 2690 et seq.), and the State Aeronautics Act (Cal 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). It a project is located on tidelands or submerged lands, it is also recommended that the CEQA analysis discuss any inconsistencies with the public trust doctrine, although such analysis is not required to be in the CEQA document as a matter of law. San Francisco Baykeeper v. California State Lands Commission, 242 Cal.App.4th 202, 215 (2015). 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 placed on the ballot for a public vote (assuming it does not contain a development agreement) or adopted outright by the city council or board of supervisors (assuming it does 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. 14 CCR 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).

CEQA and the Brown Act

Several cases have held that a lead agency's certification of an EIR (14 CCR 15090) or "approval" of a Negative Declaration (14 CCR 15074) must be included in the Brown Act agenda notice as part of it its "general description of each item of business to be transacted." Cal. Gov. Code § 54954.2(a)(2); San Joaquin Raptor Rescue Center v. County of Merced (2013) 216 Cal.App.4th 1167.

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 (e.g., ministerial approvals) 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 Resources Code § 21159.22 (statutory exemption for agricultural employee housing); Cal Pub Resources Code § 21159.23 (statutory exemption for low-income housing); Cal Pub Resources Code § 21159.24 (statutory exemption for infill housing); Cal Pub Resources Code, § 21080.58 (statutory exemption for student and faculty housing projects at certain university campuses) . Exemptions and streamlining options are reviewed

in two OPR Technical Advisories, available at http://opr.ca.gov/docs/20181010-TechAdvisory-Review_of_Housing_Exemptions.pdf and https://opr.ca.gov/ceqa/docs/20200715-PHK_TA.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 Resources Code § 21177). 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 Resources Code § 21167.6.5.

Standards of Review

Courts follow the established principle that there is no presumption that error is prejudicial. Cal Pub Resources Code § 21005(b); Rominger v. Cty. of Colusa, 229 Cal. App. 4th 690, 705, 709 (2014); see also Cal Gov 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 Resources Code §§ 21168, 21168.5. Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. Cal Pub Resources Code § 21082.2(c). Argument, speculation, unsubstantiated opinion, or narrative is not considered substantial evidence. Cal Pub Resources 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. 14 CCR 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. 14 CCR 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 CCR 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. 14 CCR 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 Resources 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 Resources 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 Resources Code § 21081.6(a)(2); 14 CCR 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 Resources 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 Resources Code § 21167.6(c). A recent appellate decision ruled that Cal Pub Resources 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 Resources 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 Resources Code § 21167.6.2(a)(2); 14 CCR 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 Resources 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 Resources 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 Resources 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 Resources 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 Resources 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 Resources 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. 14 CCR 15148 (although documents "incorporated by reference" must be made available per 14 CCR 15150(b)). Save North Petaluma River and Wetlands v. City of Petaluma, 86 Cal.App.5th 207, 225 (2022).

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 Code § 7922.545. Alternatively, real parties can request formal concurrent preparation of the record pursuant to Cal Pub Resource 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.

Attorney's Fees

CEQA itself does not provide for payment of attorneys' fees to the prevailing party in a CEQA action. However, attorneys' fees may be awarded to private Petitioners under the private attorney general theory codified by Cal. Civ. Proc. Code § 1021.5. While successful Petitioners can potentially recover their attorney's fees, it is more difficult for public agencies and real parties to recover their fees. However, specialized procedures for challenges to affordable housing projects are being utilized more often by public agencies and real parties to recover such fees (Cal. Gov. Code § 65914, 65582.1(j).) To ensure a Petitioner has financial resources to pay for such fees, the agency or the project applicant can seek a $500,000 bond from Petitioner at the outset of litigation. Cal. Civ. Proc. Code § 529.2(a); Save Livermore Downtown v. City of Livermore, 87 Cal.App.5th 1116, 1135 (2022). However, since these motions require evidence of Petitioner's motivations for filing their lawsuit, discovery is often needed to support such a motion, as permitted by California Code of Civil Procedure section 2017.010.

Litigation Resulting from CEQA Lawsuits

In lieu of filing a Motion for Attorney's fees, several recent cases have suggested that Respondents and Real Parties who prevail in their CEQA case may have a separate cause of action for malicious prosecution, where they can prove the lawsuit was motivated by malice/improper purposes. (See Dunning v. Clews, 64 Cal.App.5th 156, 177 (2021); Jenkins v. Brandt-Hawley, 86 Cal.App.5th 1357 (2022).) Suits brought with improper purposes include those in which (1) the person initiating them does not believe that their claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; or (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim. Id. at 1384. See also Save Livermore Downtown v. City of Livermore, 87 Cal.App.5th 1116, 1138 (2022) [concluding lawsuit was improperly filed to delay the project].

However, such legal theories are generally new in the context of CEQA, and any such litigation will typically involve an allegation that the malicious prosecution lawsuit constitutes a Strategic Lawsuit Against Public Participation (SLAPP), and subject to an anti-SLAPP motion from defendants. (Cal. Civ. Proc. Code § 425.16.) Parties should therefore proceed with caution before filing such a malicious prosecution action.

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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 with SLG's review of 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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Mr. Herson is an environmental attorney and planner with over 35 years of experience. A recognized authority on the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), and natural resources law, he is co-author of three popular Solano Press desktop references: *The CEQA Deskbook* (2d edition), California Environmental Law and Policy: A Practical Guide, and The NEPA Book, as well as the four CEQA chapters in the California Environmental Law and Land Use Practice treatise. Mr. Herson advises public agencies on complex environmental and land use law matters.

Mr. Herson has prepared and reviewed hundreds of CEQA documents on land use and other public agency projects, both as an attorney and as a consultant prior to joining the Firm. These include General Plans; EIRs and RTPs/SCSs for AMBAG, SANDAG, and TCAG; EIRs for transportation projects such as the LAX Landside Access Modernization Program; and large land use projects such as the Centennial Specific Plan (Tejon Ranch, Los Angeles County) and Stanford's 2019 General Use Permit (Santa Clara County). Mr. Herson provides in-depth guidance and review for priority topics such as land use, climate change, transportation, and air quality impact analysis. He also reviews regional and local plans for compliance with Government Code requirements, and for compliance with state guidance such as the RTP Guidelines and the General Plan Guidelines.

Mr. Herson is a leader in professional legal and planning associations. He has served on the Executive Committees of the State Bar and Sacramento County Environmental Law Sections. He is a Fellow of the American Institute of Certified Planners (FAICP), and Past President of the American Planning Association California Chapter, and the California Planning Roundtable. In addition to his extensive project experience, Mr. Herson's ongoing publishing and teaching roles require that he stay on top of the latest judicial, legislative, and regulatory developments in planning and environmental law, knowledge he regularly shares with clients. Mr. Herson has conducted many CEQA and NEPA courses for UC Extensions. He serves as co-chair for CLE International's Annual CEQA Update conference, currently in its fourteenth year and recognized as the state's leading CEQA legal conference.