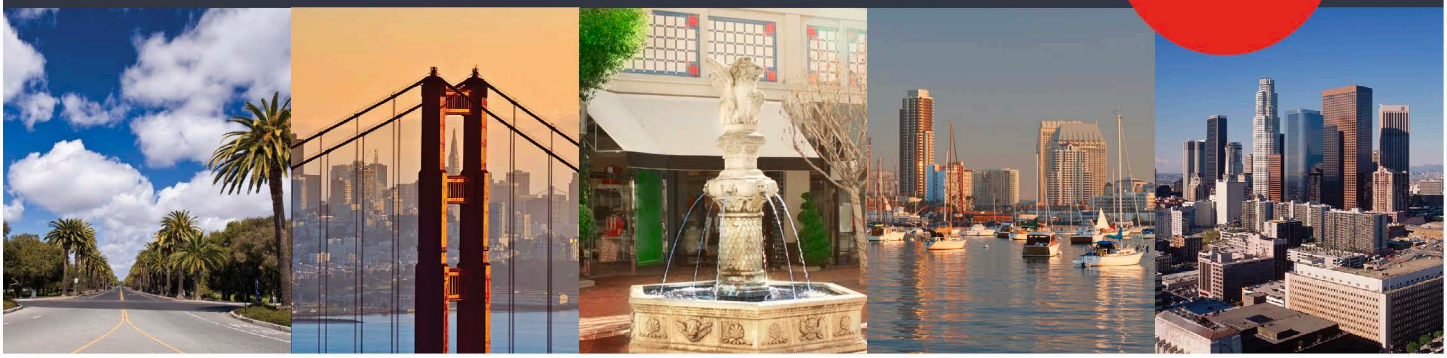
29th Annual Land Use & Development Law Briefing

2019



PERKINSCOIE
COUNSEL TO GREAT COMPANIES

Table of Contents

*Also available at http://www.californialandusedevelopmentlaw.com.

TAB 1

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

Land Use and Development Case Summaries (short form)

1. PLANNING AND ZONING

CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE V. CITY OF MORENO VALLEY,

26 Cal. App. 5th 689 (2018)

Based on the language and legislative history of the Development Agreement Statute (Gov't Code §§ 65864–65869.5), the court held that a development agreement may not be adopted by initiative. The court found it significant that the statute provided that a development agreement is "subject to referendum" but was silent as to initiatives and concluded that its reference to the "legislative body" indicated its intent to delegate power to approve development agreements exclusively to local governments. The court also reasoned that the initiative process was inconsistent with the concept of a development agreement as a contract because an initiative provides no opportunity for the local government to negotiate the agreement's terms.

HAUSER V. VENTURA COUNTY BOARD OF SUPERVISORS,

20 Cal. App. 5th 572 (2018)

The County of Ventura denied a conditional use permit that would have allowed tigers to be kept on a 19-acre property located within a half-mile of a residential area. The County found that keeping tigers on the property was not compatible with planned uses in the area and was detrimental to public health and safety. The owner challenged the decision, arguing that the use was compatible with the County's open space zoning and that escaped tigers posed little risk to the public. The court disagreed, pointing to substantial evidence in the administrative record supporting the County's decision, including neighbors' concerns about the tigers supported by evidence of other large-cat attacks, the owner's lack of formal training, and the property's proximity to residential units.

HIGH SIERRA RURAL ALLIANCE V. COUNTY OF PLUMAS,

29 Cal. App. 5th 102 (2018).

Petitioner argued that a county general plan update conflicted with the Timberland Act by impermissibly determining that all residences were compatible with land zoned for timberland provided the property was at least 160 acres. Petitioner contended that the Timberland Act required the county to conduct case-by-case compatibility determinations based on necessity and compatibility with underlying timber operations. The court held that a general plan policy requiring a finding that a residence or structure was compatible with the Timberland Act was sufficient and did not need to recite the precise requirements of the Act.

J. ARTHUR PROPERTIES, II, LLC V. CITY OF SAN JOSE,
21 Cal. App. 5th 480 (2018)

The owners of a medical marijuana collective opened a business on a site zoned for commercial office use. At that time, the zoning code was silent on medical marijuana use but allowed medical offices at the site. Subsequently, the City of San Jose enacted a zoning ordinance allowing medical marijuana use in certain zoning areas, not including commercial office areas. The City sent a compliance order requiring the owners discontinue their business. The owners sued, arguing they should be allowed to continue the marijuana collective as a legal, nonconforming use because their business qualified as a medical office. The court rejected the owners' broad interpretation of the zoning code's definition of medical office, emphasizing that medical marijuana collectives do not involve on-site patient treatment by a physician or other medical professional.

SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE V. CITY AND COUNTY OF SAN FRANCISCO,
22 Cal. App. 5th 77 (2018)

San Francisco enacted an ordinance modifying the City's Planning Code to allow alteration of nonconforming residential units but imposed a 10-year waiting period for units that had been the subject of a "no fault" eviction. The court concluded the ordinance was preempted by the Ellis Act, which prevents local laws from imposing a prohibitive price on a landlord's ability to exit the residential rental business. The ordinance reached beyond the City's authority to regulate land use because it did not regulate the particulars of a proposed alteration, but instead penalized property owners protected by the Ellis Act. While the Ellis Act does not prohibit municipalities from imposing mitigation measures on landlords to alleviate any adverse impact from displacement, there was no evidence the 10-year wait period helped displaced tenants.

VISALIA RETAIL, LP V. CITY OF VISALIA,
20 Cal. App. 5th 1 (2018).

Petitioner challenged a new general plan policy that required Neighborhood Commercial areas to be anchored by a grocery store and prohibited businesses greater than 40,000 square feet. Petitioner argued that the size limit conflicted with other policies and goals in the general plan, including a goal to promote infill development. The court concluded that the city council could reasonably decide to restrict the nature of infill development in some areas to pursue other goals, such as encouraging smaller businesses or promoting pedestrian-oriented retail.

WESTSIDERS OPPOSED V. CITY OF LOS ANGELES,
27 Cal. App. 5th 1079 (2018)

The City amended its general plan to change the land use designation of a five-acre former car dealership to allow a mixed-use development close to a new light rail station. The City's charter allowed amendment of the general plan "by geographic areas, provided that the part or area involved has significant social, economic or physical identity." Plaintiffs contended that the project site could not qualify under these criteria because "geographic area" referred to a region, and a single lot could not

qualify as a region. Citing the principle that a court may not construe a charter as restricting municipal power without a clear mandate to that effect in the charter itself, the court found no "clear and explicit limitations [or] restrictions" in the charter regarding the size of the "geographic area" that may be the subject of an amendment. The court also rejected plaintiff's argument that a car dealership could not qualify as property having significant social, economic or physical identity. It concluded that the City could properly analyze the site's identity based on the proposed construction, not its prior use. The City satisfied the charter's requirements through its findings that the site was one of the largest underutilized sites in the area and would provide the first major transit-oriented development in West Los Angeles.

2. COASTAL ACT

BEACH AND BLUFF CONSERVANCY V. CITY OF SOLANA BEACH,
28 Cal. App. 5th 244 (2018)

Plaintiffs brought an action for declaratory relief and traditional mandate under Code of Civil Procedure section 1085 challenging several policies the City's Land Use Plan, which the Coastal Commission had earlier certified under the Coastal Act. The court held that none of the claims could properly be considered because the exclusive remedy under the circumstances was a petition for writ of mandate under Code of Civil Procedure § 1094.5. The court relied on Public Resources Code § 30801, which states that judicial review of any decision of the Coastal Commission must be by writ of mandate under Section 1094.5 filed within 60 days of the decision. The court reasoned that any post-approval facial challenge to a local land use policy under the Coastal Act "is essentially a challenge to the Commission's quasi-judicial certification decision." As such, the court said, the challenge must be by timely petition under Section 1094.5. The fact that the *City* had been acting legislatively when it enacted the policies at issue here did not alter the fact that an administrative mandamus proceeding against the Commission (with the City named as a necessary party) was plaintiff's exclusive remedy.

GREENFIELD V. MANDALAY SHORES COMMUNITY ASSOCIATION,
21 Cal. App. 5th 896 (2018)

A homeowners' association for a beach community adopted a resolution banning short-term rentals. Plaintiff-homeowners sued to prevent enforcement of the ban on the ground that the association needed a coastal development permit. The court agreed, finding that the ban constituted a "development" under the Coastal Act. Observing that a goal of the Act was to maximize public access to the coast, the court reasoned the ban prevented non-residents from vacationing—as they had for decades—through the short-term rental of beach homes and hence created a "monetary barrier to the beach." Thus, whether short-term rentals should be regulated, the court said, needed to be decided by the City or the Coastal Commission, not the homeowners' association.

SAN DIEGO UNIFIED PORT DIST. V. CAL. COASTAL COMMISSION,
27 Cal. App. 5th 1111 (2018)

The Coastal Commission rejected the Port's request for certification of an amendment to its master plan to allow construction of a 175-room hotel because it did not adequately protect lower-cost access to coastal recreational opportunities. The court upheld the decision, observing that the Commission was empowered to exercise independent judgment in determining not only whether a master plan amendment conforms with the Act's policies, but also whether the plan "carries out those policies." The Commission had a statutory mandate to consider "the manner of public access" on a case-by-case basis and properly exercised this mandate in deciding that the amendment did not adequately protect lower-cost visitor and public recreational opportunities, including overnight accommodations.

3. INITIATIVE AND REFERENDUM

CITIZENS FOR AMENDING PROPOSITION L V. CITY OF POMONA,
28 Cal. App. 5th 1159 (2018)

The City of Pomona entered into an agreement with Regency Outdoor Advertising allowing advertising billboards alongside several Pomona freeways. A subsequent ballot initiative prohibited construction of any new billboards within city limits. After the City's agreement with Regency expired, the city council agreed to amend the agreement to extend it for an additional 12-year term. The court concluded that the purported amendment was a nullity because the agreement had expired at the time the amendment was approved. As a new agreement, it violated the terms of the initiative because the original agreement required removal of the billboards upon its expiration, hence the new agreement effectively permitted billboards that would otherwise have been removed. The court also rejected the contention that Regency Outdoor was an indispensable party, reasoning that the interests of City and Regency were aligned both legally and financially, and hence the City adequately protected Regency's interests in the case.

CITY OF MORGAN HILL V. BUSHEY,
5 Cal. 5th 1068 (2018)

The California Supreme Court resolved a split among the courts of appeal, concluding that citizens may bring a referendum to challenge a zoning ordinance even if the referendum would temporarily leave in place zoning inconsistent with the general plan. To put such a referendum on the ballot, there must be other consistent zoning designations available or the local government must have other ways of making the zoning consistent with the general plan. The court reasoned that while simultaneous modifications to the general plan and zoning code are preferred, state law does not require it. Additionally, the court differentiated a referendum from an ordinance or initiative enacting inconsistent zoning. It observed that a referendum setting aside a zoning ordinance that would have resolved a general plan inconsistency "simply keeps that inconsistency in place for a certain time — until the local government can make the zoning ordinance and general plan consistent in a manner acceptable to a majority of voters."

SAVE LAFAYETTE V. CITY OF LAFAYETTE,
20 Cal. App. 5th 657 (2018)

The City of Lafayette amended its general plan to designate a parcel as residential and approved a zoning amendment to conform the parcel's zoning to the general plan. Project opponents filed a referendum petition to set aside the newly enacted zoning ordinance. The City refused to put the referendum on the ballot, arguing that it was legally invalid because it would result in zoning inconsistent with the general plan.

The court disagreed, reasoning that the referendum did not enact new inconsistent zoning, but instead sought to preserve the status quo. While the referendum did challenge the City's choice of zoning for the parcel, it did not hinder the City's ability to choose another conforming zoning designation.

4. LAND USE LITIGATION

ATWELL V. CITY OF ROHNERT PARK,
27 Cal. App. 5th 692 (2018)

The Sierra Club and a local conservation group challenged the City's approval of the expansion of a Wal-Mart store, including a claim that the project was inconsistent with specific policies of the general plan. They ultimately dropped that claim and instead successfully pursued a CEQA claim. Three individuals later filed a second suit raising the same general plan claim. The court held that the action was barred by res judicata. The general plan issue had been raised in the prior litigation and need not actually have been litigated and decided for res judicata to apply. Further, there was privity between the petitioners in the two lawsuits since both alleged claims on behalf of "citizens, taxpayers, property owners, and electors" of the City and the petitioners in the second action did not contend that their interests were not adequately represented in the first.

COMMUNITIES FOR A BETTER ENVIRONMENT V. STATE ENERGY RESOURCES CONSERVATION DEVELOPMENT COMMISSION,
19 Cal. App. 5th 725 (2018)

The State Energy Commission has the sole authority to license thermal power plants over 50 megawatts. Under state law, Energy Commission decisions are reviewable only by the Supreme Court of California. The Court's review is discretionary, and it has denied every challenge to a power plant licensing decision since the 1990s. Plaintiffs in this case challenged the statute limiting judicial review as unconstitutional. Defendants argued that the case was not ripe because plaintiffs in effect sought an advisory opinion on the constitutionality of a statute unmoored to any concrete factual dispute. The appellate court disagreed, reasoning that no factual context was necessary to decide the issues in the case and the statute in question would be implicated in all future judicial review of Energy Commission licensing decisions.

5. FEES AND TAXES

1901 FIRST STREET OWNER V. TUSTIN UNIFIED SCHOOL DISTRICT,
21 Cal. App. 5th 1186 (2018)

The City of Tustin calculated school impact fees for apartment buildings using a "net rentable" method, including only the square footage of individual apartment units, while excluding everything else in the building. The school district objected, arguing that state law required all space within the perimeter of the building to be a part of the calculation, not just rented space. The City changed its calculation to conform to the school district's interpretation and the building owner sued. The court rejected the owner's argument that the calculated square footage of an apartment building should be limited to individual units, reasoning that the enumerated space exclusions in the statute only applied to outdoor areas. The court also concluded that the City's decision to change the impact fee calculation method to implement the statutory mandate did not violate the plaintiff's vested rights.

SUMMERHILL WINCHESTER LLC V. CAMPBELL UNION SCHOOL DISTRICT,
No. H043253 (6th Dist., Dec. 4, 2018)

The court invalidated a school district's Level 1 development fee because the underlying fee study did not properly calculate anticipated growth and included the cost of hypothetical new schools the district did not plan to build. The court found that although the fee study determined the District was already over capacity (and hence would be impacted by any new students from development), the study had failed to calculate the amount of new housing projected to be built within the District. Instead, the study simply stated that the amount of new development would be in excess of 133 residential units. This was inadequate, the court said, because it did not provide the information needed "to determine whether new school facilities are needed due to anticipated development." While the Board did not need to identify "specific facilities that would be built," it did need "to decide whether or not new school facilities were needed and, if so, what type of facilities were needed."

6. ANTI-SLAPP STATUTE

GOLDEN EAGLE LAND INVESTMENT, L.P. V. RANCHO SANTA FE ASSOCIATION,
19 Cal. App. 5th 399 (2018)

Developers sued a homeowners' association alleging violations of the Common Interest Development Open Meeting Act and other claims resulting from the association's failure to approve the developers' proposed senior housing project (where such approval was required under a protective covenant and County general planning). The association filed a motion to strike all of the developers' claims under the anti-SLAPP statute. The court concluded that the anti-SLAPP statute applied because the activities complained of—communicating with the project applicants, setting agendas, and sending emails and letters—were all within the quasi-governmental responsibilities of the association. Thus, the association's actions fell within the broad protections of the anti-SLAPP statute as "conduct in furtherance of the exercise the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

7. TAKINGS

COLONY COVE PROPERTIES V. CITY OF CARSON,
888 F.3d 445 (9th Cir. 2018)

Plaintiff purchased a $23 million mobile home park, $18 million of which was financed through a loan. Subsequently, the City adopted an ordinance changing the method of calculation of allowable rent for mobile homes. The new rent control formula no longer factored in changes in debt service expenses, which caused the City to grant the owner smaller rent increases than it requested. The court rejected the owner's regulatory takings claims against the City. Citing prior cases finding that diminution in property value in excess of 75% did not constitute a regulatory taking, the court found that denial of the requested rent increase did not amount to a taking even though it resulted in a 24.8% reduction in property value. Additionally, the court concluded that, under the facts of the case, the owner's reliance on the City continuing its past practice of calculating debt service in future rent increases did not create a reasonable investment-backed expectation.

TAB 2

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

Land Use and Development Case Summaries (Long Form)*

1. PLANNING AND ZONING

CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE V. CITY OF MORENO VALLEY,

26 Cal. App. 5th 689 (2018)

A development agreement cannot be adopted by initiative, the California court of appeal ruled in *Center for Community Action and Environmental Justice v. City of Moreno Valley*, 26 Cal. App. 5th 689 (2018).

The Development Agreement Statute (Government Code sections 65864–65869.5) allows a municipal government and a property owner to enter into a contract that vests development rights by freezing the land use regulations applicable to a property. The statute includes procedural and substantive requirements for development agreements, including that "[a] development agreement is a legislative act that shall be approved by ordinance and is subject to referendum." (Government Code section 65867.5(a).)

The project at issue in this case was a proposed logistics center in Moreno Valley. In 2015, the Moreno Valley City Council approved project entitlements, including a development agreement. Opponents then filed a CEQA lawsuit to challenge the environmental impact report for the project. A group backed by the developer responded by filing a petition for an initiative that would repeal the development agreement ordinance and approve a new development agreement. The initiative development agreement was substantially the same as the agreement the City Council approved for the project. The City Council adopted the initiative, rather than submitting it to the voters. Because voter-sponsored initiatives are not subject to CEQA, no environmental review was completed before the City Council adopted the initiative. Opponents then filed this lawsuit, asserting that a development agreement cannot be adopted by initiative.

Based on the statutory language, statutory scheme, and legislative history, the court determined that the Development Agreement Statute did not permit adoption of a development agreement by initiative.

First, the court found it meaningful that the Development Agreement Statute specifies that adoption of a development agreement is a "legislative act . . . subject to referendum" but omitted any reference to initiative. This omission, according to the court, indicated an intent by the Legislature to preclude adoption by initiative. The court also found the Development Agreement Statute's reference to a "legislative body" as providing support for the Legislature's intent to exclusively delegate power to adopt a development agreement to local governments.

Second, the court determined that the statutory scheme was of statewide concern, which supported inferring a legislative intent to exclude initiatives. In addition, the court explained that the initiative

*Also available at: http://www.californialandusedevelopmentlaw.com

process was inconsistent with the concept of a development agreement as a negotiated contract because an initiative does not provide any opportunity for the local government to negotiate its terms. The court also observed that adoption by initiative could result in development agreements that did not include all provisions required by the Development Agreement Statute.

Third, the court noted that the legislative history was consistent with an intent to prevent adoption of development agreements by initiative. The court cited an amendment to the text of the bill that stated that development agreements would be subject to referendum. Singling out referenda, the court stated, indicated an intent to exclude initiatives. The court also noted that numerous documents in the legislative history referred to referenda but were silent as to initiatives.

The court also analyzed the meaning of a bill that passed the Legislature in 2017 but was vetoed by the governor, which would have amended the Development Agreement Statute to prohibit adoption by initiative. The court concluded that this bill did not necessarily mean that the current statute would allow adoption by initiative, because the failed bill stated that it would "clarify" the law.

In holding that a development agreement may not be adopted by initiative, the court's decision affirms that a development agreement is a contract that must be negotiated by a local government and a property owner. The court's holding in this case is straightforward, but has important implications for developers. Adoption of a voter-sponsored initiative by the local legislative body has been an important tool in the developer's toolkit because CEQA does not apply to such an action. Going forward, local legislative bodies can still adopt voter-sponsored initiatives to amend a general plan, zoning ordinance, or other land use regulations, but not development agreements to vest those regulations.

HAUSER V. VENTURA COUNTY BOARD OF SUPERVISORS,
20 Cal. App. 5th 572 (2018)

In an unsurprising decision, the Second District Court of Appeal upheld Ventura County's decision to a deny a use permit that would allow tigers to be kept on property located within a half-mile of a residential area. *Hauser v. Ventura County Board of Supervisors*, 20 Cal.App.5th 572 (2018).

Background. Plaintiff Irena Hauser applied for a conditional use permit that would allow five tigers to be kept on a 19-acre parcel in an unincorporated area of Ventura County. The proposed project would include several tiger enclosures and an arena within a seven-acre area surrounded by a chain link fence. The plaintiff planned to use the tigers in the entertainment business and transport them for that purpose up to 60 times per year.

Neighbors strongly opposed the project and presented a petition to the county which contained roughly 11,000 signatures in opposition. The planning commission denied the permit application, and on appeal, the board of supervisors did the same, finding the plaintiff failed to prove two elements necessary for a use permit: that the project was compatible with the planned uses in the general area, and that it was not detrimental to the public interest, health, safety or welfare.

The Court of Appeal's Decision. The court of appeal upheld the trial court's decision rejecting the plaintiff's challenge. The court first explained that, as the permit applicant, the plaintiff had the burden to

show she was legally entitled to a use permit. She had, however, failed to persuade the board of supervisors that the requirements for a use permit were met. In passing, the court stated that the board's determination that the requirements were not met did not have to be supported by substantial evidence because it is the absence of evidence of sufficient weight and credibility to convince the trier of fact that leads to that conclusion. Nevertheless, the court undertook a thorough review of the record and found that the board's decision was amply supported by substantial evidence.

The court noted that it would be appropriate to focus on the evidence that would tend to support the board's decision rather than the evidence that would tend to detract from it. Where the trier of fact has drawn reasonable inferences from the evidence, a reviewing court does not have authority to draw different inferences, even though they might also be reasonable.

Applying this standard, the court observed that the property was located in an area that contained a significant number of homes and that it was reasonable for the county to conclude that keeping tigers was not compatible with the area's use. This determination alone was sufficient to deny the permit application.

The court rejected the plaintiff's argument that the project was compatible with the area's open space zoning, declaring that a tiger compound surrounded by a chain link fence was not "open space." Nor was the plaintiff entitled to a use permit simply because similar projects had been approved in other residential areas.

The court also found ample evidence supporting a finding that the tigers posed a danger to the public. Rejecting the plaintiff's evidence that escaped captive-born tigers pose little risk to the public, the court cited evidence in the administrative record of numerous instances where tigers had escaped, and other instances where they had severely injured or killed people. The court noted that no matter what precautions might be taken to prevent the tigers from escaping, human error was foreseeable, if not inevitable.

The plaintiff further contended that the members of the board of supervisors violated board rules when they met outside of the public hearing with residents and representatives who opposed the project and that, as a result, the plaintiff did not receive a fair hearing before the board. However, the court found no violation because the board members disclosed the meetings as required by the board's rules. Furthermore, the court noted that board members have both a right and a duty to discuss issues of concern with their constituents. Moreover, the plaintiff had not shown clear evidence of actual bias or that her application was not denied on its merits.

HIGH SIERRA RURAL ALLIANCE V. COUNTY OF PLUMAS,
29 Cal. App. 5th 102 (2018)

The Third District Court of Appeal rejected a CEQA challenge to a county's general plan update, holding that a county's California Timberland Productivity Act finding that a residence or structure is necessary for timberland production zone management is not a discretionary act for CEQA purposes. *High Sierra Rural Alliance v. County of Plumas*, 29 Cal. App. 5th 102 (2018).

*Also available at: http://www.californialandusedevelopmentlaw.com

In December 2013, the County prepared a comprehensive update to its 1984 General Plan, along with an accompanying "first-tier" programmatic environmental impact report. The general plan focused on new population growth within specific geographic "Planning Areas" to prevent "rural sprawl" and preserve natural resources. The general plan update called for all new development to take place within, or next to, these Planning Areas. The EIR and general plan anticipated little population growth or construction outside of the Planning Areas due to historical development patterns and the new general plan policies.

Petitioner contended that the general plan update conflicted with the Timberland Act because the general plan determined that any residence on timberland production zone land is a compatible use with timberland production, so long as the parcel is at least 160 acres. It also claimed that CEQA review was required each time the County determined whether proposed residences were compatible with timberland use. The Court of Appeal rejected both arguments.

The Timberland Act imposes mandatory restrictions on parcels zoned for timberland production, limiting the permitted uses to "growing and harvesting timber and to compatible uses." Gov. Code § 51110 et. seq. Timberland production zones are regulated by state statutes, but local governments are required to enforce the zoning restrictions. Petitioner argued that the general plan update impermissibly determined that all residences are compatible with timberland production zoned land by including a policy confirming that any residence or structure on a parcel zoned for timberland production that is at least 160 acres is a compatible use. Petitioner contended that Government Code Section 51104 requires the County to make case-by-case compatibility determinations based on whether a residence is (1) necessary for management of timberland, and (2) not otherwise incompatible with underlying timber operations.

The court found that the County had been aware of the above Section 51104 requirements and had applied them to previous compatibility determinations. It concluded that the updated general plan policies concerning timberland production did not conflict with state law merely because they did not repeat Section 51104 in its entirety, and that the general plan policy requiring a finding that a residence or structure was compatible with the Timberland Act was sufficient.

The court also disagreed with petitioner's contention that the County engages in discretionary review under CEQA when determining whether proposed residences or structures are compatible with timberland production. Instead, the determination is classified as ministerial because the statutory guidance provided to local governments by the Timberland Act do not allow an agency to deny or condition a building permit to mitigate environmental damage. The court also noted that the Timberland Act expressly exempts the County's decisions to put parcels in timberland production zones from CEQA review because the decision "involves the state law's authorization of residences and structures necessary for the management of these parcels" and the compatibility findings are governed solely by the Timberland Act. Thus, the court concluded that the County is not required to engage in discretionary review under CEQA each time it approves proposed structures that are compatible with timberland.

J. ARTHUR PROPERTIES, II, LLC V. CITY OF SAN JOSE,
21 Cal. App. 5th 480 (2018)

The Sixth District Court of Appeal has held that a medical marijuana collective is not a "medical office" as defined in San Jose's Municipal Code. *J. Arthur Properties, II, LLC v. City of San Jose*, 21 Cal. App. 5th 480 (2018).

Plaintiffs opened a medical marijuana collective in 2010 at a site zoned Commercial Office. At the time, San Jose's Municipal Code did not regulate any type of marijuana-specific uses and allowed medical offices in Commercial Office zoning areas. The City Council amended the Municipal Code in 2014 to regulate and permit medical marijuana uses in certain industrial zoning area but not in Commercial Office areas. Plaintiffs received a compliance order in 2014 stating that medical marijuana collectives were not permitted in Commercial Office zoning areas, effectively requiring them to discontinue their business at the site.

Plaintiffs sued, contending that their marijuana collective should continue to be allowed as a legal, nonconforming use. The Sixth District Court of Appeal disagreed. San Jose's Municipal Code defines medical office as "offices of doctors, dentists, chiropractors, physical therapists, acupuncturists, optometrists, and similar health related occupations, where patients visit on a daily basis." Plaintiffs argued that medical marijuana collectives should be considered medical offices because they provide a medical and health-related service. The court declined this broad interpretation, observing that medical marijuana collectives did not fall under any of the enumerated uses listed in the definition and that a medical marijuana collective is not a "similar health related occupation." Emphasizing that the enumerated uses typically involve the on-site treatment of patients by a physician or other professional, the court found no evidence that medical marijuana collectives provided a similar service. Instead, "members of collectives are patients of the physicians who prescribed marijuana."

Accordingly, the court held that the collective had never been a permitted use to begin with and hence could not be a legal nonconforming use.

SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE V. CITY AND COUNTY OF SAN FRANCISCO,
22 Cal. App. 5th 77 (2018)

Once again, the City and County of San Francisco has been found to have exceeded the limits of its authority under the Ellis Act in its efforts to deter conversion of residential rental units. *Small Property Owners of San Francisco Institute v. City and County of San Francisco*, 22 Cal. App. 5th 77 (2018).

The Ellis Act prohibits local governments from "compel[ling] the owner of any residential real property to offer, or to continue to offer accommodations in the property for rent or lease." (Gov't Code § 7060(a).) Courts have held that the Ellis Act completely occupies the field of substantive eviction controls over landlords who withdraw units from the market and prohibits local ordinances that penalize the exercise of rights established by the statute.

The ordinance challenged in this case modified the City's Planning Code to permit enlargement, alteration or reconstruction of nonconforming residential units in zoning districts where residential use was principally permitted, but imposed a 10-year waiting period for units that had been the subject of a "no fault" eviction. Small Property Owners of San Francisco Institute ("SPOSFI") sued, claiming that the imposition of a 10-year waiting period penalized the exercise of the right to exit the rental business and therefore conflicted with and was preempted by the Ellis Act.

The City argued (1) SPOSFI could not state a facial challenge to the Ordinance; and (2) the imposition of the 10-year waiting period fell within the City's authority to regulate land use and mitigate impacts on displaced tenants.

The court rejected both arguments. It found that SPOSFI did state a facial challenge to the Ordinance because, in every case where a property owner exercised its Ellis Act rights, the property owner had a locally imposed legal barrier of a 10-year waiting period to make alterations, and it did not matter that the waiting period occurred after the eviction rather than before. The court also held that the complete prohibition of alteration of a nonconforming unit for 10 years reached beyond regulating the particulars of a property owner's proposed alterations and yet did not help displaced tenants — it therefore constituted an undue burden on the exercise of Ellis Act rights in violation of the Act.

VISALIA RETAIL, LP V. CITY OF VISALIA,
20 Cal. App. 5th 1 (2018)

A general plan policy that limited the size of retail tenants in certain areas of a city was not likely to cause urban decay and was not inconsistent with other general plan policies encouraging infill development, the court of appeal held in *Visalia Retail, LP v. City of Visalia*, 20 Cal. App. 5th 1 (2018).

The City of Visalia's general plan update included a policy that Neighborhood Commercial areas should be anchored by a grocery store and could not have individual tenants greater than 40,000 square feet. Visalia Retail, which owned property designated Neighborhood Commercial, filed a petition for writ of mandate seeking to invalidate the city council's certification of the EIR and adoption of the general plan update. Visalia Retail argued that the EIR should have analyzed the potential for the tenant size cap to cause urban decay and that the general plan was internally inconsistent. The superior court ruled in favor of the city, and the court of appeal upheld the superior court's decision.

Potential for Urban Decay

The petitioner argued that the EIR should have analyzed the potential for urban decay to result from the tenant size cap. The petitioner had submitted a report from a real estate broker that explained the policy would likely lead to vacancies, physical blight, and urban decay because, in his opinion, it was unlikely a grocery store anchor would be willing to lease a space that was smaller than 40,000 square feet. In support, the real estate broker stated in his report that (1) he was personally unaware of any grocers willing to build new stores under 40,000 square feet, (2) a typical grocery store for four grocery chains must be at least 50,000 square feet to be profitable, (3) 10,000–20,000-square-foot stores launched by a large grocery chain had been unsuccessful, and (4) three grocery stores in Visalia under 40,000 square feet had closed.

While an EIR does not need to study economic and social changes resulting from a project, physical changes to the environment that are caused by a project's economic or social impacts are environmental effects that must be considered under CEQA. The court of appeal concluded that the real estate broker's report did not provide substantial evidence that the 40,000-square-foot limit would cause urban decay in the form of significant physical effects on the environment.

The court explained that the real estate broker's report did not support an argument that no grocers would be willing to build stores under 40,000 square feet. The court noted that the report's conclusion was based only on the real estate broker's personal knowledge, the typical store size for four grocery chains, and one chain's experience with stores under 20,000 square feet. The court also noted that the report indicated that some grocers in some circumstances had built stores under 40,000 square feet, which contradicted the real estate broker's conclusion that no grocers would build stores under 40,000 square feet. Moreover, the court noted that the report did not provide a reason why the three stores in Visalia under 40,000 square feet had closed. Finally, the court determined that the real estate broker's report did not demonstrate that any vacancies in Neighborhood Commercial areas as a result of the tenant size cap would be so rampant as to cause urban decay.

General Plan Consistency

The petitioner also argued that the general plan was internally inconsistent. The petitioner claimed that the 40,000-square-foot limit conflicted with eight other policies and goals in the general plan, including a goal to promote infill development. The court of appeal rejected the petitioner's argument. The court concluded that the city council could have reasonably concluded that the tenant size cap would not impede infill development because tenants larger than 40,000 square feet were permitted in other areas of the city. The court also explained that the city could reasonably decide to restrict the nature of infill development in some areas in order to pursue other goals, such as encouraging smaller businesses or promoting pedestrian-oriented retail:

"In sum, just because the general plan declares a goal of promoting infill development does not mean all of its policies must encourage all types of infill development. General plans must balance various interests, and the fact that one stated goal must yield to another does not mean the general plan is fatally inconsistent. Few, if any, general plans would survive such a standard."

WESTSIDERS OPPOSED V. CITY OF LOS ANGELES,
27 Cal. App. 5th 1079 (2018)

The Second District Court of Appeal upheld the City of Los Angeles's General Plan amendment, which changed the land use designation of a proposed project site for a mixed-use development against challenges the decision was prohibited by the City Charter. *Westsiders Opposed v. City of Los Angeles*, 27 Cal. App. 5th 1079 (2018).

The developers filed a permit application with the City for the project, which consisted of the demolition of an automobile dealership and construction of an 800,000 square foot mixed-use project on a five-acre site in West Los Angeles that would include 516 residential units, 99,000 square feet of retail floor area, and 200,000 square feet of office floor area. Project approval required a General Plan

amendment, a zoning amendment, multiple conditional use permits, a development agreement, and an environmental impact report. The City Council adopted ordinances approving the General Plan amendment and the project.

Plaintiffs challenged the approvals, alleging 1) the City Charter bars amending the General Plan for a single project site or single parcel, 2) the Charter bars the City from allowing a member of the public to initiate a General Plan amendment, and 3) the City failed to make the required findings.

Under the Charter, the General Plan may be amended by "geographic areas" that have a "significant social, economic or physical identity." The plaintiffs contended that a "geographic area" must be larger than a single lot and the Project site therefore did not qualify as a geographic area with significant or special identity. Relying on principles of statutory construction, the court rejected the plaintiffs' argument and concluded that the Charter did not limit the amendment process to a minimum area or number of parcels and that the court was "prohibited from implying any such limitation or restriction on the City's exercise of its power to govern municipal matters." The court concluded the City did not violate the Charter by amending the General Plan designation for a single parcel because the Charter did not clearly restrict the City's power to do so.

Plaintiffs also argued that the City did not make the required findings that the lot was a "geographic area" or that "the lot has a *significant* economic or physical identity." The court disagreed, noting that the City is not required to make explicit findings to support the General Plan amendment because the amendment is a legislative act. Regardless, the court held that the City did make explicit findings that the lot had unique characteristics because it was a transit-oriented district that necessitated higher density that would reduce vehicle trips and provide greater local amenities to the neighborhood.

Plaintiffs also argued that the City violated the Charter by allowing the project developers to initiate the General Plan amendment. The court summarily rejected this argument finding that the developer simply requested an amendment while the Director of Planning signed the form initiating the amendments as required under the Charter. Thus, the City did not violate the Charter because the Charter does not prohibit the City from receiving amendment requests from private parties.

2. COASTAL ACT

BEACH AND BLUFF CONSERVANCY V. CITY OF SOLANA BEACH,
28 Cal. App. 5th 244 (2018)

An appellate court has held that the sole means of challenging a certified local coastal program (LCP) based on violation of the California Coastal Act is a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5. *Beach and Bluff Conservancy v. City of Solana Beach*, 28 Cal. App. 5th 244 (2018).

Under the Coastal Act, local governments must develop an LCP consisting of a land use plan (LUP) and a Local Implementation Plan and submit the plans to the Coastal Commission for certification of consistency with the Act. In this case, the City submitted an amended LUP to the Commission for certification and, after a series of proposed modifications accepted by the City, the Commission certified the LUP.

Petitioner filed an action for declaratory relief and traditional mandate under Code of Civil Procedure 1085, asserting a facial challenge to policies in the amended LUP on the grounds that they conflicted with the Coastal Act and/or violated the takings clause of the Fifth Amendment.

The appellate court concluded that petitioner's sole remedy for claims based on the Coastal Act was a petition for writ of administrative mandamus against the Coastal Commission. The court relied on Public Resources Code § 30801, which states that any challenge to a decision or action by the Coastal Commission must be by writ of mandamus under Code of Civil Procedure § 1094.5 filed within 60 days after the final decision of the Commission.

The court reasoned that any post-approval facial challenge to a local land use policy is "essentially a challenge to the Commission's quasi-judicial certification decision." That the City was acting legislatively when it enacted the LUP did not change the fact that a mandamus proceeding against the Commission (with the City named as a necessary party) was petitioner's exclusive method of challenging policies based on inconsistency with the Coastal Act. The court pointed to the established principle that where a statute creates rights and obligations not previously existing under common law, it may also define the exclusive procedure for judicial review based on those rights and obligations. Because the Coastal Act created new rights and obligations regarding the development and management of coastal property, the exclusive method of challenging decisions of the Commission under the Coastal Act was administrative mandamus, notwithstanding common law remedies that might otherwise have been available.

Turning to petitioner's constitutional challenge, the court observed that the Commission's review of an LUP is statutorily limited to a determination of consistency with the Coastal Act, and hence section 30801 arguably did not apply to a constitutional challenge to a Commission-certified LUP. The court found it unnecessary to decide this, however, finding that petitioner's constitutional claims were not ripe for adjudication because the Commission and City had not adopted a final, definitive, position regarding how policies would be applied to the petitioner's property. Only then, the court said, could it be determined whether a constitutional violation had occurred. The court added that nothing in its decision precluded any property owner affected by the LUP from later challenging the application any of its policies to the owner's specific property.

GREENFIELD V. MANDALAY SHORES COMMUNITY ASSOCIATION,
21 Cal. App. 5th 896 (2018)

Underlining the broad and expansive definition of "development" under the California Coastal Act, the Second Appellate District ruled that a coastal homeowners' association's ban on short-term rentals is considered "development" subject to the requirements of the Coastal Act. *Greenfield v. Mandalay Shores Community Association*, 21 Cal. App. 5th (2018).

The Mandalay Shores Community Association is the homeowners' association for 1,400 residences in a beach community within the City of Oxnard coastal zone. Increasingly concerned about the parking, noise and trash problems caused by short term rentals, the Association adopted a resolution barring home rentals for fewer than 30 consecutive days. Owners who violated the ban would be fined by the

Association: $1,000 for the first offense, $2,500 for the second, and $5,000 for each subsequent offense.

A Coastal Commission enforcement supervisor advised the Association that its ban on short term rentals constituted a "development" under the Coastal Act which required a coastal development permit. The plaintiffs, owners of a home in Mandalay Shores, then sued the Association to prevent enforcement of the ban, asserting it violated the Coastal Act.

The trial court denied the plaintiffs' motion for a preliminary injunction, ruling that the Association's ban on short term rentals was not a "development" under the Coastal Act.

The court of appeal reversed the trial court judgment, ruling that it had not correctly construed the Coastal Act. The court stated that, because a key goal of the Coastal Act is to maximize public access, "development" is broadly defined to include changes in density or intensity of use of land, and not just alterations of land or water. For example, the court explained, locking a gate that is usually open for public beach access over private land, or posting a "no trespassing" sign on a parcel used for beach access, are both "developments" because they have a significant adverse impact on public use of coastal resources.

Similarly, the court reasoned, preventing non-residents from vacationing—as they had for decades—at Mandalay Shores through the short-term rental of beach homes created a "monetary barrier to the beach." The Association's ban was therefore a "development" subject to the provisions of the Coastal Act. The question of whether short-term rentals should be regulated or banned would need to be decided by the Coastal Commission and the City of Oxnard, not a private homeowner's association.

The appellate court ordered the trial court to grant the plaintiffs' motion for a preliminary injunction, thereby preventing continued enforcement of the Association's ban on short-term rentals.

SAN DIEGO UNIFIED PORT DIST. V. CAL. COASTAL COMMISSION,
27 Cal. App. 5th 1111 (2018)

A core principle of the California Coastal Act is to maximize public access to the coast, including recreational opportunities in the coastal zone. The Court of Appeal determined that the Coastal Commission acted within its authority in rejecting an amendment to a port master plan as inconsistent with this principle. *San Diego Unified Port Dist. v. California Coastal Commission*, 27 Cal. App. 5th 1111 (2018).

The Port District applied to the California Coastal Commission for certification of an amendment of the District's port master plan to authorize specified hotel development, including construction of a 175-room hotel. The Commission denied the amendment finding it inconsistent with the public access and recreation policies of the Coastal Act because it did not adequately protect and encourage lower-cost visitor and public recreational opportunities. The District sought and the trial court issued a writ of mandate invalidating the decision. The trial court found the Commission, in excess of its jurisdiction, had essentially conditioned its certification on the provision of lower-cost overnight accommodations,

which "infring[ed] on the wide discretion afforded the District to determine the contents of land use plans and how to implement those plans."

The Fourth Appellate District reversed the trial court's rulings.

The appellate court rejected the District's contention that it fell within a specifically defined category of local government entity over which the Commission's authority was limited. The court declined to "rewrite the law" to extend certain restrictions on the Commission's jurisdiction to port district master plans, which are governed by Chapter 8 of the Coastal Act.

The court then addressed (de novo) whether the Commission's decision was within its authority under the Coastal Act. The District argued that "precise policy" originates with a legislative body such as the District, meaning the District is charged with creating policies to implement the Coastal Act whereas the Commission merely verifies a plan's consistency. The court disagreed, acknowledging the breadth of the mandate in reviewing planned development and other uses within the coastal zone. This mandate includes promulgating statewide rules and statewide policies, not merely acting as a "rubber stamp agency" with respect to local planning. The Commission exercises its independent judgment on the issue of a local entity's compliance with coastal policy, and its "broad supervisory role" is particularly important when dealing with a port master plan.

The court acknowledged that the Commission may not conditionally approve a master plan under the Coastal Act, i.e., grant certification subject to a specified modification. But this is not what the Commission did in this case – it denied certification on grounds that the proposed amendment did not further the Act's public access policies. While the Commission suggested how the District might meet the Act's policy that "lower cost visitor… facilities shall be… provided," it expressly acknowledged it was not permitted to make such modifications to the plan.

The court reaffirmed that the Commission is empowered to exercise independent judgment in determining not only whether a master plan amendment conforms with the Act's policies, but also whether the plan "carries out those policies" (emphasis in original). The Commission has a statutory mandate to consider "the manner of public access" on a case-by-case basis and may take into account social and economic needs. The court concluded that the Commission exercised this mandate in deciding that the plan amendment did not adequately protect lower-cost visitor and public recreational opportunities, including overnight accommodations.

3. INITIATIVE AND REFERENDUM

CITIZENS FOR AMENDING PROPOSITION L V. CITY OF POMONA,
28 Cal. App. 5th 1159 (2018)

The Second District Court of Appeal held that the purported amendment of an agreement to extend the period in which billboards were permitted within the City constituted a new agreement and hence violated the terms of a ballot initiative prohibiting new billboards. *Citizens for Amending Proposition L v. City of Pomona*, 28 Cal. App. 5th 1159 (2018).

The City of Pomona entered into an agreement with Regency Outdoor Advertising allowing billboards alongside several Pomona freeways, but requiring their removal upon the agreement's expiration. Thereafter, Proposition L was passed prohibiting construction of new billboards within city limits. The City/Regency agreement expired in June 2014. One month later, the city council adopted an ordinance purporting to amend the agreement by extending it for an additional 12-year term. Plaintiffs sued, contending that the "amendment" was in fact a new agreement allowing new billboards in violation of Proposition L.

Preliminarily, the court rejected the City's argument that the plaintiffs lacked standing. It noted that both plaintiffs — one of whom was a competitor of Regency — were residents of the City and hence could assert public interest standing in having City laws enforced. The court also disagreed with the City's claim that Regency was an indispensable party and that the failure to include Regency within the applicable limitations period required dismissal of the suit. The agreement required Regency to pay the City $1 million as consideration for the new agreement. Accordingly, the court reasoned, the interests of the City and Regency were aligned both legally and financially and Regency's interests were thus adequately protected by the City's assertion of its own interests in upholding the contract.

On the merits, the court found that the purported amendment of the City/Regency agreement was a nullity because the agreement had already expired at the time the amendment was approved by the city council. As a new agreement, it was subject to the rules, regulations, and official policies in force in the City at the time of its adoption, including Proposition L. The new agreement violated Proposition L because the original agreement had required removal of the billboards upon its expiration, and thus the new agreement effectively permitted billboards that would otherwise not have existed, contravening both the letter and spirit of the ballot measure.

CITY OF MORGAN HILL V. BUSHEY,
5 Cal. 5th 1068 (2018)

The California Supreme Court has resolved a split among the courts of appeal, concluding that citizens may bring a referendum to challenge a zoning ordinance even if the referendum would temporarily leave in place zoning inconsistent with the general plan. *City of Morgan Hill v. Bushey*, 5 Cal.5th 1068 (2018).

Government Code Section 65860 requires a city's zoning ordinance to be consistent with the general plan. When a zoning ordinance becomes inconsistent due to a general plan amendment, the city must enact a consistent zoning ordinance within a "reasonable time." Gov't Code Section 65860(c).

Here, voters in the City of Morgan Hill rejected by referendum a zoning ordinance the city council enacted to bring zoning into consistency with its recently amended general plan. The city claimed that by rejecting the zoning ordinance, the voters essentially enacted inconsistent zoning in violation of Section 65860.

The court disagreed. It held that unlike an initiative or ordinance that enacts inconsistent zoning, a referendum that leaves inconsistent zoning in place simply does so for a limited period of time — "until the local government can make the zoning ordinance and general plan consistent in a manner

acceptable to a majority of voters." So long as there are other consistent zoning designations available, or the local government has other ways to make the zoning consistent and general plan consistent, then such a referendum is valid.

Furthermore, the court interpreted the "reasonable time" provision of Section 65860(c) as providing localities some undefined time to act, and determined that the time taken for a single referendum rejecting a zoning ordinance did not violate this limitation.

Because the trial court had not addressed whether there were other viable zoning designations or other options for the city to resolve the inconsistency between the existing zoning ordinance and the general plan, the court remanded the case for further consideration of these issues.

SAVE LAFAYETTE TREES V. CITY OF LAFAYETTE,
20 Cal. App. 5th 657 (2018)

Broadly construing Government Code § 65009, which establishes a 90-day limitations period for claims under the Planning and Zoning Law, an appellate court held that approval of an agreement allowing removal of trees constituted a "decision regarding a permit," triggering the 90-day filing deadline. *Save Lafayette Trees v. City of Lafayette*, 20 Cal. App. 5th 657 (2018).

The City of Lafayette entered into an agreement with PG&E allowing removal of approximately 270 trees within a natural gas pipeline right-of-way. Petitioners sued contending that the agreement had been approved in violation of the Planning and Zoning Law and CEQA. The trial court dismissed the complaint on the ground that it had not been filed and served within the 90-day limitations period under Section 65009.

Government Code § 65009 provides that an action challenging "any decision" regarding "permits, when the zoning ordinance provides therefor" must be filed and served within 90 days of the decision. On appeal, petitioners argued that Section 65009 was inapplicable because the City entered into an agreement allowing tree removal and did not issue any permits. The appellate court disagreed, finding "no meaningful difference between the two in this instance." It noted that the staff report to the City Council regarding the agreement expressly referred to the project as a "major tree removal project" that required a permit under the municipal code. Approval of the agreement allowing removal of the trees, the court said, was properly considered to be a decision regarding a permit subject to Section 65009.

Petitioners also argued that its action was subject to a longer, 180-day statute of limitations in the City's municipal code governing challenges to decisions of the City Council. The court concluded this provision was preempted by Section 65009 because it expressly conflicted with the statute's 90-day period. In dicta, the court noted that most local statutes of limitations regarding challenges to planning and Planning and Zoning Law decisions had likely been preempted by the enactment of Section 65009.

The court also found, however, that petitioners' CEQA challenge was subject to the 180-day limitations period under Public Resources Code, not the 90-day period under Section 65009. Concluding that the two statutes could not be reconciled because they established different deadlines, the court held that the CEQA limitations period, as the more specific, controlled.

*Also available at: http://www.californialandusedevelopmentlaw.com

4. LAND USE LITIGATION

ATWELL V. CITY OF ROHNERT PARK,
27 Cal. App. 5th 692 (2018)

The court of appeal held that the plaintiff's challenge to the City of Rohnert Park's reapproval of a Wal-Mart grocery store was barred by the doctrine of res judicata because a prior proceeding had raised the same issues. *Atwell v. City of Rohnert Park (Wal-Mart Stores, Inc.)*, 27 Cal. App. 5th 692 (2018).

In 2010, the City approved the Wal-Mart project. Following the City's approval, the Sierra Club and Sonoma County Conservation Action (SCCA) filed a petition challenging the project on grounds that it violated CEQA and conflicted with the City's General Plan Policy LU-7. Policy LU-7 sought to "encourage new neighborhood commercial facilities and supermarkets to be located to maximize accessibility to all residential areas. … to ensure that convenient shopping facilities such as supermarkets and drugstores are located close to where people live and facilitate access to these on foot or on bicycles … this policy will encourage dispersion of supermarkets rather than their clustering in a few locations."

While the plaintiffs in the 2010 proceeding alleged that the project conflicted with Policy LU-7 in their petition, the plaintiffs did not pursue the claim during the proceeding. The trial court ultimately granted the petition on the CEQA claims and ordered that the resolutions approving the Project be vacated, and that the Project be remanded for additional environmental review with respect to traffic and noise impacts.

The City prepared a revised EIR; however, the EIR did not alter the original EIR's analysis of the project's consistency with the General Plan. Following the City's reapproval of the project in 2015, the plaintiffs filed this current proceeding challenging the project's consistency with Policy LU-7. The trial court denied the petition finding that the petition was barred by the 2010 proceeding under the doctrine of res judicata.

The doctrine of res judicata applies where a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding, the prior proceeding resulted in a final judgment on the merits, and the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceedings.

The court of appeal affirmed the trial court's finding that the prior and present proceedings both raised the claim that the project was inconsistent with Policy LU-7. The court rejected the plaintiff's argument that the actions raised distinct issues because the prior proceeding did not actually litigate the General Plan issue. Rather, the court held that the doctrine of res judicata applied to issues that could have been litigated, as well as to issues actually litigated, finding that "[n]othing in the record suggests appellants' current petition materially differs from the General Plan consistency claim raised in the [2010] Sierra Club action[.]"

The court also rejected plaintiffs' argument that no privity existed between them and Sierra Club and SCCA. Privity within the context of res judicata concerns a person's relationship to the subject matter of the litigation. The court found that "[t]his case raises issues of harm to the community - namely, the

detrimental impact to neighborhood supermarkets caused by having one located in a large commercial area. … Likewise, Sierra Club and SCCA brought their petition on behalf of its members who are part of the community." Accordingly, the court held that there was privity as the relationships of plaintiffs, the Sierra Club and SCCA to the subject matter of the litigation were identical.

COMMUNITIES FOR A BETTER ENVIRONMENT V. STATE ENERGY RESOURCES CONSERVATION DEVELOPMENT COMMISSION,

19 Cal. App. 5th 725 (2018)

In *Communities for a Better Environment v. State Energy Resources Conservation and Development Commission*, 19 Cal. App. 5th 725 (2017), the First District Court of Appeal reversed the trial court's conclusion that a challenge to the constitutionality of California's process for judicial review of decisions of the State Energy Resources Conservation and Development Commission (Energy Commission) was not ripe. The practical effect of this decision may be to increase the difficulty in permitting and financing large, non-renewable power plants in California.

The Energy Commission has exclusive authority to license thermal power plants over 50 megawatts, "in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law." Under Section 25531 of the Public Resources Code, decisions of the Energy Commission are reviewable only by the Supreme Court of California, and the Commission's factual findings "are final and are not subject to review." Review by the Supreme Court is discretionary and, in practice, the high court has summarily denied every challenge to an Energy Commission power plant licensing decision since energy deregulation in California in the 1990s.

The trial court dismissed the case on ripeness grounds, concluding that no actual controversy existed between the environmental groups and the Energy Commission that could be adjudicated in the context of a specific factual dispute.

On appeal, defendants argued that the trial court's determination was correct because the groups were seeking a purely advisory opinion on the constitutionality of a statute, unmoored to any concrete factual dispute regarding an actual Energy Commission decision. The appellate court disagreed, finding that the dispute was sufficiently concrete for adjudication. Prior decisions had found cases to be unripe when "a factual context was necessary" to resolve the legal issue. But here, no factual context was necessary "or even useful," according to the court, because the constitutionality of Section 25531 would be implicated in every future judicial review of an Energy Commission power plant licensing decision. The court also determined that ripeness should not operate to bar adjudication of the dispute before it because the consequences would be lingering uncertainty in the law despite the widespread public interest in the answer to a particular legal question.

Although the effect of this decision is merely to send the case back to the trial court for further adjudication, the court's concern that the failure to address the constitutionality of Section 25531 would result in a "lingering uncertainty" suggests that the court found some merit to the environmental groups' arguments. Without legislative intervention, the decision portends a more uncertain future for the development of large thermal power plants in California. Smaller power plant projects (under 50 megawatts) regulated by other state and local government agencies experience significant delay and

increased risks from a complicated approval and permitting process. Larger plants licensed by the Energy Commission may soon confront the same challenges. The decision may have limited impact, however, as recent forecasts produced by the Public Utilities Commission show no appetite for new natural gas plants.

5. FEES AND TAXES

1901 FIRST STREET OWNER V. TUSTIN UNIFIED SCHOOL DISTRICT,
21 Cal. App. 5th 1186 (2018)

School impact fees for an apartment complex must be calculated based on the square footage of both the individual units and other space within the interior of the buildings, such as hallways and elevator shafts. *1901 First Street Owner v. Tustin Unified School District*, 21 Cal. App. 5th 1186 (2018).

School impact fees under Government Code section 65995 are based on "assessable space," defined as "all of the square footage within the perimeter of a residential structure, not including any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area." (§ 65995(b)(1).) This square footage is to be "calculated by the building department of the city or county issuing the building permit, in accordance with the standard practice of that city or county in calculating structural perimeters." (Id.)

The City of Tustin calculated the square footage of an apartment building owned by 1901 First Street using a "net rentable" method — the City's standard practice at that time — which included the square footage of the individual apartment units but excluded everything else in the building. The school district objected to this method, contending that the statute required all space within the perimeter of the building to be included. The City then revised its square footage calculation based on the perimeter of the building, which resulted in an increase in the fee of over $238,000. First Street sued to recover the difference.

First Street's principal argument was that, in the case of apartment buildings, the area of a "residential structure" was limited to the apartments themselves, pointing to the exclusions in section 65995(b)(1) for "any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area." The court found that none of these exclusions applied to areas within the interior of apartment structures, such as lounge areas, recreation rooms, indoor pools, elevator shafts, mechanical rooms and the like. The only potentially applicable exclusion, the court said, was for walkways. It concluded, however, that the statute used the term walkway "in the sense of an external walking path" not in the sense of an internal hallway, reasoning that the other items in the list—such as carports, garages and patios—were typically located at or near the periphery of a residential structure, and that the Legislature had specified these exceptions to make it clear that these peripheral areas were not intended to be included as assessable space.

First Street also argued that the City's standard practice of calculating net rentable space should govern, relying on the provision in section 65995(b)(1) that "the square footage within the perimeter of a residential structure shall be calculated by the building department of the city . . . in accordance with the standard practice of that city . . . in calculating structural perimeters." (Emphasis added.) The court

disagreed, concluding that the "standard practice" referred to in the statute was specifically the standard practice of calculating the square footage "within the perimeter of a residential structure," which had to comply with section 65995(b)(1).

First Street's final argument was that the City's decision to change its method of calculating assessable space violated First Street's vested rights to proceed in accordance with the rules, regulations and ordinances in effect at the time of the approval of its vesting tentative map. The court rejected this argument, citing Government Code section 66498.6(b), which states that approval of a vesting tentative map "does not grant local agencies the option to disregard any state or federal laws, regulations, or policies." The City's standard practice, the court stated, was not in compliance with state law; hence the City could adopt a new rule implementing the statutory mandate without violating any vested rights.

SUMMERHILL WINCHESTER LLC V. CAMPBELL UNION SCHOOL DISTRICT,
No. H043253 (6th Dist., Dec. 4, 2018)

The Sixth District Court of Appeal invalidated a school district's Level 1 development fee because the underlying fee study did not properly calculate anticipated growth and included the cost of hypothetical new schools that the district had no plans to build. *Summerhill Winchester v. Campbell Union School District*, No. H043253 (6th Dist., Dec. 4, 2018).

The Campbell Union School District adopted a Level 1 development fee based on a fee study that concluded the District had no capacity to accommodate new students and calculated an average cost of $22,039 to house each additional student in new school facilities. This figure was based on the projected cost of building a new, 600-student elementary school and a 1,000-student middle school.

Petitioner paid the development fees under protest and sued to recover them, contending that the fee study had failed to calculate anticipated growth from new development or to identify any new facilities that were necessary to accommodate such growth. The court of appeal agreed on both counts and ordered a full refund of the fees.

The court found that although the fee study determined the District was already over capacity (and hence would be impacted by any new students from development), the study had failed to calculate the "total amount of new housing projected to be built within the District." Instead, the study simply stated that the amount of new development "would be in excess of 133 residential units." This was inadequate, the court said, because it did not provide the information needed "to determine whether new school facilities are needed due to anticipated development." While the Board did not need to identify "specific facilities that would be built," it did need "to decide whether or not new school facilities were needed and, if so, what type of facilities were needed."

The court also decided that the Board had improperly assessed the fee based on the cost of new school facilities that were not shown to be necessary to accommodate students from new development. While the fee study based its calculations on the cost of building new elementary and middle schools, there was insufficient evidence either that such schools would be needed to accommodate students from new development or that the District actually planned to build such schools.

The District argued that because its enrollment already exceeded its capacity, every additional student generated by new development would necessarily result in a financial impact on the District. The court accepted the validity of this statement but found it did not satisfy the statutory requirement that the "Board demonstrate a reasonable relationship between the amount of the fee and the impact of development on the need for new or reconstructed school facilities." (Emphasis added.) The court concluded that the "fee study's use of hypothetical new schools that [the District] was not going to build as the financial premise for calculating the fee was not a reasonable alternative methodology that could legally support the fee imposed by the Board."

6. ANTI-SLAPP STATUTE

GOLDEN EAGLE LAND INVESTMENT, L.P. V. RANCHO SANTA FE ASSOCIATION,
19 Cal. App. 5th 399 (2018)

The California Court of Appeal for the Fourth District has determined that the actions of a homeowners association undertaken in accordance with its land use approval process are protected activities in furtherance of free speech under California's anti-SLAPP statute. *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Association*, 19 Cal. App. 5th 399 (2018).

Background. Two developers proposed a joint project to build residential housing units for senior citizens on property near Rancho Santa Fe, California. Because the project would exceed local density restrictions, the developers sought approvals from both the County of San Diego and the Rancho Santa Fe Association. Initially, the association expressed support for the development. But that changed following an association meeting at which community members expressed opposition to the project. Following the meeting, the association sent communications to the county recommending the county follow current zoning requirements until the association determined whether it would approve the project.

After the developers failed to secure the necessary approvals, they filed suit against the association asserting nine causes of action alleging violations of the Common Interest Development Open Meeting Act, breach of fiduciary duties, fraud, and interference with business relations. While the complaint separated these theories into separate causes of action, the crucial allegations common to each were that the association initially expressed to the developers that it supported the project; the association refused the developers' request to reschedule an "informational public meeting" to discuss the project; the meeting agenda did not adequately describe the meeting; and the association improperly influenced the county to reject the project.

In response, the association filed a special motion to strike all nine causes of action under California's anti-SLAPP statute, Code of Civil Procedure § 425.16. The trial court granted the association's motion as to eight causes of action, but denied the motion as to the cause of action for violations of the Open Meeting Act. The trial court ruled that the association's alleged activities were not protected under sections 425.16(e)(1) or (2) of the Act as activities occurring during an "official proceeding."

The Court of Appeal's Decision. The court of appeal held that the trial court erred in finding the association's alleged violations of the Open Meeting Act were not based on protected conduct in furtherance of free speech, and upheld the trial court's rulings striking the developers' other claims.

Application of the anti-SLAPP statute requires a two-step analysis. First the defendant must demonstrate that the cause of action arises from protected activity. If the defendant does so, the burden then shifts to the plaintiff to demonstrate that it is likely to prevail on its claims.

Regarding the Open Meeting Act cause of action, asserted by only one of the developers, the court concluded that it was unclear whether the association's activities should qualify as "official" governmental actions under the statute. The court held, however, that the anti-SLAPP statute applied because the activities complained of—communicating with project applicants, setting agendas, and sending emails and letters—were all within the quasi-governmental responsibilities of the association. As a result, the association's actions fell within the broader protections of section 425.16(e)(4) as "conduct in furtherance of the exercise the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Under the second prong, the court held that the developer could not demonstrate a probability of success on the merits because it was not a member of the association and therefore lacked standing to seek relief under the Open Meeting Act.

For the remaining causes of action based on the association's alleged breach of fiduciary duties, fraud, and interference with business relations, the court held that the crux of these causes of action was the same as the set of allegations giving rise to the Open Meeting Act cause of action. Thus, these causes of action also arose from protected activities. And because the developers did not show they could prevail on the merits of those claims, the trial court did not err by striking them.

Conclusion. While the court acknowledged that the case presented a "close question as to the applicability" of the anti-SLAPP statute, it broadly held that that the association's activities concerning property entitlements "are matters of public interest" and therefore are protected activities in furtherance of free speech. The court did not suggest any limitations or provide any guidance as to how broad a segment of the public must be affected for the challenged activities to be considered as in the public interest.

7. TAKINGS

COLONY COVE PROPERTIES V. CITY OF CARSON,
888 F.3d 445 (9th Cir. 2018)

The Ninth Circuit held that the City of Carson's mobile home rent control board's decision not to factor in debt service increases in its adjustment of a rental rate for a mobile home park did not result in a regulatory taking of the mobile home park owner's property. *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018).

The plaintiff purchased a $23 million rent-controlled mobile home park in the City of Carson, $18 million of which was financed through a loan. When the plaintiff acquired the property, the City Rent Review

Board's application review guidelines required the Board to consider certain expenses submitted by property owners against the property's income to determine what rents would give the owner a fair return on their investment. At the time the plaintiff purchased the property, these expenses included debt service, which are interest payments made on a loan to purchase the rent-controlled property. Subsequently, the City revised its guidelines for considering rent increases and the City's new rent control formula no longer factored in debt service expenses.

The plaintiff twice petitioned the city's Rent Review Board for a several hundred-dollar rent adjustment, per space. Applying the new guidelines, the City only granted a rent increase of $36.74. The plaintiff sued the City, contending the Board's decision was an unconstitutional taking. The jury awarded the plaintiff over $3 million in damages and the City appealed the decision.

The Ninth Circuit engaged in a regulatory takings analysis, governed by the factors set out in *Penn Central v. Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which instructs courts to evaluate: 1) the regulation's economic impact; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the government action.

First, citing prior cases finding that a diminution in property value in excess of 75% did not amount to a taking, the court found that the denial of the plaintiff's requested rent increase was not a legally sufficient economic impact. The plaintiff's diminution in value "would only be 24.8% … far too small to establish a regulatory taking."

Second, the plaintiff argued the change interfered with an investment-backed expectations because the City's implementation guidelines at the time plaintiff purchased the property included a debt service calculation in the rent increase. The court rejected this argument as the guidelines explicitly stated the current analysis would not create an entitlement to a specific rent increase. The court further concluded that the owner's reliance on the City continuing its past practice of calculating debt service in future rent increases did not create a reasonable investment-backed expectation.

Lastly, the court reasoned that the City's rent control program should be characterized as a public program, rather than a physical invasion, as the rent control program is intended to protect homeowners from rent increases. The court found that the "[t]his central purpose of rent control programs counsels against finding a *Penn Central* taking."

The Ninth Circuit therefore found that no reasonable finder of fact could conclude the plaintiff successfully presented a regulatory takings claim and reversed the district court's judgment.

TAB 3

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

Legislative Alert: Land Use: January 2019

SUMMARY OF SIGNIFICANT CALIFORNIA LAND USE LEGISLATION IN 2018
(effective January 1, 2019 or earlier)

TABLE OF CONTENTS

INTRODUCTION

In 2018, as in 2017, land use legislation focused heavily on California's housing crisis. New bills make significant changes to the state's housing density bonus law and regional housing needs analysis requirements, and strengthen last year's SB 35 housing streamlining bill. In addition, charter cities, which had long been exempt from many Planning and Zoning Law requirements, including some intended to encourage housing, now must comply with a long list of that law's requirements.

Sustainability was a second focus of the Legislature's efforts. New laws set higher renewable energy procurement standards for electric utilities; overhaul water management planning; and give the Bay Area Rapid Transit District significant new responsibilities and powers for transit-oriented development on its properties.

A. HOUSING

1. SB 1227: New Student Housing Density Bonus

SB 1227 amends the State Density Bonus Law by adding a bonus for eligible student housing developments in which at least 20 percent of units, or rental beds, are restricted to lower-income students for 55 years. The legislation is intended to ensure that student housing projects can become eligible for a density bonus regardless of whether they include apartment-style units or dormitory-style bedrooms. To qualify, all student housing units must be used exclusively for students enrolled full time at an accredited institution of higher education, and the developer must enter into an operating agreement or a master lease with one or more such institutions. The development also must provide a priority for its affordable units for lower-income students experiencing homelessness.

Cities and counties are required to grant qualifying projects a density bonus equivalent to 35 percent of the student housing units or rental beds, as well as any other benefits for which the projects qualify under the Density Bonus Law, including incentives or concessions, waivers or reductions of development standards, and limitations on parking requirements.

2. AB 2372: New Floor Area Ratio Density Bonus

AB 2372 authorizes, but does not require, cities and counties to offer a floor area ratio bonus in lieu of a density bonus awarded based on dwelling units per acre under the State Density Bonus Law. The new legislation defines "floor area ratio bonus" as an allowance for an eligible housing development to use a floor area ratio over the otherwise maximum allowable density permitted under the governing land use regulations.

To become eligible for a floor area ratio bonus under AB 2372, a development must (1) be located in a city or county that voluntarily has established a procedure by ordinance to grant such a bonus; (2) comprise a multifamily housing development of five or more residential units; (3) be located on an urban infill site within a transit priority area, or within one-half mile of a major transit stop; (4) be located on a site zoned to allow residential or mixed-use development with a minimum planned density of at least 20 dwelling units per acre, with no land zoned for low-density residential or exclusively nonresidential use; (5) comply with the Density Bonus Law's replacement requirements for preexisting rental units; (6) include at least 20 percent very low-income units; and (7) comply with height requirements established by the zoning district. Despite establishing these specific criteria, AB 2372 also states that cities and counties electing to offer a floor area ratio bonus may do so under terms that differ from these.

3. AB 2753: Required Determinations Under the Density Bonus Law

AB 2753 requires cities and counties to provide applicants under the State Density Bonus Law with additional information when giving notification that an application is deemed complete. At that time, the applicant must be provided with a determination as to (1) the amount of the density bonus for which the applicant is eligible; (2) the parking ratio for which the applicant is eligible, if so requested; and (3)

whether the applicant has provided adequate information for the local government to make a determination regarding any incentives, concessions, or waivers or reductions of development standards requested by the applicant.

4. AB 2797: Density Bonus Law and the California Coastal Act

AB 2797 amends the State Density Bonus Law to specify that its benefits must be granted in a manner consistent with both the Density Bonus Law and the California Coastal Act. The Legislature stated that its intent in enacting AB 2797 is to harmonize the two statutes to ensure that the Density Bonus Law can be used in the coastal zone while also ensuring protection of coastal resources and access. The legislation supersedes a recent judicial decision, *Kalnel Gardens, LLC v. City of Los Angeles*, 3 Cal. App. 5th 927 (2016), in which the Court of Appeal held that the Density Bonus Law was subordinate to the Coastal Act.

5. SB 765: Revisions to SB 35 Streamlining Legislation

SB 765 makes several limited modifications to SB 35, a housing streamlining bill enacted in late 2017. In specified circumstances, SB 35 provides a streamlined, ministerial approval process for multifamily residential developments that include affordable housing. SB 765 clarifies that certain projects can become eligible for SB 35 streamlining by dedicating at least 50 percent of their units to low-income housing, where the local jurisdiction is not approving enough units for either very low-income households or low-income households. In addition to making other minor modifications to SB 35, SB 765 exempts qualifying subdivision applications from compliance with CEQA and extends to them a streamlined review process.

6. AB 3194: Expanded Application of the Housing Accountability Act

AB 3194 expands the circumstances under which a city or county must determine that a proposed housing development project is consistent with applicable zoning standards under the Housing Accountability Act. The Act already prohibited a city or county from disapproving housing projects that comply with applicable objective general plan, zoning, and subdivision standards and criteria, unless the local agency could make certain findings. AB 3194 provides further that a proposed housing development may not be deemed inconsistent with applicable zoning standards or criteria if (1) the project is consistent with objective general plan standards, but (2) the zoning for the project site is inconsistent with the general plan.

7. SB 828: Changes to the Regional Housing Needs Allocation Process

SB 828 makes significant changes to the Regional Housing Needs Allocation process. The bill prohibits the use of prior underproduction of housing or stable population numbers in a city or county from the previous regional housing needs cycle as a basis for justifying a reduction in the city's or county's share of the regional housing need. SB 828 also requires the California Department of Housing and Community Development to use new information in determining a region's existing and projected housing need, including the percentage of households that are overcrowded or cost burdened, and the rates of overcrowding and housing cost burden for a comparable or healthy housing market.

8. AB 1771: Changes to the Regional Housing Needs Allocation Process

AB 1771 makes several further modifications to the Regional Housing Needs Allocation process. Among other changes, the legislation requires councils of governments, in allocating the regional housing need, to consider (1) the percentage of existing households at various income levels that are paying more than 30 or 50 percent of their income in rent, (2) the rate of overcrowding, (3) units that were lost during any recent state of emergency and have not yet been rebuilt or replaced, and (4) the region's greenhouse gas emissions targets. Regional Housing Needs Allocation plans also now must affirmatively further fair housing. Additionally, AB 1771 requires councils of governments to publish a draft allocation methodology on their websites and to submit the draft allocation methodology to the California Department of Housing and Community Development for review before its adoption.

B. GENERAL PLANS

1. SB 1035: General Plan Safety Elements - Flood, Fire and Climate Change

Existing law (Government Code section 65302(g)(2) - (4)) requires jurisdictions to update their general plan safety elements to address fire risks, flood risks, and climate change adaptation and resilience policies. SB 1035 requires planning agencies to review and update their general plan safety elements addressing these topics on a more specific schedule than under prior law:

> After the initial revision of the safety element pursuant to paragraph (2), (3), and (4), the planning agency shall review and, if necessary, revise the safety element upon each revision of the housing element or local hazard mitigation plan, but not less than once every eight years, to identify new information relating to flood and fire hazards and climate adaptation and resiliency strategies applicable to the city or county that was not available during the previous revision of the safety element.

2. SB 1333: Charter Cities Now Subject to Key Provisions of Planning and Zoning Law

Based on a legislative finding that addressing the lack of affordable housing is of vital statewide importance, and that ensuring housing for all income levels is a matter of statewide concern, SB 1333 makes sweeping changes to the former inapplicability of many Planning and Zoning Law provisions to charter cities. The following Government Code provisions now apply to charter cities:

- § 65300.5 - general plan internal consistency
- § 65301.5 - general plan adoption a legislative act reviewable under CCP section 1085
- §§ 65359, 65454 - specific plan consistency with general plan
- § 65450 - specific plans for systematic implementation of general plan
- § 65455 - zoning, tentative map, parcel map, and public works project consistency with specific plan
- § 65460.8 - transit village plan consistency with general plan
- §§ 65590, 65590.1 - low- and moderate-income housing within the Coastal Zone
- Article 10.6 (commencing with section 65580) - housing elements
- § 65852.150 - accessory dwelling units
- §§ 65852.25, 65863.4 - reconstruction, restoration or rebuilding of multifamily dwelling involuntarily damaged or destroyed
- § 65860 - consistency of zoning ordinance with general plan
- § 65863 - regional housing needs; local share
- § 65863.6 - growth limitation ordinances
- § 65863.8 - notice of Mobilehome park conversion application
- §§ 65866, 65867.5 - development agreements

C. SUSTAINABILITY

1. SB 100: New Targets for California Renewables Portfolio Standard Program

Existing law required retail sellers of electricity to procure a minimum of 33 percent of their electricity from renewable energy resources by December 31, 2020, 40 percent by December 31, 2024, 45 percent by December 31, 2027, and 50 percent by December 31, 2030.

SB 100 increases the 2024 - 2030 standards, requiring 44 percent renewables by December 31, 2024, 52 percent by December 31, 2027, and 60 percent by December 31, 2030.

In addition, SB 100 provides: "It is the policy of the state that eligible renewable energy resources and zero-carbon resources supply 100 percent of all retail sales of electricity to California end-use customers and 100 percent of electricity procured to serve all state agencies by December 31, 2045."

For both the interim and the 2045 RPS standards, SB 100 allows waivers for specified conditions if those conditions "are beyond the control of the retail seller and will prevent compliance." Examples include inadequate transmission capacity, insufficient supply of eligible renewable energy resources available to the retail seller, unanticipated increase in retail sales due to transportation electrification, and inability to meet Energy Commission-imposed limits on costs of renewable energy procurement. In each case, the retail seller must demonstrate its efforts to anticipate and avoid these conditions.

SB 100 also makes special provisions for retail sellers that procure much of their electricity from hydroelectric projects.

2. AB 1668 and SB 606: Water Management Planning

Existing law required the state to achieve a 20 percent reduction in urban per capita water use by December 31, 2020 and required urban water suppliers to adopt Urban Water Management Plans every five years. AB 1668 and SB 606 represent the state's efforts to move beyond 2020, incorporate lessons from the 2012-2016 drought, and "make water conservation a California way of life." Among the bills' many provisions are several that may be of particular interest to sponsors of development projects.

AB 1668 creates a statewide standard for indoor residential water use until January 1, 2025: 55 gallons per day per person. Compliance is to be assessed at the aggregate supplier level, not at the customer level. From 2025 to the beginning of 2030, the standard will be either 52.5 gallons per day or a greater amount recommended by the State Water Resources Control Board and the Department of Water Resources. Beginning in 2030, the standard will be either 50 gallons per day or a greater amount recommended by the Board and the Department.

The Department, in cooperation with the Board, is required to recommend performance measures for "CII" (construction, industrial, institutional, and large landscape water) users, and standards for residential and CII landscapes, by October 1, 2021, and to adopt the performance measures and standards by June 30, 2022.

SB 606 increases the obligations of urban retail water suppliers, requiring them to:

- Calculate their water use objectives and actual use by November 1, 2023, and every November 1 thereafter
- Provide different information in their Urban Water Master Plans, particularly with respect to water shortages
- Forego *any* water grant or loan if the supplier does not comply with the new UWMP requirements

In addition, the governing body of a distributor of a public water supply now must, rather than may, declare a water shortage emergency if the governing body finds that the ordinary demands and requirements of water consumers cannot be satisfied without depleting the water supply of the distributor to the extent that there would be insufficient water for human consumption, sanitation and fire protection.

The Department has held public listening sessions on its implementation process for AB 1668 and SB 606 and is providing updates on its website, water.ca.gov.

3. AB 2923: BART Transit-Oriented Development

To encourage housing near high-capacity transit, AB 2923 requires the Bay Area Rapid Transit District to adopt new transit-oriented development (TOD) zoning standards for each of its stations, with narrow exceptions. The zoning standards will establish minimum local zoning requirements for height, density, parking, and floor area ratio only, for TOD development on BART property. BART must conduct CEQA review for the new standards. If for any reason BART does not adopt new zoning standards for a station by July 1, 2020, then Table 1 of BART's 2017 TOD Guidelines will apply until BART adopts new standards for that station.

Local jurisdictions where BART stations are located must amend their zoning ordinances to conform to the BART zoning standards. If local zoning remains inconsistent with the BART TOD zoning standards after July 1, 2022, the TOD zoning standards will become the zoning for any BART-owned parcels that are at least 75 percent within one-half mile of any existing or planned BART station entrance within the BART district, so long as the area is represented on the BART board.

AB 2923 includes detailed provisions for affordable housing, coordination with local jurisdictions, parking, and public outreach.

D. CEQA

1. AB 1804: CEQA Exemption for Infill Residential or Mixed-Use Housing Projects in Counties

In 1998, CEQA Guidelines section 15332 created a categorical exemption from CEQA for infill developments on sites no larger than five acres. This exemption is restricted, however, to projects that are proposed within city limits.

AB 1804 adds a similar exemption to the CEQA statute itself, where the proposed project site is located in an unincorporated area of a county. In addition to the five-acre limit and standard requirements for categorical exemptions, the new exemption is restricted to residential or mixed-use housing projects, and imposes minimum residential density requirements. This new exemption will remain in effect until January 1, 2025.

2. AB 2341: Narrow Exception to Requirement to Analyze Aesthetic Impacts

AB 2341 excuses a lead agency from analyzing the aesthetic impacts of a very narrow class of projects: those that involve the refurbishment, conversion, repurposing, or replacement of an existing building where 1) the building is abandoned or dilapidated or has been vacant for more than one year; 2) the building is in an urbanized area; 3) the project includes the construction of housing; 4) any new structure does not substantially exceed the height of the existing structure; and 5) the project does not create a new source of substantial light or glare. This relief does not apply to a project with potentially significant aesthetic effects on historical or cultural resources, or on an official state scenic highway. The legislation remains in effect until January 1, 2024.

3. AB 2782: Lead Agency May Consider Project Benefits in CEQA Document's Description and Evaluation of Proposed Project

AB 2782 adds Public Resources Code section 21082.4, which provides: "In describing and evaluating a project in an environmental review document prepared pursuant to this division, the lead agency may consider specific economic, legal, social, technological, or other benefits, including regionwide or statewide environmental benefits, of a proposed project and the negative impacts of denying the project. Any benefits or negative impacts considered pursuant to this section shall be based on substantial evidence in light of the whole record."

4. AB 734 and AB 987: CEQA Streamlining for Professional Sports Projects

Bills enacted in 2018 create CEQA streamlining for a stadium and mixed-use development project for the Oakland Athletics (AB 734) and a proposed basketball arena and entertainment complex in Inglewood (AB 987). Prerequisites for obtaining CEQA streamlining are detailed for each project; both bills include detailed environmental and prevailing wage/living wage requirements. Under both bills, streamlining would result in any CEQA litigation, including any appeals, being resolved, "to the extent feasible," within 270 days of the filing of the certified record of proceedings with the court.

E. ELECTIONS

1. SB 1153: Withdrawal of Initiative Petitions by Proponents

Citizens may propose an initiative measure by circulating a petition for signature, and presenting enough valid signatures to force action by the jurisdiction's council or board. If the signatures are sufficient, the council or board has three choices: (1) adopt the measure without change; (2) place the measure on the ballot; or (3) order a report to be completed within 30 days and then opt for one of the first two choices. Under SB 1153, initiative proponents may withdraw their petition, even if it has already qualified for the ballot, any time up to the 88th day before the election. The bill does not

address the possibility that decision-makers might adopt the measure, resulting in no election. The bill presents an interesting opportunity for settlement negotiations. Even after initiative proponents have established that they have sufficient signatures, and even after the measure has qualified for the ballot, proponents could reach an agreement with those who would oppose the initiative measure to withdraw the measure, and those who signed the petition need not be consulted.

F. BUILDING PERMITS / BUILDING STANDARDS

1. AB 655: Building Permit Generally Freezes Building Code for 12 Months Rather than 180 Days

Existing law provides that statewide, model, and local building code changes apply only to construction under building permits applied for after the changes come into effect. Existing law provided that this freeze on building code changes remained in effect so long as: a) no emergency was proclaimed pursuant to the Emergency Service Act; b) work under the building permit began within 180 days of the permit's issuance and was not abandoned; and c) the permit was not suspended or revoked due to error or incorrect information supplied.

AB 655 changes the second of these provisos, allowing the building permit holder 12 months rather than 180 days to begin work under the building permit while applying the building codes that applied on the date the holder applied for the building permit.

G. SUBDIVISION MAP ACT

1. AB 2973: Additional Discretionary Extension Available to Certain Tentative Maps Approved in Select Counties

The Legislature has statutorily extended the life of tentative maps multiple times since 2008 in response to the economic downturn. The first several of these extensions were broadly applicable. The two-year statutory extension enacted in 2015 was narrower than previous extensions; it applied only in counties where economic conditions – as measured by specified thresholds for relative median household incomes, unemployment, and median poverty rates – remained depressed.

In 2018, the Legislature offered an even narrower statutory extension of tentative map expiration dates. AB 2973, which adds Section 66452.26 to the Government Code, provides that the life of a tentative map may in the local agency's discretion be extended for up to 24 months where the map:

- Was approved on or after January 1, 2006, and not later than July 11, 2013;
- Relates to construction of single- or multi-family housing;
- Had its expiration date extended pursuant to the 2015 statutory extension (Government Code § 66452.25), meaning the new 2018 extension applies only in the same economically-challenged counties that qualified in 2015; and
- Had not expired on or before the effective date of AB 2973, which was September 27, 2018.

H. REAL ESTATE

1. AB 3041: Private Transfer Fees (PTFs)

AB 3041 prohibits developers from creating new property covenants, conditions, or restrictions that force subsequent owners to pay specially designated fees every time the property is transferred, unless the fee provides a "direct benefit" to the encumbered property. Existing federal law applicable to Fannie Mae and Freddie Mac backed mortgages requires that funds generated by PTFs provide a "direct benefit" to the encumbered property. The definition of "direct benefit" under AB 3041 mirrors the federal definition.

2. AB 1445: Designated Qualified Opportunity Zones; Sale or Lease of Property

AB 1445 requires a city or county selling or leasing property located within a designated qualified opportunity zone, for use as a qualified opportunity zone business property, to collect specific information including a timeline for completing the investment activity on the property, an estimate of the number of jobs that will be created as a result of the investment activity on the property, and a summary of local workforce utilization strategies that will be employed as part of the investment activity on the property. The information required under AB 1445 must be posted on the city's or county's website.

3. SB 818: Homeowner Bill of Rights and Foreclosure Requirements

SB 818 impacts loans secured by one to four residential units. Many provisions of the Homeowner Bill of Rights ("HBOR," originally enacted in 2012 as SB 900) expired on January 1, 2018. SB 818 permanently re-enacts many expired provisions of the HBOR. SB 818 also revives the distinction in requirements for "small" mortgage servicers (during the preceding annual reporting period, foreclosed on 175 or fewer properties with one to four residential units) and "large" mortgage servicers. Notably, SB 818 provides that as part of the nonjudicial foreclosure process, borrowers must be considered for and have a meaningful opportunity to obtain mitigation options offered by the mortgage servicer or bank such as modifications or other foreclosure alternatives (although no particular result is required). Further, if a borrower requests a foreclosure prevention alterative, the mortgage servicer must provide the borrower with a single point of contact if the servicer is a "large" mortgage servicer. SB 818 also imposes a number of conditions that a mortgage servicer must satisfy prior to recording a notice of default, all related to conducting sufficient outreach to and education of the borrower.

TAB 4

School District's Fee Study Did Not Contain the Information Necessary to Lawfully Impose Development Fees

The Sixth District Court of Appeal invalidated a school district's Level 1 development fee because the underlying fee study did not properly calculate anticipated growth and included the cost of hypothetical new schools that the district had no plans to build. Summerhill Winchester v Campbell Union School District, No. H043253 (6th Dist., Dec. 4, 2018).

The Campbell Union School District adopted a Level 1 development fee based on a fee study that concluded the District had no capacity to accommodate new students and calculated an average cost of $22,039 to house each additional student in new school facilities. This figure was based on the projected cost of building a new, 600-student elementary school and a 1,000-student middle school.

Petitioner paid the development fees under protest and sued to recover them, contending that the fee study had failed to calculate anticipated growth from new development or to identify any new facilities that were necessary to accommodate such growth. The court of appeal agreed on both counts and ordered a full refund of the fees.

The court found that although the fee study determined the District was already over capacity (and hence would be impacted by any new students from development), the study had failed to calculate the "total amount of new housing projected to be built within the District." Instead, the study simply stated that the amount of new development "would be in excess of 133 residential units." This was inadequate, the court said, because it did not provide the information needed "to determine whether new school facilities are needed due to anticipated development." While the Board did not need to identify "specific facilities that would be built," it did need "to decide whether or not new school facilities were needed and, if so, what type of facilities were needed."

The court also decided that the Board had improperly assessed the fee based on the cost of new school facilities that were not shown to be necessary to accommodate students from new development. While the fee study based its calculations on the cost of building new elementary and middle schools, there was insufficient evidence either that such schools would be needed to accommodate students from new development or that the District actually planned to build such schools.

The District argued that because its enrollment already exceeded its capacity, every additional student generated by new development would necessarily result in a financial impact on the District. The court accepted the validity of this statement but found it did not satisfy the statutory requirement that the "Board demonstrate a reasonable relationship between the amount of the fee and the impact of development on the need for new or reconstructed school facilities." (Emphasis added.) The court concluded that the "fee study's use of hypothetical new schools that [the District] was not going to build as the financial premise for calculating the fee was not a reasonable alternative methodology that could legally support the fee imposed by the Board."

Filed 12/4/18; Certified for Publication 12/20/18 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SUMMERHILL WINCHESTER LLC, Plaintiff and Respondent, v. CAMPBELL UNION SCHOOL DISTRICT et al., Defendants and Appellants.	H043253 (Santa Clara County Super. Ct. No. CV245585)

Appellants Campbell Union School District (CUSD) and Campbell Union School District Governing Board (the Board) appeal from the trial court's invalidation of the Board's 2012 resolution enacting a fee on new residential development under Education Code section 17620. CUSD and the Board contend that the trial court could not invalidate the Board's resolution and order that respondent SummerHill Winchester, LLC's fees be refunded because the Board properly relied on a fee study that used a reasonable methodology to calculate the fee. We conclude that the fee study did not contain the data required to properly calculate a development fee. Accordingly, we affirm the trial court's judgment.

I. Background

Education Code section 17620 authorizes a school district "to levy a fee, charge, dedication, or other requirement against any [new residential] construction within the boundaries of the district, for the purpose of funding the construction or reconstruction of school facilities . . . ." (Ed. Code, § 17620, subd. (a)(1).) These fees are known as "Level 1" fees.[1] A school district "shall do all of the following: [¶] (1) Identify the purpose of the fee. [¶] (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged. [¶] (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed. [¶] (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed." (Gov. Code, § 66001, subd. (a).)

In February 2012, Jack Schreder & Associates prepared a "Level 1 Developer Fee Study" (the fee study) for CUSD.[2] In 2012, CUSD had three middle schools and nine elementary schools. The fee study calculated that, using statewide "loading factors," CUSD's capacity was 7,373 students. CUSD's enrollment already exceeded this calculated capacity by 155 students in 2009/2010. An additional 24 students were added the following school year (2010/2011), and another 132 additional students were added in

---

[1] Level 2 and Level 3 fees, which are not at issue in this case, are authorized by Government Code sections 65995.5 and 65995.7, rather than Education Code section 17620.

[2] Although the fee study was over 50 pages long, most of its length was consumed by boilerplate and some it was devoted to commercial development. The key portions for our purposes are quite brief.

2011/2012. Thus, at the time of the fee study, CUSD's enrollment already exceeded the fee study's calculated capacity by 311 students. The fee study also projected future enrollment growth, but these projections did not take into account any new residential construction. The fee study projected that 359 additional students would enroll in CUSD's schools over the next five years after the 2011/2012 school year.

The fee study devoted little attention to future new residential construction. There was just a single paragraph addressing how much new residential construction was expected within CUSD's boundaries in the next five years. It stated: "The City of San Jose, City of Campbell and the County of Santa Clara Planning Departments were contacted regarding current and future residential development projects within the District's boundaries. According to the planning departments, there are in excess of 133 residential units that could be constructed over the next five years. The proposed units were not included in the enrollment projection to augment the projection." Schreder had actually obtained "quantified" information from only the City of Campbell. The County of Santa Clara provided no information, and the City of San Jose had no "quantifiable" information to provide.[3]

The fee study projected that "it will cost the District an average of $22,039 to house each additional student in new facilities." This figure was based on a projected $12.8 million cost to build a new 600-student elementary school and a projected $24.4 million cost to build a new 1,000-student middle school. However, CUSD and the Board conceded that they "do not contend that there is a need to build two new schools for

---

[3] This information was contained in responses from CUSD and the Board to special interrogatories. CUSD and the Board do not and did not object to the trial court's or our consideration of this evidence. Our record contains no document identified as the administrative record in this case.

1,600 students for an expected capacity increase by 2016-17 of 359 students."[4] Using statewide averages, the fee study calculated a "student yield factor" of .5 students per single-family residential unit. It used a real estate database to estimate an average residential unit size of 1,773 square feet. Using these figures, the fee study calculated a per square foot fee for new residential construction of $6.21. $22,039 (per student cost for the two new schools) multiplied by .5 (students per unit) and divided by 1773 (square feet per unit) equals $6.21. Since the statutory maximum for a Level 1 fee in 2012 was $3.20 per square foot, the fee study asserted that its calculations supported imposition of the maximum fee.[5] As CUSD had a fee sharing agreement with the high school district under which CUSD received 70 percent of any such fee, CUSD's share was $2.24 per square foot.

In March 2012, the Board, relying on the fee study, adopted a resolution imposing a fee of $2.24 per square foot on new residential construction and making numerous findings. The Board found that CUSD's enrollment "presently exceeds capacity, is at capacity, or will exceed capacity." It also found that new residential construction "will increase the need for" school facilities. The Board found: "Substantial residential development . . . is projected within the District's boundaries and the enrollment produced thereby will exceed the capacity of the schools of the District. As a result, conditions of overcrowding, exist or will exist, within the District, which will impair the normal functioning of the District's educational programs." It further found that the fees proposed by the fee study were "for the purposes of providing adequate school facilities" and "will be used for construction and/or reconstruction of school facilities . . . ." The

---

[4] This concession was made in a response by CUSD and the Board to a special interrogatory. CUSD and the Board did not object to this evidence in the trial court nor do they on appeal.

[5] Government Code section 65995 sets the maximum amount that may be levied per square foot of residential construction. (Gov. Code, § 65995, subd. (b)(1).)

Board concluded that there was a "reasonable relationship" between the fees and "the need for school facilities created by the types of development projects on which the fees are imposed." The Board declared that it had considered other possible revenue sources.

SummerHill Winchester, LLC (SummerHill) owns a 110-unit residential development project in the City of Santa Clara that is within CUSD's boundaries. In 2012 and 2013, SummerHill tendered to CUSD under protest development fees of $499,976.96.

II. Procedural Background

SummerHill filed a petition for a writ of mandate and complaint for declaratory relief seeking a refund of the fees it had paid to CUSD and a declaration that the fees were invalid.[6] SummerHill alleged that CUSD's development fees were "unreasonable because they are excessive, are not roughly proportional or reasonably related to the burdens caused by the Project, and lack an essential nexus between the amount of the school development fees imposed on the Project and CUSD's alleged need to construct certain improvements and facilities for reasons that are attributable to the Project, and are therefore invalid."

SummerHill argued that "the first problem" with the fee study was that it had failed to "actually calculate actual expected growth." Schreder had obtained information from only the City of Campbell, rather than all of the cities and the County of Santa Clara within CUSD's boundaries. The second problem was that the fee study did not identify any necessary new facilities required because of new development but instead used "hypothetical schools" as the basis for its cost figures even though CUSD had no plans to build new schools. SummerHill contended: "They have to calculate how much new

---

[6] SummerHill's original petition/complaint was filed in April 2013; its amended petition/complaint was filed in February 2014.

development there will be, how many students it will generate, what capital facilities are necessary to accommodate those students, what that costs, and then do some math to spread those costs over the new development. [¶] Really, all they did was the math. They didn't do any of the rest."

CUSD and the Board responded that "eventually" CUSD would have to build new schools or "at least the potential existed for that." They claimed that the factors discussed in prior cases were inapplicable to CUSD because each of the school districts in those cases "wasn't at capacity yet" as CUSD was.

The trial court granted SummerHill's petition on the ground that the fee study did not contain sufficient support for the Board's resolution. The court ruled: "The Fee Study used to support the Resolution was defective in the following particulars: (1) it did not project the total amount of housing that was to be constructed in the district; (2) it did not adequately estimate the number of new students in the district resulting from the new development; and (3) it did not establish the necessary relationship between the number of new students and the proposed capital facilities. The Study's projection based on 'at least' 133 new units yielding 67 new students is not an acceptable alternative discretionary methodology. These hypothetical numbers may be an appropriate mathematical formula to determine a cost per student. However, the methodology fails to make a sufficient finding on the first two prongs of the *Shapell*[[7]] test. The third prong cannot be met because the report fails to consider the impact of funding already existing from a bond and how it might be used to accommodate the increase in the number of students. Therefore, it cannot be determined with any accuracy what developer funding is *necessary* as a result of the new residential housing. The Fee Study cost calulation is heavily dependent on two hypothetical new schools which may never be constructed. Instead, the required approach would have been to consider the cost of the real

---

[7] *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218 (*Shapell*).

construction plans which already existed. The Fee Study should have indicated what the district intended to do to accommodate the growth and project a cost on that basis. CUSD does not have the discretion to estimate a cost per student based on the construction of new schools when the increase in number of students may not cause the construction of any new facilities."

The court's initial order did not order CUSD to refund SummerHill's fees. Instead, it gave CUSD time to revise the fee study and enact a new resolution with recalculated fees. SummerHill moved for reconsideration on the ground that CUSD should not be permitted to revise its fee study to support recalculated fees. The court granted SummerHill's motion for reconsideration. The court concluded that a recalculation was not possible without "amending some of the data relied upon by the Board." It ordered that SummerHill's fees be refunded.

The court issued a statement of decision and a peremptory writ of mandate requiring CUSD and the Board to set aside the resolution and refund SummerHill's fees. CUSD and the Board timely filed a notice of appeal. The trial court subsequently denied SummerHill's motion for attorney's fees under Code of Civil Procedure section 1021.5.

III. Discussion

A. Standard of Review

The Board's enactment of the challenged fees was a quasi-legislative action that SummerHill challenged by ordinary mandamus. Under these circumstances, "'[a] court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.'" (*Shapell*, *supra*, 1 Cal.App.4th at p. 232.) "[T]he ultimate question, whether the agency's action was arbitrary or capricious, is a question of law." (*Shapell*, at p. 233.) Consequently, we accord no

deference to the trial court's decision.[8] (*Ibid.*) Our role, like the trial court's, is to determine whether the enactment of the challenged fees by CUSD and the Board lacked evidentiary support or failed to demonstrate a rational connection between the relevant factors, the purpose of the statute, and the decision to enact the fees.

B. Analysis

"[F]acilities fees are justified only to the extent that they are limited to the cost of increased services made necessary by virtue of the development. [Citations.] The Board imposing the fee must therefore show that a valid method was used for arriving at the fee in question, 'one which established a reasonable relationship between the fee charged and the burden posed by the development.' [Citations.] [¶] In our view such a showing with respect to the fees in this case must involve the interrelation of three elements. First, since the fee is to be assessed per square foot of development, there must be a projection of the total amount of new housing expected to be built within the District. Second, in order to measure the extent of the burden imposed on schools by new development, the District must determine approximately how many students will be generated by the new housing. And finally, the District must estimate what it will cost to provide the necessary school facilities for that approximate number of new students." (*Shapell*, *supra*, 1 Cal.App.4th at p. 235.) "Since the process required of the District will necessarily involve predictions regarding population trends and future building costs, it is not to be expected that the figures will be exact. Nor will courts concern themselves with the

---

[8] We have received amicus briefs from the California School Boards Association's Education Legal Alliance and from the Coalition for Adequate School Housing and California Association of School Business Officials in support of CUSD and the Board. They argue that the trial court failed to apply the appropriate standard of deferential judicial review. Since our review is independent of the trial court's review, this argument is only pertinent to our review standard. It does not matter what review standard was applied by the trial court.

District's methods of marshalling and evaluating scientific data. [Citations.] Yet the court must be able to assure itself that before imposing the fee the District engaged in a reasoned analysis designed to establish the requisite connection between the amount of the fee imposed and the burden created. We do not believe this can be accomplished without addressing all three factors enumerated above." (*Shapell,* at pp. 235-236.)

CUSD and the Board argue that the fee study upon which the Board based its resolution satisfied the three-factor test set forth in *Shapell*. We conclude that it did not. The fee study began by failing to project the "total amount of new housing expected to be built within the District." (*Shapell*, *supra*, 1 Cal.App.4th at p. 235.) Instead, the fee study simply stated that the amount of new residential development would be "in excess of 133 residential units." While precision is not required (*Shapell*, *supra*, 1 Cal.App.4th at pp. 235-236), this vague and unrestricted figure is little better than saying that "some" development is anticipated since it provides no guidance for CUSD and the Board to determine *whether* new school facilities are needed due to the anticipated development.

CUSD and the Board claim that the mere fact that CUSD's enrollment already exceeded its capacity eliminated the need for any estimate of how much new development was expected. Not so. The reason why a projection of the total amount of new development is necessary is that this projection provides the basis for the estimate of the new students who can be expected to be generated by the new development. The fee study used its "in excess of 133 residential units" estimate to calculate that this amount of residential development would produce *at least* 67 new students. Like the fee study's failure to estimate the total amount of new development, the fee study's reliance on its assertion that at least 67 new students would be generated by new development could not provide a basis for the Board to determine *whether* new school facilities were needed. Indeed, despite the fact that the fee study based its calculations on the cost of building two new schools, CUSD and the Board do not dispute that even the total projected enrollment increase (including both new students from new development and other new

students) will *not* necessitate the construction of such schools. Consequently, the fee study's methodology lacked an evidentiary basis.

Without a realistic estimate of how many students would be generated by new development, the fee study could not provide the requisite foundation for the Board to decide what steps needed to be taken to accommodate projected enrollment increases. While CUSD and the Board did not have to identify *specific facilities that would be built* or make "concrete construction plans" (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 335 (*Garrick*)), they did need to decide whether or not new school facilities were needed and, if so, what *type* of facilities were needed (*ibid*). In *Garrick*, for instance, the school district was "at or near capacity" in its elementary and middle schools. (*Garrick*, at pp. 332-333.) The fee study in *Garrick* projected that "approximately 16,400 dwelling units" would be developed within the district during the time period in question and that these new dwelling units would generate thousands of new students. (*Garrick*, at p. 326, fn. 4.) These projections provided a reasonable basis for the school district to decide that multiple new schools would be needed to accommodate the thousands of new students that were expected to be generated by new development. (*Garrick*, at pp. 332-333.)

CUSD and the Board, in contrast, were indisputably *not* going to be building the hypothetical new schools upon which the fee study premised the fees. And the fee study provided no basis for the Board to decide whether new school facilities were needed or what type of new or reconstructed school facilities might be required because the fee study lacked quantified information about the total amount of new development that was expected and the number of students it could be expected to generate. It was not enough, as CUSD and the Board claim, that the Board stated in its resolution that the fees would be used for "school facilities." Government Code section 66001 requires that "the facilities *shall be identified*." (Gov. Code, § 66001, subd. (a)(2), italics added.) The fee

study could not identify the *cost* on which to base the fees without identification of facilities that would satisfy quantified needs.

CUSD and the Board argue that the fee study here must be deemed sufficient to support their fees because the fee study in *Garrick*, which was found sufficient, "involved the same general methodology" as the one here. We disagree. Here, unlike in *Garrick*, the fee study made no quantifiable projection of the amount of new development that could be expected, and the Board made no decision to construct new schools to accommodate the unknown number of new students that might be generated by this unknown amount of new development. The Board's decision to enact a development fee in this case is invalid because the Board did not decide that its enrollment increases would necessitate the construction of new schools but nevertheless based the amount of the development fee on the cost of building new schools. This discontinuity precluded the Board from being able to demonstrate a reasonable relationship between the impact of new development and the development fee. While courts defer to the reasonable legislative choices made by school district boards, those boards still must comply with the enabling statutes governing the fees that they impose. The Board did not do so here.

CUSD and the Board claim that, even if they failed to satisfy the three *Shapell* factors, the fee must be upheld because they applied an "alternative" "reasonable methodology" that was sufficient to support the fee. They insist that because CUSD's enrollment already exceeds its capacity "every single additional student generated by development will result in a financial impact on the District."[9] We accept the validity of

---

[9] CUSD and the Board assert: "Since every student generated by development would necessitate new or expanded facilities, each individual new student generates the same per-student financial cost to the at-capacity school district." Even if this were true, that "financial cost" depends on what type of facilities will be used to accommodate those students. The fee study did not consider this question but instead based its financial cost calculation on hypothetical new schools that CUSD and the Board did not plan to use to accommodate the new students generated by new development.

this statement, but it does not satisfy the statutory requirement that CUSD and the Board demonstrate a relationship between the *amount* of the fee and impact of development on *the need for new or reconstructed school facilities*. Here, the fee study's use of hypothetical new schools that CUSD was not going to build as the financial premise for calculating the fee was not a reasonable alternative methodology that could legally support the fee imposed by the Board. Like the "in excess of 133 residential units" and the *at least 67 students*, "***a*** financial impact" lacks quantification. That "financial impact" can only be quantified by using the *Shapell* factors or some other *reasonable* methodology. The fee study did not do so.

CUSD and the Board claim that the superior court erred in concluding that the fees could not be "recalculated." No "recalculation" is possible since the fee study failed to provide any of the data necessary to make such a calculation. The key missing element was what new facilities would be necessary for the new students generated by new residential development. The fee study failed to quantify the expected amount of new development or the number of new students it would generate, did not identify the type of facilities that would be necessary to accommodate those new students, and failed to assess the costs associated with those facilities. The trial court did not err in finding that recalculation was impossible under these circumstances.

Finally, CUSD and the Board maintain that the trial court prejudicially erred in disregarding two declarations that it proffered. "It is well settled that extra-record evidence is generally not admissible in non-CEQA traditional mandamus actions challenging quasi-legislative administrative decisions." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 574.) "Although extra-record evidence is not admissible to contradict evidence upon which the administrative agency relied in making its quasi-legislative decision, or to raise a question regarding the wisdom of that decision [citation], it may be admissible to provide background information regarding the quasi-legislative agency decision, to establish whether the agency fulfilled its duties in making

the decision, or to assist the trial court in understanding the agency's decision." (*Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 251.)

CUSD submitted a declaration from James Crawford, a CUSD employee. Crawford authenticated several documents, including a "Board Policy" adopting class size standards and the Board's collective bargaining agreement with the teacher's association, which specified class sizes. Crawford declared that CUSD's enrollment already exceeded its capacity by over 300 students in the 2011/2012 school year. CUSD also submitted a declaration from Jack Schreder, who had prepared the fee study. Schreder declared: "The per-student cost remains the same regardless of the number of new units developed, with the exception that when the development count gets large enough, land costs must be added in." SummerHill objected to and moved to strike portions of the Crawford and Schreder declarations, and the trial court "disregarded" these declarations.

Since neither of these declarations provided the data that was missing from the fee study, the trial court's decision to disregard them was immaterial.

IV. Disposition

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Greenwood, P. J.

_____
Elia, J.

Filed 12/20/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SUMMERHILL WINCHESTER LLC, Plaintiff and Respondent, v. CAMPBELL UNION SCHOOL DISTRICT et al., Defendants and Appellants.	H043253 (Santa Clara County Super. Ct. No. CV245585) ORDER CERTIFYING OPINION FOR PUBLICATION

BY THE COURT:

Pursuant to California Rules of Court, rule 8.1105(b), the request for publication is hereby granted. It is ordered that the opinion in this matter, filed on December 4, 2018, shall be certified for publication.

Date:

_____
Mihara, J.

_____
Greenwood, P. J.

_____
Elia, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable James L. Stoelker
Attorneys for Plaintiff and Respondent:	Andrew L. Faber Richard E. Nosky, Jr. Berliner Cohen, LLP
Attorneys for Defendants and Appellants:	Harold M. Freiman Mark W. Waterman Kelly Marie Rem Lozano Smith
Attorneys for Amicus Curiae California School Boards Association/Education Legal Alliance:	James Richard Traber Anna Barth Fagen Friedman & Fulfrost, LLP Keith Bray D. Michael Ambrose California School Boards Association/ Education Legal Alliance
Attorneys for Amicus Curiae Coalition for Adequate School Housing and California Association of School Business Officials:	Martin Anthony Hom Jennifer D. Cantrell Atkinson, Andelson, Loya, Ruud & Romo

SCHOOL FACILITIES ACT *(relevant excerpts)*

State of California

GOVERNMENT CODE

Section 65995

65995. (a) Except for a fee, charge, dedication, or other requirement authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), a fee, charge, dedication, or other requirement for the construction or reconstruction of school facilities shall not be levied or imposed in connection with, or made a condition of, any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use, or development of real property, or any change in governmental organization or reorganization, as defined in Section 56021 or 56073.

(b) Except as provided in Sections 65995.5 and 65995.7, the amount of any fees, charges, dedications, or other requirements authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), or both, shall not exceed the following:

(1) In the case of residential construction, including the location, installation, or occupancy of manufactured homes and mobilehomes, one dollar and ninety-three cents ($1.93) per square foot of assessable space. "Assessable space," for this purpose, means all of the square footage within the perimeter of a residential structure, not including any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area. The amount of the square footage within the perimeter of a residential structure shall be calculated by the building department of the city or county issuing the building permit, in accordance with the standard practice of that city or county in calculating structural perimeters. "Manufactured home" and "mobilehome" have the meanings set forth in subdivision (f) of Section 17625 of the Education Code. The application of any fee, charge, dedication, or other form of requirement to the location, installation, or occupancy of manufactured homes and mobilehomes is subject to Section 17625 of the Education Code.

(2) In the case of any commercial or industrial construction, thirty-one cents ($0.31) per square foot of chargeable covered and enclosed space. "Chargeable covered and enclosed space," for this purpose, means the covered and enclosed space determined to be within the perimeter of a commercial or industrial structure, not including any storage areas incidental to the principal use of the construction, garage, parking structure, unenclosed walkway, or utility or disposal area. The determination of the chargeable covered and enclosed space within the perimeter of a commercial or industrial structure shall be made by the building department of the city or county issuing the building permit, in accordance with the building standards of that city or county. For the determination of chargeable fees to be paid to the appropriate school

district in connection with any commercial or industrial construction under the jurisdiction of the Office of Statewide Health Planning and Development, the architect of record shall determine the chargeable covered and enclosed space within the perimeter of a commercial or industrial structure.

(3) The amount of the limits set forth in paragraphs (1) and (2) shall be increased in 2000, and every two years thereafter, according to the adjustment for inflation set forth in the statewide cost index for class B construction, as determined by the State Allocation Board at its January meeting, which increase shall be effective as of the date of that meeting.

(c) (1) Notwithstanding any other law, during the term of a contract entered into between a subdivider or builder and a school district, city, county, or city and county, whether general law or chartered, on or before January 1, 1987, that requires the payment of a fee, charge, or dedication for the construction of school facilities as a condition to the approval of residential construction, neither Section 17620 of the Education Code nor this chapter applies to that residential construction.

(2) Notwithstanding any other provision of state or local law, construction that is subject to a contract entered into between a person and a school district, city, county, or city and county, whether general law or chartered, after January 1, 1987, and before the operative date of the act that adds paragraph (3) that requires the payment of a fee, charge, or dedication for the construction of school facilities as a condition to the approval of construction, may not be affected by the act that adds paragraph (3).

(3) Notwithstanding any other provision of state or local law, until January 1, 2000, any construction not subject to a contract as described in paragraph (2) that is carried out on real property for which residential development was made subject to a condition relating to school facilities imposed by a state or local agency in connection with a legislative act approving or authorizing the residential development of that property after January 1, 1987, and before the operative date of the act adding this paragraph, shall be required to comply with that condition.

Notwithstanding any other provision of state or local law, on and after January 1, 2000, any construction not subject to a contract as described in paragraph (2) that is carried out on real property for which residential development was made subject to a condition relating to school facilities imposed by a state or local agency in connection with a legislative act approving or authorizing the residential development of that property after January 1, 1987, and before the operative date of the act adding this paragraph, may not be subject to a fee, charge, dedication, or other requirement exceeding the amount specified in paragraphs (1) and (2) of subdivision (b), or, if a district has increased the limit specified in paragraph (1) of subdivision (b) pursuant to either Section 65995.5 or 65995.7, that increased amount.

(4) Any construction that is not subject to a contract as described in paragraph (2), or to paragraph (3), and that satisfies both of the requirements of this paragraph, may not be subject to any increased fee, charge, dedication, or other requirement authorized by the act that adds this paragraph beyond the amount specified in paragraphs (1) and (2) of subdivision (b).

(A) A tentative map, development permit, or conditional use permit was approved before the operative date of the act that amends this subdivision.

(B) A building permit is issued before January 1, 2000.

(d) For purposes of this chapter, "construction" means new construction and reconstruction of existing building for residential, commercial, or industrial. "Residential, commercial, or industrial construction" does not include any facility used exclusively for religious purposes that is thereby exempt from property taxation under the laws of this state, any facility used exclusively as a private full-time day school as described in Section 48222 of the Education Code, or any facility that is owned and occupied by one or more agencies of federal, state, or local government. In addition, "commercial or industrial construction" includes, but is not limited to, any hotel, inn, motel, tourist home, or other lodging for which the maximum term of occupancy for guests does not exceed 30 days, but does not include any residential hotel, as defined in paragraph (1) of subdivision (b) of Section 50519 of the Health and Safety Code.

(e) The Legislature finds and declares that the financing of school facilities and the mitigation of the impacts of land use approvals, whether legislative or adjudicative, or both, on the need for school facilities are matters of statewide concern. For this reason, the Legislature hereby occupies the subject matter of requirements related to school facilities levied or imposed in connection with, or made a condition of, any land use approval, whether legislative or adjudicative act, or both, and the mitigation of the impacts of land use approvals, whether legislative or adjudicative, or both, on the need for school facilities, to the exclusion of all other measures, financial or nonfinancial, on the subjects. For purposes of this subdivision, "school facilities" means any school-related consideration relating to a school district's ability to accommodate enrollment.

(f) Nothing in this section shall be interpreted to limit or prohibit the use of Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 to finance the construction or reconstruction of school facilities. However, the use of Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 may not be required as a condition of approval of any legislative or adjudicative act, or both, if the purpose of the community facilities district is to finance school facilities.

(g) (1) The refusal of a person to agree to undertake or cause to be undertaken an act relating to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5, including formation of, or annexation to, a community facilities district, voting to levy a special tax, or authorizing another to vote to levy a special tax, may not be a factor when considering the approval of a legislative or adjudicative act, or both, involving, but not limited to, the planning, use, or development of real property, or any change in governmental organization or reorganization, as defined in Section 56021 or 56073, if the purpose of the community facilities district is to finance school facilities.

(2) If a person voluntarily elects to establish, or annex into, a community facilities district and levy a special tax approved by landowner vote to finance school facilities, the present value of the special tax specified in the resolution of formation shall be

calculated as an amount per square foot of assessable space and that amount shall be a credit against any applicable fee, charge, dedication, or other requirement for the construction or reconstruction of school facilities. For purposes of this paragraph, the calculation of present value shall use the interest rate paid on the United States Treasury's 30-year bond on the date of the formation of, or annexation to, the community facilities district, as the capitalization rate.

(3) For purposes of subdivisions (f), (h), and (i), and this subdivision, "school facilities" means any school-related consideration relating to a school district's ability to accommodate enrollment.

(h) The payment or satisfaction of a fee, charge, or other requirement levied or imposed pursuant to Section 17620 of the Education Code in the amount specified in Section 65995 and, if applicable, any amounts specified in Section 65995.5 or 65995.7 are hereby deemed to be full and complete mitigation of the impacts of any legislative or adjudicative act, or both, involving, but not limited to, the planning, use, or development of real property, or any change in governmental organization or reorganization as defined in Section 56021 or 56073, on the provision of adequate school facilities.

(i) A state or local agency may not deny or refuse to approve a legislative or adjudicative act, or both, involving, but not limited to, the planning, use, or development of real property, or any change in governmental organization or reorganization as defined in Section 56021 or 56073 on the basis of a person's refusal to provide school facilities mitigation that exceeds the amounts authorized pursuant to this section or pursuant to Section 65995.5 or 65995.7, as applicable.

(Amended by Stats. 2015, Ch. 120, Sec. 1. (AB 715) Effective January 1, 2016. Note: Pursuant to Education Code Section 101122 (subd. (d)), which was added Nov. 8, 2016, by Prop. 51, Chapter 4.9 (Sections 65995 to 65998) as it read on Jan. 1, 2015, continues in effect until Dec. 31, 2020, or earlier date prescribed. Thereafter, Chapter 4.9 may be amended.)

State of California

GOVERNMENT CODE

Section 65995.5

65995.5. (a) The governing board of a school district may impose the amount calculated pursuant to this section as an alternative to the amount that may be imposed on residential construction calculated pursuant to subdivision (b) of Section 65995.

(b) To be eligible to impose the fee, charge, dedication, or other requirement up to the amount calculated pursuant to this section, a governing board shall do all of the following:

(1) Make a timely application to the State Allocation Board for new construction funding for which it is eligible and be determined by the board to meet the eligibility requirements for new construction funding set forth in Article 2 (commencing with Section 17071.10) and Article 3 (commencing with Section 17071.75) of Chapter 12.5 of Part 10 of the Education Code. A governing board that submits an application to determine the district's eligibility for new construction funding shall be deemed eligible if the State Allocation Board fails to notify the district of the district's eligibility within 120 days of receipt of the application.

(2) Conduct and adopt a school facility needs analysis pursuant to Section 65995.6.

(3) Until January 1, 2000, satisfy at least one of the requirements set forth in subparagraphs (A) to (D), inclusive, and, on and after January 1, 2000, satisfy at least two of the requirements set forth in subparagraphs (A) to (D), inclusive:

(A) The district is a unified or elementary school district that has a substantial enrollment of its elementary school pupils on a multitrack year-round schedule. "Substantial enrollment" for purposes of this paragraph means at least 30 percent of district pupils in kindergarten and grades 1 to 6, inclusive, in the high school attendance area in which all or some of the new residential units identified in the needs analysis are planned for construction. A high school district shall be deemed to have met the requirements of this paragraph if either of the following apply:

(i) At least 30 percent of the high school district's pupils are on a multitrack year-round schedule.

(ii) At least 40 percent of the pupils enrolled in public schools in kindergarten and grades 1 to 12, inclusive, within the boundaries of the high school attendance area for which the school district is applying for new facilities are enrolled in multitrack year-round schools.

(B) The district has placed on the ballot in the previous four years a local general obligation bond to finance school facilities and the measure received at least 50 percent plus one of the votes cast.

(C) The district meets one of the following:

(i) The district has issued debt or incurred obligations for capital outlay in an amount equivalent to 15 percent of the district's local bonding capacity, including indebtedness that is repaid from property taxes, parcel taxes, the district's general fund, special taxes levied pursuant to Section 4 of Article XIII A of the California Constitution, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of registered voters, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of landowners prior to November 4, 1998, and revenues received pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code). Indebtedness or other obligation to finance school facilities to be owned, leased, or used by the district, that is incurred by another public agency, shall be counted for the purpose of calculating whether the district has met the debt percentage requirement contained herein.

(ii) The district has issued debt or incurred obligations for capital outlay in an amount equivalent to 30 percent of the district's local bonding capacity, including indebtedness that is repaid from property taxes, parcel taxes, the district's general fund, special taxes levied pursuant to Section 4 of Article XIII A of the California Constitution, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of registered voters, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of landowners after November 4, 1998, and revenues received pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code). Indebtedness or other obligation to finance school facilities to be owned, leased, or used by the district, that is incurred by another public agency, shall be counted for the purpose of calculating whether the district has met the debt percentage requirement contained herein.

(D) At least 20 percent of the teaching stations within the district are relocatable classrooms.

(c) The maximum square foot fee, charge, dedication, or other requirement authorized by this section that may be collected in accordance with Chapter 6 (commencing with Section 17620) of Part 10.5 of the Education Code shall be calculated by a governing board of a school district, as follows:

(1) The number of unhoused pupils identified in the school facilities needs analysis shall be multiplied by the appropriate amounts provided in subdivision (a) of Section 17072.10. This sum shall be added to the site acquisition and development cost determined pursuant to subdivision (h).

(2) The full amount of local funds the governing board has dedicated to facilities necessitated by new construction shall be subtracted from the amount determined pursuant to paragraph (1). Local funds include fees, charges, dedications, or other requirements imposed on commercial or industrial construction.

(3) The resulting amount determined pursuant to paragraph (2) shall be divided by the projected total square footage of assessable space of residential units anticipated

to be constructed during the next five-year period in the school district or the city and county in which the school district is located. The estimate of the projected total square footage shall be based on information available from the city or county within which the residential units are anticipated to be constructed or a market report prepared by an independent third party.

(d) A school district that has a common territorial jurisdiction with a district that imposes the fee, charge, dedication, or other requirement up to the amount calculated pursuant to this section or Section 65995.7, may not impose a fee, charge, dedication, or other requirement on residential construction that exceeds the limit set forth in subdivision (b) of Section 65995 less the portion of that amount it would be required to share pursuant to Section 17623 of the Education Code, unless that district is eligible to impose the fee, charge, dedication, or other requirement up to the amount calculated pursuant to this section or Section 65995.7.

(e) Nothing in this section is intended to limit or discourage the joint use of school facilities or to limit the ability of a school district to construct school facilities that exceed the amount of funds authorized by Section 17620 of the Education Code and provided by the state grant program, if the additional costs are funded solely by local revenue sources other than fees, charges, dedications, or other requirements imposed on new construction.

(f) Except as provided in paragraph (5) of subdivision (a) of Section 17620 of the Education Code, a fee, charge, dedication, or other requirement authorized under this section and Section 65995.7 shall be expended solely on the school facilities identified in the needs analysis as being attributable to projected enrollment growth from the construction of new residential units. This subdivision does not preclude the expenditure of a fee, charge, dedication, or other requirement, authorized pursuant to subparagraph (C) of paragraph (1) of subdivision (a) of Section 17620, on school facilities identified in the needs analysis as necessary due to projected enrollment growth attributable to the new residential units.

(g) "Residential units" and "residences" as used in this section and in Sections 65995.6 and 65995.7 means the development of single-family detached housing units, single-family attached housing units, manufactured homes and mobilehomes, as defined in subdivision (f) of Section 17625 of the Education Code, condominiums, and multifamily housing units, including apartments, residential hotels, as defined in paragraph (1) of subdivision (b) of Section 50519 of the Health and Safety Code, and stock cooperatives, as defined in Section 4190 of the Civil Code.

(h) Site acquisition costs shall not exceed half of the amount determined by multiplying the land acreage determined to be necessary under the guidelines of the State Department of Education, as published in the "School Site Analysis and Development Handbook," as that handbook read as of January 1, 1998, by the estimated cost determined pursuant to Section 17072.12 of the Education Code. Site development costs shall not exceed the estimated amount that would be funded by

the State Allocation Board pursuant to its regulations governing grants for site development costs.

(Amended by Stats. 2012, Ch. 181, Sec. 54. (AB 806) Effective January 1, 2013. Operative January 1, 2014, by Sec. 86 of Ch. 181. Note: Pursuant to Education Code Section 101122 (subd. (d)), which was added Nov. 8, 2016, by Prop. 51, Chapter 4.9 (Sections 65995 to 65998) as it read on Jan. 1, 2015, continues in effect until Dec. 31, 2020, or earlier date prescribed. Thereafter, Chapter 4.9 may be amended.)

State of California

GOVERNMENT CODE

Section 65995.6

65995.6. (a) The school facilities needs analysis required by paragraph (2) of subdivision (b) of Section 65995.5 shall be conducted by the governing board of a school district to determine the need for new school facilities for unhoused pupils that are attributable to projected enrollment growth from the development of new residential units over the next five years. The school facilities needs analysis shall project the number of unhoused elementary, middle, and high school pupils generated by new residential units, in each category of pupils enrolled in the district. This projection of unhoused pupils shall be based on the historical student generation rates of new residential units constructed during the previous five years that are of a similar type of unit to those anticipated to be constructed either in the school district or the city or county in which the school district is located, and relevant planning agency information, such as multiphased development projects, that may modify the historical figures. For purposes of this paragraph, "type" means a single family detached, single family attached, or multifamily unit. The existing school building capacity shall be calculated pursuant to Article 2 (commencing with Section 17071.10) of Chapter 12.5 of Part 10 of the Education Code. The existing school building capacity shall be recalculated by the school district as part of any revision of the needs analysis pursuant to subdivision (e) of this section. If a district meets the requirements of paragraph (3) of subdivision (b) of Section 65995.5 by having a substantial enrollment on a multitrack year-round schedule, the determination of whether the district has school building capacity area shall reflect the additional capacity created by the multitrack year-round schedule.

(b) When determining the funds necessary to meet its facility needs, the governing board shall do each of the following:

(1) Identify and consider any surplus property owned by the district that can be used as a schoolsite or that is available for sale to finance school facilities.

(2) Identify and consider the extent to which projected enrollment growth may be accommodated by excess capacity in existing facilities.

(3) Identify and consider local sources other than fees, charges, dedications, or other requirements imposed on residential construction available to finance the construction or reconstruction of school facilities needed to accommodate any growth in enrollment attributable to the construction of new residential units.

(c) The governing board shall adopt the school facility needs analysis by resolution at a public hearing. The school facilities needs analysis may not be adopted until the school facilities needs analysis in its final form has been made available to the public for a period of not less than 30 days during which time the school facilities needs

analysis shall be provided to the local agency responsible for land use planning for its review and comment. Prior to the adoption of the school facilities needs analysis, the public shall have the opportunity to review and comment on the school facilities needs analysis and the governing board shall respond to written comments it receives regarding the school facilities needs analysis.

(d) Notice of the time and place of the hearing, including the location and procedure for viewing or requesting a copy of the proposed school facilities needs analysis and any proposed revision of the school facilities needs analysis, shall be published in at least one newspaper of general circulation within the jurisdiction of the school district that is conducting the hearing no less than 30 days prior to the hearing. If there is no paper of general circulation, the notice shall be posted in at least three conspicuous public places within the jurisdiction of the school district not less than 30 days prior to the hearing. In addition to these notice requirements, the governing board shall mail a copy of the school facilities needs analysis and any proposed revision to the school facilities needs analysis not less than 30 days prior to the hearing to any person who has made a written request if the written request was made 45 days prior to the hearing. The governing board may charge a fee reasonably related to the cost of providing these materials to those persons who request the school facilities needs analysis or revision.

(e) The school facilities needs analysis may be revised at any time in the same manner, and the revision is subject to the same conditions and requirements, applicable to the adoption of the school facilities needs analysis.

(f) A fee, charge, dedication, or other requirement in an amount authorized by this section or Section 65995.7, shall be adopted by a resolution of the governing board as part of the adoption or revision of the school facilities needs analysis and may not be effective for more than one year. Notwithstanding subdivision (a) of Section 17621 of the Education Code, or any other provision of law, the fee, charge, dedication, or other requirement authorized by the resolution shall take effect immediately after the adoption of the resolution.

(g) Division 13 (commencing with Section 21000) of the Public Resources Code may not apply to the preparation, adoption, or update of the school facilities needs analysis, or adoption of the resolution specified in this section.

(h) Notice and hearing requirements other than those provided in this section may not be applicable to the adoption or revision of a school facilities needs analysis or the resolutions adopted pursuant to this section.

(Amended by Stats. 1999, Ch. 858, Sec. 17. Effective January 1, 2000. Note: Pursuant to Education Code Section 101122 (subd. (d)), which was added Nov. 8, 2016, by Prop. 51, Chapter 4.9 (Sections 65995 to 65998) as it read on Jan. 1, 2015, continues in effect until Dec. 31, 2020, or earlier date prescribed. Thereafter, Chapter 4.9 may be amended.)

MITIGATION FEE ACT *(relevant excerpts)*

Government Code §§ 66000 et seq.

TITLE 7. PLANNING AND LAND USE [65000 - 66499.58]; DIVISION 1. PLANNING AND ZONING [65000 - 66210];

Section 66000.

As used in this chapter, the following terms have the following meanings:

(a) "Development project" means any project undertaken for the purpose of development. "Development project" includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.

(b) "Fee" means a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements adopted pursuant to Article 2.5 (commencing with Section 65864) of Chapter 4, or fees collected pursuant to agreements with redevelopment agencies that provide for the redevelopment of property in furtherance or for the benefit of a redevelopment project for which a redevelopment plan has been adopted pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code).

(c) "Local agency" means a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state.

(d) "Public facilities" includes public improvements, public services, and community amenities.

Section 66001.

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

Section 66005.

(a) When a local agency imposes any fee or exaction as a condition of approval of a proposed development, as defined by Section 65927, or development project, those fees or exactions shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed.

Section 66020.

(a) Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a development project, as defined in Section 66000, by a local agency by meeting both of the following requirements:

(1) Tendering any required payment in full or providing satisfactory evidence of arrangements to pay the fee when due or ensure performance of the conditions necessary to meet the requirements of the imposition.

(2) Serving written notice on the governing body of the entity, which notice shall contain all of the following information:

(A) A statement that the required payment is tendered or will be tendered when due, or that any conditions which have been imposed are provided for or satisfied, under protest.

(B) A statement informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest.

(b) Compliance by any party with subdivision (a) shall not be the basis for a local agency to withhold approval of any map, plan, permit, zone change, license, or other form of permission, or concurrence, whether discretionary, ministerial, or otherwise, incident to, or necessary for, the development project. This section does not limit the ability of a local agency to ensure compliance with all applicable provisions of law in determining whether or not to approve or disapprove a development project.

(c) Where a reviewing local agency makes proper and valid findings that the construction of certain public improvements or facilities, the need for which is directly attributable to the proposed development, is required for reasons related to the public health, safety, and welfare, and elects to impose a requirement for construction of those improvements or facilities as a

condition of approval of the proposed development, then in the event a protest is lodged pursuant to this section, that approval shall be suspended pending withdrawal of the protest, the expiration of the limitation period of subdivision (d) without the filing of an action, or resolution of any action filed. This subdivision confers no new or independent authority for imposing fees, dedications, reservations, or other exactions not presently governed by other law.

(d) (1) A protest filed pursuant to subdivision (a) shall be filed at the time of approval or conditional approval of the development or within 90 days after the date of the imposition of the fees, dedications, reservations, or other exactions to be imposed on a development project. Each local agency shall provide to the project applicant a notice in writing at the time of the approval of the project or at the time of the imposition of the fees, dedications, reservations, or other exactions, a statement of the amount of the fees or a description of the dedications, reservations, or other exactions, and notification that the 90-day approval period in which the applicant may protest has begun.

(2) Any party who files a protest pursuant to subdivision (a) may file an action to attack, review, set aside, void, or annul the imposition of the fees, dedications, reservations, or other exactions imposed on a development project by a local agency within 180 days after the delivery of the notice. Thereafter, notwithstanding any other law to the contrary, all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the imposition. Any proceeding brought pursuant to this subdivision shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings.

(e) If the court finds in favor of the plaintiff in any action or proceeding brought pursuant to subdivision (d), the court shall direct the local agency to refund the unlawful portion of the payment, with interest at the rate of 8 percent per annum, or return the unlawful portion of the exaction imposed.

(f) (1) If the court grants a judgment to a plaintiff invalidating, as enacted, all or a portion of an ordinance or resolution enacting a fee, dedication, reservation, or other exaction, the court shall direct the local agency to refund the unlawful portion of the payment, plus interest at an annual rate equal to the average rate accrued by the Pooled Money Investment Account during the time elapsed since the payment occurred, or to return the unlawful portion of the exaction imposed.

(2) If an action is filed within 120 days of the date at which an ordinance or resolution to establish or modify a fee, dedication, reservation, or other exactions to be imposed on a development project takes effect, the portion of the payment or exaction invalidated shall also be returned to any other person who, under protest pursuant to this section and under that invalid portion of that same ordinance or resolution as enacted, tendered the payment or provided for or satisfied the exaction during the period from 90 days prior to the date of the filing of the action which invalidates the payment or exaction to the date of the entry of the judgment referenced in paragraph (1).

(g) Approval or conditional approval of a development occurs, for the purposes of this section, when the tentative map, tentative parcel map, or parcel map is approved or conditionally

approved or when the parcel map is recorded if a tentative map or tentative parcel map is not required.

(h) The imposition of fees, dedications, reservations, or other exactions occurs, for the purposes of this section, when they are imposed or levied on a specific development.

Section 66021.

(a) Any party on whom a fee, tax, assessment, dedication, reservation, or other exaction has been imposed, the payment or performance of which is required to obtain governmental approval of a development, as defined by Section 65927, or development project, may protest the establishment or imposition of the fee, tax, assessment, dedication, reservation, or other exaction as provided in Section 66020.

Section 66024.

(a) In any judicial action or proceeding to validate, attack, review, set aside, void, or annul any ordinance or resolution providing for the imposition of a development fee by any city, county, or district in which there is at issue whether the development fee is a special tax within the meaning of Section 50076, the city, county, or district has the burden of producing evidence to establish that the development fee does not exceed the cost of the service, facility, or regulatory activity for which it is imposed.

(b) No party may initiate any action or proceeding pursuant to subdivision (a) unless both of the following requirements are met:

> (1) The development fee was directly imposed on the party as a condition of project approval.
>
> (2) At least 30 days prior to initiating the action or proceeding, the party requests the city, county, or district to provide a copy of the documents which establish that the development fee does not exceed the cost of the service, facility, or regulatory activity for which it is imposed. In accordance with Section 6257, the city, county, or district may charge a fee for copying the documents requested pursuant to this paragraph.

(c) For purposes of this section, costs shall be determined in accordance with fundamental fairness and consistency of method as to the allocation of costs, expenses, revenues, and other items included in the calculation.

TAB 5

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

CEQA Year In Review 2018

A SUMMARY OF PUBLISHED APPELLATE OPINIONS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

TABLE OF CONTENTS

The California Supreme Court issued its only CEQA opinion of 2018 at the end of the year. In *Sierra Club v. County of Fresno*, the court rejected a standard air quality impact analysis in the EIR for a typical mixed-use development project. The court declined to apply the substantial evidence standard of review to the EIR's discussion of the impact. Instead, the court independently decided that the EIR's discussion did not include "detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project."

In another case focused on air quality, a court of appeal upheld most aspects of an EIR for a new railyard and agreed that the project would reduce overall truck emissions, but it held that the EIR did not include sufficient information describing the impact of truck emissions along a four-mile truck route that adjoined residences and schools.

Several other 2018 decisions addressed whether comments by members of the public amounted to substantial evidence of significant environmental impacts, which would preclude the lead agency from adopting a negative declaration rather than preparing an EIR. Two of these opinions concerned projects in designated historic districts. These courts delivered a clear message that residents' statements that the mass, density, height, or materials of a proposed project are inconsistent with a historic district—as opposed to mere expressions of dislike of a project's design—can constitute substantial evidence of a significant aesthetic impact on the historic district, necessitating an EIR. In one of these cases, the court also found that observations of traffic conditions by nearby residents could prevail over both a traffic expert's report and a city's established traffic significance thresholds.

In a third case, however, the court examined project opponents' attempt to apply the noise analysis from one project to a different project in a different location, concluded that their statements did not constitute substantial evidence that the second project would cause a significant noise impact, and upheld the project's negative declaration.

Finally, the *Golden Door Properties* case illustrates the difficulties that lead agencies continue to face in developing quantitative thresholds for significant greenhouse gas impacts. The court rejected San Diego County's Guidance Document for analyzing GHG impacts, finding a violation of the rule that a lead agency's adoption of a threshold of significance must be adopted by ordinance, resolution, rule, or regulation and must be developed through a public review process. Substantively, the court held that substantial evidence did not support the Guidance Document's efficiency metric of 4.9 metric tons of carbon dioxide-equivalent per service population per year, because the evidence did not show why use of statewide GHG reduction levels would properly be used in the specific context of San Diego County.

LIST OF CASES

California Supreme Court

Courts of Appeal

A. EXCLUSIONS AND EXEMPTIONS FROM CEQA

1. Seven-Year Extension of Diablo Canyon Lease Held Exempt from CEQA

World Business Academy v. California State Lands Commission
(2018) 24 CA 5th 476 (2nd Dist.)

The court rejected CEQA challenges to a State Lands Commission lease extension, allowing the Diablo Canyon nuclear power plant to continue operating through 2025.

Pacific Gas & Electric Company plans to cease operating Diablo Canyon in 2025, when the plant's federal licenses will expire. The plant's cooling water intake and discharge structures are on state-owned submerged and tidal lands, for which the Commission had issued leases to PG&E expiring in 2018 and 2019. The Commission granted PG&E a consolidated lease extension through 2025, relying on CEQA's categorical exemption for continued operation of existing facilities.

CEQA's categorical exemptions are subject to several exceptions that can force a lead agency to prepare a negative declaration or an environmental impact report. The "unusual circumstances" exception applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Here, Diablo Canyon opponents argued that continued operation of the state's last nuclear power plant was rife with unusual circumstances that could cause significant environmental effects.

To show that the unusual circumstances exception applies, normally a challenger must show both (1) unusual circumstances; and (2) a reasonable possibility of a significant environmental effect due to those unusual circumstances. Here, the Commission had made no finding regarding unusual circumstances. With no finding before it, the court of appeal elected to assume unusual circumstances did exist and then proceeded to the second half of the test: whether there was a fair argument that the lease extension would cause significant environmental impacts.

The court began by holding that the baseline for its analysis consisted of existing operations under the lease. In so doing, the court followed an earlier case that applied the same rule with respect to Central Valley Project water contract renewals.

The court then reviewed each factor the challenger claimed raised a fair argument of significant environmental effects—Diablo Canyon's size, location, impacts on human health and marine life, fuel rod storage, reactor embrittlement, risks from seismic events and terror attacks, and status as the state's last remaining nuclear plant—and found that none of these conditions would be changed by the lease extension. Because there was no fair argument of significant environmental effects from the extension, the court held the Commission did not violate CEQA.

The court's opinion is instructive in two respects. First, it reinforces precedent holding that however damaging an existing environmental condition is alleged to be, that condition is still the baseline under CEQA, and only a project-caused worsening of that condition is a CEQA concern.

Second, the case is a reminder that if the lead agency fails to make findings supporting the conclusion that a proposed project involves no unusual circumstances, the court may assume that the project does involve unusual circumstances. The court will then proceed to ask whether project opponents have raised a fair argument that the project will cause significant environmental effects. Although project opponents often do not meet even this low threshold, lead agencies relying on potentially controversial categorical exemptions should minimize this risk by making findings regarding unusual circumstances.

2. CEQA Baseline for Development Permit Should Not Have Been Set Prior to Demolition of Historic Structure

Bottini v. City of San Diego
(2018) 27 CA 5th 281 (4th Dist.)

The court held that the CEQA baseline for construction of a new home should not have been set at a date prior to demolition of a potential historic structure on the site, where the demolition had already occurred before the permit application for the new home had been submitted.

The Bottinis applied to the City of San Diego for a Coastal Development Permit to construct a single-family home on a vacant lot. City staff determined that the project was categorically exempt under CEQA's Class 3 exemption for construction of a single-family home. On appeal, however, the city council found that full environmental review was necessary because the Bottinis had demolished a 19th-century cottage on the lot shortly before applying for the CDP. The city had itself previously concluded that cottage was not a historic resource, declared the structure to be a public nuisance, and authorized the Bottinis to demolish it. Nevertheless, the city council retroactively declared the cottage "historic," concluded that the demolition should be considered part of the new home project, and found that there was a reasonable possibility that CEQA's "historical resources" and "unusual circumstances" exceptions precluded use of the categorical exemption.

The Bottinis sued, contending that the city's baseline determination violated CEQA and that the city's decisions violated the Bottinis' due process rights and resulted in a regulatory taking.

With respect to the CEQA claims, the appellate court disagreed with the city's determination that the "CEQA project" included both the demolition and the proposed construction of a single-family residence. Reasoning that CEQA applies prospectively, and not to completed work, the court held that the correct baseline was the condition of the property when the Bottinis filed their permit application. At that time, the property was a vacant lot.

Using the correct project baseline, the court said, the Class 3 exemption clearly applied to the Bottinis' proposed single-family residence, and the historical resource and unusual circumstances exceptions were inapplicable.

3. Court Upholds Use of Small Facilities Exemption for Microcell DAS Project

Aptos Residents Association v. County of Santa Cruz
(2018) 20 CA 5th 1039 (6th Dist.)

The court of appeal upheld Santa Cruz County's use of a CEQA exemption to approve a distributed antenna system (often referred to as a DAS) for the provision of cell service.

The court found that the project fit squarely within the intended scope of CEQA's Class 3 categorical exemption for small facilities and structures. The court also rejected petitioners' arguments that there was an applicable exception that would have precluded the use of the exemption.

Background

The project involved 10 microcell transmitters that would be used as part of Crown Castle's distributed antenna system. Each microcell consisted of a two-foot by one-foot antenna mounted on an extender pole that would be attached to an existing utility pole. Crown Castle submitted a separate permit application for each microcell. Raising concerns about health and aesthetics, residents began mounting opposition to the project.

The county jointly considered the applications for the microcells and determined that they fell within the Class 3 exemption for small structures. After conducting site visits and reviewing photo simulations, the county concluded that the microcells would not result in any significant visual or other environmental impacts. Residents filed suit, contending that the county's approval of the project violated CEQA.

The Court's Decision

The residents' petition claimed that the county violated CEQA in several ways: by improperly segmenting the project, by finding that the project fell within the Class 3 exemption, and by using an exemption where an exception barred an exemption. The court of appeal found these claims unavailing.

Improper segmentation. The court rejected petitioners' contention that because Crown Castle applied for a separate permit for each microcell, the project was improperly segmented. The county expressly considered the project to be the entire group of microcells and found that the Class 3 exemption was applicable to all of the microcells. The fact that Crown Castle filed a separate permit for each microcell unit was irrelevant.

Applicability of exemption. The Class 3 categorical exemption applies to "limited numbers of new, small facilities or structures" including "electrical, gas, and other utility extensions." The court found the project to fall squarely within the class of projects intended to be covered by this exemption, recognizing that the exemption extends to multiple small structures in scattered locations.

Exceptions to the use of the exemption. Petitioners urged the court to find applicable several exceptions that would have precluded the use of the Class 3 exemption. The court declined, finding that that petitioners failed to meet their burden to identify evidence supporting an exception.

Cumulative impact exception. The cumulative impact exception bars an exemption where the cumulative impact of "successive projects of the same type in the same place, over time is significant." Petitioners claimed that this exception should apply because AT&T intended to implement its own distributed antenna system in the area at some time in the future. The court rejected this argument as amounting to "mere speculation," given that petitioners provided no evidence that AT&T was actually pursuing a project or any evidence of the location of AT&T's proposed facilities.

Location exception. The CEQA Guidelines prohibit use of the Class 3 exemption if the activity may have an impact on an environmental resource of "hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state or local agencies." The county's zoning of the project area as "Residential Agricultural" did not meet this requirement because nothing in the zoning ordinance specifically designated the zone as "an environmental resource of hazardous or critical concern."

Unusual circumstance exception. Under the CEQA Guidelines, an exemption cannot be used where there is "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The court found nothing unusual in microcells being built in rural areas, because such areas "clearly need utilities, including cell coverage."

4. Application of Small Facilities Exemption to Cell Tower in Neighborhood Park Upheld

Don't Cell Our Parks v. City of San Diego
(2018) 21 CA 5th 338 (3rd Dist.)

Verizon Wireless obtained approval from the City of San Diego to construct a cell tower in a dedicated neighborhood park. The petitioner challenged the city's decision that the facility was exempt from CEQA under the categorical exemption for small facilities, but the court of appeal upheld the city's determination.

The court first rejected the petitioner's argument the project did not qualify for the small facilities exemption because it was a stand-alone utility structure rather than an urban infill development. While none of the examples of exempt facilities listed in the exemption directly applied, the court found that the tower fell within the scope of the exemption: It is a small facility that is much smaller than the types of structures that are listed as examples, such as a residence, store, motel, office or restaurant.

The court also rejected the petitioner's argument that an exemption was barred by the "unusual circumstances" exception to the categorical exemptions. Under that exception, an activity cannot be found exempt where there is a reasonable possibility it will have a significant environmental effect due to unusual circumstances. The court found the circumstances were not unusual because at least 37 similar facilities are located in city parks. It also found that the city's detailed analysis of biological, aesthetic, recreation and construction impacts supported the city's finding there was no reasonable possibility the project would have a significant impact on the environment.

The petitioner's alternative contention that an exemption was barred by the "location exception," which is applicable to projects that may impact officially designated environmental resources of critical concern, also failed, given the absence of any such designation.

5. Settlement Agreement for Beach Restoration Project Found Exempt from CEQA

County of Ventura v. City of Moorpark
(2018) 24 CA 5th 377 (2nd Dist.)

The court of appeal upheld a settlement agreement between the City of Moorpark and the Broad Beach Geologic Hazard Abatement District, finding that the settlement agreement was statutorily exempt from CEQA. The court rejected the County of Ventura's argument that the settlement agreement and beach restoration project were separate, nonexempt projects under CEQA.

The district was formed to restore a 46-acre stretch of beach. The beach restoration project would require sand deposits of over 1.5 million cubic yards over a period of 20 years. During the project approval process, the city and district entered into a settlement agreement to address the city's concerns that hauling sand through the city would negatively impact residents.

The court of appeal rejected the county's argument that the beach restoration project and the settlement agreement should be treated as separate and distinct projects under CEQA. The court found that the district was formed with the mandate to make improvements to the beach to address geologic hazards, and the settlement agreement, which addressed trucks hauling sand through the city, is "one piece of a single, coordinated endeavor to address erosion at Broad Beach, and is thus part of the whole of the action." The court further held that the settlement agreement and the beach restoration project constituted a single project since the settlement agreement and restoration activities served a single purpose of abating a geologic hazard, and even if the beach restoration could be completed without the agreement, the two became linked when the settlement agreement was incorporated into the coastal development permit for the project.

Accordingly, the court of appeal upheld the settlement agreement and held that the entirety of the beach restoration project, including the settlement agreement, was exempt from the requirements of CEQA.

B. NEGATIVE DECLARATIONS

1. Negative Declaration Survives Challenge Based on Non-Expert Opinion About Noise Impacts

Jensen v. City of Santa Rosa
(2018) 23 CA 5th 877 (1st Dist.)

Claims of significant noise impact unsupported by expert opinion, fact, or reasonable inference do not provide grounds for challenging a negative declaration.

The project, called the Dream Center, would provide emergency shelter for homeless youth and transitional housing for young adults, as well as counseling, health, education, and job placement services. The center would also provide outdoor recreational activities for residents, including a basketball area, pottery throwing area, and garden. The center would occupy a vacant building formerly used as a hospital. A wooden fence and landscaping separated the rear parking lot from an adjacent residential neighborhood.

The City of Santa Rosa adopted a negative declaration and approved a rezoning and conditional use permit for the project. Conditions of approval limited parking in the rear lot to employees during normal operating hours. The city's negative declaration relied on a noise study prepared by an engineering firm. The noise study concluded that noise impacts would be less than significant because noise would not exceed standards in the city's general plan or noise ordinance, and noise levels would not be increased more than 5 dBA Ldn above existing conditions. (Ldn is the average day/night noise level.)

The petitioners, who lived near the project, asserted that there was a fair argument the project would cause significant noise impacts from vehicles in the rear parking lot and from outdoor recreation activities. The petitioners based their main arguments on their own calculations, using data taken from a noise study for a different project in the city called Tower Market, a 24-hour convenience store and gas station.

The court held that no substantial evidence supported the petitioners' claims.

First, the court found that the petitioners misused noise data from the Tower Market study. The petitioners took the Tower Market study's noise level estimates for passing vehicles and argued that these estimates exceeded maximum noise levels that they had calculated. The court explained that the petitioners' calculations showed very little about noise impacts because they did not predict the average noise level over time. Further, the court noted, this methodology was not backed up by expert opinion.

Second, the court concluded the petitioners' argument regarding parking lot noise was grounded on speculation and hypothesis rather than fact, expert opinion, or reasonable inference. The petitioners asserted that cars and trucks could drive through the rear parking lot at all hours of the day and night. The court explained, however, that this claim was "most improbable and not a fair inference from the evidence," particularly in light of the project characteristics and the conditions of approval. The court also noted that it was "obvious" that Tower Market and the Dream Center were not similar projects: The rear parking lot at the Dream Center would have much less frequent car traffic (especially at night,

when employees would not be allowed to park in the rear parking lot) and would have minimal or nonexistent truck traffic, as compared to a 24-hour market and gas station.

Third, the court rejected the petitioners' interpretation of the city's noise ordinance. The city's noise ordinance set forth base ambient noise levels based on a property's zoning and time of day. The petitioners treated these noise levels as thresholds of significance. The noise ordinance, however, specified that the base noise levels were intended to be used for comparative purposes, and noise level is one of 12 factors to be considered in determining whether a noise impact violates the noise ordinance.

Finally, the court rejected the petitioners' arguments that the noise from outdoor recreation activities (basketball, pottery, and gardening) would be significant. The court held that the petitioners' methodology was "vague" and hard to grasp, was not a "legitimate factual or scientific basis for finding a significant impact," and was "not supported by expert opinion."

In this case, the petitioners' only evidence of significant noise impacts was their own calculations and opinions. The court held that this was not enough to support a fair argument of significant impact. The take-home message is that petitioners challenging a negative declaration based on noise impacts or other technical issues have to support their arguments with expert opinion if they are to prevail.

2. Opinions of Local Residents that Building Proposed Within Historic Area Would Have Negative Aesthetic Impact Was Sufficient to Trigger Need for EIR

Georgetown Preservation Society v. County of El Dorado
(3rd Dist., No. C084872, 12/17/18)

Georgetown, a former gold rush camp located in the Sierra Nevada foothills, is a state historical landmark. The county approved a Dollar General chain discount store on Main Street, within the town's historic commercial district, relying on a mitigated negative declaration. Local residents objected, commenting that the building did not belong in a historic community, that the store's size and appearance would have a negative aesthetic impact, and that the design of the building was incompatible with nearby historic buildings.

Not surprisingly, the county's decision to approve the project was followed by a lawsuit claiming that an EIR should have been prepared to evaluate the project's significant aesthetic effects. The court of appeal ruled for the opponents, and in its opinion, it issued rulings on three important questions relating to evaluation of aesthetic impacts in a negative declaration and the effect of comments by members of the public about such impacts.

Design review by the lead agency is not a substitute for CEQA compliance. The county had determined that the new store would not have adverse aesthetic impacts because it satisfied the criteria in the county's Historic Design Guide. On appeal, the county and developer argued that subjective opinions of several residents about the aesthetic merits of the project should not override the county's design review determinations. The court ruled, however, that design review under the zoning code is not a substitute for review of a project under CEQA. The design review process can provide relevant

evidence, but when the agency is considering a negative declaration, it does not shield the project from review of its impacts under the fair argument standard.

Public comments can establish a fair argument that aesthetic impacts may be significant. The county and developer contended that public commentary by nonexperts should not be enough to support a fair argument that the project may cause significant aesthetic impacts. They argued that subjective opinions about aesthetic issues, standing alone, signal a public controversy but are not evidence that the impact is significant. The court disagreed, noting that a number of persons objected to the size and appearance of the building, asserting that it was too big and too boxy or monolithic to blend in and that its presence would damage the look and feel of the historic town center. The county should have taken account of this body of evidence, according to the court, because it related to nontechnical matters on which residents were capable of giving an opinion, such as the building's size and general appearance. Further, its evidentiary value was enough to satisfy the "fair argument" test, which triggers an EIR. As the court put it: "Despite the subjective nature of aesthetic concerns, it is clear that the project may have a significant adverse environmental impact."

A lead agency cannot argue that evidence in the record was unfounded or not credible unless it made specific findings to that effect. When considering comments relating to potential environmental impacts, a lead agency may disregard evidence that is unfounded or not credible for other reasons. Here, the county argued that it had properly discounted the public comments the court cited due to their lack of foundation or creditability. The court held, however, that in order to preserve attacks on comments based on lack of foundation or credibility, the lead agency must have made findings showing it had rejected the evidence for those reasons. The county had not done so here.

Conclusion. Criticisms of a project's design or complaints about its attractiveness, standing alone, are not enough to show a significant aesthetic impact. While CEQA is concerned with adverse impacts on the human environment, it is unconcerned with aesthetic values that are merely a matter of personal preference. In this case, the evidence was sufficient to persuade the court that the aesthetic objections to the project rested on broader community values: The court found there was sufficient evidence "to show this project in this location might significantly impair the central district's unique and treasured Gold Rush character."

3. Aesthetic and Traffic Issues in Historic Overlay District Necessitate EIR

Protect Niles v. City of Fremont
(2018) 25 CA 5th 1129 (1st Dist.)

The court of appeal overturned the city's mitigated negative declaration for a small mixed-use development in a historic overlay district, holding that aesthetic and traffic issues require the preparation of an environmental impact report.

The proposed project, comprising 98 housing units and 3,500 square feet of commercial uses, was to be located in the Niles Historic Overlay District within the City of Fremont. The city approved a mitigated negative declaration for the project, finding that with mitigation incorporated, the project would cause no significant environmental impacts necessitating an EIR.

Residents sued, alleging that an environmental impact report was required because substantial evidence supported a fair argument that the project would cause significant impacts, due to (1) aesthetic incompatibility with the historic district; and (2) traffic impacts that were not acknowledged in the expert traffic report prepared for the city's analysis. The court of appeal upheld both challenges and required that an EIR be prepared.

Aesthetics. With respect to aesthetics, the court cited CEQA's express concern for aesthetic and historic environmental qualities, as well as case law holding that a project's context is vital to assessment of its aesthetic impacts. Here, members of both the public and the city's Historical Architectural Review Board had cited the project's "siting, massing, scale, size, materials, textures and colors" as inconsistent with the historic district's "small town feeling."

The court first held that a project's visual impact on a surrounding officially designated historical district is an appropriate topic for aesthetic review under CEQA and that such an aesthetic analysis does not undermine the separate scheme for CEQA review of environmental impacts on historical resources. Next, recognizing that aesthetic judgments are inherently subjective, the court observed that objections raised by HARB members and others "were not solely based on vague notions of beauty or personal preference, but were grounded in inconsistencies with the prevailing building heights and architectural styles of the Niles HOD." The court found that these personal observations constituted substantial evidence that the project would cause a significant aesthetic impact in the context of the historic district.

Traffic. The court next concluded that the city's expert traffic report could not prevail over individuals' observations of existing traffic conditions and predictions of hazards. The traffic report concluded that a new left-turn pocket in front of the project, while recommended, was not necessary, based in part on the posted speed limit. Commenters stated, however, that the posted speed limit was often ignored, and that without a left-turn pocket, the combination of high speeds, queued drivers waiting to turn left into the project, and a blind curve would result in dangerous conditions. The court identified these comments as substantial evidence supporting a fair argument that the project would create a traffic safety hazard.

Nor did the city's established significance threshold for deterioration in traffic level of service protect it from the need to prepare an EIR. The city acknowledged that with the proposed project, the level of service nearby would deteriorate from an unacceptable LOS E to a still worse LOS F, but under the city's significance thresholds, this did not constitute a significant impact. The court, citing residents' and officials' reports of extreme traffic backups under existing conditions, concluded that these comments "supported a fair argument that unusual circumstances in Niles might render the thresholds inadequate to capture the impacts."

Conclusion

The *Protect Niles* opinion highlights the importance that courts can attach to comments by the public where an agency proposes to rely on a negative declaration rather than an EIR. Because CEQA is designed to favor EIRs over negative declarations, plausible fact-based comments (as opposed to generalized complaints) can, depending on the circumstances, prevail over both expert reports and agency significance thresholds, leading to the need for an EIR.

4. Possibility that Zoning Standards Might Be Violated in Final Design Did Not Mandate EIR at Tentative Map Stage

Friends of Riverside's Hills v. City of Riverside
(2018) 26 CA 5th 1137 (4th Dist.)

A project opponent's argument that the project might violate zoning laws in the future is not sufficient to require a city to prepare an EIR under CEQA.

The Lofgrens requested a permit to build six single-family homes on an 11-acre parcel in Riverside. The proposed development was within the city's RC – Residential Conservation Zone, which had unique zoning standards to preserve the area's topographic conditions. These included two different sets of standards for lot size, dwelling density, and lot coverage depending on whether the development was "conventional" or a "Planned Residential Development." City zoning laws allowed subdivisions qualifying as PRDs more flexibility to create smaller lots in existing neighborhoods and promoted clustering of lots on less sensitive sections of the property to preserve open space. The Lofgrens applied for a PRD permit with a six-lot tentative tract map and a list of mandatory project requirements that would qualify the project as a PRD.

In response to objections from Friends of Riverside's Hills to their original application, the Lofgrens also submitted a revised five-lot subdivision map that complied with conventional zoning requirements. The City of Riverside approved the PRD permit, finding the project in compliance with all PRD standards for residential development in the RC Zone. The city conditioned the Lofgrens' ability to obtain a grading permit on submission of a final tract map and evidence that natural features on steeper portions of the property were preserved as open space. The city also required that future building permits comply with RC Zone "superior design standards."

The city adopted a negative declaration, concluding that the project did not conflict with any land use provisions that were adopted to avoid or mitigate environmental impacts.

Friends of Riverside's Hills sued, contending an EIR was required because, in violation of RC Zone standards, the project would require excessive grading and did not cluster residential lots in the least steep portion of the site. Additionally, the organization alleged the city abused its discretion when it approved the permit because it did not provide evidence of the average slope of the lots and deferred the selection of superior design elements to the building-permit stage.

The court held that these claims were too speculative at the tentative map stage because the Lofgrens did not yet have a proposal for the final lot placement and finish grading. The claim that a project *might* violate zoning standards was not enough to require the city to prepare an EIR. The appropriate time for the petitioner's CEQA challenge over RC Zone violations, the court said, would be when the city approved the grading permit for the proposed project. At that time, the Lofgrens would need to submit a final tract map that complied with RC Zone requirements. Only then would an EIR potentially be required based on deviation from zoning code standards.

5. Mitigated Negative Declaration for Infill Project Upheld Against Claims Parking and Traffic Impacts Would Be Significant

Covina Residents for Responsible Development v. City of Covina
(2018) 21 Cal. App. 5th 712 (2nd Dist.)

The petitioner, CRRD, challenged the mitigated negative declaration for a 68-unit, mixed-use infill project. Its principal CEQA claims related to the project's parking and traffic impacts. The court of appeal found both claims were meritless.

The project's parking impacts were exempt from CEQA. Under Public Resources Code section 21099(d)(1), the parking impacts of qualifying infill projects within a half-mile of a major transit stop are exempt from CEQA. The court found that the project easily qualified: it would be located in an urban area, on a site that had been previously developed, within a quarter-mile of a commuter rail station. As a result, any claim that the project lacked adequate parking was barred. While the statute does not exempt impacts relating to air quality, noise, or safety that may occur as secondary parking impacts due to resulting traffic congestion, the adequacy of parking itself is exempt from CEQA review.

The MND's review of traffic impacts was properly tiered from the applicable specific plan EIR. The mitigated negative declaration relied on the analysis of traffic impacts in the EIR certified for the city's Town Center Specific Plan. CRRD argued that the traffic impacts that might result from a shortage of project parking might be significant and that those impacts were not anticipated by the specific plan EIR. The court disagreed: The city had conducted a project-specific trip analysis and required the project to comply with relevant mitigation requirements for road improvements, and CRRD had not identified any evidence showing this was insufficient.

C. ENVIRONMENTAL IMPACT REPORTS

1. California Supreme Court Sets Standard for Air Quality Impact Analyses

Sierra Club v. County of Fresno
Cal. Supreme Court Case No. S219783 (Dec. 24, 2018)

The California Supreme Court overturned the environmental impact report for a mixed-use development project, holding that the EIR inadequately explained the human health consequences of significant air pollutant emissions that would result from the development. In so doing, the court both clarified the standard of review that courts must apply to an EIR's explanation of significant environmental impacts and increased the obligation of EIR preparers to provide those explanations.

The court also responded to challenges to the EIR's air quality mitigation measures. The court required that the EIR's claim of "substantial" pollution reduction through mitigation be supported with substantial evidence, but the court upheld mitigation measures that allowed for subsequent replacement based on new technologies and provided for implementation through future county review.

Facts

In the case before the Supreme Court, the county's analysis of criteria air pollutants appears to have been typical. The EIR generally explained the health impacts of exposure to ozone, particulate matter, carbon monoxide, and nitrogen dioxide but, except for ozone, did not identify the concentrations at which symptoms would be expected. The EIR then quantified the tonnages of air pollutants that would be emitted each year as a result of the project, compared those amounts to the regional air district's tonnage-based significance thresholds, and concluded that the project's air quality impacts would be significant because the emissions would substantially exceed the thresholds. The EIR then identified mitigation measures that would reduce the emissions, but not enough to bring them below the thresholds. The EIR did not attempt to quantify the extent to which each of the project's air pollutant emissions might affect human health in the air basin.

Standard of Review

The Sierra Club and other parties challenged the EIR's discussion of air quality impacts as well as the mitigation measures it identified. The court began by addressing the standard of review that courts must apply to such challenges. Under CEQA, courts are to apply a deferential "substantial evidence" standard of review to an EIR's factual determinations (e.g., which scientific methodology to use for analysis of a particular impact), but a non-deferential "de novo" standard to the question of whether the agency preparing the EIR has followed the correct procedures. The court acknowledged that some questions that arise under CEQA are both factual and procedural, and create uncertainty regarding the appropriate standard of judicial review.

Where the question is whether an EIR's discussion of significant environmental impacts is "adequate," the court identified "three basic principles":

- An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR;
- However, a reviewing court must determine whether "the EIR comports with its intended function of including 'detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project'"; and
- The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions. The court explained: "For example, a decision to use a particular methodology and reject another is amenable to substantial evidence review. But whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence."

The EIR's Air Quality Discussion

Applying these principles, the court found the county's EIR inadequate because it did not explain how the proposed project would change air quality in the air basin; it did not indicate the concentrations at which PM, CO and sulfur dioxide would trigger health symptoms; and, even as to ozone, for which the EIR did identify concentrations that would trigger symptoms, it did not identify how many parts per million of ozone would result from the project.

Briefs submitted to the court attempted to explain that the connection between emissions and human health that plaintiffs sought could not be provided given the current state of environmental science modeling. The court responded that this explanation should have been provided in the EIR rather than in litigation: "if it is not scientifically possible to do more than has already been done to connect air quality effects with potential human health impacts, the EIR itself must explain why, in a manner reasonably calculated to inform the public of the scope of what is and is not yet known about the Project's impacts."

Mitigation Measures

The plaintiffs also challenged the EIR's air quality mitigation measures on four grounds. The court upheld the first of these challenges, holding that the EIR lacked facts or analysis to explain its conclusion that the mitigation measures would "substantially reduce air quality impacts."

The court rejected the plaintiffs' three remaining challenges. First, the court approved a "substitution clause" in the mitigation measures that allowed the county to substitute new mitigation measures for those listed in the EIR if the new measures were shown to be equally effective. Whereas the plaintiffs considered this unlawfully deferred mitigation, the court responded that allowing future substitutions for equal or more efficient technology would promote CEQA's goal of environmental protection. Second, the court rejected plaintiffs' challenge to mitigation measures that would not reduce a project's impacts below the threshold of significance. The court noted that under CEQA, agencies may approve projects that have significant unavoidable environmental impacts so long as they adopt all feasible mitigation

measures and issue a statement of overriding considerations. Finally, the court held that the mitigation measures were not vague or otherwise unenforceable. The county's mitigation monitoring plan explained when in the development process the various mitigation measures were to be implemented and imposed the duty on the county to ensure that the measures were implemented. If the county were to fail in this duty, its abuse of discretion could be corrected in a court mandamus proceeding.

Conclusions

The *Sierra Club* decision reinforces the importance of careful explanations of significance determinations in EIRs and, in particular, the importance of presenting the analytical connection between raw data and the resulting impacts to the physical environment. Every effort should be made to provide clear explanations in an EIR, including a discussion of the evidentiary basis for health-based significance standards, so that decision makers and members of the public can better understand the

magnitude of a project's contribution to risks to human health. Notably, the court recognized that an EIR need not be exhaustive, and perfection is not the legal standard. But this decision raises the bar for achieving legal adequacy under CEQA.

2. EIR For Railyard Omitted Important Information About Air Quality Impacts

City of Long Beach v. City of Los Angeles
(2018) 19 CA 5th 465 (1st Dist.)

Rejecting most challenges to the environmental impact report for a new railyard near the Port of Los Angeles, the court of appeal nevertheless held that the EIR must be decertified because it did not adequately address air quality impacts in the vicinity of the new yard.

When BNSF Railway Company proposed the project, the port was served by on-dock railyards, one near-dock railyard five miles north of the port, and two off-dock railyards 24 miles north. Trucks are used to transport cargo containers between the port and the near-dock and off-dock railyards. One of the effects of the new near-dock railyard would be to substitute four-mile trips on surface streets for many existing 24-mile trips via a freeway to and from the off-dock railyards. Project opponents concerned about the impacts of this shift in port truck traffic sued under CEQA.

The court held that crucial information regarding air quality was omitted from the EIR. The EIR showed that total particulate matter emissions from trucks would be reduced by the project compared to the "no project" alternative, because a four-mile truck trip is shorter than a 24-mile trip. But the court concluded the EIR did not adequately explain that in the vicinity of the proposed railyard, air quality would be substantially *worse* with the railyard than without it, and that the vicinity included homes and schools.

In addition, the EIR did not estimate how frequently or for what length of time the level of particulate air pollution in the area surrounding the new railyard would exceed the EIR's standard of significance. Rejecting the port's argument that it would be impractical to run the air quality model for every year of the railyard's projected operation, the court found that selecting a reasonable number of benchmark years for analysis might be acceptable, but that in this case, "the decision to perform only a single modeling run with a 50-year analysis range does not comply with CEQA."

The court also rejected one element of the EIR's analysis of cumulative air quality impacts, holding that the EIR did not adequately focus on the combined impacts of the proposed project and another large railyard expansion proposed by Union Pacific adjacent to the proposed project. The fact that independent CEQA analysis of the Union Pacific project had been delayed did not excuse the port from a focused, rather than general, discussion of two large railyard expansions proposed to be located next to one another.

The result in the *City of Long Beach* case is consistent with a long line of CEQA decisions, including the California Supreme Court's recent decision in *Sierra Club v. County of Fresno*, that have focused with particular intensity on claims that an EIR did not adequately describe the impacts of air pollution on the nearby community.

3. Court Rejects County Guidance Document's Recommended Significance Standards for GHG Emissions

Golden Door Properties v. County of San Diego
(2018) 27 CA 5th 892 (4th Dist.)

The court of appeal rejected San Diego County's 2016 "Guidance Document" for preparation of climate change analysis reports to be used in CEQA documents.

In ruling the county had violated CEQA by adopting the Guidance Document, the court first found that the "efficiency metric" defined in the Guidance Document was designed to establish a recognized and recommended threshold of significance for use in CEQA documents. The county contended that the Guidance Document merely suggested a methodology for evaluating GHG emissions. The court disagreed, however, pointing to the fact that the defined efficiency metric of 4.9 metric tons of CO2 per service population per year established a single, quantifiable volume of omissions—a level above which a project's GHG impact would be significant, and below which the impact would be less than significant. The court then ruled that because the Guidance Document established a threshold of significance for general use, under CEQA it was required to have been developed through a public review process and to be adopted by ordinance, resolution, rule, or regulation. But it was not.

The court also found that the EIR for the county's general plan update included mitigation measures that required the county to prepare a climate action plan and to revise its guidelines for determining significance of GHG emissions based on that plan. But no climate action plan was in place when the county published the Guidance Document, nor was it circulated for public review, as required by the county's CEQA guidelines.

Additionally, the court held that the efficiency metric in the Guidance Document was not supported by substantial evidence. The efficiency metric had relied on statewide standards, but there was no evidence showing why it would be sufficient for use by projects in San Diego County. The efficiency metric also did not account for variations among different types of development or explain why it would be appropriate to apply it evenly despite project differences.

4. EIR for Revisions to Housing Element Properly Used Future Population Projections as the Baseline

San Franciscans for Livable Neighborhoods v. City and County of San Francisco
(2018) 26 Cal. App. 5th 596 (1st Dist.)

The court ruled the city did not err by certifying an EIR for revisions to its housing element that relied in part on 2025 population projections as a baseline. While the environmental baseline in an EIR should normally reflect existing conditions, use of a future-conditions baseline is permissible where an existing-conditions baseline would be misleading or without informational value.

After certifying an EIR, defendant City and County of San Francisco adopted a 2009 update to its general plan housing element. San Franciscans for Livable Neighborhoods challenged the adequacy of that EIR on several grounds, including that it improperly relied on population projections, rather than existing conditions, as an environmental baseline for its traffic and water supply impacts analysis. SFLN argued that the EIR's use of 2025 population projections by the Association of Bay Area Governments improperly inflated the baseline in an "analytical sleight of hand."

The court sided with the city, finding that a comparison of existing conditions with and without the housing element was not required. The city had not declined to consider the impacts of the housing element by suggesting that regional population growth was inevitable, as SFLN claimed. Rather, the EIR had discussed projected growth at length, and analyzed traffic and water supply impacts based on those projections.

The court viewed the housing element as a "growth-accommodating rather than growth-inducing" policy. The housing element update was thus distinguishable from other projects where approval would clearly lead to population growth in a previously undeveloped area. The court concluded that "when an amendment to a general plan takes a long view of city planning, the analysis of the amendment's impacts should do so as well."

The lengthy opinion also rejected SFLN's numerous other challenges to the EIR concerning the EIR's impacts analysis for traffic and water supply, the EIR's baseline and impacts analysis for land use and visual resources, the city's decision not to recirculate the EIR, the EIR's alternatives analysis, and the feasibility of certain proposed mitigation measures.

5. Court Rejects Challenge to Refinery EIR's Project Description, GHG Emissions Analysis and Hazards Assessment

Rodeo Citizens Association v. County of Contra Costa
(2018) 22 Cal. App. 5th 214 (1st Dist.)

The county certified an EIR and approved a land use permit for a propane recovery project at an existing oil refinery. The project would modify some existing equipment and add other equipment to allow the refinery to recover butane and propane as a byproduct of the refining process and to ship it by rail for commercial sale.

The trial court found the EIR's air impact analysis inadequate but rejected the petitioner's other claims. Unsatisfied with that result, the petitioner appealed, but the court of appeal also ruled against the petitioner on those claims.

The project description was accurate and adequate. The petitioner contested the EIR's project description, arguing that the project would involve more frequent processing of "nontraditional" crude feedstocks—such as imported tar sands and Bakken crudes—which would contain higher levels of propane and butane, together with higher levels of dangerous chemicals that would increase emissions of air pollution. The court, however, found no support for the claim, concluding the evidence showed that the project was proposed and designed as an adjunct to existing operations, not to change the types or amount of crude oil that can be processed at the refinery. The project would allow recovery of butane and propane produced by ongoing refinery operations, but it would not increase the amount of butane and propane that are produced and would not change any of the other process units at the refinery.

An analysis of downstream GHG emissions would require undue speculation. The petitioner further argued the EIR was deficient because it did not analyze greenhouse gas emissions from combustion of the propane and butane that would be sold to downstream users. The EIR explained, however, that propane and butane have many non-fuel uses that generate negligible greenhouse gas emissions and that they can also be used to replace fuels with higher emissions. Given the uncertainty regarding end uses, coupled with the highly changeable nature of the propane and butane market, any attempt to quantify downstream GHG emissions would be speculative, so a downstream emissions analysis was not required.

Public and environmental hazard impacts were adequately analyzed. The petitioner also challenged the EIR's findings that the project would not have a significant impact on the public or the environment from the handling and transportation of hazardous materials, including a claim that the EIR failed to analyze the project's contribution to the cumulative risk of rail-related accidents. The EIR concluded that because the project would add tank cars to existing trains, and not add new train trips, the cumulative risk of train accidents would not increase. The court found this explanation "not unreasonable." It also rejected the petitioner's other arguments regarding hazard impacts, finding that the EIR's exceptionally detailed risk analysis was plainly sufficient.

6. Size Limit on Retail Tenants Not Likely to Cause Urban Decay

Visalia Retail, LP v. City of Visalia
(2018) 20 CA 5th 1 (5th Dist.)

The court of appeal ruled that a general plan policy that limited the size of retail tenants in certain areas of a city was not likely to cause urban decay and was not inconsistent with other general plan policies encouraging infill development.

The City of Visalia's general plan update included a policy that Neighborhood Commercial areas should be anchored by a grocery store and could not have individual tenants greater than 40,000 square feet. Visalia Retail, which owned property designated Neighborhood Commercial, filed a petition for a writ of

mandate seeking to invalidate the city council's certification of the EIR and adoption of the general plan update. Visalia Retail argued that the EIR should have analyzed the potential for the tenant size cap to cause urban decay and that the general plan was internally inconsistent.

The petitioner had submitted a report from a real estate broker explaining that the tenant size cap policy would likely lead to vacancies, physical blight, and urban decay because, in his opinion, it was unlikely a grocery store anchor would be willing to lease a space that was smaller than 40,000 square feet. In support, the real estate broker stated in his report that (1) he was personally unaware of any grocers willing to build new stores under 40,000 square feet, (2) a typical grocery store for four grocery chains must be at least 50,000 square feet to be profitable, (3) stores sized 10,000–20,000 square feet that were launched by a large grocery chain had been unsuccessful, and (4) three grocery stores in Visalia under 40,000 square feet had closed.

While an EIR does not need to study economic and social changes resulting from a project, physical changes to the environment that are caused by a project's economic or social impacts are environmental effects that must be considered under CEQA. The court of appeal concluded that the real estate broker's report did not provide substantial evidence that the 40,000-square-foot limit would cause urban decay in the form of significant physical effects on the environment.

The court explained that the real estate broker's report did not support an argument that no grocers would be willing to build stores under 40,000 square feet. The court noted that the report's conclusion was based only on the real estate broker's personal knowledge, the typical store size for four grocery chains, and one chain's experience with stores under 20,000 square feet. The court also noted that the report indicated that some grocers in some circumstances had built stores under 40,000 square feet, which contradicted the real estate broker's conclusion that no grocers would build stores under 40,000 square feet. Moreover, the court noted that the report did not provide a reason why the three stores in Visalia under 40,000 square feet had closed. Finally, the court determined that the real estate broker's report did not demonstrate that any vacancies in Neighborhood Commercial areas as a result of the tenant size cap would be so rampant as to cause urban decay.

7. EIR for General Plan Update Adequately Addressed Reasonably Foreseeable Future Development

High Sierra Rural Alliance v. County of Plumas
(2018) 29 CA 5th 102 (3rd Dist.)

In 2013, Plumas County adopted a comprehensive update to its 1984 General Plan, relying on a "first-tier" programmatic environmental impact report. A key goal of the general plan update was to focus new population growth and housing within specific geographic "planning areas" to prevent "rural sprawl" and preserve natural resources. The EIR and plan update anticipated little population growth or development outside of the planning areas due to historical development patterns and the new general plan policies. Petitioner High Sierra Rural Alliance asserted that the EIR was deficient because it did not adequately assess the impacts of development outside of the designated planning areas. The court of appeal concluded, however, that the EIR adequately addressed reasonably foreseeable development within the county.

The policies in the plan update called for future development to be located adjacent to or within existing planning areas. Accordingly, the update and EIR forecasted little growth or development outside the identified planning areas in the foreseeable future. High Sierra claimed the EIR was deficient because it failed to address the potential for construction of multiple buildings on a single parcel without discretionary review and it did not adequately describe the impacts of allowing new clustered subdivision development in rural areas.

The EIR explained, however, that the assumption in both the update and the EIR that future growth would largely occur in county planning areas was based on a historic development patterns within the county. High Sierra contended the update would invite small subdivisions that would create "rural sprawl" outside of the designated planning areas. The court held, however, that it was not enough for High Sierra to argue that policies in the update might be interpreted to allow such development; it had to demonstrate the county erred in relying on the evidence indicating only limited growth would occur outside the planning areas in the reasonably foreseeable future. That evidence included population forecasts, historic land use data, and the development standards in the update itself. Indeed, population forecasts indicated the county's population was actually expected to decrease, and this reasonably foreseeable lack of demand for new housing supported the EIR's conclusions. Relying on the fundamental rule that an EIR is required to study only reasonably foreseeable consequences of a proposed project, and need not examine an unlikely worst-case scenario, the court held that the EIR was legally adequate.

D. SUPPLEMENTAL ENVIRONMENTAL REVIEW

1. EIR Addendum Process Upheld Against Facial Challenge

Save Our Heritage Organisation v. City of San Diego
(2018) 28 CA 5th 656 (4th Dist.)

The court rejected a facial challenge to the EIR addendum process and held that an agency is not required to make new findings in connection with approval of an EIR addendum.

Background

In 2012, the City of San Diego certified an EIR and approved a project to revitalize Balboa Park, a large urban park in the city. The project involved restricting vehicles from entering many of the central roadways and plazas, building a new road to bypass the car-free areas, and constructing an underground parking structure. Four years later, the city approved minor modifications to the project to account for changed conditions at the project site after the initial project approval, comply with current building and stormwater standards, accelerate the project construction schedule, and reduce project costs. The city adopted an addendum to the EIR, which concluded that a subsequent or supplemental EIR was not required.

Facial Challenge to Addendum Process Rejected

The petitioner claimed the addendum process described in the CEQA Guidelines conflicts with CEQA's public review requirements and is not expressly authorized by the statute. The court rejected both claims.

The court began its analysis by noting that the addendum guideline implements CEQA section 21166, which sets forth conditions under which project changes, changed circumstances, or new information requires the agency to prepare a subsequent EIR. The court explained: "the addendum process fills a gap in CEQA for projects with a previously certified EIR requiring revisions that do not warrant the preparation of subsequent EIRs. CEQA authorizes the Resources Agency to fill such gaps in the statutory scheme, so long as it does so in a manner consistent with the statute." The court determined that the addendum process is consistent with and furthers the objectives of CEQA "by requiring an agency to substantiate its reasons for determining why project revisions do not necessitate further environmental review."

The court also held that the absence of a public review process for addenda was not inconsistent with CEQA. Rather, it reflected the nature of an addendum as a document describing project revisions too insubstantial to require subsequent environmental review. Finally, the court noted that the Legislature's failure to modify CEQA to eliminate the addendum process in 35 years was a strong indication that it was consistent with legislative intent.

New Findings on Project's Significant Impacts Not Required

The petitioner also argued that the city was required to make new findings on the project's significant impacts when it approved the addendum. The court rejected this argument as well. The court held that nothing in the statute or Guidelines required new findings when an agency approves changes to a project based on an addendum. The court explained that the purpose of findings is to address new significant effects, but an addendum is proper only where there are no new significant effects; thus, no purpose would be served by requiring new findings to address the same significant effects that had already been addressed when the project was first approved.

E. CERTIFIED REGULATORY PROGRAMS

1. Air Resources Board's Regulatory Relief for Small Truck Fleets Violated CEQA

John R. Lawson Rock & Oil, Inc. v. State Air Resources Board
(2018) 20 CA 5th 77 (5th Dist.)

A court of appeal has held that the California Air Resources Board violated CEQA when it issued a "regulatory advisory" notifying small trucking operations that they need not meet ARB's regulatory deadline for retrofitting their truck engines and that the regulation would soon be relaxed. The court rejected ARB's argument that it did not need to prepare the equivalent of an environmental impact report before issuing the regulatory advisory.

In 2008, ARB adopted its Truck and Bus Regulation, requiring retrofits or upgrades to large diesel vehicles so that their air pollutant emissions would not exceed those of model year 2010 or newer trucks. January 1, 2014, was to be the deadline for small fleets to bring at least one of their trucks into compliance. By October 2013, the vast majority of the 260,000 California-registered trucks were in compliance; of those that still needed retrofits, most were in small fleets.

In November 2013, ARB decided to ease the rules applicable to small fleets, issuing a "regulatory advisory" that it would take no enforcement action against noncompliant truck operators before July 1, 2014, and that operators could rely on five regulatory changes ARB planned to adopt in 2014 that would make the Truck and Bus Regulation more lenient.

In 2014, ARB approved the revised regulations without preparing an EIR-equivalent CEQA document under its certified regulatory program. ARB reasoned: "The amendments only change the mid-term timing of clean-up of the truck fleet and, therefore, do not result in any increase in emissions compared to existing environmental conditions." A truck operator that had complied with the regulation on time sued, alleging ARB had violated CEQA and the Administrative Procedures Act.

Citing the California Supreme Court's decision in *Save Tara v. City of West Hollywood*, the court held that ARB violated CEQA when it approved the regulatory advisory in 2013, because it had publicly announced that the regulation would be changed and that its existing terms would not be enforced. In so doing, ARB significantly furthered its proposed 2014 regulatory changes in a manner that foreclosed alternatives or mitigation measures, including the alternative of not going forward with the project. Accordingly, CEQA compliance was required at that point.

The court ruled that that ARB was required to prepare the equivalent of an EIR for its relaxation of the Truck and Bus Regulation, based on the difference between future conditions with and without its proposed regulatory change. The court cited CEQA's requirement that a lead agency discuss any inconsistencies between the proposed project and applicable plans, including the State Implementation Plan for air pollutant reductions and the state's plans for reductions in greenhouse gas emissions. Because there was a fair argument that ARB's action would conflict with these plans, at least in the short- to medium-term, an EIR-equivalent document was required.

The decision in *Lawson* demonstrates both the difficulties that ARB faces in conforming its regulatory decision-making to the demands of CEQA and the heightened attention that courts pay to air quality and greenhouse gas impacts.

F. CEQA LITIGATION

1. Attorneys' Fees Can Be Awarded to CEQA Litigants Hoping to Preserve Their Home Values

Heron Bay Homeowners Association v. City of San Leandro
(2018) 19 CA 5th 376 (5th Dist.)

Successful petitioners under CEQA who are motivated to file suit, in part, by their private financial interests are not necessarily ineligible for an award of attorneys' fees under the public interest fee statute.

Halus Power Systems sought approval from the City of San Leandro for a zoning variance to construct a 100-foot-tall wind turbine on a five-acre industrial parcel. The property is located in the San Francisco Bay Estuary, where many species of waterfowl and shorebirds, including four threatened or endangered species, reside. The property is also roughly 500 feet from the 629-unit Heron Bay residential development. The city approved the construction of the turbine based on a mitigated negative declaration, finding that the significant environmental effects of the project could be reduced to insignificance through 11 mitigation measures.

The Heron Bay Homeowners Association filed suit under CEQA, asserting that the city needed to prepare an EIR for the project. The trial court rejected the mitigated negative declaration, finding a fair argument that the project as mitigated would still have a significant effect on biological and aesthetic resources and noise. It entered judgment in favor of the HOA and directed the city to set aside its approvals and halt any further action on the project until an EIR was certified. Halus Power and the city did not appeal the decision, and Halus Power ultimately abandoned the project.

Heron Bay HOA then requested an award of attorneys' fees under California Code of Civil Procedure section 1021.5, which authorizes an award of attorneys' fees to the prevailing party in a case that enforces an important right affecting the public interest. The trial court awarded the HOA only part of the fees it sought, finding that the HOA "had a significant financial incentive to initiate the litigation." The court found that the HOA members had brought the suit in part because they feared the turbine would cause their property values to decrease. But it also found that they were also motivated by "non-pecuniary" concerns for the project's impact on wildlife, aesthetics, health, and noise levels. As a result, the court apportioned financial responsibility for their attorneys' fees during the administrative proceedings entirely to the HOA, but because of the "different risks and much larger financial commitment" of CEQA litigation, it divided equally the responsibility for the fees the HOA incurred for the litigation between the HOA on one side, and the city and Halus Power on the other.

Halus Power and the city appealed the award of attorneys' fees, arguing that a fee award was not appropriate because the value of the benefit to the members of the HOA (i.e., maintenance of their property values) far exceeded the financial burden of litigation.

The court of appeal disagreed. It found that any financial benefit to the homeowners was speculative since the litigation was not certain to prevent construction of the turbine or even change the project, and preservation of property values was not immediately or certainly "bankable." And while the exact

amount of personal benefit to the HOA members was uncertain, the fees could nevertheless be apportioned because the record supported an implied finding that the HOA's motivation to litigate was not purely financial self-interest. Thus, the court of appeal ruled, the trial court's apportionment and partial award of attorneys' fees was not an abuse of discretion.

The court of appeal affirmed the trial court's award to the Heron Bay HOA of a little over $181,000 in attorneys' fees for the CEQA litigation, which was less than half the amount that the HOA had requested. The court also awarded the HOA its attorneys' fees for successfully defending the appeal.

This decision exemplifies the rule that trial courts have considerable discretion in awarding and apportioning attorneys' fees under section 1021.5 based on the particular facts of each case. More importantly, it makes it crystal clear that CEQA plaintiffs that might avoid a decrease in their property values by successfully challenging a project are not cut off from recovering attorneys' fees under section 1021.5.

2. An Agency Can Take Over Preparation of the Record When a Petitioner that Elects to Prepare the Record Unreasonably Delays Preparing It

Landwatch San Luis Obispo County v. Cambria Community Services District
(2018) 25 CA 5th 638 (2nd Dist.)

In a case brought under CEQA to challenge an agency determination or other action, the petitioner may elect to prepare the administrative record, subject to the agency's certification of its accuracy. The petitioner here filed an action challenging an exemption determination by the community services district for an emergency water supply project and notified the district it would prepare the record.

It took the petitioner nine months to provide the district with a draft administrative record index. The district notified the petitioner that a key document had been omitted and other documents should have been excluded because they postdated the approval. The district also notified the petitioner that in order to expedite the process, it had prepared a new index and would immediately certify the record based on that index.

Subsequently, at the petitioner's request, the court ordered that the record be augmented with additional documents and included in an appendix to the administrative record that the district had certified. After the petitioner failed to assemble the appendix, the district prepared the appendix itself.

Ultimately, the trial court denied the petition, finding that the district had properly determined the project was exempt from CEQA. The court awarded the district $21,160 in costs for preparation of the record and the supplemental appendix.

On appeal, the petitioner objected that the cost award was improper because it had elected to prepare the record. Noting CEQA's 60-day time limit for preparation of the record, the court of appeal ruled that the petitioner had unreasonably delayed preparation of the record. As a result, the petitioner had forfeited its right to prepare the record, and it was appropriate for the district to step in and prepare the record itself.

3. City Approval of Agreement for Tree Removal Triggered 90-Day Statute of Limitations Under Planning and Zoning Law

Save Lafayette Trees v. City of Lafayette
(2018) 28 CA 5th 622 (1st Dist.)

Broadly construing Government Code section 65009, which establishes a 90-day limitations period for claims under the Planning and Zoning Law, an appellate court held that approval of an agreement allowing removal of trees constituted a "decision regarding a permit," triggering the 90-day filing deadline.

The City of Lafayette entered into an agreement with PG&E allowing removal of approximately 270 trees within a natural gas pipeline right-of-way. Petitioners sued, contending that the agreement had been approved in violation of the Planning and Zoning Law and CEQA. The trial court dismissed the complaint on the ground that it had not been filed and served within the 90-day limitations period under section 65009.

Government Code section 65009 provides that an action challenging "any decision" regarding "permits, when the zoning ordinance provides therefor" must be filed and served within 90 days of the decision. On appeal, petitioners argued that section 65009 was inapplicable because the city entered into an agreement allowing tree removal and did not issue any permits. The appellate court disagreed, finding "no meaningful difference between the two in this instance." It noted that the staff report to the City Council regarding the agreement expressly referred to the project as a "major tree removal project" that required a permit under the municipal code. Approval of the agreement allowing removal of the trees, the court said, was properly considered to be a decision regarding a permit subject to section 65009.

Petitioners also argued that their action was subject to a longer, 180-day statute of limitations in the City's municipal code governing challenges to decisions of the City Council. The court concluded that this provision was preempted by section 65009 because it expressly conflicted with the statute's 90-day period. In dicta, the court noted that most local statutes of limitations regarding challenges to planning and Planning and Zoning Law decisions had likely been preempted by the enactment of section 65009.

The court also found, however, that petitioners' CEQA challenge was subject to the 180-day limitations period under the Public Resources Code, not the 90-day period under section 65009. Concluding that the two statutes could not be reconciled because they established different deadlines, the court held that the CEQA limitations period, as the more specific, controlled.

Note: On November 26, the court of appeal granted a request for rehearing filed by PG&E.

4. A Decision that Resolves All Claims Alleged in a Petition on the Merits Is an Appealable Final Judgment Even Though It Is Not Labeled as a Judgment

Alliance of Concerned Citizens Organized for Responsible Development v. City of San Juan Bautista
(2018) 29 Cal. App. 5th 424 (6th Dist.)

Plaintiff filed a petition for a writ of mandate challenging the city's approval of a mitigated negative declaration for a gas station, convenience store, and quick-serve restaurant. After hearing the case, the trial court issued a decision labeled "Peremptory Writ of Mandate of Interlocutory Remand for Reconsideration of Potential Noise Impacts." That decision required the city to set aside its approvals, and reconsider the significance of the project's potential noise impacts, before taking further action on the project. The plaintiff did not appeal from that decision.

In response, the city set aside its prior approvals, conducted a new noise analysis, adopted a new MND, and reapproved the project. The city then filed a return with the court describing the steps it had taken to comply with the peremptory writ of mandate. The court found the city had complied, and issued a decision labeled as "Final Judgment on Petition for Writ of Mandamus." The petitioner then filed an appeal from that decision.

The court of appeal found that the trial court's initial decision disposed of all issues raised in the petition, and the substance and effect of that decision was that it was a final judgment for purposes of appeal. Even though that decision contained language stating it was not to be construed as the final judgment, its self-description was not determinative. A decision or order that does not leave any issues for further consideration except for whether its terms have been complied with is an appealable final judgment, regardless of the label that is applied to it.

Because the court's initial decision was an appealable final judgment, the plaintiff forfeited appellate review of the trial court's determinations by failing to file a timely appeal. Therefore, the court concluded that the plaintiff's appeal from the court's subsequent decision that the city had complied with the trial court's peremptory writ of mandate was limited to the question whether the trial court had erred in finding that the city had complied.

In an unpublished portion of the opinion, the court of appeal found that the plaintiff failed to satisfy its burden to prove that the new MND the city adopted failed to comply with CEQA.

5. CEQA Challenge to Development Proposal Barred by Doctrine of Res Judicata

Inland Oversight Committee v. City of San Bernardino
(2018) 27 CA 5th 771 (4th Dist.)

Plaintiffs were barred from relitigating a CEQA challenge to modifications to a development proposal because the same claims had been raised and rejected in an earlier lawsuit.

The Development Proposal and Prior Litigation

In 1982, the City of San Bernardino approved a specific plan and certified an environmental impact report for a proposed residential development. Three years later, the city amended the specific plan to allow for the construction of low- and moderate-income multi-family units where single-family units had been originally planned. The Highland Hills Homeowners Association filed suit challenging that change.

The HOA lawsuit resulted in a settlement agreement that, for over a decade, continued to evolve as development plans changed. A 2001 second addendum to the settlement (court-approved as a stipulated judgment) introduced a new application process to facilitate approval of future "minor modifications" to the project.

In 2014, the developer applied for approval of modified construction plans as minor modifications. The city's development director agreed that the changes were minor and approved them. At the request of the developer and the city, the trial court that had overseen the settlement agreement agreed that the proposed modifications were "minor" and therefore further action under CEQA was not required. The HOA appealed, and the court of appeal upheld the trial court order.

Plaintiffs Barred from Relitigating CEQA Claims

While the appeal of the HOA lawsuit was pending, the HOA, along with two other organizations, filed a separate suit alleging that the city's approval of the proposed changes under the minor modifications process was "illegal." They claimed that changes to the construction plans required further CEQA review in light of their environmental impacts. They also alleged that the modifications should not have been approved without preparation of a water supply assessment. The trial court dismissed the suit, and the appeals court upheld the dismissal.

The court explained that, in the CEQA context, "if two actions involve the 'same general subject matter,' but 'involve distinct episodes of purported noncompliance,' the doctrine of res judicata does not apply." The HOA's contention that the city violated CEQA by approving the development as a minor modification had, however, been addressed in the earlier lawsuit. The court there had rejected the HOA's arguments regarding each of the purported significant adverse environmental impacts that were alleged.

The court also held that the plaintiffs' allegation that preparation of a water supply assessment was required for the modified development proposal rested on the premise that the modifications constitute a discretionary project requiring further CEQA review. The court in the first case had, however, determined that supplemental CEQA review was not required for the modification, and plaintiffs were barred from relitigating that finding.

TAB 6

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

Analysis: 2018 CEQA Guidelines Updates

After a five-year process, on December 28, 2018, the Office of Administrative Law approved the Natural Resource Agency's updates to the CEQA Guidelines, which represent the first comprehensive overhaul of the Guidelines since 1997. The Guidelines also implement 2013's Senate Bill 743 by replacing automobile delay with vehicle miles traveled as the measure of a project's transportation impacts under CEQA. The revised Guidelines, with revision marks, along with explanations, public comments, and the Technical Advisory on Evaluating Transportation Impacts, are available at http://opr.ca.gov/ceqa/updates/guidelines/.

The revised CEQA Guidelines operate prospectively only; they do not formally apply to projects that began environmental review prior to the effective date. Nevertheless, some lead agencies and project opponents began to rely on the reasoning of many of the revisions prior to the state's final approval.

Overall, the revisions substantially improve the CEQA Guidelines by making them more consistent with recent CEQA statutory and case law, and reducing time-wasting redundancies (as well as traps for the unwary) that plague practitioners who relied on the previous version of the Guidelines. However, a few of the revised Guidelines are confusing, appear not to accurately reflect case law, or both. Key updates relevant to a broad range of projects include:

- **Using Regulatory Standards in CEQA.** The 2018 Guidelines add section 15064.7 and amend section 15064(b)(2), in a stated effort to support lead agencies' use of regulatory standards adopted for environmental protection as CEQA thresholds of significance. The proposed amendments could, however, make the use of such standards more difficult by imposing new limits on a lead agency's use of them. For example, section 15064.7 states: "In adopting or using an environmental standard as a threshold of significance, a public agency shall explain how the particular requirements of that environmental standard avoid project impacts, including cumulative impacts, to a level that is less than significant, and why the environmental standard is relevant to the analysis of the project under consideration." In addition, the new Guideline limits the types of regulatory standards that can be adopted as significance thresholds by public agencies. None of these requirements previously existed. In addition, section 15064(b)(2) notes that even with this additional effort, "Compliance with the threshold does not relieve a lead agency of the obligation to consider substantial evidence indicating that the project's environmental effects may still be significant." Accordingly, these revisions will likely make CEQA compliance more, rather than less, difficult and cumbersome.

- **"Within the Scope" of a Program EIR.** Guidelines section 15168 describes how a program EIR may be used for later activities that are "within the scope" of the program. The 2018 revisions add a non-exclusive list of factors that may assist a lead agency in determining whether a later activity is within the scope of the program, *i.e.*, whether the later activity is consistent with the program EIR's descriptions of allowable land uses overall planned density and building intensity, the geographic area analyzed for potential impacts, and covered infrastructure.

- **Clarifying Rules on Tiering.** Guidelines section 15152, governing "tiering" of environmental review, was adopted before many other provisions for CEQA streamlining, and imposes numerous technical requirements. The 2018 amendments clarify: "Where multiple methods may apply, lead agencies have discretion regarding which to use." This revision should help eliminate arguments that all CEQA "tiering" must be performed in compliance with section 15152.

- **Using the Existing Facilities Exemption.** One of the revisions to the "existing facilities" categorical exemption of Guidelines section 15301 could affect many projects. Section 15301 previously stated that the exemption was limited to projects "involving negligible or no expansion of use *beyond that existing at the time of the lead agency's determination*." It had been argued that this text made the exemption inapplicable to, for example, reuse of a building that happened to be vacant at the time of the lead agency's determination. The revision clarifies that the exemption applies to projects "involving negligible or no expansion of *existing or former use*," bringing the existing facilities exemption in line with CEQA case law governing baseline environmental conditions.

- **Updating the Environmental Checklist.** The 2018 amendments update the Appendix G Environmental Checklist to delete redundant questions, to focus more closely on environmental impacts as opposed to planning considerations, and to reflect recent legislation and case law. However, the Environmental Checklist provides no legal safe harbor to public agencies, and a court could find an agency has erred by ignoring or inadequately considering an impact that appears nowhere on the Checklist. In addition, as discussed below, the Environmental Checklist updates do not clearly implement the California Supreme Court decision in *CBIA v. BAAQMD,* which held that impacts of the environment on a project's future users or residents is not generally a CEQA concern.

- **Remedies and Remand.** The 2018 Guidelines add a new section 15234 to clarify potential remedies that a court may impose when it determines that a public agency has not complied with CEQA and that noncompliance constitutes a prejudicial abuse of discretion. The court need not necessarily order the agency to void the entire project approval and suspend all project activities. Instead, the court may allow project activities to proceed that are severable; will not prejudice the agency's compliance with CEQA as described in the court's writ of mandate; and complied with CEQA.

  In addition, the CEQA document the agency prepares to remedy its CEQA violation may include only those topics as to which the court found a violation: "In general, the agency need not expand the scope of analysis on remand beyond that specified by the court." As noted in the Natural Resources Agency's Statement of Reasons (page 59), however, a CEQA document judicially ordered to address only specified topics may also need to include other topics if circumstances have changed as to those topics with the passage of time, so that the project would result in substantially more severe impacts with respect to those additional topics.

- **Analysis of Energy Impacts.** Revised Guidelines section 15126.2 implements CEQA section 21100(b)(3), which requires EIRs to include "measures to reduce the wasteful, inefficient, and unnecessary consumption of energy." New subsection (b) provides: "If analysis of the project's energy use reveals that the project may result in significant environmental effects due to wasteful, inefficient, or unnecessary use of energy, or wasteful use of energy resources, the EIR shall mitigate that energy use. This analysis should include the project's energy use for all project phases and components, including transportation-related energy, during construction and operation. In addition to building code compliance, other relevant considerations may include, among others, the project's size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project…. This analysis is subject to the rule of reason and shall focus on energy use that is caused by the project[1]…." These revisions bring the Guidelines into conformity with recent case law on energy impacts.

- **Analyzing Transportation Impacts.** The 2018 Guidelines implement SB 743 by adding new section 15064.3, which among other provisions:

    - Identifies vehicle miles traveled as the most appropriate measure of transportation impacts, and provides that except for roadway capacity projects, "a project's effect on automobile delay shall not constitute a significant environmental impact"

    - Provides that land use projects within one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor should be presumed to cause a less than significant transportation impact, as should projects that decrease vehicle miles traveled in the project area

    - Provides that "projects that decrease vehicle miles traveled in the project area compared to existing conditions should be presumed to have a less than significant transportation impact"

    - Leaves discretion with the lead agency regarding the appropriate measure of transportation impact for roadway capacity projects

    - Allows qualitative analysis if existing models or methods are not available to estimate the VMT for a particular project, and acknowledges that for many projects, "a qualitative analysis of construction traffic may be appropriate"

    - Leaves discretion with the lead agency regarding the most appropriate methodology to evaluate VMT, "including whether to express the change in absolute terms, per capita, per household, or in any other measure"

  Much of the information practitioners will need to implement SB 743 and section 15064.3 is provided in the separate, non-regulatory Technical Advisory.

[1] The Resources Agency explains that this sentence "signals that a full 'lifecycle' analysis that would account for energy used in building materials and consumer products will generally not be required."

- **Analyzing Impacts from Greenhouse Gas Emissions.** The 2018 Guidelines amend section 15064.4, governing analysis of impacts from GHG emissions, in the following respects, among others, to clarify that the lead agency's analysis:

    - Should focus on a project's incremental contribution to climate change, consider a timeframe that is appropriate for the project and reasonably reflect evolving scientific knowledge and state regulatory schemes

    - May consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change

    - May use a model or methodology to estimate GHG emissions, so long as it supports its selection of the model or methodology with substantial evidence; the agency should also explain the limitations of the model or methodology it selects

- **Consideration of Significant Effects and Hazards.** In *CBIA v. BAAQMD*, the California Supreme Court held that "agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents," while making an exception to this rule "when a proposed project risks exacerbating those environmental hazards or conditions that already exist"; in this circumstance, the agency "must analyze the potential impact of such hazards on future residents or users." OPR's revisions to the CEQA Checklist do not appear to fully implement the Supreme Court's decision; the proposed revisions do not remove or revise all questions that could be read to suggest that a significant CEQA impact can be created simply by bringing people to an existing hazard. In addition, although the text of the proposed changes to section 15126(a) can be read to be consistent with *CBIA v. BAAQMD* and subsequent cases, portions of the Resource Agency's explanatory text are ambiguous. In interpreting and applying the revised section 15126(a) and the CEQA Checklist, practitioners should rely directly on case law rather than on the Resource Agency's explanation.

- **Baseline**. The 2018 Guidelines amend section 15125 to incorporate recent case law regarding baselines for environmental review, and particularly the California Supreme Court decisions in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* and *Communities for a Better Environment v. South Coast Air Quality Management District.* Under these cases, and now under section 15125, a lead agency may select a baseline, based on substantial evidence, of:

- Existing conditions, defined as

    - Conditions existing at the time environmental review begins;

    - Where conditions fluctuate, historic conditions; or

- Where conditions fluctuate, conditions anticipated when project operations are expected to begin.

Or

- Both existing conditions plus "future" conditions, i.e., conditions projected for a date later than when project operations are expected to begin

However, a lead agency "may use projected future conditions (beyond the date of project operations) baseline as the *sole* baseline for analysis only if it demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public. Use of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record." Guidelines section 15125(a)(2).

Finally, a lead agency shall not use "hypothetical conditions, such as those that might be allowed, but have never actually occurred, as the baseline."

- **Other Amendments.** The 2018 Guidelines include numerous other substantive changes and procedural improvements. Some of these are:

  - Updating the Water Supply Analysis discussion in section 15155 to reflect the California Supreme Court decision in *Vineyard Area Citizens for Responsible Growth City of Rancho Cordova*

  - Updating section 15126.4 to reflect recent case law on deferral of the details of mitigation measures

  - Updating sections 15087 and 15088 to reflect recent case law on a lead agency's limited obligation to respond to public comments that are general and/or that cite voluminous documents without explaining their relevance

  - Amending sections 15072 and 15087 to clarify that lead agencies need not make available for public review every document "referenced" in a negative declaration or EIR, but rather must make available any document that is "incorporated by reference"

  - Bringing section 15082 into compliance with CEQA section 21092.3, which requires Notices of Preparation of EIRs to be filed with the county clerk of each county in which the project will be located. Section 15082 did not mention this statutory requirement and practitioners who relied entirely on the CEQA Guidelines could easily miss it

  - Clarifying the definition of "discretionary project" in section15357 to add: "The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project."

  - Amending section 15370 to state that permanent protection of off-site resources through conservation easements constitutes mitigation under CEQA.

Sections Amended: 15004, 15051, 15061, 15062, 15063, 15064, 15064.4, 15064.7, 15072, 15075, 15082, 15086, 15087, 15088, 15094, 15107, 15124, 15125, 15126.2, 15126.4, 15152, 15155, 15168, 15182, 15222, 15269, 15301, 15357, 15370, Appendix G, Appendix M and Appendix N.

Sections Added: 15064.3 and 15234

Sections Repealed: None

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 1. General

§ 15004. Time of Preparation.

(a) Before granting any approval of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR or negative declaration or another document authorized by these guidelines to be used in the place of an EIR or negative declaration. See the definition of "approval" in Section 15352.

(b) Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.

(1) With public projects, at the earliest feasible time, project sponsors shall incorporate environmental considerations into project conceptualization, design, and planning. CEQA compliance should be completed prior to acquisition of a site for a public project.

(2) To implement the above principles, public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. For example, agencies shall not:

(A) Formally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities**,** except that agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance.

(B) Otherwise take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.

(3) With private projects, the Lead Agency shall encourage the project proponent to incorporate environmental considerations into project conceptualization, design, and planning at the earliest feasible time.

(4) While mere interest in, or inclination to support, a project does not constitute approval, a public agency entering into preliminary agreements regarding a project prior to approval shall not, as a practical matter, commit the agency to the project. For example, an agency shall not grant any vested development entitlements prior to compliance with CEQA. Further, any such pre-approval agreement should, for example:

(A) Condition the agreement on compliance with CEQA;

(B) Not bind any party, or commit to any definite course of action, prior to CEQA compliance;

(C) Not restrict the lead agency from considering any feasible mitigation measures and alternatives, including the "no project" alternative; and

(D) Not restrict the lead agency from denying the project.

(c) The environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively. When the lead agency is a state agency, the environmental document shall be included as part of the regular project report if such a report is used in its existing review and budgetary process.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21003, 21061 and 21105, Public Resources Code; Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal. 3d 247; Mount Sutro Defense Committee v. Regents of the University of California, (1978) 77 Cal. App. 3d 20**; and *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116**.

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 4. Lead Agency

§ 15051. Criteria for Identifying the Lead Agency.

Where two or more public agencies will be involved with a project, the determination of which agency will be the lead agency shall be governed by the following criteria:

(a) If the project will be carried out by a public agency, that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency.

(b) If the project is to be carried out by a nongovernmental person or entity, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.

(1) The lead agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project.

(2) Where a city prezones an area, the city will be the appropriate lead agency for any subsequent annexation of the area and should prepare the appropriate environmental document at the time of the prezoning. The local agency formation commission shall act as a responsible agency.

(c) Where more than one public agency equally meet the criteria in subdivision (b), the agency which will act first on the project in question **will normally** ~~**shall**~~ be the lead agency.

(d) Where the provisions of subdivisions (a), (b), and (c) leave two or more public agencies with a substantial claim to be the lead agency, the public agencies may by agreement designate an agency as the lead agency. An agreement may also provide for cooperative efforts by two or more agencies by contract, joint exercise of powers, or similar devices.

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section 21165, Public Resources Code.

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 5. Preliminary Review of Projects and Conduct of Initial Study

§ 15061. Review for Exemption.

(a) Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA.

(b) A project is exempt from CEQA if:

(1) The project is exempt by statute (see, e.g. Article 18, commencing with Section 15260).

(2) The project is exempt pursuant to a categorical exemption (see Article 19, commencing with Section 15300) and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2.

(3) The activity is covered by the ~~**general rule**~~ **common sense exemption** that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

(4) The project will be rejected or disapproved by a public agency. (See Section 15270(b)).

(5) The project is exempt pursuant to the provisions of Article 12.5 of this Chapter.

[…subdivisions (c) through (e)…]

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21080~~(b)~~, 21080.9, 21080.10, 21084, 21108~~(b)~~, 21151, 21152~~(b)~~ and 21159.21, Public Resources Code; **Muzzy Ranch Co. v. Solano County Airport Land Use Commission (2007) 41 Cal. 4th 372,** No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68.

§ 15062. Notice of Exemption.

(a) When a public agency decides that a project is exempt from CEQA pursuant to Section 15061, and the public agency approves or determines to carry out the project, the agency may, file a notice of exemption. The notice shall be filed, if at all, after approval of the project. Such a notice shall include:

(1) A brief description of the project,

(2) The location of the project (either by street address and cross street for a project in an urbanized area or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 7-1/2' topographical map identified by quadrangle name),

(3) A finding that the project is exempt from CEQA, including a citation to the State Guidelines section or statute under which it is found to be exempt,

(4) A brief statement of reasons to support the finding, and

(5) The applicant's name, if any.

(6) If different from the applicant, the identity of the person undertaking the project which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies or the identity of the person receiving a lease, permit, license, certificate, or other entitlement for use from one or more public agencies.

(b) A notice of exemption may be filled out and may accompany the project application through the approval process. The notice shall not be filed, with the county clerk or OPR until the project has been approved.

(c) When a public agency approves an applicant's project, either the agency or the applicant may file a notice of exemption.

(1) When a state agency files this notice, the notice of exemption shall be filed with the Office of Planning and Research. A form for this notice is provided in Appendix E (~~Revised **2011**~~). A list of all such notices shall be posted on a weekly basis at the Office of Planning and Research, 1400 Tenth Street, Sacramento, California. The list shall remain posted for at least 30 days. The Office of Planning and Research shall retain each notice for not less than 12 months.

(2) When a local agency files this notice, the notice of exemption shall be filed with the county clerk of each county in which the project will be located. Copies of all such notices will be available for public inspection and such notices shall be posted within 24 hours of receipt in the office of the county clerk. Each notice shall remain posted for a period of 30 days. Thereafter, the clerk shall return the notice to the local agency with a notation of the period it was posted. The local agency shall retain the notice for not less than 12 months.

(3) All public agencies are encouraged to make postings pursuant to this section available in electronic format on the Internet. Such electronic postings are in addition to the procedures required by these guidelines and the Public Resources Code.

(4) When an applicant files this notice, special rules apply.

(A) The notice filed by an applicant is filed in the same place as if it were filed by the agency granting the permit. If the permit was granted by a state agency, the notice is filed with the Office of Planning and Research. If the permit was granted by a local agency, the notice is filed with the county clerk of the county or counties in which the project will be located.

(B) The notice of exemption filed by an applicant shall contain the information required in subdivision (a) together with a certified document issued by the public agency stating that the agency has found the project to be exempt. The certified document may be a certified copy of an existing document or record of the public agency.

(C) A notice filed by an applicant is subject to the same posting and time requirements as a notice filed by a public agency.

(d) The filing of a Notice of Exemption and the posting on the list of notices start a 35 day statute of limitations period on legal challenges to the agency's decision that the project is exempt from CEQA. If a Notice of Exemption is not filed, a 180 day statute of limitations will apply.

(e) When a local agency determines that a project is not subject to CEQA under sections 15193, 15194, or 15195, and it approves or determines to carry out that project, the local agency or person seeking project approval shall file a notice with OPR identifying the section under which the exemption is claimed.

Note: Authority cited: Section 21083 and 21108, Public Resources Code. Reference: Sections 21108, 21152 and 21152.1, Public Resources Code.

§ 15063. Initial Study.

(a) Following preliminary review, the lead agency shall conduct an initial study determine if the project may have a significant effect on the environment. If the lead agency can determine that an EIR will clearly be required for the project, an initial study is not required but may still be desirable.

(1) All phases of project planning, implementation, and operation must be considered in the initial study of the project.

(2) To meet the requirements of this section, the lead agency may use an environmental assessment or a similar analysis prepared pursuant to the National Environmental Policy Act.

(3) An initial study may rely upon expert opinion supported by facts, technical studies or other substantial evidence to document its findings. However, an initial study is neither intended nor required to include the level of detail included in an EIR.

(4) The lead agency may use any of the arrangements or combination of arrangements described in Section 15084(d) to prepare an initial study. The initial study sent out for public review must reflect the independent judgment of the Lead Agency.

(b) Results.

(1) If the agency determines that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial, the lead agency shall do one of the following:

(A) Prepare an EIR or

(B) Use a previously prepared EIR which the lead agency determines would adequately analyze the project at hand, or

(C) Determine, pursuant to a program EIR, tiering, or another appropriate process, which of a project's effects were adequately examined by an earlier EIR or negative declaration. Another appropriate process may include, for example, a master EIR, a master environmental assessment, approval of housing and neighborhood commercial facilities in urban areas, approval of residential projects pursuant to a specific plan as described in section 15182, approval of residential projects consistent with a community plan, general plan or zoning as described in section 15183, or an environmental document prepared under a State certified regulatory program. The lead agency shall then ascertain which effects, if any, should be analyzed in a later EIR or negative declaration.

(2) The lead agency shall prepare a negative declaration if there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment.

(c) Purposes. The purposes of an initial study are to:

(1) Provide the lead agency with information to use as the basis for deciding whether to prepare an EIR or negative declaration;

(2) Enable an applicant or lead agency to modify a project, mitigating adverse impacts before an EIR is prepared, thereby enabling the project to qualify for a negative declaration;

(3) Assist the preparation of an EIR, if one is required, by:

(A) Focusing the EIR on the effects determined to be significant,

(B) Identifying the effects determined not to be significant,

(C) Explaining the reasons for determining that potentially significant effects would not be significant, and

(D) Identifying whether a program EIR, tiering, or another appropriate process can be used for analysis of the project's environmental effects.

(4) Facilitate environmental assessment early in the design of a project;

(5) Provide documentation of the factual basis for the finding in a negative declaration that a project will not have a significant effect on the environment;

(6) Eliminate unnecessary EIRs;

(7) Determine whether a previously prepared EIR could be used with the project.

(d) Contents. An initial study shall contain in brief form:

(1) A description of the project including the location of the project;

(2) An identification of the environmental setting;

(3) An identification of environmental effects by use of a checklist, matrix, or other method, provided that entries on a checklist or other form are briefly explained to indicate that there is some evidence to support the entries. The brief explanation may be either through a narrative or a reference to another information source such as an attached map, photographs, or an earlier EIR or negative declaration. A reference to another document should include, where appropriate, a citation to the page or pages where the information is found.

(4) A discussion of ways to mitigate the significant effects identified, if any;

(5) An examination of whether the project would be consistent with existing zoning, plans, and other applicable land use controls;

(6) The name of the person or persons who prepared or participated in the initial study.

(e) Submission of Data. If the project is to be carried out by a private person or private organization, the lead agency may require such person or organization to submit data and information which will enable the lead agency to prepare the initial study. Any person may submit any information in any form to assist a lead agency in preparing an initial study.

(f) Format. Sample forms for an applicant's project description and a review form for use by the lead agency are contained in Appendices G and H. When used together, these forms would meet the requirements for an initial study, provided that the entries on the checklist are briefly explained

pursuant to subdivision (d)(3). These forms are only suggested, and public agencies are free to devise their own format for an initial study. A previously prepared EIR may also be used as the initial study for a later project.

(g) Consultation. As soon as a lead agency has determined that an initial study will be required for the project, the lead agency shall consult informally with all responsible agencies and all trustee agencies responsible for resources affected by the project to obtain the recommendations of those agencies as to whether an EIR or a negative declaration should be prepared. During or immediately after preparation of an initial study for a private project, the lead agency may consult with the applicant to determine if the applicant is willing to modify the project to reduce or avoid the significant effects identified in the initial study.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21080(c), 21080.1, 21080.3, 21082.1, 21100 and 21151, Public Resources Code; Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359, San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713, Leonoff v. Monterey County Board of Supervisors (1990) 222 Cal.App.3d 1337.

§ 15064. Determining the Significance of the Environmental Effects Caused by a Project.

(a) Determining whether a project may have a significant effect plays a critical role in the CEQA process.

(1) If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR.

(2) When a final EIR identifies one or more significant effects, the lead agency and each responsible agency shall make a finding under Section 15091 for each significant effect and may need to make a statement of overriding considerations under Section 15093 for the project.

(b) **(1)** The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.

(2) Thresholds of significance, as defined in Section 15064.7(a), may assist lead agencies in determining whether a project may cause a significant impact. When using a threshold, the lead agency should briefly explain how compliance with the threshold means that the project's impacts are less than significant. Compliance with the threshold does not relieve a lead agency of the obligation to consider substantial evidence indicating that the project's environmental effects may still be significant.

(c) In determining whether an effect will be adverse or beneficial, the lead agency shall consider the views held by members of the public in all areas affected as expressed in the whole record before the

lead agency. Before requiring the preparation of an EIR, the lead agency must still determine whether environmental change itself might be substantial.

(d) In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project.

(1) A direct physical change in the environment is a physical change in the environment which is caused by and immediately related to the project. Examples of direct physical changes in the environment are the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant.

(2) An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution.

(3) An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.

(e) Economic and social changes resulting from a project shall not be treated as significant effects on the environment. Economic or social changes may be used, however, to determine that a physical change shall be regarded as a significant effect on the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment. If the physical change causes adverse economic or social effects on people, those adverse effects may be used as a factor in determining whether the physical change is significant. For example, if a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding would be regarded as a significant effect.

(f) The decision as to whether a project may have one or more significant effects shall be based on substantial evidence in the record of the lead agency.

(1) If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR (Friends of B Street v. City of Hayward (1980) 106 Cal. App. 3d 988). Said another way, if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68).

(2) If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment but the lead agency determines that revisions in the project plans or proposals made by, or agreed to by, the applicant would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur and there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment then a mitigated negative declaration shall be prepared.

(3) If the lead agency determines there is no substantial evidence that the project may have a significant effect on the environment, the lead agency shall prepare a negative declaration (Friends of B Street v. City of Hayward (1980) 106 Cal. App. 3d 988).

(4) The existence of public controversy over the environment effects of a project will not require preparation of an EIR if there is no substantial evidence before the agency that the project may have a significant effect on the environment.

(5) Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

(6) Evidence of economic and social impacts that do not contribute to or are not caused by physical changes in the environment is not substantial evidence that the project may have a significant effect on the environment.

(7) The provisions of sections 15162, 15163, and 15164 apply when the project being analyzed is a change to, or further approval for, a project for which an EIR or negative declaration was previously certified or adopted (e.g. a tentative subdivision, conditional use permit). Under case law, the fair argument standard does not apply to determinations of significance pursuant to sections 15162, 15163, and 15164.

(g) After application of the principles set forth above in Section 15064(f), and in marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

(h)(1) When assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact is significant and whether the effects of the project are cumulatively considerable. An EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. "Cumulatively considerable" means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(2) A lead agency may determine in an initial study that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant. When a project might contribute to a significant cumulative impact, but the contribution will be rendered less than cumulatively considerable through mitigation measures set forth in a mitigated negative declaration, the initial study shall briefly indicate and explain how the contribution has been rendered less than cumulatively considerable.

(3) A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program (including, but not limited to, water quality control plan, air quality attainment or maintenance plan, integrated waste management plan, habitat conservation plan, natural community conservation plan, plans or regulations for the reduction of greenhouse gas emissions) that provides specific requirements that will avoid or substantially lessen the cumulative problem within the geographic area in which the project is located. Such plans or programs must be specified in law or adopted by the public agency with jurisdiction over the affected resources through a public review process to implement, interpret, or make specific the law enforced or administered by the public agency. When relying on a plan, regulation or program, the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project's incremental contribution to the cumulative effect is not cumulatively considerable. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.

(4) The mere existence of significant cumulative impacts caused by other projects alone shall not constitute substantial evidence that the proposed project's incremental effects are cumulatively considerable.

AUTHORITY:

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Sections 21003, 21065, 21068, 21080, 21082, 21082.1, 21082.2, 21083, 21083.05 and 21100, Public Resources Code; No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68; San Joaquin Raptor/Wildlife Center v. County of Stanislaus (1996) 42 Cal.App.4th 608; Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359; Laurel Heights Improvement Assn. v. Regents of the University of California (1993) 6 Cal.4th 1112; ~~and~~ Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98**; Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099; and Rominger v. County of Colusa (2014) 229 Cal.App.4th 690**.

***New* Section 15064.3. Determining the Significance of Transportation Impacts.**

(a) Purpose.

This section describes specific considerations for evaluating a project's transportation impacts. Generally, vehicle miles traveled is the most appropriate measure of transportation impacts. For the

purposes of this section, "vehicle miles traveled" refers to the amount and distance of automobile travel attributable to a project. Other relevant considerations may include the effects of the project on transit and non-motorized travel. Except as provided in subdivision (b)(2) below (regarding roadway capacity), a project's effect on automobile delay shall not constitute a significant environmental impact.

(b) Criteria for Analyzing Transportation Impacts.

(1) Land Use Projects. Vehicle miles traveled exceeding an applicable threshold of significance may indicate a significant impact. Generally, projects within one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor should be presumed to cause a less than significant transportation impact. Projects that decrease vehicle miles traveled in the project area compared to existing conditions should be presumed to have a less than significant transportation impact.

(2) Transportation Projects. Transportation projects that reduce, or have no impact on, vehicle miles traveled should be presumed to cause a less than significant transportation impact. For roadway capacity projects, agencies have discretion to determine the appropriate measure of transportation impact consistent with CEQA and other applicable requirements. To the extent that such impacts have already been adequately addressed at a programmatic level, such as in a regional transportation plan EIR, a lead agency may tier from that analysis as provided in Section 15152 .

(3) Qualitative Analysis. If existing models or methods are not available to estimate the vehicle miles traveled for the particular project being considered, a lead agency may analyze the project's vehicle miles traveled qualitatively. Such a qualitative analysis would evaluate factors such as the availability of transit, proximity to other destinations, etc. For many projects, a qualitative analysis of construction traffic may be appropriate.

(4) Methodology. A lead agency has discretion to choose the most appropriate methodology to evaluate a project's vehicle miles traveled, including whether to express the change in absolute terms, per capita, per household or in any other measure. A lead agency may use models to estimate a project's vehicle miles traveled, and may revise those estimates to reflect professional judgment based on substantial evidence. Any assumptions used to estimate vehicle miles traveled and any revisions to model outputs should be documented and explained in the environmental document prepared for the project. The standard of adequacy in Section 15151 shall apply to the analysis described in this section.

(c) Applicability.

The provisions of this section shall apply prospectively as described in section 15007. A lead agency may elect to be governed by the provisions of this section immediately. Beginning on July 1, 2020, the provisions of this section shall apply statewide.

Note: Authority cited: Sections 21083 and 21099, Public Resources Code. Reference: Sections 21099 and 21100, Public Resources Code; *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413; *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal. App. 4th 173.

§ 15064.4. Determining the Significance of Impacts from Greenhouse Gas Emissions.

(a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency ~~should~~ **shall** make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:

(1) ~~Use a model or methodology to q~~ **Q**uantify greenhouse gas emissions resulting from a project~~, and which model or methodology to use. The lead agency has discretion to select the model or methodology it considers most appropriate provided it supports its decision with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use~~; and/or

(2) Rely on a qualitative analysis or performance based standards.

(b) **In determining the significance of a project's greenhouse gas emissions, the lead agency should focus its analysis on the reasonably foreseeable incremental contribution of the project's emissions to the effects of climate change. A project's incremental contribution may be cumulatively considerable even if it appears relatively small compared to statewide, national or global emissions. The agency's analysis should consider a timeframe that is appropriate for the project. The agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes.** A lead agency should consider the following factors, among others, when ~~assessing~~ **determining** the significance of impacts from greenhouse gas emissions on the environment:

(1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;

(2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.

(3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions **(see, e.g., section 15183.5(b))**. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project. **In determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or**

strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulatively considerable.

(c) A lead agency may use a model or methodology to estimate greenhouse gas emissions resulting from a project. The lead agency has discretion to select the model or methodology it considers most appropriate to enable decision makers to intelligently take into account the project's incremental contribution to climate change. The lead agency must support its selection of a model or methodology with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use.

AUTHORITY:

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Sections 21001, 21002, 21003, 21065, 21068, 21080, 21082, 21082.1, 21082.2, 21083.05 and 21100, Public Resources Code; **Cleveland National Forest Foundation v. San Diego Assn. of Governments (2017) 3 Cal.5th 497; Mission Bay Alliance v. Office of Community Investment & Infrastructure (2016) 6 Cal.App.5th 160; Center for Biological Diversity v. Dept. of Fish & Wildlife (2015) 62 Cal.4th 204; Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70;** Eureka Citizens for Responsible Govt. v. City of Eureka (2007) 147 Cal.App.4th 357; Mejia v. City of Los Angeles (2005) 130 Cal.App.4th 322; Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099; Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98; Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm. (2001) 91 Cal.App.4th 1344; and City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868.

§ 15064.7. Thresholds of Significance.

(a) ~~**Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects.**~~ A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.

(b) **Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects.** Thresholds of significance to be adopted for general use as part of the lead agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence. **Lead agencies may also use thresholds on a case-by-case basis as provided in Section 15064(b)(2).**

(c) When adopting **or using** thresholds of significance, a lead agency may consider thresholds of significance previously adopted or recommended by other public agencies or recommended by experts, provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence.

(d) Using environmental standards as thresholds of significance promotes consistency in significance determinations and integrates environmental review with other environmental program planning and regulation. Any public agency may adopt or use an environmental standard as a threshold of significance. In adopting or using an environmental standard as a threshold of significance, a public agency shall explain how the particular requirements of that environmental standard reduce project impacts, including cumulative impacts, to a level that is less than significant, and why the environmental standard is relevant to the analysis of the project under consideration. For the purposes of this subdivision, an "environmental standard" is a rule of general application that is adopted by a public agency through a public review process and that is all of the following:

(1) a quantitative, qualitative or performance requirement found in an ordinance, resolution, rule, regulation, order, plan or other environmental requirement;

(2) adopted for the purpose of environmental protection;

(3) addresses the environmental effect caused by the project; and,

(4) applies to the project under review.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21000, 21082 and 21083, Public Resources Code**; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099**.

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 6. Negative Declaration Process

§ 15072. Notice of Intent to Adopt a Negative Declaration or Mitigated Negative Declaration.

(a) A lead agency shall provide a notice of intent to adopt a negative declaration or mitigated negative declaration to the public, responsible agencies, trustee agencies, and the county clerk of each county within which the proposed project is located, sufficiently prior to adoption by the lead agency of the negative declaration or mitigated negative declaration to allow the public and agencies the review period provided under Section 15105.

(b) The lead agency shall mail a notice of intent to adopt a negative declaration or mitigated negative declaration to the last known name and address of all organizations and individuals who have previously requested such notice in writing and shall also give notice of intent to adopt a negative declaration or mitigated negative declaration by at least one of the following procedures to allow the public the review period provided under Section 15105:

(1) Publication at least one time by the lead agency in a newspaper of general circulation in the area affected by the proposed project. If more than one area is affected, the notice shall be published in the newspaper of largest circulation from among the newspapers of general circulation in those areas.

(2) Posting of notice by the lead agency on and off site in the area where the project is to be located.

(3) Direct mailing to the owners and occupants of property contiguous to the project. Owners of such property shall be identified as shown on the latest equalized assessment roll.

(c) The alternatives for providing notice specified in subdivision (b) shall not preclude a lead agency from providing additional notice by other means if the agency so desires, nor shall the requirements of this section preclude a lead agency from providing the public notice at the same time and in the same manner as public notice required by any other laws for the project.

(d) The county clerk of each county within which the proposed project is located shall post such notices in the office of the county clerk within 24 hours of receipt for a period of at least 20 days.

(e) For a project of statewide, regional, or areawide significance, the lead agency shall also provide notice to transportation planning agencies and public agencies which have transportation facilities within their jurisdictions which could be affected by the project as specified in Section 21092.4(a) of the Public Resources Code. "Transportation facilities" includes: major local arterials and public transit within five miles of the project site and freeways, highways and rail transit service within 10 miles of the project site. **The lead agency should also consult with public transit agencies with facilities within one-half mile of the proposed project.**

(f) If the United States Department of Defense or any branch of the United States Armed Forces has given a lead agency written notification of the specific boundaries of a low-level flight path, military impact zone, or special use airspace and provided the lead agency with written notification of the military contact office and address for the military service pursuant to subdivision (b) of Section 15190.5, then the lead agency shall include the specified military contact office in the list of organizations and individuals receiving a notice of intent to adopt a negative declaration or a mitigated negative declaration pursuant to this section for projects that meet the criteria set forth in subdivision (c) of Section 15190.5. The lead agency shall send the specified military contact office such notice of intent sufficiently prior to adoption by the lead agency of the negative declaration or mitigated negative declaration to allow the military service the review period provided under Section 15105.

(g) A notice of intent to adopt a negative declaration or mitigated negative declaration shall specify the following:

(1) A brief description of the proposed project and its location.

(2) The starting and ending dates for the review period during which the lead agency will receive comments on the proposed negative declaration or mitigated negative declaration. This shall include starting and ending dates for the review period. If the review period has been is shortened pursuant to Section 15105, the notice shall include a statement to that effect.

(3) The date, time, and place of any scheduled public meetings or hearings to be held by the lead agency on the proposed project, when known to the lead agency at the time of notice.

(4) The address or addresses where copies of the proposed negative declaration or mitigated negative declaration including the revisions developed under Section 15070(b) and all documents **incorporated by reference** ~~**referenced**~~ in the proposed negative declaration or mitigated negative declaration are available for review. This location or locations shall be readily accessible to the public during the lead agency's normal working hours.

(5) The presence of the site on any of the lists enumerated under Section 65962.5 of the Government Code including, but not limited to lists of hazardous waste facilities, land designated as hazardous waste property, and hazardous waste disposal sites, and the information in the Hazardous Waste and Substances Statement required under subdivision (f) of that section.

(6) Other information specifically required by statute or regulation for a particular project or type of project.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21091, 21092, 21092.2, 21092.4, 21092.3, 21092.6, 21098 and 21151.8, Public Resources Code.

§ 15075. Notice of Determination on a Project for Which a Proposed Negative or Mitigated Negative Declaration Has Been Approved.

(a) The lead agency shall file a notice of determination within five working days after deciding to carry out or approve the project. For projects with more than one phase, the lead agency shall file a notice of determination for each phase requiring a discretionary approval.

(b) The notice of determination shall include:

(1) An identification of the project including the project title as identified on the proposed negative declaration, its location, and the State Clearinghouse identification number for the proposed negative declaration if the notice of determination is filed with the State Clearinghouse.

(2) A brief description of the project.

(3) The agency's name, the applicant's name, if any, and the date on which the agency approved the project.

(4) The determination of the agency that the project will not have a significant effect on the environment.

(5) A statement that a negative declaration or a mitigated negative declaration was adopted pursuant to the provisions of CEQA.

(6) A statement indicating whether mitigation measures were made a condition of the approval of the project, and whether a mitigation monitoring plan/program was adopted.

(7) The address where a copy of the negative declaration or mitigated negative declaration may be examined.

(8) The identity of the person undertaking a project which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies or the identity of the person receiving a lease, permit, license, certificate, or other entitlement for use from one or more public agencies.

(c) If the lead agency is a state agency, the lead agency shall file the notice of determination with the Office of Planning and Research within five working days after approval of the project by the lead agency.

(d) If the lead agency is a local agency, the local agency shall file the notice of determination with the county clerk of the county or counties in which the project will be located within five working days after approval of the project by the lead agency. If the project requires discretionary approval from any state agency, the local lead agency shall also, within five working days of this approval, file a copy of the notice of determination with the Office of Planning and Research.

(e) A notice of determination filed with the county clerk shall be available for public inspection and shall be posted by the county clerk within 24 hours of receipt for a period of at least 30 days. Thereafter, the clerk shall return the notice to the local lead agency with a notation of the period during which it was posted. The local lead agency shall retain the notice for not less than 12 months.

(f) A notice of determination filed with the Office of Planning and Research shall be available for public inspection and shall be posted for a period of at least 30 days. The Office of Planning and Research shall retain each notice for not less than 12 months.

(g) The filing of the notice of determination pursuant to subdivision (c) above for state agencies and the filing and posting of the notice of determination pursuant to subdivisions (d) and (e) above for local agencies, start a 30-day statute of limitations on court challenges to the approval under CEQA.

(h) A sample Notice of Determination ~~(**Rev. 2011**)~~ is provided in Appendix D. Each public agency may devise its own form, but the minimum content requirements of subdivision (b) above shall be met.

Public agencies are encouraged to make copies of all notices filed pursuant to this section available in electronic format on the Internet. Such electronic notices are in addition to the posting requirements of these guidelines and the Public Resources Code.

Note: Authority cited: Sections 21083 and 21152, Public Resources Code. Reference: Sections 21080~~**(c)**~~, 21108~~**(a)**~~, 21108~~**(c)**~~, 21152 and 21167~~**(b)**~~, Public Resources Code; Citizens of Lake Murray Area Association v. City Council~~,~~ (1982) 129 Cal. App. 3d 436.

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 7. EIR Process

§ 15082. Notice of Preparation and Determination of Scope of EIR.

(a) Notice of Preparation. Immediately after deciding that an environmental impact report is required for a project, the lead agency shall send **a notice of preparation stating that an environmental impact report will be prepared** to the Office of Planning and Research and each responsible and trustee agency ~~**a notice of preparation stating that an environmental impact report will be prepared**~~ **and file with the county clerk of each county in which the project will be located**. This notice shall also be sent to every federal agency involved in approving or funding the project. If the United States Department of Defense or any branch of the United States Armed Forces has given the lead agency written notification of the specific boundaries of a low-level flight path, military impact zone, or special use airspace and provided the lead agency with written notification of the military contact office and address for the military service pursuant to subdivision (b) of Section 15190.5, then the lead agency shall include the specified military contact office in the list of organizations and individuals receiving a notice of preparation of an EIR pursuant to this section for projects that meet the criteria set forth in subdivision (c) of Section 15190.5.

(1) The notice of preparation shall provide the responsible and trustee agencies**,** ~~**and**~~ the Office of Planning and Research **and county clerk** with sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response. At a minimum, the information shall include:

(A) Description of the project,

(B) Location of the project (either by street address and cross street, for a project in an urbanized area, or by attaching a specific map, preferably a copy of a U.S.G.S. 15'or 7 1/2'topographical map identified by quadrangle name), and

(C) Probable environmental effects of the project.

(2) A sample notice of preparation is shown in Appendix I. Public agencies are free to devise their own formats for this notice. A copy of the initial study may be sent with the notice to supply the necessary information.

(3) To send copies of the notice of preparation, the lead agency shall use either certified mail or any other method of transmittal that provides it with a record that the notice was received.

(4) The lead agency may begin work on the draft EIR immediately without awaiting responses to the notice of preparation. The draft EIR in preparation may need to be revised or expanded to conform to

responses to the notice of preparation. A lead agency shall not circulate a draft EIR for public review before the time period for responses to the notice of preparation has expired.

(b) Response to Notice of Preparation. Within 30 days after receiving the notice of preparation under subdivision (a), each responsible and trustee agency and the Office of Planning and Research shall provide the lead agency with specific detail about the scope and content of the environmental information related to the responsible or trustee agency's area of statutory responsibility that must be included in the draft EIR.

(1) The response at a minimum shall identify:

(A) The significant environmental issues and reasonable alternatives and mitigation measures that the responsible or trustee agency, or the Office of Planning and Research will need to have explored in the draft EIR; and

(B) Whether the agency will be a responsible agency or trustee agency for the project.

(2) If a responsible or trustee agency, or the Office of Planning and Research fails by the end of the 30-day period to provide the lead agency with either a response to the notice or a well-justified request for additional time, the lead agency may presume that none of those entities have a response to make.

(3) A generalized list of concerns not related to the specific project shall not meet the requirements of this section for a response.

(c) Meetings. In order to expedite the consultation, the lead agency, a responsible agency, a trustee agency, the Office of Planning and Research, or a project applicant may request one or more meetings between representatives of the agencies involved to assist the lead agency in determining the scope and content of the environmental information that the responsible or trustee agency may require. Such meetings shall be convened by the lead agency as soon as possible, but no later than 30 days after the meetings were requested. On request, the Office of Planning and Research will assist in convening meetings that involve state agencies.

(1) For projects of statewide, regional or areawide significance pursuant to Section 15206, the lead agency shall conduct at least one scoping meeting. A scoping meeting held pursuant to the National Environmental Policy Act, 42 USC 4321 et seq.(NEPA) in the city or county within which the project is located satisfies this requirement if the lead agency meets the notice requirements of subsection (c)(2) below.

(2) The lead agency shall provide notice of the scoping meeting to all of the following:

(A) any county or city that borders on a county or city within which the project is located, unless otherwise designated annually by agreement between the lead agency and the county or city;

(B) any responsible agency

(C) any public agency that has jurisdiction by law with respect to the project;

(D) any organization or individual who has filed a written request for the notice.

(3) A lead agency shall call at least one scoping meeting for a proposed project that may affect highways or other facilities under the jurisdiction of the Department of Transportation if the meeting is requested by the department. The lead agency shall call the scoping meeting as soon as possible but not later than 30 days after receiving the request from the Department of Transportation.

(d) The Office of Planning and Research. The Office of Planning and Research will ensure that the state responsible and trustee agencies reply to the lead agency within 30 days of receipt of the notice of preparation by the state responsible and trustee agencies.

(e) Identification Number. When the notice of preparation is submitted to the State Clearinghouse, the state identification number issued by the Clearinghouse shall be the identification number for all subsequent environmental documents on the project. The identification number should be referenced on all subsequent correspondence regarding the project, specifically on the title page of the draft and final EIR and on the notice of determination.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21083.9, 21080.4**, 21092.3** and 21098, Public Resources Code.

§ 15086.Consultation Concerning Draft EIR.

(a) The lead agency shall consult with and request comments on the draft EIR from:

(1) Responsible agencies,

(2) Trustee agencies with resources affected by the project, and

(3) Any other state, federal, and local agencies which have jurisdiction by law with respect to the project or which exercise authority over resources which may be affected by the project, including water agencies consulted pursuant to section 15083.5.

(4) Any city or county which borders on a city or county within which the project is located.

(5) For a project of statewide, regional, or areawide significance, the transportation planning agencies and public agencies which have transportation facilities within their jurisdictions which could be affected by the project. “Transportation facilities” includes: major local arterials and public transit within five miles of the project site, and freeways, highways and rail transit service within 10 miles of the project site. **The lead agency should also consult with public transit agencies with facilities within one-half mile of the proposed project.**

(6) For a state lead agency when the EIR is being prepared for a highway or freeway project, the California Air Resources Board as to the air pollution impact of the potential vehicular use of the

highway or freeway and if a non-attainment area, the local air quality management district for a determination of conformity with the air quality management plan.

(7) For a subdivision project located within one mile of a facility of the State Water Resources Development System, the California Department of Water Resources.

(b) The lead agency may consult directly with:

(1) Any person who has special expertise with respect to any environmental impact involved,

(2) Any member of the public who has filed a written request for notice with the lead agency or the clerk of the governing body.

(3) Any person identified by the applicant whom the applicant believes will be concerned with the environmental effects of the project.

(c) A responsible agency or other public agency shall only make substantive comments regarding those activities involved in the project that are within an area of expertise of the agency or which are required to be carried out or approved by the responsible agency. Those comments shall be supported by specific documentation.

(d) Prior to the close of the public review period, a responsible agency or trustee agency which has identified what that agency considers to be significant environmental effects shall advise the lead agency of those effects. As to those effects relevant to its decision, if any, on the project, the responsible or trustee agency shall either submit to the lead agency complete and detailed performance objectives for mitigation measures addressing those effects or refer the lead agency to appropriate, readily available guidelines or reference documents concerning mitigation measures. If the responsible or trustee agency is not aware of mitigation measures that address identified effects, the responsible or trustee agency shall so state.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21081.6, 21092.4, 21092.5, 21104 and 21153, Public Resources Code.

§ 15087. Public Review of Draft EIR.

(a) The lead agency shall provide public notice of the availability of a draft EIR at the same time as it sends a notice of completion to the Office of Planning and Research. If the United States Department of Defense or any branch of the United States Armed Forces has given the lead agency written notification of the specific boundaries of a low-level flight path, military impact zone, or special use airspace and provided the lead agency with written notification of the contact office and address for the military service pursuant to subdivision (b) of Section 15190.5, then the lead agency shall include the specified military contact office in the list of organizations and individuals receiving a notice of availability of a draft EIR pursuant to this section for projects that meet the criteria set forth in subdivision (c) of Section

15190.5. The public notice shall be given as provided under Section 15105 (a sample form is provided in Appendix L). Notice shall be mailed to the last known name and address of all organizations and individuals who have previously requested such notice in writing, and shall also be given by at least one of the following procedures:

(1) Publication at least one time by the public agency in a newspaper of general circulation in the area affected by the proposed project. If more than one area is affected, the notice shall be published in the newspaper of largest circulation from among the newspapers of general circulation in those areas.

(2) Posting of notice by the public agency on and off the site in the area where the project is to be located.

(3) Direct mailing to the owners and occupants of property contiguous to the parcel or parcels on which the project is located. Owners of such property shall be identified as shown on the latest equalized assessment roll.

(b) The alternatives for providing notice specified in subdivision (a) shall not preclude a public agency from providing additional notice by other means if such agency so desires, nor shall the requirements of this section preclude a public agency from providing the public notice required by this section at the same time and in the same manner as public notice otherwise required by law for the project.

(c) The notice shall disclose the following:

(1) A brief description of the proposed project and its location.

(2) The starting and ending dates for the review period during which the lead agency will receive comments**, and the manner in which the lead agency will receive those comments**. If the review period is shortened, the notice shall disclose that fact.

(3) The date, time, and place of any scheduled public meetings or hearings to be held by the lead agency on the proposed project when known to the lead agency at the time of notice.

(4) A list of the significant environmental effects anticipated as a result of the project, to the extent which such effects are known to the lead agency at the time of the notice.

(5) The address where copies of the EIR and all documents **incorporated by reference** ~~**referenced**~~ in the EIR will be available for public review. This location shall be readily accessible to the public during the lead agency's normal working hours.

(6) The presence of the site on any of the lists of sites enumerated under Section 65962.5 of the Government Code including, but not limited to lists of hazardous waste facilities, land designated as hazardous waste property, hazardous waste disposal sites and others, and the information in the Hazardous Waste and Substances Statement required under subdivision (f) of that Section.

(d) The notice required under this section shall be posted in the office of the county clerk of each county in which the project will be located for a period of at least 30 days. The county clerk shall post such notices within 24 hours of receipt.

(e) In order to provide sufficient time for public review, the review period for a draft EIR shall be as provided in Section 15105. The review period shall be combined with the consultation required under Section 15086. When a draft EIR has been submitted to the State Clearinghouse, the public review period shall be at least as long as the review period established by the State Clearinghouse. The public review period and the state agency review period may, but are not required to, begin and end at the same time. Day one of the state review period shall be the date that the State Clearinghouse distributes the document to state agencies.

(f) Public agencies shall use the State Clearinghouse to distribute draft EIRs to state agencies for review and should use areawide clearinghouses to distribute the documents to regional and local agencies.

(g) To make copies of EIRs available to the public, lead agencies should furnish copies of draft EIRs to public library systems serving the area involved. Copies should also be available in offices of the lead agency.

(h) Public agencies should compile listings of other agencies, particularly local agencies, which have jurisdiction by law and/or special expertise with respect to various projects and project locations. Such listings should be a guide in determining which agencies should be consulted with regard to a particular project.

(i) Public hearings may be conducted on the environmental documents, either in separate proceedings or in conjunction with other proceedings of the public agency. Public hearings are encouraged, but not required as an element of the CEQA process.

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21091, 21092, 21092.2, 21092.3, 21092.6, 21098, 21104, 21152, 21153 and 21161, Public Resources Code.

§ 15088. Evaluation of and Response to Comments.

(a) The lead agency shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response. The lead agency shall respond to comments **raising significant environmental issues** received during the noticed comment period and any extensions and may respond to late comments.

(b) The lead agency shall provide a written proposed response**, either in a printed copy or in an electronic format,** to a public agency on comments made by that public agency at least 10 days prior to certifying an environmental impact report.

(c) The written response shall describe the disposition of significant environmental issues raised (e.g., revisions to the proposed project to mitigate anticipated impacts or objections). In particular, the major environmental issues raised when the lead agency's position is at variance with recommendations and

objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice. **The level of detail contained in the response, however, may correspond to the level of detail provided in the comment (i.e., responses to general comments may be general). A general response may be appropriate when a comment does not contain or specifically refer to readily available information, or does not explain the relevance of evidence submitted with the comment.**

(d) The response to comments may take the form of a revision to the draft EIR or may be a separate section in the final EIR. Where the response to comments makes important changes in the information contained in the text of the draft EIR, the lead agency should either:

(1) Revise the text in the body of the EIR, or

(2) Include marginal notes showing that the information is revised in the response to comments.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections **21091;** 21092.5, 21104 and 21153, Public Resources Code; People v. County of Kern, (1974) 39 Cal. App. 3d 830; Cleary v. County of Stanislaus, (1981) 118 Cal. App. 3d 348**; Friends of the Eel River v. Sonoma County Water Agency (2003) 108 Cal. App. 4th 859; Citizens for Responsible Equitable Environmental Development v. City of San Diego (2011) 196 Cal.App.4th 515; Consolidated Irrigation Dist. v. Superior Court (2012) 205 Cal. App. 4th 697.**

§ 15094. Notice of Determination.

(a) The lead agency shall file a Notice of Determination ~~**(Rev. 2011**~~) within five working days after deciding to carry out or approve the project.

(b) The notice of determination shall include:

(1) An identification of the project including the project title as identified on the draft EIR, and the location of the project (either by street address and cross street for a project in an urbanized area or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 7-1/2' topographical map identified by quadrangle name). If the notice of determination is filed with the State Clearinghouse, the State Clearinghouse identification number for the draft EIR shall be provided.

(2) A brief description of the project.

(3) The lead agency's name, the applicant's name, if any, and the date on which the agency approved the project. If a responsible agency files the notice of determination pursuant to Section 15096(i), the responsible agency's name, the applicant's name, if any, and date of approval shall also be identified.

(4) The determination of the agency whether the project in its approved form will have a significant effect on the environment.

(5) A statement that an EIR was prepared and certified pursuant to the provisions of CEQA.

(6) Whether mitigation measures were made a condition of the approval of the project, and whether a mitigation monitoring plan/program was adopted.

(7) Whether findings were made pursuant to Section 15091.

(8) Whether a statement of overriding considerations was adopted for the project.

(9) The address where a copy of the final EIR and the record of project approval may be examined.

(10) If different from the applicant, the identity of the person undertaking the project which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies or the identity of the person receiving a lease, permit, license, certificate, or other entitlement for use from one or more public agencies.

(c) If the lead agency is a state agency, the lead agency shall file the notice of determination with the Office of Planning and Research within five working days after approval of the project by the lead agency.

(d) If the lead agency is a local agency, the local lead agency shall file the notice of determination with the county clerk of the county or counties in which the project will be located, within five working days after approval of the project by the lead agency. If the project requires discretionary approval from any state agency, the local lead agency shall also, within five working days of this approval, file a copy of the notice of determination with the Office of Planning and Research.

(e) A notice of determination filed with the county clerk shall be available for public inspection and shall be posted within 24 hours of receipt for a period of at least 30 days. Thereafter, the clerk shall return the notice to the local lead agency with a notation of the period during which it was posted. The local lead agency shall retain the notice for not less than 12 months.

(f) A notice of determination filed with the Office of Planning and Research shall be available for public inspection and shall be posted for a period of at least 30 days. The Office of Planning and Research shall retain each notice, for not less than 12 months.

(g) The filing of the notice of determination pursuant to subdivision (c) above for state agencies and the filing and posting of the notice of determination pursuant to subdivisions (d) and (e) above for local agencies, start a 30-day statute of limitations on court challenges to the approval under CEQA.

(h) A sample notice of determination is provided in Appendix D. Each public agency may devise its own form, but any such form shall include, at a minimum, the information required by subdivision (b). Public agencies are encouraged to make copies of all notices filed pursuant to this section available in electronic format on the Internet. Such electronic notices are in addition to the posting requirements of the Guidelines and the Public Resources Code.

Note: Authority cited: Section 21083 and 21152, Public Resources code. Reference: Sections 21108, 21152 and 21167, Public Resources code; *Citizens of Lake Murray Area Association v. City Council*, (1982) 129 Cal. App. 3d 436.

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 8. Time Limits

§ 15107. Completion of Negative Declaration for Certain Private Projects.

With private projects involving the issuance of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies, the negative declaration must be completed and approved within 180 days from the date when the lease agency accepted the application as complete. **Lead agency procedures may provide that the 180-day time limit may be extended once for a period of not more than 90 days upon consent of the lead agency and the applicant.**

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21100.2 and 21151.5, Public Resources Code.

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 9. Contents of Environmental Impact Reports

§ 15124. Project Description.

The description of the project shall contain the following information but should not supply extensive detail beyond that needed for evaluation and review of the environmental impact.

(a) The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map.

(b) A statement of the objectives sought by the proposed project. A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project **and may discuss the project benefits**.

(c) A general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities.

(d) A statement briefly describing the intended uses of the EIR.

(1) This statement shall include, to the extent that the information is known to the lead agency,

(A) A list of the agencies that are expected to use the EIR in their decision-making, and

(B) A list of permits and other approvals required to implement the project.

(C) A list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies. To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.

(2) If a public agency must make more than one decision on a project, all its decisions subject to CEQA should be listed, preferably in the order in which they will occur. On request, the Office of Planning and Research will provide assistance in identifying state permits for a project.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21080.3, 21080.4, 21165, 21166 and 21167.2, Public Resources Code; County of Inyo v. City of Los Angeles (1977) 71 Cal. App. 3d 185.

§ 15125. Environmental Setting.

(a) An EIR must include a description of the physical environmental conditions in the vicinity of the project**. ~~, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environ-mental analysis is commenced, from both a local and regional perspective.~~** This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to **provide** an understanding of the significant effects of the proposed project and its alternatives. **The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.**

(1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported with substantial evidence. In addition, a lead agency may also use baselines

consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record.

(2) A lead agency may use projected future conditions (beyond the date of project operations) baseline as the sole baseline for analysis only if it demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public. Use of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record.

(3) An existing conditions baseline shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.

(b) When preparing an EIR for a plan for the reuse of a military base, lead agencies should refer to the special application of the principle of baseline conditions for determining significant impacts contained in Section 15229.

(c) Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.

(d) The EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan, area-wide waste treatment and water quality control plans, regional transportation plans, regional housing allocation plans, regional blueprint plans, plans for the reduction of greenhouse gas emissions, habitat conservation plans, natural community conservation plans and regional land use plans for the protection of the coastal zone, Lake Tahoe Basin, San Francisco Bay, and Santa Monica Mountains.

(e) Where a proposed project is compared with an adopted plan, the analysis shall examine the existing physical conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced as well as the potential future conditions discussed in the plan.

AUTHORITY:

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Sections 21060.5, 21061 and 21100, Public Resources Code; ***Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439; *Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal.4th 310; *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316; *San Francisco Baykeeper v. California State Lands Commission* (2015) 242 Cal.App.4th 202; *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94;**

E.P.I.C. v. County of El Dorado (1982) 131 Cal. App. 3d 350; San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713; Bloom v. McGurk (1994) 26 Cal.App.4th 1307.

§ 15126.2. Consideration and Discussion of Significant Environmental Impacts.

(a) The Significant Environmental Effects of the Proposed Project. An EIR shall identify and focus on the significant ~~**environmental**~~ effects of the proposed project **on the environment**. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services. The EIR shall also analyze any significant environmental effects the project might cause **or risk exacerbating** by bringing development and people into the area affected. For example~~**, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there. Similarly,**~~ the EIR should evaluate any potentially significant **direct, indirect, or cumulative environmental** impacts of locating development in ~~other~~ areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas)**, including both short-term and long-term conditions,** as identified in authoritative hazard maps, risk assessments or in land use plans, addressing such hazards areas.

(b) **Energy Impacts. If analysis of the project's energy use reveals that the project may result in significant environmental effects due to wasteful, inefficient, or unnecessary use of energy, or wasteful use of energy resources, the EIR shall mitigate that energy use. This analysis should include the project's energy use for all project phases and components, including transportation-related energy, during construction and operation. In addition to building code compliance, other relevant considerations may include, among others, the project's size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. (Guidance on information that may be included in such an analysis is presented in Appendix F.) This analysis is subject to the rule of reason and shall focus on energy use that is caused by the project. This analysis may be included in related analyses of air quality, greenhouse gas emissions, transportation or utilities in the discretion of the lead agency.**

(c) Significant Environmental Effects Which Cannot be Avoided if the Proposed Project is Implemented. Describe any significant impacts, including those which can be mitigated but not reduced to a level of insignificance. Where there are impacts that cannot be alleviated without imposing an alternative

design, their implications and the reasons why the project is being proposed, notwithstanding their effect, should be described.

~~(c)~~**(d)** Significant Irreversible Environmental Changes Which Would be Caused by the Proposed Project Should it be Implemented. Uses of nonrenewable resources during the initial and continued phases of the project may be irreversible since a large commitment of such resources makes removal or nonuse thereafter unlikely. Primary impacts and, particularly, secondary impacts (such as highway improvement which provides access to a previously inaccessible area) generally commit future generations to similar uses. Also irreversible damage can result from environmental accidents associated with the project. Irretrievable commitments of resources should be evaluated to assure that such current consumption is justified. (See Public Resources Code section 21100.1 and Title 14, California Code of Regulations, section 15127 for limitations to applicability of this requirement.)

~~(d)~~**(e)** Growth-Inducing Impact of the Proposed Project. Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.

AUTHORITY:

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Sections 21002, 21003 and 21100, Public Resources Code; **CBIA v. BAAQMD (2015) 62 Cal.4th 369; *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal. App. 4th 256; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912;** Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d 553; Laurel Heights Improvement Association v. Regents of the University of California, (1988) 47 Cal.3d 376; Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359; Laurel Heights Improvement Association v. Regents of the University of California (1993) 6 Cal.4th 1112; and Goleta Union School Dist. v. Regents of the Univ. Of Calif (1995) 37 Cal. App.4th 1025.

§ 15126.4. Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects.

(a) Mitigation Measures in General.

(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy.

(A) The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead,

responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR.

(B) Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures ~~should~~ **shall** not be deferred until some future time. ~~However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.~~ **The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will considered, analyzed, and potentially incorporated in the mitigation measure. Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.**

(C) Energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant. Examples of energy conservation measures are provided in Appendix F.

(D) If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed. (*Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986.)

(2) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design.

(3) Mitigation measures are not required for effects which are not found to be significant.

(4) Mitigation measures must be consistent with all applicable constitutional requirements, including the following:

(A) There must be an essential nexus (i.e. connection) between the mitigation measure and a legitimate governmental interest. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and

(B) The mitigation measure must be "roughly proportional" to the impacts of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Where the mitigation measure is an ad hoc exaction, it must be "roughly proportional" to the impacts of the project. *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

(5) If the lead agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed. Instead, the EIR may simply reference that fact and briefly explain the reasons underlying the lead agency's determination.

(b) Mitigation Measures Related to Impacts on Historical Resources.

(1) Where maintenance, repair, stabilization, rehabilitation, restoration, preservation, conservation or reconstruction of the historical resource will be conducted in a manner consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings (1995), Weeks and Grimmer, the project's impact on the historical resource shall generally be considered mitigated below a level of significance and thus is not significant.

(2) In some circumstances, documentation of an historical resource, by way of historic narrative, photographs or architectural drawings, as mitigation for the effects of demolition of the resource will not mitigate the effects to a point where clearly no significant effect on the environment would occur.

(3) Public agencies should, whenever feasible, seek to avoid damaging effects on any historical resource of an archaeological nature. The following factors shall be considered and discussed in an EIR for a project involving such an archaeological site:

(A) Preservation in place is the preferred manner of mitigating impacts to archaeological sites. Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid conflict with religious or cultural values of groups associated with the site.

(B) Preservation in place may be accomplished by, but is not limited to, the following:

1. Planning construction to avoid archaeological sites;

2. Incorporation of sites within parks, greenspace, or other open space;

3. Covering the archaeological sites with a layer of chemically stable soil before building tennis courts, parking lots, or similar facilities on the site.

4. Deeding the site into a permanent conservation easement.

(C) When data recovery through excavation is the only feasible mitigation, a data recovery plan, which makes provision for adequately recovering the scientifically consequential information from and about the historical resource, shall be prepared and adopted prior to any excavation being undertaken. Such studies shall be deposited with the California Historical Resources Regional Information Center. Archaeological sites known to contain human remains shall be treated in accordance with the provisions of Section 7050.5 Health and Safety Code. If an artifact must be removed during project excavation or testing, curation may be an appropriate mitigation.

(D) Data recovery shall not be required for an historical resource if the lead agency determines that testing or studies already completed have adequately recovered the scientifically consequential

information from and about the archaeological or historical resource, provided that the determination is documented in the EIR and that the studies are deposited with the California Historical Resources Regional Information Center.

(c) Mitigation Measures Related to Greenhouse Gas Emissions.

Consistent with section 15126.4(a), lead agencies shall consider feasible means, supported by substantial evidence and subject to monitoring or reporting, of mitigating the significant effects of greenhouse gas emissions. Measures to mitigate the significant effects of greenhouse gas emissions may include, among others:

(1) Measures in an existing plan or mitigation program for the reduction of emissions that are required as part of the lead agency's decision;

(2) Reductions in emissions resulting from a project through implementation of project features, project design, or other measures, such as those described in Appendix F;

(3) Off-site measures, including offsets that are not otherwise required, to mitigate a project's emissions;

(4) Measures that sequester greenhouse gases;

(5) In the case of the adoption of a plan, such as a general plan, long range development plan, or plans for the reduction of greenhouse gas emissions, mitigation may include the identification of specific measures that may be implemented on a project-by-project basis. Mitigation may also include the incorporation of specific measures or policies found in an adopted ordinance or regulation that reduces the cumulative effect of emissions.

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Sections 5020.5, 21002, 21003, 21083.05, 21084.1 and 21100, Public Resources Code; Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d 553; Laurel Heights Improvement Association v. Regents of the University of California, (1988) 47 Cal.3d 376; Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359; Laurel Heights Improvement Association v. Regents of the University of California (1993) 6 Cal.4th 1112; Sacramento Old City Assn. v. City Council of Sacramento (1991) 229 Cal.App.3d 1011; San Franciscans Upholding the Downtown Plan v. City & Co. of San Francisco (2002) 102 Cal.App.4th 656; Ass'n of Irritated Residents v. County of Madera (2003) 107 Cal.App.4th 1383; ~~and~~ Environmental Council of Sacramento v. City of Sacramento (2006) 142 Cal.App.4th 1018**; Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200; Preserve Wild Santee v. City of Santee (2012) 210 Cal.App.4th 260; and Rialto Citizens for Responsible Growth v. City of Rialto (2012) 208 Cal.App.4th 899.**

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 10. Considerations in Preparing EIRs and Negative Declarations

§ 15152. Tiering.

(a) "Tiering" refers to using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and negative declarations on narrower projects; incorporating by reference the general discussions from the broader EIR; and concentrating the later EIR or negative declaration solely on the issues specific to the later project.

(b) Agencies are encouraged to tier the environmental analyses which they prepare for separate but related projects including general plans, zoning changes, and development projects. This approach can eliminate repetitive discussions of the same issues and focus the later EIR or negative declaration on the actual issues ripe for decision at each level of environmental review. Tiering is appropriate when the sequence of analysis is from an EIR prepared for a general plan, policy, or program to an EIR or negative declaration for another plan, policy, or program of lesser scope, or to a site-specific EIR or negative declaration. Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration. However, the level of detail contained in a first tier EIR need not be greater than that of the program, plan, policy, or ordinance being analyzed.

(c) Where a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof (e.g., an area plan or community plan), the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographical scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand.

(d) Where an EIR has been prepared and certified for a program, plan, policy, or ordinance consistent with the requirements of this section, any lead agency for a later project pursuant to or consistent with the program, plan, policy, or ordinance should limit the EIR or negative declaration on the later project to effects which:

(1) Were not examined as significant effects on the environment in the prior EIR; or

(2) Are susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition of conditions, or other means.

(e) Tiering under this section shall be limited to situations where the project is consistent with the general plan and zoning of the city or county in which the project is located, except that a project requiring a rezone to achieve or maintain conformity with a general plan may be subject to tiering.

(f) A later EIR shall be required when the initial study or other analysis finds that the later project may cause significant effects on the environment that were not adequately addressed in the prior EIR. A negative declaration shall be required when the provisions of Section 15070 are met.

(1) Where a lead agency determines that a cumulative effect has been adequately addressed in the prior EIR, that effect is not treated as significant for purposes of the later EIR or negative declaration, and need not be discussed in detail.

(2) When assessing whether there is a new significant cumulative effect, the lead agency shall consider whether the incremental effects of the project would be considerable when viewed in the context of past, present, and probable future projects. At this point, the question is not whether there is a significant cumulative impact, but whether the effects of the project are cumulatively considerable. For a discussion on how to assess whether project impacts are cumulatively considerable, see Section 15064(i).

(3) Significant environmental effects have been "adequately addressed" if the lead agency determines that:

(A) they have been mitigated or avoided as a result of the prior environmental impact report and findings adopted in connection with that prior environmental report; or

(B) they have been examined at a sufficient level of detail in the prior environmental impact report to enable those effects to be mitigated or avoided by site specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project.

(g) When tiering is used, the later EIRs or negative declarations shall refer to the prior EIR and state where a copy of the prior EIR may be examined. The later EIR or negative declaration should state that the lead agency is using the tiering concept and that it is being tiered with the earlier EIR.

(h) ~~**There are various types of EIRs that may be used in a tiering situation.**~~ **The rules in this section govern tiering generally. Several other methods to streamline the environmental review process exist, which are governed by the more specific rules of those provisions. Where multiple methods may apply, lead agencies have discretion regarding which to use.** These **other methods** include, but are not limited to, the following:

(1) General plan EIR (Section 15166).

(2) Staged EIR (Section 15167).

(3) Program EIR (Section 15168).

(4) Master EIR (Section 15175).

(5) Multiple-family residential development/residential and commercial or retail mixed-use development (Section 15179.5).

(6) Redevelopment project (Section 15180).

(7) Projects consistent with community plan, general plan, or zoning (Section 15183).

(8) Infill projects (Section 15183.3).

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21003, 21061, **21083.3,** 21093, 21094, 21100**, and** 21151, **21157, and 21158** Public Resources Code; Stanislaus Natural Heritage Project, Sierra Club v. County of Stanislaus (1996) 48 Cal.App.4th 182; Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal.App. 4th 729; and Sierra Club v. County of Sonoma (1992) 6 Cal.App. 4th 1307.

§ 15155. Water Supply Analysis; City or County Consultation with Water Agencies.

(a) The following definitions are applicable to this section.

(1) A "water-demand project" means:

(A) A residential development of more than 500 dwelling units.

(B) A shopping center or business establishment employing more than 1,000 persons or having more than 500,000 square feet of floor space.

(C) A commercial office building employing more than 1,000 persons or having more than 250,000 square feet of floor space.

(D) A hotel or motel, or both, having more than 500 rooms.

(E) An industrial, manufacturing, or processing plant, or industrial park planned to house more than 1,000 persons, occupying more than 40 acres of land, or having more than 650,000 square feet of floor area.

(F) A mixed-use project that includes one or more of the projects specified in subdivisions (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), (a)(1)(E), and (a)(1)(G) of this section.

(G) A project that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project.

(H) For public water systems with fewer than 5,000 service connections, a project that meets the following criteria:

1. A proposed residential, business, commercial, hotel or motel, or industrial development that would account for an increase of 10 percent or more in the number of a public water system's existing service connections; or

2. A mixed-use project that would demand an amount of water equivalent to, or greater than, the amount of water required by residential development that would represent an increase of 10 percent or more in the number of the public water system's existing service connections.

(2) "Public water system" means a system for the provision of piped water to the public for human consumption that has 3000 or more service connections. A public water system includes all of the following:

(A) Any collection, treatment, storage, and distribution facility under control of the operator of the system which is used primarily in connection with the system.

(B) Any collection or pretreatment storage facility not under the control of the operator that is used primarily in connection with the system.

(C) Any person who treats water on behalf of one or more public water systems for the purpose of rendering it safe for human consumption.

(3) "Water acquisition plans" means any plans for acquiring additional water supplies prepared by the public water system or a city or county lead agency pursuant to subdivision (a) of section 10911 of the Water Code.

(4) "Water assessment" means the water supply assessment that must be prepared by the governing body of a public water system, or the city or county lead agency, pursuant to and in compliance with sections 10910 to 10915 of the Water Code, and that includes, without limitation, the elements of the assessment required to comply with subdivisions (d), (e), (f), and (g) of section 10910 of the Water Code.

(5) "City or county lead agency" means a city or county, acting as lead agency, for purposes of certifying or ap-proving an environmental impact report, a negative declaration, or a mitigated negative declaration for a water-demand project.

(b) Subject to section 15155, subdivision (d) below, at the time a city or county lead agency determines whether an environmental impact report, a negative declaration, or a mitigated negative declaration, or any supplement thereto, is required for the water-demand project, the city or county lead agency shall take the following steps:

(1) The city or county lead agency shall identify any water system that either: (A) is a public water system that may supply water to the water-demand project, or (B) that may become such a public water system as a result of supplying water to the water-demand project. The city or county lead agency shall request the governing body of each such public water system to determine whether the projected water demand associated with a water-demand project was included in the most recently adopted urban water management plan adopted pursuant to Part 2.6 (commencing with section 10610) of the Water Code, and to prepare a water assessment approved at a regular or special meeting of that governing body.

(2) If the city or county lead agency is not able to identify any public water system that may supply water for the water-demand project, the city or county lead agency shall prepare a water assessment after consulting with any entity serving domestic water supplies whose service area includes the site of the water-demand project, the local agency formation commission, and the governing body of any public water system adjacent to the site of the water-demand project. The governing body of the city or county lead agency must approve the water assessment prepared pursuant to this section at a regular or special meeting.

(c) The city or county lead agency shall grant any reasonable request for an extension of time that is made by the governing body of a public water system preparing the water assessment, provided that the request for an extension of time is made within 90 days after the date on which the governing body of the public water system received the request to prepare a water assessment. If the governing body of the public water system fails to request and receive an extension of time, or fails to submit the water assessment notwithstanding the 30-day extension, the city or county lead agency may seek a writ of mandamus to compel the governing body of the public water system to comply with the requirements of Part 2.10 of Division 6 (commencing with section 10910) of the Water Code relating to the submission of the water assessment.

(d) If a water-demand project has been the subject of a water assessment, no additional water assessment shall be required for subsequent water-demand projects that were included in such larger water-demand project if all of the following criteria are met:

(1) The entity completing the water assessment had concluded that its water supplies are sufficient to meet the projected water demand associated with the larger water-demand project, in addition to the existing and planned future uses, including, but not limited to, agricultural and industrial uses; and

(2) None of the following changes has occurred since the completion of the water assessment for the larger water-demand project:

(A) Changes in the larger water-demand project that result in a substantial increase in water demand for the water-demand project.

(B) Changes in the circumstances or conditions substantially affecting the ability of the public water system or the water supplying city or county identified in the water assessment to provide a sufficient supply of water for the water demand project.

(C) Significant new information becomes available which was not known and could not have been known at the time when the entity had reached the conclusion in subdivision (d)(1).

(e) The city or county lead agency shall include the water assessment, and any water acquisition plan in the EIR, negative declaration, or mitigated negative declaration, or any supplement thereto, prepared for the water-demand project, and may include an evaluation of the water assessment and water acquisition plan information within such environmental document. The city or county lead agency shall determine, based on the entire record, whether projected water supplies will be sufficient to satisfy the

demands of the project, in addition to existing and planned future uses. If a city or county lead agency determines that water supplies will not be sufficient, the city or county lead agency shall include that determination in its findings for the water-demand project.

(f) The degree of certainty regarding the availability of water supplies will vary depending on the stage of project approval. A lead agency should have greater confidence in the availability of water supplies for a specific project than might be required for a conceptual plan (i.e. general plan, specific plan). An analysis of water supply in an environmental document may incorporate by reference information in a water supply assessment, urban water management plan, or other publicly available sources. The analysis shall include the following:

(1) Sufficient information regarding the project's proposed water demand and proposed water supplies to permit the lead agency to evaluate the pros and cons of supplying the amount of water that the project will need.

(2) An analysis of the reasonably foreseeable environmental impacts of supplying water throughout all phases of the project.

(3) An analysis of circumstances affecting the likelihood of the water's availability, as well as the degree of uncertainty involved. Relevant factors may include but are not limited to, drought, salt-water intrusion, regulatory or contractual curtailments, and other reasonably foreseeable demands on the water supply.

(4) If the lead agency cannot determine that a particular water supply will be available, it shall conduct an analysis of alternative sources, including at least in general terms the environmental consequences of using those alternative sources, or alternatives to the project that could be served with available water.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section 21151.9, Public Resources Code; and Sections 10910-10915, Water Code**; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal. 4th 412**.

Article 11. Types of EIRs

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

§ 15168. Program EIR.

(a) General. A program EIR is an EIR which may be prepared on a series of actions that can be characterized as one large project and are related either:

(1) Geographically,

(2) As logical parts in the chain of contemplated actions,

(3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or

(4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.

(b) Advantages. Use of a program EIR can provide the following advantages. The program EIR can:

(1) Provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action,

(2) Ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis,

(3) Avoid duplicative reconsideration of basic policy considerations,

(4) Allow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts,

(5) Allow reduction in paperwork.

(c) Use With Later Activities. ~~**Subsequent**~~ **Later** activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

(1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration. **That later analysis may tier from the program EIR as provided in Section 15152.**

(2) If the agency finds that pursuant to Section 15162, no ~~**new effects could occur or no new mitigation measures**~~ **subsequent EIR** would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required. **Whether a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record. Factors that an agency may consider in making that determination include, but are not limited to, consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and covered infrastructure, as described in the program EIR.**

(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into ~~**subsequent actions**~~ **later activities** in the program.

(4) Where the ~~subsequent~~ **later** activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were ~~covered in~~ **within the scope of** the program EIR.

(5) A program EIR will be most helpful in dealing with ~~subsequent~~ **later** activities if it **provides a description of planned activities that would implement the program and** deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed **project description and** analysis of the program, many ~~subsequent~~ **later** activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required.

(d) Use With Subsequent EIRS and Negative Declarations. A program EIR can be used to simplify the task of preparing environmental documents on later ~~parts of~~ **activities in** the program. The program EIR can:

(1) Provide the basis in an initial study for determining whether the later activity may have any significant effects.

(2) Be incorporated by reference to deal with regional influences, secondary effects, cumulative impacts, broad alternatives, and other factors that apply to the program as a whole.

(3) Focus an EIR on a ~~subsequent project~~ **later activity** to permit discussion solely of new effects which had not been considered before.

(e) Notice With Later Activities. When a law other than CEQA requires public notice when the agency later proposes to carry out or approve an activity within the program and to rely on the program EIR for CEQA compliance, the notice for the activity shall include a statement that:

(1) This activity is within the scope of the program approved earlier, and

(2) The program EIR adequately describes the activity for the purposes of CEQA.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section 21003, Public Resources Code; ***Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal. App. 4th 598; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689**; County of Inyo v. Yorty **(1973)**~~,~~ 32 Cal. App. 3d 795 ~~(1973)~~.

Article 12. Special Situations

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

§ 15182. ~~Residential~~ Projects Pursuant to a Specific Plan.

(a) **General. Certain residential, commercial and mixed-use projects that are consistent with a specific plan adopted pursuant to Title 7, Division 1, Chapter 3, Article 8 of the Government Code are exempt from CEQA, as described in subdivisions (b) and (c) of this section.**

(b) Projects Proximate to Transit.

(1) Eligibility. A residential or mixed-use project, or a project with a floor area ratio of at least 0.75 on commercially-zoned property, including any required subdivision or zoning approvals, is exempt if the project satisfies the following criteria:

(A) It is located within a transit priority area as defined in Public Resources Code section 21099(a)(7);

(B) It is consistent with a specific plan for which an environmental impact report was certified; and

(C) It is consistent with the general use designation, density, building intensity, and applicable policies specified for the project area in either a sustainable communities strategy or an alternative planning strategy for which the State Air Resources Board has accepted the determination that the sustainable communities strategy or the alternative planning strategy would achieve the applicable greenhouse gas emissions reduction targets.

(2) Limitation. Additional environmental review shall not be required for a project described in this subdivision unless one of the events in section 15162 occurs with respect to that project.

(3) Statute of Limitations. A challenge to a project described in this subdivision is subject to the statute of limitations periods described in section 15112.

(c) ~~Exemption~~ Residential Projects Implementing Specific Plans.

(1) **Eligibility.** Where a public agency has prepared an EIR on a specific plan after January 1, 1980, **~~no EIR or negative declaration need be prepared for~~** a residential project undertaken pursuant to and in conformity to that specific plan **is exempt from CEQA** if the project meets the requirements of this section.

~~(b) Scope.~~ Residential projects covered by this section include but are not limited to land subdivisions, zoning changes, and residential planned unit developments.

~~(c)~~(2) Limitation. **~~This section is subject to the limitation that i~~ I**f after the adoption of the specific plan, an event described in Section 15162 **~~should~~** occur**s**, **~~this~~ the** exemption **in this subdivision** shall not apply until the city or county which adopted the specific plan completes a subsequent EIR or a supplement to an EIR on the specific plan. The exemption provided by this section shall again be available to residential projects after the lead agency has filed a Notice of Determination on the specific plan as reconsidered by the subsequent EIR or supplement to the EIR.

(3) Statute of Limitations. A court action challenging the approval of a project under this subdivision for failure to prepare a supplemental EIR shall be commenced within 30 days after the lead agency's decision to carry out or approve the project in accordance with the specific plan.

(d) Fees. The lead agency has authority to charge fees to applicants for projects which benefit from this section. The fees shall be calculated in the aggregate to defray but not to exceed the cost of developing and adopting the specific plan including the cost of preparing the EIR.

~~**(e) Statute of Limitations. A court action challenging the approval of a project under this section for failure to pre-pare a supplemental EIR shall be commenced within 30 days after the lead agency's decision to carry out or approve the project in accordance with the specific plan.**~~

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section **21155.4, Public Resources Code; Sections** ~~**65453**~~ **65456 and 65457**, Government Code**; *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal. App. 4th 1301**.

Article 14. Projects Also Subject to the National Environmental Policy Act (NEPA)

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

§ 15222. Preparation of Joint Documents.

If a lead agency finds that an EIS or finding of no significant impact for a project would not be prepared by the federal agency by the time when the lead agency will need to consider an EIR or negative declaration, the lead agency should try to prepare a combined EIR-EIS or negative declaration-finding of no significant impact. To avoid the need for the federal agency to prepare a separate document for the same project, the lead agency must involve the federal agency in the preparation of the joint document. **The lead agency may also enter into a Memorandum of Understanding with the federal agency to ensure that both federal and state requirements are met.** This involvement is necessary because federal law generally prohibits a federal agency from using an EIR prepared by a state agency unless the federal agency was involved in the preparation of the document.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21083.5 and 21083.7, Public Resources Code; Section 102(2)(D) of NEPA, 43 U.S.C.A. 4322 (2)(D); 40 C.F.R. Part 1506.2.

Article 15. Litigation

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

***New* Section 15234. Remand.**

(a) Courts may fashion equitable remedies in CEQA litigation. If a court determines that a public agency has not complied with CEQA, and that noncompliance was a prejudicial abuse of discretion, the court shall issue a peremptory writ of mandate requiring the agency to do one or more of the following:

(1) void the project approval, in whole or in part;

(2) suspend any project activities that preclude consideration and implementation of mitigation measures and alternatives necessary to comply with CEQA; or

(3) take specific action necessary to bring the agency's consideration of the project into compliance with CEQA.

(b) Following a determination described in subdivision (a), an agency or project proponent may only proceed with those portions of the challenged determinations, findings, or decisions for the project or those project activities that the court finds:

(1) are severable;

(2) will not prejudice the agency's compliance with CEQA as described in the court's peremptory writ of mandate; and

(3) complied with CEQA.

(c) An agency may also proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion to permit project activities to proceed during that period.

(d) As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall only be required ~~as required~~ by the court consistent with principles of res judicata. In general, the agency need not expand the scope of analysis on remand beyond that specified by the court.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21005, 21168.9; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal. App. 4th 260; *Golden Gate Land Holdings, LLC v.*

***East Bay Regional Park Dist*. (2013) 215 Cal. App. 4th 353; *POET, LLC v. State Air Resources Board* (2013) 218 Cal. App. 4th 681; *Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal. App. 4th 282.**

Article 18. Statutory Exemptions

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

§ 15269. Emergency Projects.

The following emergency projects are exempt from the requirements of CEQA.

(a) Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor pursuant to the California Emergency Services Act, commencing with Section 8550 of the Government Code. This includes projects that will remove, destroy, or significantly alter an historical resource when that resource represents an imminent threat to the public of bodily harm or of damage to adjacent property or when the project has received a determination by the State Office of Historic Preservation pursuant to Section 5028(b) of Public Resources Code.

(b) Emergency repairs to publicly or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare. **Emergency repairs include those that require a reasonable amount of planning to address an anticipated emergency.**

(c) Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term**, but this exclusion does not apply (i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility**.

(d) Projects undertaken, carried out, or approved by a public agency to maintain, repair, or restore an existing highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, provided that the project is within the existing right of way of that highway and is initiated within one year of the damage occurring. This exemption does not apply to highways designated as official state scenic highways, nor any project undertaken, carried out, or approved by a public agency to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide.

(e) Seismic work on highways and bridges pursuant to Section180.2 of the Streets and Highways Code, Section 180 et seq.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21080(b)(2), (3), and (4), 21080.33 and 21172, Public Resources Code; ***CalBeach Advocates v. City of Solana Beach*** **(2002) 103 Cal. App. 4th 529**; Castaic Lake Water Agency v. City of Santa Clarita (1995) 41 Cal.App.4th 1257; and Western Municipal Water District of Riverside County v. Superior Court of San Bernardino County (1987) 187 Cal.App.3d 1104.

Article 19. Categorical Exemptions

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

§ 15301. Existing Facilities.

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of **existing or former** use ~~**beyond that existing at the time of the lead agency's determination**~~. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of ~~**an existing**~~ use.

Examples include but are not limited to:

(a) Interior or exterior alterations involving such things as interior partitions, plumbing, and electrical conveyances;

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety**, and other alterations such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, transit improvements such as bus lanes, pedestrian crossings, street trees, and other similar alterations that do not create additional automobile lanes**).

(d) Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the

damage was substantial and resulted from an environmental hazard such as earthquake, landslide, or flood;

(e) Additions to existing structures provided that the addition will not result in an increase of more than:

(1) 50 percent of the floor area of the structures before the addition, or 2,500 square feet, whichever is less; or

(2) 10,000 square feet if:

(A) The project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and

(B) The area in which the project is located is not environmentally sensitive.

(f) Addition of safety or health protection devices for use during construction of or in conjunction with existing structures, facilities, or mechanical equipment, or topographical features including navigational devices;

(g) New copy on existing on and off-premise signs;

(h) Maintenance of existing landscaping, native growth, and water supply reservoirs (excluding the use of pesticides, as defined in Section 12753, Division 7, Chapter 2, Food and Agricultural Code);

(i) Maintenance of fish screens, fish ladders, wildlife habitat areas, artificial wildlife waterway devices, streamflows, springs and waterholes, and stream channels (clearing of debris) to protect fish and wildlife resources;

(j) Fish stocking by the California Department of Fish and Game;

(k) Division of existing multiple family or single-family residences into common-interest ownership and subdivision of existing commercial or industrial buildings, where no physical changes occur which are not otherwise exempt;

(l) Demolition and removal of individual small structures listed in this subdivision;

(1) One single-family residence. In urbanized areas, up to three single-family residences may be demolished under this exemption.

(2) A duplex or similar multifamily residential structure. In urbanized areas, this exemption applies to duplexes and similar structures where not more than six dwelling units will be demolished.

(3) A store, motel, office, restaurant, and similar small commercial structure if designed for an occupant load of 30 persons or less. In urbanized areas, the exemption also applies to the demolition of up to three such commercial buildings on sites zoned for such use.

(4) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.

(m) Minor repairs and alterations to existing dams and appurtenant structures under the supervision of the Department of Water Resources.

(n) Conversion of a single family residence to office use.

(o) Installation, in an existing facility occupied by a medical waste generator, of a steam sterilization unit for the treatment of medical waste generated by that facility provided that the unit is installed and operated in accordance with the Medical Waste Management Act (Section 117600, et seq., of the Health and Safety Code) and accepts no offsite waste.

(p) Use of a single-family residence as a small family day care home, as defined in Section 1596.78 of the Health and Safety Code.

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section 21084, Public Resources Code; ***North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94; *Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal.4th 310;** Bloom v. McGurk (1994) 26 Cal.App.4th 1307.

Title 14. Natural Resources
Division 6. California Natural Resources Agency
Chapter 3. Guidelines for the Implementation of the California Environmental Quality Act

Article 20. Definitions

§ 15357.Discretionary Project.

"Discretionary project" means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, ~~**or**~~ regulations**, or other fixed standards**. **The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project.** A timber harvesting plan submitted to the State Forester for approval under the requirements of the Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Res. Code Sections 4511 et seq.) constitutes a discretionary project within the meaning of the California Environmental Quality Act. Section 21065(c).

AUTHORITY:

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section 21080(a), Public Resources Code; Johnson v. State of California (1968) 69 Cal. 2d 782; People v. Department of Housing and Community Development (1975) 45 Cal. App. 3d 185; Day v. City of Glendale (1975) 51 Cal. App. 3d 817; N.R.D.C. v. Arcata National Corp. (1976) 59 Cal. App. 3d 959**; Friends of Westwood, Inc. v. City of Los Angeles (1987) 191 Cal. App. 3d 259; Mountain Lion Foundation v. Fish & Game Comm. (1997) 16 Cal. 4th 105; Friends of Juana Briones House v. City of Palo Alto (2010) 190 Cal. App. 4th 286; San Diego Navy Broadway Complex Coalition v. City of San Diego (2010) 185 Cal. App. 4th 924.**

§ 15370. Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments**, including through permanent protection of such resources in the form of conservation easements**.

Note: Authority cited: Section 21083, Public Resources Code.
Reference: Sections 21002,21002.1, 21081 and 21100(c), Public Resources Code**; *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230**.

Appendix G

Environmental Checklist Form

NOTE: The following is a sample form ~~**and**~~ **that** may be tailored to satisfy individual agencies' needs and project circumstances. It may be used to meet the requirements for an initial study when the criteria set forth in CEQA Guidelines have been met. Substantial evidence of potential impacts that are not listed on this form must also be considered. The sample questions in this form are intended to encourage thoughtful assessment of impacts, and do not necessarily represent thresholds of significance.

1. Project title: _____

2. Lead agency name and address:

_____

_____

3. Contact person and phone number: _____

4. Project location: _____

5. Project sponsor's name and address:

_____

_____

6. General plan designation: _____

7. Zoning: _____

8. Description of project: (Describe the whole action involved, including but not limited to later phases of the project, and any secondary, support, or off-site features necessary for its implementation. Attach additional sheets if necessary.)

_____

_____

9. Surrounding land uses and setting: Briefly describe the project's surroundings:

_____

_____

10. Other public agencies whose approval is required (e.g., permits, financing approval, or participation agreement.)

_____

_____

11. Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, ~~has consultation begun~~ **is there a plan for consultation that includes, for example, the determination of significance of impacts to tribal cultural resources, procedures regarding confidentiality, etc.**?

_____

_____

NOTE: Conducting consultation early in the CEQA process allows tribal governments, lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and reduce the potential for delay and conflict in the environmental review process. (See Public Resources Code section ~~21083~~**21080**.3.2.) Information may also be available from the California Native American Heritage Commission's Sacred Lands File per Public Resources Code section 5097.96 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED:

The environmental factors checked below would be potentially affected by this project, involving at least one impact that is a "Potentially Significant Impact" as indicated by the checklist on the following pages.

☐ Aesthetics	☐ Agriculture and Forestry Resources	☐ Air Quality
☐ Biological Resources	☐ Cultural Resources	☐ **Energy**
☐ Geology /Soils	☐ Greenhouse Gas Emissions	☐ Hazards & Hazardous Materials
☐ Hydrology / Water Quality	☐ Land Use / Planning	☐ Mineral Resources
☐ Noise	☐ Population / Housing	☐ Public Services
☐ Recreation	☐ Transportation~~/ Traffic~~	☐ Tribal Cultural Resources
☐ Utilities/Service Systems	☐ **Wildfire**	☐ Mandatory Findings of Significance

DETERMINATION: (To be completed by the Lead Agency)

On the basis of this initial evaluation:

☐ I find that the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.

☐ I find that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared.

☐ I find that the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.

☐ I find that the proposed project MAY have a "potentially significant impact" or "potentially significant unless mitigated" impact on the environment, but at least one effect 1) has been adequately analyzed in an earlier document pursuant to applicable legal standards, and 2) has been addressed by mitigation measures based on the earlier analysis as described on attached sheets. An ENVIRONMENTAL IMPACT REPORT is required, but it must analyze only the effects that remain to be addressed.

☐ I find that although the proposed project could have a significant effect on the environment, because all potentially significant effects (a) have been analyzed adequately in an earlier EIR or NEGATIVE DECLARATION pursuant to applicable standards, and (b) have been avoided or mitigated

pursuant to that earlier EIR or NEGATIVE DECLARATION, including revisions or mitigation measures that are imposed upon the proposed project, nothing further is required.

Signature Date

EVALUATION OF ENVIRONMENTAL IMPACTS:

1) A brief explanation is required for all answers except "No Impact" answers that are adequately supported by the information sources a lead agency cites in the parentheses following each question. A "No Impact" answer is adequately supported if the referenced information sources show that the impact simply does not apply to projects like the one involved (e.g., the project falls outside a fault rupture zone). A "No Impact" answer should be explained where it is based on project-specific factors as well as general standards (e.g., the project will not expose sensitive receptors to pollutants, based on a project-specific screening analysis).

2) All answers must take account of the whole action involved, including off-site as well as on-site, cumulative as well as project-level, indirect as well as direct, and construction as well as operational impacts.

3) Once the lead agency has determined that a particular physical impact may occur, then the checklist answers must indicate whether the impact is potentially significant, less than significant with mitigation, or less than significant. "Potentially Significant Impact" is appropriate if there is substantial evidence that an effect may be significant. If there are one or more "Potentially Significant Impact" entries when the determination is made, an EIR is required.

4) "Negative Declaration: Less Than Significant With Mitigation Incorporated" applies where the incorporation of mitigation measures has reduced an effect from "Potentially Significant Impact" to a "Less Than Significant Impact." The lead agency must describe the mitigation measures, and briefly explain how they reduce the effect to a less than significant level (mitigation measures from "Earlier Analyses," as described in (5) below, may be cross-referenced).

5) Earlier analyses may be used where, pursuant to the tiering, program EIR, or other CEQA process, an effect has been adequately analyzed in an earlier EIR or negative declaration. Section 15063(c)(3)(D). In this case, a brief discussion should identify the following:

   a) Earlier Analysis Used. Identify and state where they are available for review.

   b) Impacts Adequately Addressed. Identify which effects from the above checklist were within the scope of and adequately analyzed in an earlier document pursuant to applicable legal standards, and state whether such effects were addressed by mitigation measures based on the earlier analysis.

   c) Mitigation Measures. For effects that are "Less than Significant with Mitigation Measures Incorporated," describe the mitigation measures which were incorporated or refined from the earlier document and the extent to which they address site-specific conditions for the project.

6) Lead agencies are encouraged to incorporate into the checklist references to information sources for potential impacts (e.g., general plans, zoning ordinances). Reference to a previously prepared or outside document should, where appropriate, include a reference to the page or pages where the statement is substantiated.

7) Supporting Information Sources: A source list should be attached, and other sources used or individuals contacted should be cited in the discussion.

8) This is only a suggested form, and lead agencies are free to use different formats; however, lead agencies should normally address the questions from this checklist that are relevant to a project's environmental effects in whatever format is selected.

9) The explanation of each issue should identify:

a) the significance criteria or threshold, if any, used to evaluate each question; and

b) the mitigation measure identified, if any, to reduce the impact to less than significance

SAMPLE QUESTIONS

Issues:

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
I. AESTHETICS. **Except as provided in Public Resources Code Section 21099, ~~W~~ w**ould the project:				
a) Have a substantial adverse effect on a scenic vista?	☐	☐	☐	☐
b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?	☐	☐	☐	☐
c) **In non-urbanized areas, s**~~S~~ubstantially degrade the existing visual character or quality of **public views of** the site and its surroundings? **(Public views are those that are experienced from publicly accessible vantage point). If the project is in an urbanized area, would the project conflict with applicable zoning and other regulations governing scenic quality?**	☐	☐	☐	☐
d) Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?	☐	☐	☐	☐
II. AGRICULTURE AND FORESTRY RESOURCES. In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. In determining whether impacts to forest resources, including timberland, are significant environmental effects, lead agencies may refer to information compiled by the California Department of Forestry and Fire Protection regarding the state's inventory of forest land, including the Forest and Range Assessment Project and the Forest Legacy Assessment project; and forest carbon measurement methodology provided				

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
in Forest Protocols adopted by the California Air Resources Board. Would the project:				

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?	☐	☐	☐	☐
b) Conflict with existing zoning for agricultural use, or a Williamson Act contract?	☐	☐	☐	☐
c) Conflict with existing zoning for, or cause rezoning of, forest land (as defined in Public Resources Code section 12220(g)), timberland (as defined by Public Resources Code section 4526), or timberland zoned Timberland Production (as defined by Government Code section 51104(g))?	☐	☐	☐	☐
d) Result in the loss of forest land or conversion of forest land to non-forest use?	☐	☐	☐	☐
e) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use or conversion of forest land to non-forest use?	☐	☐	☐	☐
III. AIR QUALITY. Where available, the significance criteria established by the applicable air quality management **district** or air pollution control district may be relied upon to make the following determinations. Would the project:				
a) Conflict with or obstruct implementation of the applicable air quality plan?	☐	☐	☐	☐
b) ~~**Violate any air quality standard or contribute substantially to an existing or projected air quality violation?**~~	☐	☐	☐	☐
~~**c)**~~ Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard ~~**(including releasing emissions which exceed quantitative thresholds for ozone precursors)**~~?	☐	☐	☐	☐
c ~~**d**~~) Expose sensitive receptors to substantial pollutant concentrations?	☐	☐	☐	☐
d ~~**e**~~) ~~**Create objectionable**~~ **Result in other emissions (such as those leading to** odors ~~**or**~~	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
~~**dust**~~**) adversely** affecting a substantial number of people?				
IV. BIOLOGICAL RESOURCES: Would the project:				
a) Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?	☐	☐	☐	☐
b) Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?	☐	☐	☐	☐
c) Have a substantial adverse effect on **state or** federally protected wetlands ~~**as defined by Section 404 of the Clean Water Act**~~ (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?	☐	☐	☐	☐
d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?	☐	☐	☐	☐
e) Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?	☐	☐	☐	☐
f) Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
V. CULTURAL RESOURCES. Would the project:				
a) Cause a substantial adverse change in the significance of a historical resource **pursuant to** ~~**as defined**~~ in § 15064.5?	☐	☐	☐	☐
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?	☐	☐	☐	☐
~~**c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?**~~	☐	☐	☐	☐
c ~~**d**~~) Disturb any human remains, including those interred outside of dedicated cemeteries?	☐	☐	☐	☐
VI. **ENERGY. Would the project:**	☐	☐	☐	☐
a) **Result in potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy resources, during project construction or operation?**				
b) **Conflict with or obstruct a state or local plan for renewable energy or energy efficiency?**	☐	☐	☐	☐
VII. GEOLOGY AND SOILS. Would the project:				
a) ~~**Expose people or structures to**~~ **Directly or indirectly cause** potential substantial adverse effects, including the risk of loss, injury, or death involving:	☐	☐	☐	☐
i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.	☐	☐	☐	☐
ii) Strong seismic ground shaking?	☐	☐	☐	☐
iii) Seismic-related ground failure, including liquefaction?	☐	☐	☐	☐
iv) Landslides?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
b) Result in substantial soil erosion or the loss of topsoil?	☐	☐	☐	☐
c) Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
d) Be located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial **direct or indirect** risks to life or property?	☐	☐	☐	☐
e) Have soils incapable of adequately supporting the use of septic tanks or alternative waste water disposal systems where sewers are not available for the disposal of waste water?	☐	☐	☐	☐
f) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?	☐	☐	☐	☐
VII**I**. GREENHOUSE GAS EMISSIONS. Would the project:				
a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?	☐	☐	☐	☐
b) Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?	☐	☐	☐	☐
~~**VIII**~~ **IX**. HAZARDS AND HAZARDOUS MATERIALS. Would the project:				
a) Create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials?	☐	☐	☐	☐
b) Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment?	☐	☐	☐	☐
c) Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?	☐	☐	☐	☐
d) Be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5 and, as a result, would it create a significant hazard to the public or the environment?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
e) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard **or excessive noise** for people residing or working in the project area?	☐	☐	☐	☐
~~f) For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in the project area?~~	☐	☐	☐	☐
g) Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan?	☐	☐	☐	☐
~~h~~ g) Expose people or structures**, either directly or indirectly,** to a significant risk of loss, injury or death involving wildland fires**~~, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands~~**?	☐	☐	☐	☐
~~I~~X. HYDROLOGY AND WATER QUALITY. Would the project:				
a) Violate any water quality standards or waste discharge requirements **or otherwise substantially degrade surface or ground water quality**?	☐	☐	☐	☐
b) Substantially **~~deplete~~ decrease** groundwater supplies or interfere substantially with groundwater recharge such that **the project may impede sustainable groundwater management of the basin ~~there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)~~**?	☐	☐	☐	☐
c) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river **or through the addition of impervious surfaces**, in a manner which would**:**	☐	☐	☐	☐
(i) result in substantial erosion or siltation on- or off-site**;**	☐	☐	☐	☐
	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
(ii) substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or offsite;		☐	☐	☐
(iii) create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff; or	☐	☐	☐	☐
(iv) impede or redirect flood flows?	☐	☐	☐	☐
d) In flood hazard, tsunami, or seiche zones, risk release of pollutants due to project inundation?	☐	☐	☐	☐
e) Conflict with or obstruct implementation of a water quality control plan or sustainable groundwater management plan?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
~~d) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site?~~	☐	☐	☐	☐
~~e) Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff?~~	☐	☐	☐	☐
~~f) Otherwise substantially degrade water quality?~~	☐	☐	☐	☐
~~g) Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map?~~	☐	☐	☐	☐
~~h) Place within a 100-year flood hazard area structures which would impede or redirect flood flows?~~	☐	☐	☐	☐
~~i) Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?~~	☐	☐	☐	☐
~~j) Inundation by seiche, tsunami, or mudflow?~~	☐	☐	☐	☐
XI. LAND USE AND PLANNING. Would the project:				
a) Physically divide an established community?	☐	☐	☐	☐
b) **Cause a significant environmental impact due to a conflict** with any ~~**applicable**~~ land use plan, policy, or regulation ~~**of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance)**~~ adopted for the purpose of avoiding or mitigating an environmental effect?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
~~**c) Conflict with any applicable habitat conservation plan or natural community conservation plan?**~~	☐	☐	☐	☐
XII. MINERAL RESOURCES. Would the project:				
a) Result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the state?	☐	☐	☐	☐
b) Result in the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan?	☐	☐	☐	☐
XIII. NOISE -- Would the project result in:				
a) ~~**Exposure of persons to or g**~~ **G**eneration of **a substantial temporary or permanent increase in ambient** noise levels **in the vicinity of the project** in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?	☐	☐	☐	☐
b) ~~**Exposure of persons to or g**~~ **G**eneration of excessive groundborne vibration or groundborne noise levels?	☐	☐	☐	☐
c) ~~**A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project?**~~	☐	☐	☐	☐
~~**d) A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project?**~~	☐	☐	☐	☐
~~**e)**~~ For a project located within **the vicinity of a private airstrip or** an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels?	☐	☐	☐	☐
~~**f) For a project within the vicinity of a private airstrip, would the project expose people residing or working in the project area to excessive noise levels?**~~	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
XIV ~~II~~. POPULATION AND HOUSING. Would the project:				
a) Induce substantial **unplanned** population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)?	☐	☐	☐	☐
b) Displace substantial numbers of existing **people or** housing, necessitating the construction of replacement housing elsewhere?	☐	☐	☐	☐
~~**c) Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere?**~~	☐	☐	☐	☐
XV. PUBLIC SERVICES.				
a) Would the project result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times or other performance objectives for any of the public services:	☐	☐	☐	☐
Fire protection?	☐	☐	☐	☐
Police protection?	☐	☐	☐	☐
Schools?	☐	☐	☐	☐
Parks?	☐	☐	☐	☐
Other public facilities?	☐	☐	☐	☐
XV**I**. RECREATION.				
a) Would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
b) Does the project include recreational facilities or require the construction or expansion of recreational facilities which might have an adverse physical effect on the environment?	☐	☐	☐	☐
XVI**I**. TRANSPORTATION~~/ TRAFFIC~~.				
Would the project:				
a) Conflict with a~~n applicable~~ **program** plan, ordinance or policy ~~establishing measures of effectiveness for the performance of~~ **addressing** the circulation system, **including transit, roadway, bicycle and pedestrian facilities?** ~~taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit?~~	☐	☐	☐	☐
b) **Would the project conflict or be inconsistent with CEQA Guidelines section 15064.3, subdivision (b)**~~(1)~~**?** ~~Conflict with an applicable congestion management program, including, but not limited to level of service standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways?~~	☐	☐	☐	☐
c)~~ Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?~~	☐	☐	☐	☐
~~d)~~ Substantially increase hazards due to a **geometric** design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?	☐	☐	☐	☐
~~e~~**d**) Result in inadequate emergency access?	☐	☐	☐	☐
~~f) Conflict with adopted policies, plans, or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance or safety of such facilities?~~	☐	☐	☐	☐
XVII**I**. TRIBAL CULTURAL RESOURCES				

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:				
i) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or	☐	☐	☐	☐
ii) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.	☐	☐	☐	☐

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
XIX~~VIII~~. UTILITIES AND SERVICE SYSTEMS. Would the project:				
a) **~~Exceed wastewater treatment requirements of the applicable Regional Water Quality Control Board?~~**	☐	☐	☐	☐
~~b~~) Require or result in the **relocation or** construction of new **or expanded** water**, ~~or~~** wastewater treatment **or storm water drainage, electric power, natural gas, or telecommunications** facilities **~~or expansion of existing facilities~~**, the construction **or relocation** of which could cause significant environmental effects?	☐	☐	☐	☐
~~c) Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?~~	☐	☐	☐	☐
b ~~d~~) Have sufficient water supplies available to serve the project **and reasonably foreseeable future development during normal, dry and multiple dry years ~~from existing entitlements and resources, or are new or expanded entitlements needed~~**?	☐	☐	☐	☐
c ~~e~~) Result in a determination by the wastewater treatment provider which serves or may serve the project that it has adequate capacity to serve the project's projected demand in addition to the provider's existing commitments?	☐	☐	☐	☐
d ~~f~~) **Generate solid waste in excess of State or local standards, or in excess of the capacity of local infrastructure, or otherwise impair the attainment of solid waste reduction goals? ~~Be served by a landfill with sufficient permitted capacity to accommodate the project's solid waste disposal needs?~~**	☐	☐	☐	☐
e ~~g~~) Comply with federal, state, and local **management and reduction** statutes and regulations related to solid waste?	☐	☐	☐	☐
XX. WILDFIRE -- If located in or near state responsibility areas or lands classified as very high fire hazard severity zones, would the project:				
	☐			

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Substantially impair an adopted emergency response plan or emergency evacuation plan?	☐	☐	☐	☐
b) Due to slope, prevailing winds, and other factors, exacerbate wildfire risks, and thereby expose project occupants to, pollutant concentrations from a wildfire or the uncontrolled spread of a wildfire?	☐	☐	☐	☐
c) Require the installation or maintenance of associated infrastructure (such as roads, fuel breaks, emergency water sources, power lines or other utilities) that may exacerbate fire risk or that may result in temporary or ongoing impacts to the environment?	☐	☐	☐	☐
d) Expose people or structures to significant risks, including downslope or downstream flooding or landslides, as a result of runoff, post-fire slope instability, or drainage changes?	☐	☐	☐	☐
XXI**X**. MANDATORY FINDINGS OF SIGNIFICANCE				
a) Does the project have the potential to **substantially** degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, **substantially** reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory?	☐	☐	☐	☐
b) Does the project have impacts that are individually limited, but cumulatively considerable? ("Cumulatively considerable" means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects)?	☐	☐	☐	☐
c) Does the project have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly?	☐	☐	☐	☐

Appendix M: Performance Standards for Infill Projects Eligible for Streamlined Review

I. Introduction

Section 15183.3 provides a streamlined review process for infill projects that satisfy specified performance standards. This appendix contains those performance standards. The lead agency's determination that the project satisfies the performance standards shall be supported with substantial evidence, which should be documented on the Infill Checklist in Appendix N. Section II defines terms used in this Appendix. Performance standards that apply to all project types are set forth in Section III. Section IV contains performance standards that apply to particular project types (i.e., residential, commercial/retail, office building, transit stations, and schools).

II. Definitions

The following definitions apply to the terms used in this Appendix.

"High-quality transit corridor" means an existing corridor with fixed route bus service with service intervals no longer than 15 minutes during peak commute hours. For the purposes of this Appendix, an "existing stop along a high-quality transit corridor" may include a planned and funded stop that is included in an adopted regional transportation improvement program.

Unless more specifically defined by an air district, city or county, "high-volume roadway" means freeways, highways, urban roads with 100,000 vehicles per day, or rural roads with 50,000 vehicles per day.

"Low vehicle travel area" means a traffic analysis zone that exhibits a below average existing level of travel as determined using a regional travel demand model. For residential projects, travel refers to either home-based or household vehicle miles traveled per capita. For commercial and retail projects, travel refers to non-work attraction trip length; however, where such data are not available, commercial projects reference either home-based or household vehicle miles traveled per capita. For office projects, travel refers to commute attraction vehicle miles traveled per employee; however, where such data are not available, office projects reference either home-based or household vehicle miles traveled per capita.

"Major Transit Stop" means a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with frequencies of service intervals of 15 minutes or less during the morning and afternoon peak commute periods. For the purposes of this Appendix, an "existing major transit stop" may include a planned and funded stop that is included in an adopted regional transportation improvement program.

"Office building" generally refers to centers for governmental or professional services; however, the lead agency shall have discretion in determining whether a project is "commercial" or "office building" for the purposes of this Appendix based on local zoning codes.

"Significant sources of air pollution" include airports, marine ports, rail yards and distribution centers that receive more than 100 heavy-duty truck visits per day, as well as stationary sources that are designated major by the Clean Air Act.

A "Traffic Analysis Zone" is an analytical unit used by a travel demand model to estimate vehicle travel within a region.

III. Performance Standards Related to Project Design

To be eligible for streamlining pursuant to Section 15183.3, a project must implement all of the following:

Renewable Energy. All non-residential projects shall include on-site renewable power generation, such as solar photovoltaic, solar thermal and wind power generation, or clean back-up power supplies, where feasible. Residential projects are also encouraged to include such on-site renewable power generation.

Soil and Water Remediation. If the project site is included on any list compiled pursuant to Section 65962.5 of the Government Code, the project shall document how it has remediated the site, if remediation is completed. Alternatively, the project shall implement the recommendations provided in a preliminary endangerment assessment or comparable document that identifies remediation appropriate for the site.

Residential Units Near High-Volume Roadways and Stationary Sources. If a project includes residential units located within 500 feet, or other distance determined to be appropriate by the local agency or air district based on local conditions, of a high volume roadway or other significant sources of air pollution, the project shall comply with any policies and standards identified in the local general plan, specific plan, zoning code or community risk reduction plan for the protection of public health from such sources of air pollution. If the local government has not adopted such plans or policies, the project shall include measures, such as enhanced air filtration and project design, that the lead agency finds, based on substantial evidence, will promote the protection of public health from sources of air pollution. Those measure may include, among others, the recommendations of the California Air Resources Board, air districts, and the California Air Pollution Control Officers Association.

IV. Additional Performance Standards by Project Type

In addition to the project features described above in Section III, specific eligibility requirements are provided below by project type.

Several of the performance standards below refer to "low vehicle travel areas". Such areas can be illustrated on maps based on data developed by the regional Metropolitan Planning Organization (MPO) using its regional travel demand model.

Several of the performance standards below refer to distance to transit. Distance should be calculated so that at least 75 percent of the surface area of the project site is within the specified distance.

A. Residential

To be eligible for streamlining pursuant to Section 15183.3, a project must satisfy one of the following:

Projects achieving below average regional per capita vehicle miles traveled (VMT). A residential project is eligible if it is located in a "low vehicle travel area" within the region.

Projects located within ~~¾~~ ½ mile of an Existing Major Transit Stop or High Quality Transit Corridor. A residential project is eligible if it is located within ~~½~~ ½ mile of an existing major transit stop or an existing stop along a high quality transit corridor.

Low-Income Housing. A residential or mixed-use project consisting of 300 or fewer residential units all of which are affordable to low income households is eligible if the developer of the development project provides sufficient legal commitments to the lead agency to ensure the continued availability and use of the housing units for lower income households, as defined in Section 50079.5 of the Health and Safety Code, for a period of at least 30 years, at monthly housing costs, as determined pursuant to Section 50053 of the Health and Safety Code.

B. Commercial/Retail

To be eligible for streamlining pursuant to Section 15183.3, a project must satisfy one of the following:

Regional Location. A commercial project with no single-building floor-plate greater than 50,000 square feet is eligible if it locates in a "low vehicle travel area."

Proximity to Households. A project with no single-building floor-plate greater than 50,000 square feet located within one-half mile of 1800 households is eligible.

C. Office Building

To be eligible for streamlining pursuant to Section 15183.3, a project must satisfy one of the following:

Regional Location. Office buildings, both commercial and public, are eligible if they locate in a low vehicle travel area.

Proximity to a Major Transit Stop. Office buildings, both commercial and public, within ~~¾~~ ½ mile of an existing major transit stop, or ~~½~~ ¼ mile of an existing stop along a high quality transit corridor, are eligible.

D. Transit

Transit stations, as defined in Section 15183.3(e)(1), are eligible.

E. Schools

Elementary schools within one mile of fifty percent of the projected student population are eligible. Middle schools and high schools within two miles of fifty percent of the projected student population are eligible. Alternatively, any school within ~~¼~~ ½ mile of an existing major transit stop or an existing stop along a high quality transit corridor is eligible.

Additionally, in order to be eligible, all schools shall provide parking and storage for bicycles and scooters and shall comply with the requirements in Sections 17213, 17213.1 and 17213.2 of the California Education Code.

F. Small Walkable Community Projects

Small walkable community projects, as defined in Section 15183.3, subdivision (e)(6), that implement the project features described in Section III above are eligible.

G. Mixed-Use Projects

Where a project includes some combination of residential, commercial and retail, office building, transit station, and/or schools, the performance standards in this Section that apply to the predominant use shall govern the entire project.

Note: Authority cited: Sections 21083 and 21094.5.5, Public Resources Code. Reference: Sections 21094.5 and 21094.5.5, Public Resources Code.

Appendix N: Infill Environmental Checklist Form

NOTE: This sample form is intended to assist lead agencies in assessing infill projects according to the procedures provided in Section 21094.5 of the Public Resources Code. Lead agencies may customize this form as appropriate, provided that the content satisfies the requirements in Section 15183.3 of the CEQA Guidelines.

1. Project title: _____
2. Lead agency name and address:
   _____
   _____
   _____
3. Contact person and phone number: _____
4. Project location: _____
5. Project sponsor's name and address:
   _____
   _____
   _____
6. General plan designation: _____ 7. Zoning: _____
8. Prior Environmental Document(s) Analyzing the Effects of the Infill Project (including State Clearinghouse Number if assigned):_____
   _____
9. Location of Prior Environmental Document(s) Analyzing the Effects of the Infill Project:
   _____
   _____
10. Description of project: (Describe the whole action involved, including but not limited to later phases of the project, and any secondary, support, or off-site features necessary for its implementation. Attach additional sheets if necessary.)
    _____
    _____
    _____
11. Surrounding land uses and setting: Briefly describe the project's surroundings, including any prior uses of the project site, or, if vacant, describe the urban uses that exist on at least 75% of the project's perimeter:
    _____
    _____
    _____
12. Other public agencies whose approval is required (e.g., permits, financing approval, or participation agreement.)
    _____
    _____
    _____

13) Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, is there a plan for consultation that includes, for example, the determination of significance of impacts to tribal cultural resources, procedures regarding confidentiality, etc.?

_____
_____
_____

Note: Conducting consultation early in the CEQA process allows tribal governments, lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and reduce the potential for delay and conflict in the environmental review process. (See Public Resources Code section 21080.3.2.) Information may also be available from the California Native American Heritage Commission's Sacred Lands File per Public Resources Code section 5097.96 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

SATISFACTION OF APPENDIX M PERFORMANCE STANDARDS

Provide the information demonstrating that the infill project satisfies the performance standards in Appendix M below. For **mixed-use projects**, the predominant use will determine which performance standards apply to the entire project.

1. Does the non-residential infill project include a renewable energy feature? If so, describe below. If not, explain below why it is not feasible to do so.

_____
_____
_____

2. If the project site is included on any list compiled pursuant to Section 65962.5 of the Government Code, either provide documentation of remediation or describe the recommendations provided in a preliminary endangerment assessment or comparable document that will be implemented as part of the project.

_____
_____
_____

3. If the infill project includes residential units located within 500 feet, or such distance that the local agency or local air district has determined is appropriate based on local conditions, a high volume roadway or other significant source of air pollution, as defined in Appendix M, describe the measures that the project will implement to protect public health. Such measures may include policies and standards identified in the local general plan, specific plans, zoning code or community risk reduction plan, or measures recommended in a health risk assessment, to promote the protection of public health. Identify the policies or standards, or refer to the site specific analysis, below. (Attach additional sheets if necessary.)

_____
_____
_____

4. For residential projects, the project satisfies which of the following?

☐ Located within a low vehicle travel area, as defined in Appendix M. (Attach VMT map.)

☐ Located within ½ mile of an existing major transit stop or an existing stop along a high quality transit corridor. (Attach map illustrating proximity to transit.)

☐ Consists of 300 or fewer units that are each affordable to low income households. (Attach evidence of legal commitment to ensure the continued availability and use of the housing units for lower income households, as defined in Section 50079.5 of the Health and Safety Code, for a period of at least 30 years, at monthly housing costs, as determined pursuant to Section 50053 of the Health and Safety Code.)

5. For commercial projects with a single building floor-plate below 50,000 square feet, the project satisfies which of the following?

☐ Located within a low vehicle travel area, as defined in Appendix M. (Attach VMT map.)

☐ The project is within one-half mile of 1800 dwelling units. (Attach map illustrating proximity to households.)

6. For office building projects, the project satisfies which of the following?

☐ Located within a low vehicle travel area, as defined in Appendix M. (Attach VMT map.)

☐ Located within ½ mile of an existing major transit stop or within ¼ of a stop along a high quality transit corridor. (Attach map illustrating proximity to transit.)

7. For school projects, the project does all of the following:

☐ The project complies with the requirements in Sections 17213, 17213.1 and 17213.2 of the California Education Code.

☐ The project is an elementary school and is within one mile of 50% of the student population, or is a middle school or high school and is within two miles of 50% of the student population. Alternatively, the school is within ½ mile of an existing major transit stop or an existing stop along a high quality transit corridor. (Attach map and methodology.)

☐ The project provides parking and storage for bicycles and scooters.

8. For small walkable community projects, the project must be a residential project that has a density of at least eight units to the acre or a commercial project with a floor area ratio of at least 0.5, or both.

ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED:

The infill project could potentially result in one or more of the following environmental effects.

☐ Aesthetics	☐ Agriculture and Forestry Resources	☐ Air Quality
☐ Biological Resources	☐ Cultural Resources	☐ **Energy**
☐ Geology / Soils	☐ Greenhouse Gas Emissions	☐ Hazards & Hazardous Materials
☐ Hydrology / Water Quality	☐ Land Use / Planning	☐ Mineral Resources
☐ Noise	☐ Population / Housing	☐ Public Services
☐ Recreation	☐ Transportation/~~Traffic~~	☐ Tribal Cultural Resources
☐ Utilities/Service Systems	☐ **Wildfire**	☐ Mandatory Findings of Significance

DETERMINATION: (To be completed by the Lead Agency)

On the basis of this initial evaluation:

☐ I find that the proposed infill project WOULD NOT have any significant effects on the environment that either have not already been analyzed in a prior EIR or that are more significant than previously analyzed, or that uniformly applicable development policies would not substantially mitigate. Pursuant to Public Resources Code Section 21094.5, CEQA does not apply to such effects. A Notice of Determination (Section 15094) will be filed.

☐ I find that the proposed infill project will have effects that either have not been analyzed in a prior EIR, or are more significant than described in the prior EIR, and that no uniformly applicable development policies would substantially mitigate such effects. With respect to those effects that are subject to CEQA, I find that such effects WOULD NOT be significant and a NEGATIVE DECLARATION, or if the project is a Transit Priority Project a SUSTAINABLE COMMUNITIES ENVIRONMENTAL ASSESSMENT, will be prepared.

☐ I find that the proposed infill project will have effects that either have not been analyzed in a prior EIR, or are more significant than described in the prior EIR, and that no uniformly applicable development policies would substantially mitigate such effects. I find that although those effects could be significant, there will not be a significant effect in this case because revisions in the infill project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION, or if the project is a Transit Priority Project a SUSTAINABLE COMMUNITIES ENVIRONMENTAL ASSESSMENT, will be prepared.

☐ I find that the proposed infill project would have effects that either have not been analyzed in a prior EIR, or are more significant than described in the prior EIR, and that no uniformly applicable development policies would substantially mitigate such effects. I find that those effects WOULD be significant, and an infill ENVIRONMENTAL IMPACT REPORT is required to analyze those effects that are subject to CEQA.

_____ _____

_____ _____

Signature Date

EVALUATION OF THE ENVIRONMENTAL IMPACTS OF INFILL PROJECTS:

1) A brief explanation is required for all answers except "No Impact" answers that are adequately supported by the information sources a lead agency cites in the parentheses following each question. A "No Impact" answer is adequately supported if the referenced information sources show that the impact simply does not apply to projects like the one involved (e.g., the project falls outside a fault rupture zone). A "No Impact" answer should be explained where it is based on project-specific factors as well as general standards (e.g., the project will not expose sensitive receptors to pollutants, based on a project-specific screening analysis).

2) All answers must take account of the whole action involved, including off-site as well as on-site, cumulative as well as project-level, indirect as well as direct, and construction as well as operational impacts.

3) For the purposes of this checklist, “prior EIR” means the environmental impact report certified for a planning level decision, as supplemented by any subsequent or supplemental environmental impact reports, negative declarations, or addenda to those documents. “Planning level decision” means the enactment or amendment of a general plan, community plan, specific plan, or zoning code. (Section 15183.3(e).)

4) Once the lead agency has determined that a particular physical impact may occur as a result of an infill project, then the checklist answers must indicate whether that impact has already been analyzed in a prior EIR. If the effect of the infill project is not more significant than what has already been analyzed, that effect of the infill project is not subject to CEQA. The brief explanation accompanying this determination should include page and section references to the portions of the prior EIR containing the analysis of that effect. The brief explanation shall also indicate whether the prior EIR included any mitigation measures to substantially lessen that effect and whether those measures have been incorporated into the infill project.

5) If the infill project would cause a significant adverse effect that either is specific to the project or project site and was not analyzed in a prior EIR, or is more significant than what was analyzed in a prior EIR, the lead agency must determine whether uniformly applicable development policies or standards that have been adopted by the lead agency, or city or county, would substantially mitigate that effect. If so, the checklist shall explain how the infill project’s implementation of the uniformly applicable development policies will substantially mitigate that effect. That effect of the infill project is not subject to CEQA if the lead agency makes a finding, based upon substantial evidence, that the development policies or standards will substantially mitigate that effect.

6) If all effects of an infill project were either analyzed in a prior EIR or are substantially mitigated by uniformly applicable development policies or standards, CEQA does not apply to the project, and the lead agency shall file a Notice of Determination.

7) Effects of an infill project that either have not been analyzed in a prior EIR, or that uniformly applicable development policies or standards do not substantially mitigate, are subject to CEQA. With respect to those effects of the infill project that are subject to CEQA, the checklist shall indicate whether those effects are significant, less than significant with mitigation, or less than significant. If there are one or more " Significant Impact" entries when the determination is made, an infill EIR is required. The infill EIR should be limited to analysis of those effects determined to be significant. (Sections 15128, 15183.3(d).)

8) "Less Than Significant With Mitigation Incorporated" applies where the incorporation of mitigation measures will reduce an effect of an infill project that is subject to CEQA from " Significant Impact" to a "Less Than Significant Impact." The lead agency must describe the mitigation measures, and briefly explain how those measures reduce the effect to a less than significant level. If the effects of an infill project that are subject to CEQA are less than significant with mitigation incorporated, the lead agency may prepare a Mitigated Negative Declaration. If all of the effects of the infill project that are subject to CEQA are less than significant, the lead agency may prepare a Negative Declaration.

9) This is only a suggested form, and lead agencies are free to use different formats; however, lead agencies should normally address the questions from this checklist that are relevant to an infill project's environmental effects in whatever format is selected.

10) The explanation of each issue should identify:

   a) the significance criteria or threshold, if any, used to evaluate each question; and

   b) the mitigation measure identified, if any, to reduce the impact to less than significance.

Issues:

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
I. AESTHETICS. **Except as provided in Public Resources Code Section 21099,** ~~W~~would the project.:					
a) Have a substantial adverse effect on a scenic vista?	☐	☐	☐	☐	☐
b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?	☐	☐	☐	☐	☐
c) **~~S~~In non-urbanized area, s**ubstantially degrade the existing visual character or quality of **public views of** the site and its surroundings? **(Public views are those that are experienced from publicly accessible vantage point.) If the project is in an urbanized area, would the project conflict with applicable zoning and other regulations governing scenic quality?**	☐	☐	☐	☐	☐
d) Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?	☐	☐	☐	☐	☐
II. AGRICULTURE AND FORESTRY RESOURCES. In determining whether impacts to					

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. In determining whether impacts to forest resources, including timberland, are significant environmental effects, lead agencies may refer to information compiled by the California Department of Forestry and Fire Protection regarding the state's inventory of forest land, including the Forest and Range Assessment Project and the Forest Legacy Assessment project; and forest carbon measurement methodology provided in Forest Protocols adopted by the California Air Resources Board. Would the project:					

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?	☐	☐	☐	☐	☐
b) Conflict with existing zoning for agricultural use, or a Williamson Act contract?	☐	☐	☐	☐	☐
c) Conflict with existing zoning for, or cause rezoning of, forest land (as defined in Public Resources Code section 12220(g)), timberland (as defined by Public Resources Code section 4526), or timberland zoned Timberland Production (as defined by Government Code section 51104(g))?	☐	☐	☐	☐	☐
d) Result in the loss of forest land or conversion of forest land to non-forest use?	☐	☐	☐	☐	☐
e) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use or conversion of forest land to non-forest use?	☐	☐	☐	☐	☐
III. AIR QUALITY. Where available, the significance criteria established by the applicable air quality management **district** or air pollution control district may be relied upon to make the following determinations. Would the project:					
a) Conflict with or obstruct implementation of the applicable air quality plan?	☐	☐	☐	☐	☐
b) ~~**Violate any air quality standard or contribute substantially to an existing or projected air quality violation?**~~	☐	☐	☐	☐	☐
~~**c)**~~ Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard ~~**(including releasing emissions which exceed quantitative thresholds for ozone precursors)**~~**?**	☐	☐	☐	☐	☐
c ~~**d**~~) Expose sensitive receptors to substantial pollutant concentrations?	☐	☐	☐	☐	☐
d e) ~~**Create objectionable**~~ **Result in other emissions (such as those leading to** odors**) adversely** affecting a substantial number of people?	☐	☐	☐	☐	☐
IV. BIOLOGICAL RESOURCES: Would the project:					

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
a) Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?	☐	☐	☐	☐	☐
b) Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?	☐	☐	☐	☐	☐
c) Have a substantial adverse effect on **state or** federally protected wetlands **~~as defined by Section 404 of the Clean Water Act~~** (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?	☐	☐	☐	☐	☐
d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?	☐	☐	☐	☐	☐
e) Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?	☐	☐	☐	☐	☐
f) Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
V. CULTURAL RESOURCES. Would the project:					
a) Cause a substantial adverse change in the significance of a historical resource **~~as defined~~ pursuant to** in § 15064.5?	☐	☐	☐	☐	☐
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?	☐	☐	☐	☐	☐
~~c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?~~	☐	☐	☐	☐	☐
c ~~d~~) Disturb any human remains, including those interred outside of formal cemeteries?	☐	☐	☐	☐	☐
VI. ENERGY. Would the project:					
a) Result in potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy resources, during project construction or operation?	☐	☐	☐	☐	
b) Conflict with or obstruct a state or local plan for renewable energy or energy efficiency?					
VII. GEOLOGY AND SOILS. Would the project:					
a) **~~Expose people or structures to~~ Directly or indirectly cause** potential substantial adverse effects, including the risk of loss, injury, or death involving:	☐	☐	☐	☐	☐
i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.	☐	☐	☐	☐	☐
ii) Strong seismic ground shaking?	☐	☐	☐	☐	☐
iii) Seismic-related ground failure, including liquefaction?	☐	☐	☐	☐	☐
iv) Landslides?	☐	☐	☐	☐	☐
b) Result in substantial soil erosion or the loss of topsoil?	☐	☐	☐	☐	☐
c) Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
d) Be located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial **direct or indirect** risks to life or property?	☐	☐	☐	☐	☐
e) Have soils incapable of adequately supporting the use of septic tanks or alternative waste water disposal systems where sewers are not available for the disposal of waste water?	☐	☐	☐	☐	☐
f) Directly or indirectly destroy a unique paleontological resource or site or unique geological feature?					
VIII. GREENHOUSE GAS EMISSIONS. Would the project:	☐	☐	☐	☐	☐
a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?	☐	☐	☐	☐	☐
b) Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?	☐	☐	☐	☐	☐
~~**VIII**~~ **IX**. HAZARDS AND HAZARDOUS MATERIALS. Would the project:					
a) Create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials?	☐	☐	☐	☐	☐
b) Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment?	☐	☐	☐	☐	☐
c) Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?	☐	☐	☐	☐	☐
d) Be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5 and, as a result, would it create a significant hazard to the public or the environment?	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
e) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard **or excessive noise** for people residing or working in the project area?	☐	☐	☐	☐	☐
~~**f) For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in the project area?**~~	☐	☐	☐	☐	☐
~~**g**~~) Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan?	☐	☐	☐	☐	☐
~~**h**~~ **g**) Expose people or structures**, either directly or indirectly,** to a significant risk of loss, injury or death involving wildland fires, ~~**including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands**~~?	☐	☐	☐	☐	☐
~~I~~X. HYDROLOGY AND WATER QUALITY. Would the project:					
a) Violate any water quality standards or waste discharge requirements **or otherwise substantially degrade surface or ground water quality**?	☐	☐	☐	☐	☐
b) Substantially ~~**deplete**~~ **decrease** groundwater supplies or interfere substantially with groundwater recharge such that **the project may impede sustainable groundwater management of the basin** ~~**there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)**~~**?**	☐	☐	☐	☐	☐
c) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river **or through the addition of impervious surfaces**, in a manner which would**:**	☐	☐	☐	☐	☐
(i) result in substantial erosion or siltation on- or off-site;	☐	☐	☐	☐	☐
(ii) substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or offsite;	☐	☐	☐	☐	☐
(iii) create or contribute runoff water which would exceed the capacity of existing or	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
planned stormwater drainage systems or provide substantial additional sources of polluted runoff; or					
(iv) impede or redirect flood flows?					
d) In flood hazard, tsunami, or seiche zones, risk release of pollutants due to project inundation?					
e) Conflict with or obstruct implementation of a water quality control plan or sustainable groundwater management plan?					

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
~~**d) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site?**~~	☐	☐	☐	☐	☐
~~**e) Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff?**~~	☐	☐	☐	☐	☐
~~**f) Otherwise substantially degrade water quality?**~~	☐	☐	☐	☐	☐
~~**g) Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map?**~~	☐	☐	☐	☐	☐
~~**h) Place within a 100-year flood hazard area structures which would impede or redirect flood flows?**~~	☐	☐	☐	☐	☐
~~**i) Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?**~~	☐	☐	☐	☐	☐
~~**j) Inundation by seiche, tsunami, or mudflow?**~~	☐	☐	☐	☐	☐
XI. LAND USE AND PLANNING. Would the project:					
a) Physically divide an established community?	☐	☐	☐	☐	☐
b) **Cause a significant environmental impact due to a c**onflict with any ~~**applicable**~~ land use plan, policy, or regulation~~**of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance)**~~ adopted for the purpose of avoiding or mitigating an environmental effect?	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
~~**c) Conflict with any applicable habitat conservation plan or natural community conservation plan?**~~	☐	☐	☐	☐	☐
XI**I**. MINERAL RESOURCES. Would the project:					
a) Result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the state?	☐	☐	☐	☐	☐
b) Result in the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan?	☐	☐	☐	☐	☐
XI**I**. NOISE -- Would the project result in:					
a) ~~**Exposure of persons to or g**~~ **G**eneration of **a substantial temporary or permanent increase in ambient** noise levels **in the vicinity of the project** in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?	☐	☐	☐	☐	☐
b) ~~**Exposure of persons to or g**~~ **G**eneration of excessive groundborne vibration or groundborne noise levels?	☐	☐	☐	☐	☐
~~**c) A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project?**~~	☐	☐	☐	☐	☐
~~**d) A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project?**~~	☐	☐	☐	☐	☐
~~**e**~~ **c**) For a project located within **the vicinity of a private airstrip or** an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels?	☐	☐	☐	☐	☐
~~**f) For a project within the vicinity of a private airstrip, would the project expose people residing or working in the project area to excessive noise levels?**~~	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
XIV ~~I~~I. POPULATION AND HOUSING. Would the project:					
a) Induce substantial **unplanned** population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)?	☐	☐	☐	☐	☐
b) Displace substantial numbers of existing **people or** housing, necessitating the construction of replacement housing elsewhere?	☐	☐	☐	☐	☐
~~**c) Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere?**~~	☐	☐	☐	☐	☐
X~~I~~V. PUBLIC SERVICES.					
a) Would the project result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times or other performance objectives for any of the public services:					
Fire protection?	☐	☐	☐	☐	☐
Police protection?	☐	☐	☐	☐	☐
Schools?	☐	☐	☐	☐	☐
Parks?	☐	☐	☐	☐	☐
Other public facilities?	☐	☐	☐	☐	☐
XV**I**. RECREATION.					
a) Would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
b) Does the project include recreational facilities or require the construction or expansion of recreational facilities which might have an adverse physical effect on the environment?	☐	☐	☐	☐	☐
XVI**I**. TRANSPORTATION/~~**TRAFFIC**~~. Would the project	☐	☐	☐	☐	☐
a) Conflict with a~~**n applicable**~~ **program,** plan, ordinance or policy ~~**establishing measures of effectiveness for the performance of**~~ **addressing** the circulation system, **including transit, roadway~~s~~, bicycle ~~lanes~~ and pedestrian facilities ~~paths~~**? ~~**taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit?**~~	☐	☐	☐	☐	☐
b) **Conflict or be inconsistent with CEQA Guidelines Section 15064.3, subdivision (b)?** ~~**Conflict with an applicable congestion management program, including, but not limited to level of service standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways?**~~	☐	☐	☐	☐	☐
c) ~~**Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?**~~	☐	☐	☐	☐	☐
~~**d)**~~ Substantially increase hazards due to a **geometric** design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?	☐	☐	☐	☐	☐
~~**e**~~ **d**) Result in inadequate emergency access?	☐	☐	☐	☐	☐
~~**f) Conflict with adopted policies, plans, or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance or safety of such facilities?**~~	☐	☐	☐	☐	☐
XVIII. TRIBAL CULTURAL RESOURCES.					
a) Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and					

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
that is:					
(i) Listed or eligible for listing in the California Register of Historical Resources, or in the local register of historical resources as defined in Public Resources. Code Section 5020.1(k), or					
(ii) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.					

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
XIX. UTILITIES AND SERVICE SYSTEMS. Would the project:					
a) ~~**Exceed wastewater treatment requirements of the applicable Regional Water Quality Control Board?**~~	☐	☐	☐	☐	☐
~~**b**~~) Require or result in the **relocation or** construction of new **or expanded** water**,** ~~**or**~~ wastewater treatment **or storm water drainage, electric power, natural gas, or telecommunications** facilities ~~**or expansion of existing facilities**~~, the construction **or relocation** of which could cause significant environmental effects?	☐	☐	☐	☐	☐
~~**c) Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?**~~	☐	☐	☐	☐	☐
b ~~**d**~~) Have sufficient water supplies available to serve the project **and reasonably foreseeable future development during normal, dry and multiple dry years** ~~**from existing entitlements and resources, or are new or expanded entitlements needed**~~?	☐	☐	☐	☐	☐
c **e**) Result in a determination by the wastewater treatment provider which serves or may serve the project that it has adequate capacity to serve the project's projected demand in addition to the provider's existing commitments?	☐	☐	☐	☐	☐
d ~~**f**~~) **Generate solid waste in excess of State or local standards, or in excess of the capacity of local infrastructure, or otherwise impair the attainment of solid waste reduction goals?** ~~**Be served by a landfill with sufficient permitted capacity to accommodate the project's solid waste disposal needs?**~~	☐	☐	☐	☐	☐
e ~~**g**~~) Comply with federal, state, and local **management and reduction** statutes and regulations related to solid waste?	☐	☐	☐	☐	☐
XX. WILDFIRE – If located in or near state responsibility areas or lands classified as very high fire hazard severity zones, would the project:					
a) Substantially impair an adopted emergency response plan or emergency evacuation plan?	☐	☐	☐	☐	☐
b) Due to slope, prevailing winds, and other factors, exacerbate wildfire risks, and thereby expose project occupants to, pollutant concentrations from a wildfire or the	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐

	Significant Impact	*Less Than Significant or Less than Significant with Mitigation Incorporated*	*No Impact*	**Analyzed in the Prior EIR**	**Substantially Mitigated by Uniformly Applicable Development Policies**
uncontrolled spread of a wildfire?					
c) Require the installation or maintenance of associated infrastructure (such as roads, fuel breaks, emergency water sources, power lines or other utilities) that may exacerbate fire risk or that may result in temporary or ongoing impacts to the environment?					
d) Expose people or structures to significant risks, including downslope or downstream flooding or landslides, as a result of runoff, post-fire slope instability, or drainage changes?					
X**XI**. MANDATORY FINDINGS OF SIGNIFICANCE.					
a) Does the project have the potential to **substantially** degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, **substantially** reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory?	☐	☐	☐	☐	☐
b) Does the project have impacts that are individually limited, but cumulatively considerable? ("Cumulatively considerable" means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects)?	☐	☐	☐	☐	☐
c) Does the project have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly?	☐	☐	☐	☐	☐

Authority: Public Resources Code 21083, 21094.5.5
Reference: Public Resources Code Sections 21094.5 and 21094.5.5

TAB 7

New Guidelines for Assessing Transportation Impacts Under CEQA Finalized

The California Natural Resources Agency has adopted new CEQA Guidelines that will leave behind level of service in favor of vehicle miles traveled.

Following years of development and public comment, the Office of Planning and Research (OPR) and the Natural Resources Agency have issued new CEQA Guidelines for analyzing transportation impacts. These new regulations represent a significant shift in analyzing transportation impacts under CEQA. By July 1, 2020, all CEQA lead agencies must analyze a project's transportation impacts using vehicle miles traveled (VMT). VMT measures the per capita number of car trips generated by a project and distances cars will travel to and from a project, rather than congestion levels at intersections (level of service or "LOS," graded on a scale of A - F). California's largest cities have already adopted VMT standards and abandoned LOS, but many other jurisdictions will continue to require LOS analysis -- not for CEQA purposes, but because their general plans or other policies require LOS analysis.

In this update, we highlight key aspects of the VMT guidelines and how projects could be impacted by this important change in conducting transportation impacts analysis.

Background

In 2013, the California legislature enacted SB 743, which required, among other things, that OPR adopt new guidelines for assessing transportation impacts and that when enacted, traffic congestion would no longer be considered in assessing a significant impact under CEQA. The purpose was to better align transportation impacts analysis under CEQA with the state's goals of reducing greenhouse gas emissions and traffic-related air pollution and promoting multimodal transportation networks and a diversity of land uses. Under the existing framework of congestion-based analysis using LOS, infill and transit-oriented development is often discouraged because such projects are in areas of existing traffic congestion. As policymakers and legislators have recognized, congestion-based analysis does not necessarily improve the time spent commuting and is often at odds with state goals of reducing vehicle usage and promoting public transit. Indeed, a frequent solution to reducing level of service at intersections is to increase roadway capacity, which studies have found can actually lead to an increase in system-wide congestion and an increase in travel time. It is also now better understood that LOS does not accurately reflect vehicle travel as it only focuses on individual local intersections and roadway segments and not on the entire vehicle trip.

VMT is not a new tool for assessing environmental impacts under CEQA. It is used to assess a project's impact on greenhouse gas emissions, air quality, and energy. Using VMT for analyzing transportation impacts will emphasize reducing the number of trips and distances vehicles are used to travel to, from, or within a development project. Projects located near transit and/or within infill areas generally have lower VMT than projects in rural or undeveloped areas. The shift to VMT analysis under CEQA is intended to encourage the development of jobs, housing, and commercial uses in closer proximity to each other and to transit.

The New Guideline and Technical Advisory

Section 15064.3 of the newly adopted CEQA Guidelines gives agencies wide latitude in assessing transportation impacts with VMT. The more technical details of calculating VMT and assessing impacts are found in a Technical Advisory issued by OPR. The Technical Advisory provides guidance on assessing VMT, different methodologies, significance thresholds, and mitigation measures.

SB 743 authorized OPR to decide whether the new VMT-based approached would apply only to "transit priority areas" or to all areas in the state. A transit priority area is an area within one-half mile of a major transit stop. A major transit stop is a "site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods." Pub. Res. Code § 21064.3. OPR has opted to require the new VMT-based analysis in *all* areas of the state, not just in transit priority areas. Transit priority areas are still relevant, however; land use projects within one-half mile of a major transit stop or a stop along a high-quality transit corridor should be presumed to have a less than significant transportation impact. A high-quality transit corridor is a corridor with fixed route bus service with service intervals that do not exceed 15 minutes during peak commute hours. In addition, projects that decrease VMT in the project area as compared to existing conditions should be presumed to have less than a significant impact.

Where quantitative models or methods are unavailable, section 15064.3 allows agencies to assess VMT qualitatively, using factors such as availability of transit and proximity to other destinations. The Guideline also states that the lead agency has discretion to choose the most appropriate methodology and can use its professional judgment to adjust its analysis accordingly.

While not legally binding, the Technical Advisory will be an important reference for agencies in determining how to calculate VMT, setting significance thresholds, and identifying mitigation measures. For instance, the Technical Advisory discusses the difference between tour-based and trip-based VMT. Trip-based VMT counts trips to and from one location (i.e. home to work) but does not count any trips taken in between, whereas tour-based VMT includes these trips. Either method can be used for residential and office projects, but the Technical Advisory recommends tour-based VMT because it is more comprehensive.

Globally, the Technical Advisory suggests that agencies use consistent methodologies for setting thresholds, estimating project VMT, and estimating reductions from mitigations, to allow for apples-to-apples comparisons.

The Technical Advisory also provides guidance for setting screening thresholds and thresholds of significance:

- As stated by the new Guideline, projects within one-half mile of a major transit stop or high-quality transit corridor should be presumed to result in a less-than-significant impact.

- Small projects that generate fewer than 110 trips per day may generally be assumed to cause a less-than-significant transportation impact.

- Agencies may develop map-based screening for residential and office projects where projects located near areas with low VMT may be presumed to have a less-than-significant transportation impact.

- Residential projects that result in per capita VMT that exceeds 85 percent of existing regional or city average VMT may indicate a significant impact.

- Office projects that result in per employee VMT that exceeds 85 percent of existing regional average VMT may indicate a significant impact.

- With retail projects, the Technical Advisory recommends that the analysis should be based on total change in VMT because retail projects usually re-route travel from other retail destinations.

For mitigation measures, the Technical Advisory lists a bevy of measures that could reduce VMT, which include: improving or increasing access to transit; incorporating affordable housing into the project; providing bicycle parking; limiting or eliminating parking supply; and providing telework options.

The updated version of the Technical Advisory, released December 2018, includes new guidance on the impact of affordable housing on VMT. Generally, residential projects with more affordable housing are considered likely to reduce VMT, whereas projects that replace affordable housing units with fewer market rate housing units may increase overall VMT. A high percentage of affordable housing may serve as the basis for finding a less-than-significant transportation impact.

Conclusion

The new Guidelines and Technical Advisory are consistent with the state's effort to use land use planning to reduce greenhouse gas emissions and air pollution. Many jurisdictions have already made the switch or begun the transition to VMT, including San Francisco, Oakland, San Jose, Los Angeles, and Sacramento.

SB 743 and the new guidelines do not, however, require lead agencies to abandon LOS for purposes other than CEQA analysis. Some cities have LOS requirements in their general plans. In these jurisdictions, a project may need both a VMT analysis for CEQA purposes and an LOS analysis for purposes of establishing consistency with the general plan.

TECHNICAL ADVISORY

ON EVALUATING TRANSPORTATION IMPACTS IN CEQA

December 2018

Contents

A. Introduction

This technical advisory is one in a series of advisories provided by the Governor's Office of Planning and Research (OPR) as a service to professional planners, land use officials, and CEQA practitioners. OPR issues technical assistance on issues that broadly affect the practice of land use planning and the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). (Gov. Code, § 65040, subds. (g), (l), (m).) The purpose of this document is to provide advice and recommendations, which agencies and other entities may use at their discretion. This document does not alter lead agency discretion in preparing environmental documents subject to CEQA. This document should not be construed as legal advice.

Senate Bill 743 (Steinberg, 2013), which was codified in Public Resources Code section 21099, required changes to the guidelines implementing CEQA (CEQA Guidelines) (Cal. Code Regs., Title 14, Div. 6, Ch. 3, § 15000 et seq.) regarding the analysis of transportation impacts. As one appellate court recently explained: "During the last 10 years, the Legislature has charted a course of long-term sustainability based on denser infill development, reduced reliance on individual vehicles and improved mass transit, all with the goal of reducing greenhouse gas emissions. Section 21099 is part of that strategy . . . ." (*Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712, 729.) Pursuant to Section 21099, the criteria for determining the significance of transportation impacts must "promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses." (*Id.*, subd. (b)(1); see generally, adopted CEQA Guidelines, § 15064.3, subd. (b) [Criteria for Analyzing Transportation Impacts].) To that end, in developing the criteria, OPR has proposed, and the California Natural Resources Agency (Agency) has certified and adopted, changes to the CEQA Guidelines that identify vehicle miles traveled (VMT) as the most appropriate metric to evaluate a project's transportation impacts. With the California Natural Resources Agency's certification and adoption of the changes to the CEQA Guidelines, automobile delay, as measured by "level of service" and other similar metrics, generally no longer constitutes a significant environmental effect under CEQA. (Pub. Resources Code, § 21099, subd. (b)(3).)

This advisory contains technical recommendations regarding assessment of VMT, thresholds of significance, and mitigation measures. Again, OPR provides this Technical Advisory as a resource for the public to use at their discretion. OPR is not enforcing or attempting to enforce any part of the recommendations contained herein. (Gov. Code, § 65035 ["It is not the intent of the Legislature to vest in the Office of Planning and Research any direct operating or regulatory powers over land use, public works, or other state, regional, or local projects or programs."].)

This December 2018 technical advisory is an update to the advisory it published in April 2018. OPR will continue to monitor implementation of these new provisions and may update or supplement this advisory in response to new information and advancements in modeling and methods.

B. Background

VMT and Greenhouse Gas Emissions Reduction. Senate Bill 32 (Pavley, 2016) requires California to reduce greenhouse gas (GHG) emissions 40 percent below 1990 levels by 2030, and Executive Order B-16-12 provides a target of 80 percent below 1990 emissions levels for the transportation sector by 2050. The transportation sector has three major means of reducing GHG emissions: increasing vehicle efficiency, reducing fuel carbon content, and reducing the amount of vehicle travel. The California Air Resources Board (CARB) has provided a path forward for achieving these emissions reductions from the transportation sector in its 2016 Mobile Source Strategy. CARB determined that it will not be possible to achieve the State's 2030 and post-2030 emissions goals without reducing VMT growth. Further, in its 2018 Progress Report on California's Sustainable Communities and Climate Protection Act, CARB found that despite the State meeting its 2020 climate goals, "emissions from statewide passenger vehicle travel per capita [have been] increasing and going in the wrong direction," and "California cannot meet its [long-term] climate goals without curbing growth in single-occupancy vehicle activity."[1] CARB also found that "[w]ith emissions from the transportation sector continuing to rise despite increases in fuel efficiency and decreases in the carbon content of fuel, California will not achieve the necessary greenhouse gas emissions reductions to meet mandates for 2030 and beyond without significant changes to how communities and transportation systems are planned, funded, and built."[2]

Thus, to achieve the State's long-term climate goals, California needs to reduce per capita VMT. This can occur under CEQA through VMT mitigation. Half of California's GHG emissions come from the transportation sector[3], therefore, reducing VMT is an effective climate strategy, which can also result in co-benefits.[4] Furthermore, without early VMT mitigation, the state may follow a path that meets GHG targets in the early years, but finds itself poorly positioned to meet more stringent targets later. For example, in absence of VMT analysis and mitigation in CEQA, lead agencies might rely upon verifiable offsets for GHG mitigation, ignoring the longer-term climate change impacts resulting from land use development and infrastructure investment decisions. As stated in CARB's 2017 Scoping Plan:

> "California's future climate strategy will require increased focus on integrated land use planning to support livable, transit-connected communities, and conservation of agricultural and other lands. Accommodating population and economic growth through travel- and energy-efficient land use provides GHG-efficient growth, reducing GHGs from both transportation and building energy use. GHGs can be further reduced at the project level through implementing energy-efficient construction and travel demand management approaches."[5] (*Id.* at p. 102.)

---

[1] California Air Resources Board (Nov. 2018) *2018 Progress Report on California's Sustainable Communities and Climate Protection Act*, pp. 4, 5, available at https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report_SB150_112618_02_Report.pdf.
[2] *Id.*, p. 28.
[3] See https://ca50million.ca.gov/transportation/
[4] Fang et al. (2017) *Cutting Greenhouse Gas Emissions Is Only the Beginning: A Literature Review of the Co-Benefits of Reducing Vehicle Miles Traveled*.
[5] California Air Resources Board (Nov. 2017) *California's 2017 Climate Change Scoping Plan*, p. 102, available at https://www.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf.

In light of this, the 2017 Scoping Plan describes and quantifies VMT reductions needed to achieve our long-term GHG emissions reduction goals, and specifically points to the need for statewide deployment of the VMT metric in CEQA:

> "Employing VMT as the metric of transportation impact statewide will help to ensure GHG reductions planned under SB 375 will be achieved through on-the-ground development, and will also play an important role in creating the additional GHG reductions needed beyond SB 375 across the State. Implementation of this change will rely, in part, on local land use decisions to reduce GHG emissions associated with the transportation sector, both at the project level, and in long-term plans (including general plans, climate action plans, specific plans, and transportation plans) and supporting sustainable community strategies developed under SB 375."[6]

VMT and Other Impacts to Health and Environment. VMT mitigation also creates substantial benefits (sometimes characterized as "co-benefits" to GHG reduction) in both in the near-term and the long-term. Beyond GHG emissions, increases in VMT also impact human health and the natural environment. Human health is impacted as increases in vehicle travel lead to more vehicle crashes, poorer air quality, increases in chronic diseases associated with reduced physical activity, and worse mental health. Increases in vehicle travel also negatively affect other road users, including pedestrians, cyclists, other motorists, and many transit users. The natural environment is impacted as higher VMT leads to more collisions with wildlife and fragments habitat. Additionally, development that leads to more vehicle travel also tends to consume more energy, water, and open space (including farmland and sensitive habitat). This increase in impermeable surfaces raises the flood risk and pollutant transport into waterways.[7]

VMT and Economic Growth. While it was previously believed that VMT growth was a necessary component of economic growth, data from the past two decades shows that economic growth is possible without a concomitant increase in VMT. (Figure 1.) Recent research shows that requiring development projects to mitigate LOS may actually reduce accessibility to destinations and impede economic growth.[8,9]

---

[6] *Id.* at p. 76.

[7] Fang et al. (2017) *Cutting Greenhouse Gas Emissions Is Only the Beginning: A Literature Review of the Co-Benefits of Reducing Vehicle Miles Traveled*, available at https://ncst.ucdavis.edu/wp-content/uploads/2017/03/NCST-VMT-Co-Benefits-White-Paper_Fang_March-2017.pdf.

[8] Haynes et al. (Sept. 2015) *Congested Development: A Study of Traffic Delays, Access, and Economic Activity in Metropolitan Los Angeles*, available at http://www.its.ucla.edu/wp-content/uploads/sites/6/2015/11/Haynes_Congested-Development_1-Oct-2015_final.pdf.

[9] Osman et al. (Mar. 2016) *Not So Fast: A Study of Traffic Delays, Access, and Economic Activity in the San Francisco Bay Area*, available at http://www.its.ucla.edu/wp-content/uploads/sites/6/2016/08/Taylor-Not-so-Fast-04-01-2016_final.pdf.

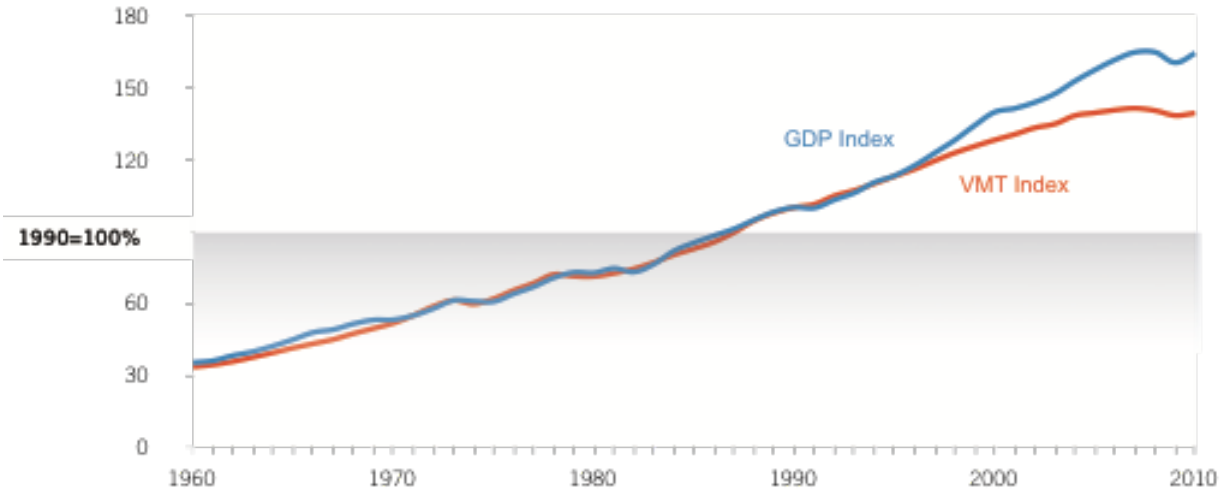


Figure 1. Kooshian and Winkelman (2011) *VMT and Gross Domestic Product (GDP), 1960-2010*.

C. Technical Considerations in Assessing Vehicle Miles Traveled

Many practitioners are familiar with accounting for VMT in connection with long-range planning, or as part of the CEQA analysis of a project's greenhouse gas emissions or energy impacts. This document provides technical information on how to assess VMT as part of a transportation impacts analysis under CEQA. Appendix 1 provides a description of which VMT to count and options on how to count it. Appendix 2 provides information on induced travel resulting from roadway capacity projects, including the mechanisms giving rise to induced travel, the research quantifying it, and information on additional approaches for assessing it.

1. Recommendations Regarding Methodology

Proposed Section 15064.3 explains that a "lead agency may use models to estimate a project's vehicle miles traveled . . . ." CEQA generally defers to lead agencies on the choice of methodology to analyze impacts. (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546; see *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409 ["the issue is not whether the studies are irrefutable or whether they could have been better" … rather, the "relevant issue is only whether the studies are sufficiently credible to be considered" as part of the lead agency's overall evaluation].) This section provides suggestions to lead agencies regarding methodologies to analyze VMT associated with a project.

Vehicle Types. Proposed Section 15064.3, subdivision (a), states, "For the purposes of this section, 'vehicle miles traveled' refers to the amount and distance of automobile travel attributable to a project." Here, the term "automobile" refers to on-road passenger vehicles, specifically cars and light trucks. Heavy-duty truck VMT could be included for modeling convenience and ease of calculation (for example, where models or data provide combined auto and heavy truck VMT). For an apples-to-apples

comparison, vehicle types considered should be consistent across project assessment, significance thresholds, and mitigation.

Residential and Office Projects. Tour- and trip-based approaches[10] offer the best methods for assessing VMT from residential/office projects and for comparing those assessments to VMT thresholds. These approaches also offer the most straightforward methods for assessing VMT reductions from mitigation measures for residential/office projects. When available, tour-based assessment is ideal because it captures travel behavior more comprehensively. But where tour-based tools or data are not available for all components of an analysis, a trip-based assessment of VMT serves as a reasonable proxy.

Models and methodologies used to calculate thresholds, estimate project VMT, and estimate VMT reduction due to mitigation should be comparable. For example:

- A tour-based assessment of project VMT should be compared to a tour-based threshold, or a trip-based assessment to a trip-based VMT threshold.
- Where a travel demand model is used to determine thresholds, the same model should also be used to provide trip lengths as part of assessing project VMT.
- Where only trip-based estimates of VMT reduction from mitigation are available, a trip-based threshold should be used, and project VMT should be assessed in a trip-based manner.

When a trip-based method is used to analyze a residential project, the focus can be on home-based trips. Similarly, when a trip-based method is used to analyze an office project, the focus can be on home-based work trips.

When tour-based models are used to analyze an office project, either employee work tour VMT or VMT from all employee tours may be attributed to the project. This is because workplace location influences overall travel. For consistency, the significance threshold should be based on the same metric: either employee work tour VMT or VMT from all employee tours.

For office projects that feature a customer component, such as a government office that serves the public, a lead agency can analyze the customer VMT component of the project using the methodology for retail development (see below).

Retail Projects. Generally, lead agencies should analyze the effects of a retail project by assessing the change in total VMT[11] because retail projects typically re-route travel from other retail destinations. A retail project might lead to increases or decreases in VMT, depending on previously existing retail travel patterns.

[10] See Appendix 1, *Considerations About Which VMT to Count,* for a description of these approaches.
[11] See Appendix 1, *Considerations About Which VMT to Count, "*Assessing Change in Total VMT" section, for a description of this approach.

Considerations for All Projects. Lead agencies should not truncate any VMT analysis because of jurisdictional or other boundaries, for example, by failing to count the portion of a trip that falls outside the jurisdiction or by discounting the VMT from a trip that crosses a jurisdictional boundary. CEQA requires environmental analyses to reflect a "good faith effort at full disclosure." (CEQA Guidelines, § 15151.) Thus, where methodologies exist that can estimate the full extent of vehicle travel from a project, the lead agency should apply them to do so. Where those VMT effects will grow over time, analyses should consider both a project's short-term and long-term effects on VMT.

Combining land uses for VMT analysis is not recommended. Different land uses generate different amounts of VMT, so the outcome of such an analysis could depend more on the mix of uses than on their travel efficiency. As a result, it could be difficult or impossible for a lead agency to connect a significance threshold with an environmental policy objective (such as a target set by law), inhibiting the CEQA imperative of identifying a project's significant impacts and providing mitigation where feasible. Combining land uses for a VMT analysis could streamline certain mixes of uses in a manner disconnected from policy objectives or environmental outcomes. Instead, OPR recommends analyzing each use separately, or simply focusing analysis on the dominant use, and comparing each result to the appropriate threshold. Recommendations for methods of analysis and thresholds are provided below. In the analysis of each use, a mixed-use project should take credit for internal capture.

Any project that includes in its geographic bounds a portion of an existing or planned Transit Priority Area (i.e., the project is within a ½ mile of an existing or planned major transit stop or an existing stop along a high quality transit corridor) may employ VMT as its primary metric of transportation impact for the entire project. (See Pub. Resources Code, § 21099, subds. (a)(7), (b)(1).)

Cumulative Impacts. A project's cumulative impacts are based on an assessment of whether the "incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (Pub. Resources Code, § 21083, subd. (b)(2); see CEQA Guidelines, § 15064, subd. (h)(1).) When using an absolute VMT metric, i.e., total VMT (as recommended below for retail and transportation projects), analyzing the combined impacts for a cumulative impacts analysis may be appropriate. However, metrics such as VMT per capita or VMT per employee, i.e., metrics framed in terms of efficiency (as recommended below for use on residential and office projects), cannot be summed because they employ a denominator. A project that falls below an efficiency-based threshold that is aligned with long-term goals and relevant plans has 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. This is similar to the analysis typically conducted for greenhouse gas emissions, air quality impacts, and impacts that utilize plan compliance as a threshold of significance. (See *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 219, 223; CEQA Guidelines, § 15064, subd. (h)(3).)

D. General Principles to Guide Consideration of VMT

SB 743 directs OPR to establish specific "criteria for determining the significance of transportation impacts of projects[.]" (Pub. Resources Code, § 21099, subd. (b)(1).) In establishing this criterion, OPR was guided by the general principles contained within CEQA, the CEQA Guidelines, and applicable case law.

To assist in the determination of significance, many lead agencies rely on "thresholds of significance." The CEQA Guidelines define a "threshold of significance" to mean "an identifiable **quantitative, qualitative[12] or performance level** of a particular environmental effect, non-compliance with which means the effect will ***normally*** be determined to be significant by the agency and compliance with which means the effect ***normally*** will be determined to be less than significant." (CEQA Guidelines, § 15064.7, subd. (a) (emphasis added).) Lead agencies have discretion to develop and adopt their own, or rely on thresholds recommended by other agencies, "provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence." (*Id*. at subd. (c); *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068.) Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Id*. at § 15384 (emphasis added); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-1109.)

Additionally, the analysis leading to the determination of significance need not be perfect. The CEQA Guidelines describe the standard for adequacy of environmental analyses:

> An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to **make a decision which intelligently takes account of environmental consequences**. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is **reasonably feasible**. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The **courts have looked not for perfection** but for **adequacy**, **completeness**, and a **good faith effort** at full disclosure.

(CEQA Guidelines, § 15151 (emphasis added).)

These general principles guide OPR's recommendations regarding thresholds of significance for VMT set forth below.

[12] Generally, qualitative analyses should only be conducted when methods do not exist for undertaking a quantitative analysis.

E. Recommendations Regarding Significance Thresholds

As noted above, lead agencies have the discretion to set or apply their own thresholds of significance. (*Center for Biological Diversity v. California Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 218-223 [lead agency had discretion to use compliance with AB 32's emissions goals as a significance threshold]; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th at p. 1068.) However, Section 21099 of the Public Resources Code states that the criteria for determining the significance of transportation impacts must promote: (1) reduction of greenhouse gas emissions; (2) development of multimodal transportation networks; and (3) a diversity of land uses. It further directed OPR to prepare and develop criteria for determining significance. (Pub. Resources Code, § 21099, subd. (b)(1).) This section provides OPR's suggested thresholds, as well as considerations for lead agencies that choose to adopt their own thresholds.

The VMT metric can support the three statutory goals: "the reduction of greenhouse gas emissions, the development of multimodal transportation networks, ***and*** a diversity of land uses." (Pub. Resources Code, § 21099, subd. (b)(1), emphasis added.) However, in order for it to promote and support all three, lead agencies should select a significance threshold that aligns with state law on all three. State law concerning the development of multimodal transportation networks and diversity of land uses requires planning for and prioritizing increases in complete streets and infill development, but does not mandate a particular depth of implementation that could translate into a particular threshold of significance. Meanwhile, the State has clear quantitative targets for GHG emissions reduction set forth in law and based on scientific consensus, and the depth of VMT reduction needed to achieve those targets has been quantified. Tying VMT thresholds to GHG reduction also supports the two other statutory goals. Therefore, to ensure adequate analysis of transportation impacts, OPR recommends using quantitative VMT thresholds linked to GHG reduction targets when methods exist to do so.

Various legislative mandates and state policies establish quantitative greenhouse gas emissions reduction targets. For example:

- Assembly Bill 32 (2006) requires statewide GHG emissions reductions to 1990 levels by 2020 and continued reductions beyond 2020.

- Senate Bill 32 (2016) requires at least a 40 percent reduction in GHG emissions from 1990 levels by 2030.

- Pursuant to Senate Bill 375 (2008), the California Air Resources Board GHG emissions reduction targets for metropolitan planning organizations (MPOs) to achieve based on land use patterns and transportation systems specified in Regional Transportation Plans and Sustainable Community Strategies (RTP/SCS). Current targets for the State's largest MPOs call for a 19 percent reduction in GHG emissions from cars and light trucks from 2005 emissions levels by 2035.

- Executive Order B-30-15 (2015) sets a GHG emissions reduction target of 40 percent below 1990 levels by 2030.

- Executive Order S-3-05 (2005) sets a GHG emissions reduction target of 80 percent below 1990 levels by 2050.

- Executive Order B-16-12 (2012) specifies a GHG emissions reduction target of 80 percent below 1990 levels by 2050 specifically for transportation.

- Executive Order B-55-18 (2018) established an additional statewide goal of achieving carbon neutrality as soon as possible, but no later than 2045, and maintaining net negative emissions thereafter. It states, "The California Air Resources Board shall work with relevant state agencies to develop a framework for implementation and accounting that tracks progress toward this goal."

- Senate Bill 391 requires the California Transportation Plan to support 80 percent reduction in GHGs below 1990 levels by 2050.

- The *California Air Resources Board Mobile Source Strategy* (2016) describes California's strategy for containing air pollutant emissions from vehicles, and quantifies VMT growth compatible with achieving state targets.

- The California Air Resources Board's *2017 Climate Change Scoping Plan Update: The Strategy for Achieving California's 2030 Greenhouse Gas Target* describes California's strategy for containing GHG emissions from vehicles, and quantifies VMT growth compatible with achieving state targets.

Considering these various targets, the California Supreme Court observed:

> Meeting our statewide reduction goals does not preclude all new development. Rather, the Scoping Plan … assumes continued growth and depends on increased efficiency and conservation in land use and transportation from all Californians.

(*Center for Biological Diversity v. California Dept. of Fish & Wildlife*, *supra*, 62 Cal.4th at p. 220.) Indeed, the Court noted that when a lead agency uses consistency with climate goals as a way to determine significance, particularly for long-term projects, the lead agency must consider the project's effect on meeting long-term reduction goals. (*Ibid*.) And more recently, the Supreme Court stated that "CEQA requires public agencies . . . to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes." (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504.)

Meeting the targets described above will require substantial reductions in existing VMT per capita to curb GHG emissions and other pollutants. But targets for overall GHG emissions reduction do not translate directly into VMT thresholds for individual projects for many reasons, including:

- Some, but not all, of the emissions reductions needed to achieve those targets could be accomplished by other measures, including increased vehicle efficiency and decreased fuel carbon content. The CARB's *First Update to the Climate Change Scoping Plan* explains:

"Achieving California's long-term criteria pollutant and GHG emissions goals will require four strategies to be employed: (1) improve vehicle efficiency and develop zero emission technologies, (2) reduce the carbon content of fuels and provide market support to get these lower-carbon fuels into the marketplace, (3) **plan and build communities to reduce vehicular GHG emissions and provide more transportation options, and (4) improve the efficiency and throughput of existing transportation systems.**"[13] CARB's *2018 Progress Report on California's Sustainable Communities and Climate Protection Act* states on page 28 that "California cannot meet its climate goals without curbing growth in single-occupancy vehicle activity." In other words, vehicle efficiency and better fuels are necessary, but insufficient, to address the GHG emissions from the transportation system. Land use patterns and transportation options also will need to change to support reductions in vehicle travel/VMT.

- New land use projects alone will not sufficiently reduce per-capita VMT to achieve those targets, nor are they expected to be the sole source of VMT reduction.

- Interactions between land use projects, and also between land use and transportation projects, existing and future, together affect VMT.

- Because location within the region is the most important determinant of VMT, in some cases, streamlining CEQA review of projects in travel efficient locations may be the most effective means of reducing VMT.

- When assessing climate impacts of some types of land use projects, use of an efficiency metric (e.g., per capita, per employee) may provide a better measure of impact than an absolute numeric threshold. (*Center for Biological Diversity*, *supra*.)

Public Resources Code section 21099 directs OPR to propose criteria for determining the significance of transportation impacts. In this Technical Advisory, OPR provides its recommendations to assist lead agencies in selecting a significance threshold that may be appropriate for their particular projects. While OPR's Technical Advisory is not binding on public agencies, CEQA allows lead agencies to "consider thresholds of significance . . . recommended by other public agencies, provided the decision to adopt those thresholds is supported by substantial evidence." (CEQA Guidelines, § 15064.7, subd. (c).) Based on OPR's extensive review of the applicable research, and in light of an assessment by the California Air Resources Board quantifying the need for VMT reduction in order to meet the State's long-term climate goals, **OPR recommends that a per capita or per employee VMT that is fifteen percent below that of existing development may be a reasonable threshold**.

Fifteen percent reductions in VMT are achievable at the project level in a variety of place types.[14]

Moreover, a fifteen percent reduction is consistent with SB 743's direction to OPR to select a threshold that will help the State achieve its climate goals. As described above, section 21099 states that the

[13] California Air Resources Board (May 2014) *First Update to the Climate Change Scoping Plan*, p. 46 (emphasis added).
[14] CAPCOA (2010) *Quantifying Greenhouse Gas Mitigation Measures*, p. 55, available at http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf.

criteria for determining significance must "promote the reduction in greenhouse gas emissions." In its document *California Air Resources Board 2017 Scoping Plan-Identified VMT Reductions and Relationship to State Climate Goals*[15], CARB assesses VMT reduction per capita consistent with its evidence-based modeling scenario that would achieve State climate goals of 40 percent GHG emissions reduction from 1990 levels by 2030 and 80 percent GHG emissions reduction levels from 1990 by 2050. Applying California Department of Finance population forecasts, CARB finds per-capita light-duty vehicle travel would need to be approximately 16.8 percent lower than existing, and overall per-capita vehicle travel would need to be approximately 14.3 percent lower than existing levels under that scenario. Below these levels, a project could be considered low VMT and would, on that metric, be consistent with 2017 Scoping Plan Update assumptions that achieve climate state climate goals.

CARB finds per capita vehicle travel would need to be kept below what today's policies and plans would achieve.

CARB's assessment is based on data in the 2017 Scoping Plan Update and 2016 Mobile Source Strategy. In those documents, CARB previously examined the relationship between VMT and the state's GHG emissions reduction targets. The Scoping Plan finds:

> "While the State can do more to accelerate and incentivize these local decisions, local actions that reduce VMT are also necessary to meet transportation sector-specific goals and achieve the 2030 target under SB 32. Through developing the Scoping Plan, CARB staff is more convinced than ever that, in addition to achieving GHG reductions from cleaner fuels and vehicles, California must also reduce VMT. Stronger SB 375 GHG reduction targets will enable the State to make significant progress toward needed reductions, but alone will not provide the VMT growth reductions needed; there is a gap between what SB 375 can provide and what is needed to meet the State's 2030 and 2050 goals."[16]

Note that, at present, consistency with RTP/SCSs does not necessarily lead to a less-than-significant VMT impact.[17] As the Final 2017 Scoping Plan Update states,

> VMT reductions are necessary to achieve the 2030 target and must be part of any strategy evaluated in this Plan. Stronger SB 375 GHG reduction targets will enable the State to make significant progress toward this goal, but alone will not provide all of the VMT growth reductions that will be needed. There is a gap between what SB 375 can provide and what is needed to meet the State's 2030 and 2050 goals."[18]

---

[15] California Air Resources Board (forthcoming) *California Air Resources Board 2017 Scoping Plan-Identified VMT Reductions and Relationship to State Climate Goals*.
[16] California Air Resources Board (Nov. 2017) *California's 2017 Climate Change Scoping Plan*, p. 101.
[17] California Air Resources Board (Feb. 2018) *Updated Final Staff Report: Proposed Update to the SB 375 Greenhouse Gas Emission Reduction Targets*, Figure 3, p. 35, available at https://www.arb.ca.gov/cc/sb375/sb375_target_update_final_staff_report_feb2018.pdf.
[18] California Air Resources Board (Nov. 2017) *California's 2017 Climate Change Scoping Plan*, p. 75.

Also, in order to capture the full effects of induced travel resulting from roadway capacity projects, an RTP/SCS would need to include an assessment of land use effects of those projects, and the effects of those land uses on VMT. (See section titled "*Estimating VMT Impacts from Transportation Projects"* below.) RTP/SCSs typically model VMT using a collaboratively-developed land use "vision" for the region's land use, rather than studying the effects on land use of the proposed transportation investments.

In summary, achieving 15 percent lower per capita (residential) or per employee (office) VMT than existing development is both generally achievable and is supported by evidence that connects this level of reduction to the State's emissions goals.

1. Screening Thresholds for Land Use Projects

Many agencies use "screening thresholds" to quickly identify when a project should be expected to cause a less-than-significant impact without conducting a detailed study. (See e.g., CEQA Guidelines, §§ 15063(c)(3)(C), 15128, and Appendix G.) As explained below, this technical advisory suggests that lead agencies may screen out VMT impacts using project size, maps, transit availability, and provision of affordable housing.

Screening Threshold for Small Projects

Many local agencies have developed screening thresholds to indicate when detailed analysis is needed. Absent substantial evidence indicating that a project would generate a potentially significant level of VMT, or inconsistency with a Sustainable Communities Strategy (SCS) or general plan, projects that generate or attract fewer than 110 trips per day[19] generally may be assumed to cause a less-than-significant transportation impact.

Map-Based Screening for Residential and Office Projects

Residential and office projects that locate in areas with low VMT, and that incorporate similar features (i.e., density, mix of uses, transit accessibility), will tend to exhibit similarly low VMT. Maps created with VMT data, for example from a travel survey or a travel demand model, can illustrate areas that are currently below threshold VMT (see recommendations below). Because new development in such

[19] CEQA provides a categorical exemption for existing facilities, including additions to existing structures of up to 10,000 square feet, so long as the project is in an area where public infrastructure is available to allow for maximum planned development and the project is not in an environmentally sensitive area. (CEQA Guidelines, § 15301, subd. (e)(2).) Typical project types for which trip generation increases relatively linearly with building footprint (i.e., general office building, single tenant office building, office park, and business park) generate or attract an additional 110-124 trips per 10,000 square feet. Therefore, absent substantial evidence otherwise, it is reasonable to conclude that the addition of 110 or fewer trips could be considered not to lead to a significant impact.

locations would likely result in a similar level of VMT, such maps can be used to screen out residential and office projects from needing to prepare a detailed VMT analysis.

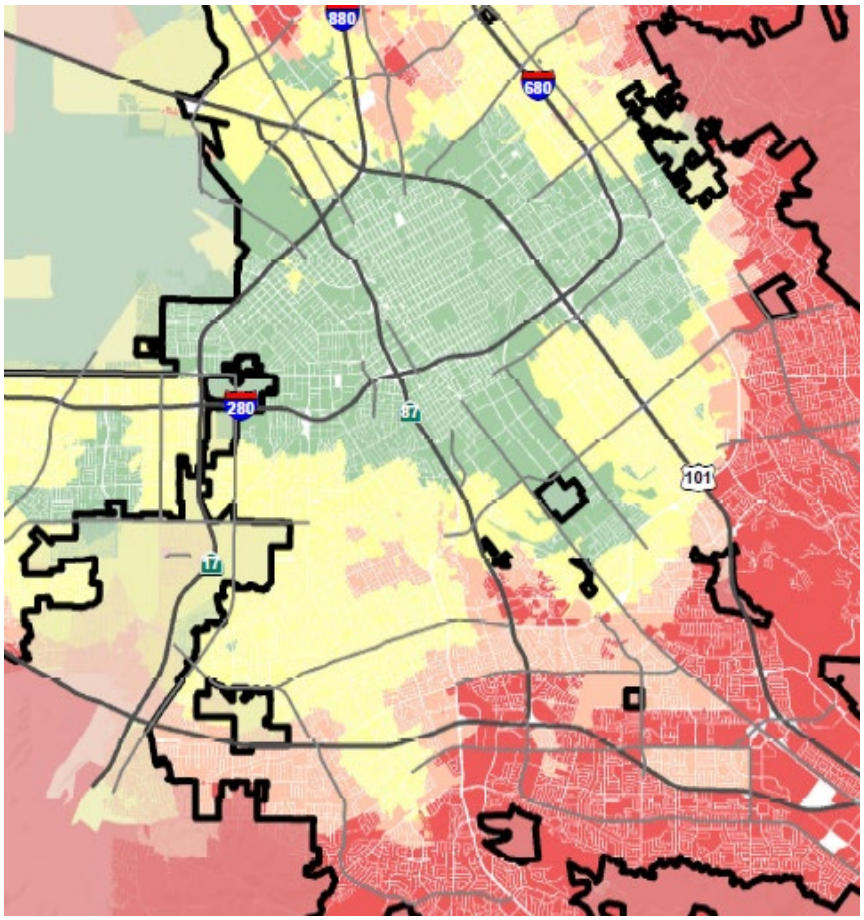


Figure 2. Example map of household VMT that could be used to delineate areas eligible to receive streamlining for VMT analysis. (Source: City of San José, Department of Transportation, draft output of City Transportation Model.)

Presumption of Less Than Significant Impact Near Transit Stations

Proposed CEQA Guideline Section 15064.3, subdivision (b)(1), states that lead agencies generally should presume that certain projects (including residential, retail, and office projects, as well as projects that are a mix of these uses) proposed within ½ mile of an existing major transit stop[20] or an existing stop

[20] Pub. Resources Code, § 21064.3 ("'Major transit stop' means a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.").

along a high quality transit corridor[21] will have a less-than-significant impact on VMT. This presumption would not apply, however, if project-specific or location-specific information indicates that the project will still generate significant levels of VMT. For example, the presumption might not be appropriate if the project:

- Has a Floor Area Ratio (FAR) of less than 0.75
- Includes more parking for use by residents, customers, or employees of the project than required by the jurisdiction (if the jurisdiction requires the project to supply parking)
- Is inconsistent with the applicable Sustainable Communities Strategy (as determined by the lead agency, with input from the Metropolitan Planning Organization)
- Replaces affordable residential units with a smaller number of moderate- or high-income residential units

A project or plan near transit which replaces affordable residential units[22] with a smaller number of moderate- or high-income residential units may increase overall VMT because the increase in VMT of displaced residents could overwhelm the improvements in travel efficiency enjoyed by new residents.[23]

If any of these exceptions to the presumption might apply, the lead agency should conduct a detailed VMT analysis to determine whether the project would exceed VMT thresholds (see below).

Presumption of Less Than Significant Impact for Affordable Residential Development

Adding affordable housing to infill locations generally improves jobs-housing match, in turn shortening commutes and reducing VMT.[24,25] Further, "… low-wage workers in particular would be more likely to choose a residential location close to their workplace, if one is available."[26] In areas where existing jobs-housing match is closer to optimal, low income housing nevertheless generates less VMT than market-

[21] Pub. Resources Code, § 21155 ("For purposes of this section, a high-quality transit corridor means a corridor with fixed route bus service with service intervals no longer than 15 minutes during peak commute hours.").
[22] Including naturally-occurring affordable residential units.
[23] Chapple et al. (2017) *Developing a New Methodology for Analyzing Potential Displacement,* Chapter 4, pp. 159-160, available at https://www.arb.ca.gov/research/apr/past/13-310.pdf.
[24] Karner and Benner (2016) *The convergence of social equity and environmental sustainability: Jobs-housing fit and commute distance* ("[P]olicies that advance a more equitable distribution of jobs and housing by linking the affordability of locally available housing with local wage levels are likely to be associated with reduced commuting distances").
[25] Karner and Benner (2015) *Low-wage jobs-housing fit: identifying locations of affordable housing shortages.*
[26] Karner and Benner (2015) *Low-wage jobs-housing fit: identifying locations of affordable housing shortages.*

rate housing.[27,28] Therefore, a project consisting of a high percentage of affordable housing may be a basis for the lead agency to find a less-than-significant impact on VMT. Evidence supports a presumption of less than significant impact for a 100 percent affordable residential development (or the residential component of a mixed-use development) in infill locations. Lead agencies may develop their own presumption of less than significant impact for residential projects (or residential portions of mixed use projects) containing a particular amount of affordable housing, based on local circumstances and evidence. Furthermore, a project which includes any affordable residential units may factor the effect of the affordability on VMT into the assessment of VMT generated by those units.

2. Recommended Numeric Thresholds for Residential, Office, and Retail Projects

Recommended threshold for residential projects: A proposed project exceeding a level of 15 percent below existing VMT per capita may indicate a significant transportation impact. Existing VMT per capita may be measured as regional VMT per capita or as city VMT per capita. Proposed development referencing a threshold based on city VMT per capita (rather than regional VMT per capita) should not cumulatively exceed the number of units specified in the SCS for that city, and should be consistent with the SCS.

Residential development that would generate vehicle travel that is 15 or more percent below the existing residential VMT per capita, measured against the region or city, may indicate a less-than-significant transportation impact. In MPO areas, development measured against city VMT per capita (rather than regional VMT per capita) should not cumulatively exceed the population or number of units specified in the SCS for that city because greater-than-planned amounts of development in areas above the region-based threshold would undermine the VMT containment needed to achieve regional targets under SB 375.

For residential projects in unincorporated county areas, the local agency can compare a residential project's VMT to (1) the region's VMT per capita, or (2) the aggregate population-weighted VMT per capita of all cities in the region. In MPO areas, development in unincorporated areas measured against aggregate city VMT per capita (rather than regional VMT per capita) should not cumulatively exceed the population or number of units specified in the SCS for that city because greater-than-planned amounts of development in areas above the regional threshold would undermine achievement of regional targets under SB 375.

[27] Chapple et al. (2017) *Developing a New Methodology for Analyzing Potential Displacement*, available at https://www.arb.ca.gov/research/apr/past/13-310.pdf.
[28] CAPCOA (2010) *Quantifying Greenhouse Gas Mitigation Measures*, pp. 176-178, available at http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf.

These thresholds can be applied to either household (i.e., tour-based) VMT or home-based (i.e., trip-based) VMT assessments.[29] It is critical, however, that the agency be consistent in its VMT measurement approach throughout the analysis to maintain an "apples-to-apples" comparison. For example, if the agency uses a home-based VMT for the threshold, it should also be use home-based VMT for calculating project VMT and VMT reduction due to mitigation measures.

Recommended threshold for office projects: A proposed project exceeding a level of 15 percent below existing regional VMT per employee may indicate a significant transportation impact.

Office projects that would generate vehicle travel exceeding 15 percent below existing VMT per employee for the region may indicate a significant transportation impact. In cases where the region is substantially larger than the geography over which most workers would be expected to live, it might be appropriate to refer to a smaller geography, such as the county, that includes the area over which nearly all workers would be expected to live.

Office VMT screening maps can be developed using tour-based data, considering either total employee VMT or employee work tour VMT. Similarly, tour-based analysis of office project VMT could consider either total employee VMT or employee work tour VMT. Where tour-based information is unavailable for threshold determination, project assessment, or assessment of mitigation, home-based work trip VMT should be used throughout all steps of the analysis to maintain an "apples-to-apples" comparison.

Recommended threshold for retail projects: A net increase in total VMT may indicate a significant transportation impact.

Because new retail development typically redistributes shopping trips rather than creating new trips,[30] estimating the total change in VMT (i.e., the difference in total VMT in the area affected with and without the project) is the best way to analyze a retail project's transportation impacts.

By adding retail opportunities into the urban fabric and thereby improving retail destination proximity, local-serving retail development tends to shorten trips and reduce VMT. Thus, lead agencies generally may presume such development creates a less-than-significant transportation impact. Regional-serving retail development, on the other hand, which can lead to substitution of longer trips for shorter ones, may tend to have a significant impact. Where such development decreases VMT, lead agencies should consider the impact to be less-than-significant.

Many cities and counties define local-serving and regional-serving retail in their zoning codes. Lead agencies may refer to those local definitions when available, but should also consider any project-

[29] See Appendix 1 for a description of these approaches.
[30] Lovejoy, et al. (2013) *Measuring the impacts of local land-use policies on vehicle miles of travel: The case of the first big-box store in Davis, California, The Journal of Transport and Land Use*.

specific information, such as market studies or economic impacts analyses that might bear on customers' travel behavior. Because lead agencies will best understand their own communities and the likely travel behaviors of future project users, they are likely in the best position to decide when a project will likely be local-serving. Generally, however, retail development including stores larger than 50,000 square feet might be considered regional-serving, and so lead agencies should undertake an analysis to determine whether the project might increase or decrease VMT.

Mixed-Use Projects

Lead agencies can evaluate each component of a mixed-use project independently and apply the significance threshold for each project type included (e.g., residential and retail). Alternatively, a lead agency may consider only the project's dominant use. In the analysis of each use, a project should take credit for internal capture. Combining different land uses and applying one threshold to those land uses may result in an inaccurate impact assessment.

Other Project Types

Of land use projects, residential, office, and retail projects tend to have the greatest influence on VMT. For that reason, OPR recommends the quantified thresholds described above for purposes of analysis and mitigation. Lead agencies, using more location-specific information, may develop their own more specific thresholds, which may include other land use types. In developing thresholds for other project types, or thresholds different from those recommended here, lead agencies should consider the purposes described in section 21099 of the Public Resources Code and regulations in the CEQA Guidelines on the development of thresholds of significance (e.g., CEQA Guidelines, § 15064.7).

Strategies and projects that decrease local VMT but increase total VMT should be avoided. Agencies should consider whether their actions encourage development in a less travel-efficient location by limiting development in travel-efficient locations.

Redevelopment Projects

Where a project replaces existing VMT-generating land uses, if the replacement leads to a net overall decrease in VMT, the project would lead to a less-than-significant transportation impact. If the project leads to a net overall increase in VMT, then the thresholds described above should apply.

As described above, a project or plan near transit which replaces affordable[31] residential units with a smaller number of moderate- or high-income residential units may increase overall VMT, because

[31] Including naturally-occurring affordable residential units.

displaced residents' VMT may increase.[32] A lead agency should analyze VMT for such a project even if it otherwise would have been presumed less than significant. The assessment should incorporate an estimate of the aggregate VMT increase experienced by displaced residents. That additional VMT should be included in the numerator of the VMT per capita assessed for the project.

If a residential or office project leads to a net increase in VMT, then the project's VMT per capita (residential) or per employee (office) should be compared to thresholds recommended above. Per capita and per employee VMT are efficiency metrics, and, as such, apply only to the existing project without regard to the VMT generated by the previously existing land use.

If the project leads to a net increase in provision of locally-serving retail, transportation impacts from the retail portion of the development should be presumed to be less than significant. If the project consists of regionally-serving retail, and increases overall VMT compared to with existing uses, then the project would lead to a significant transportation impact.

RTP/SCS Consistency (All Land Use Projects)

Section 15125, subdivision (d), of the CEQA Guidelines provides that lead agencies should analyze impacts resulting from inconsistencies with regional plans, including regional transportation plans. For this reason, if a project is inconsistent with the Regional Transportation Plan and Sustainable Communities Strategy (RTP/SCS), the lead agency should evaluate whether that inconsistency indicates a significant impact on transportation. For example, a development may be inconsistent with an RTP/SCS if the development is outside the footprint of development or within an area specified as open space as shown in the SCS.

3. Recommendations Regarding Land Use Plans

As with projects, agencies should analyze VMT outcomes of land use plans across the full area over which the plan may substantively affect travel patterns, including beyond the boundary of the plan or jurisdiction's geography. And as with projects, VMT should be counted in full rather than split between origin and destination. (Emissions inventories have sometimes spit cross-boundary trips in order to sum to a regional total, but CEQA requires accounting for the full impact without truncation or discounting). Analysis of specific plans may employ the same thresholds described above for projects. A general plan, area plan, or community plan may have a significant impact on transportation if proposed new residential, office, or retail land uses would in aggregate exceed the respective thresholds recommended above. Where the lead agency tiers from a general plan EIR pursuant to CEQA Guidelines sections 15152 and 15166, the lead agency generally focuses on the environmental impacts that are specific to the later project and were not analyzed as significant impacts in the prior EIR. (Pub. Resources Code, § 21068.5; Guidelines, § 15152, subd. (a).) Thus, in analyzing the later project, the lead agency

[32] Chapple et al. (2017) *Developing a New Methodology for Analyzing Potential Displacement,* Chapter 4, pp. 159-160, available at https://www.arb.ca.gov/research/apr/past/13-310.pdf.

would focus on the VMT impacts that were not adequately addressed in the prior EIR. In the tiered document, the lead agency should continue to apply the thresholds recommended above.

Thresholds for plans in non-MPO areas may be determined on a case-by-case basis.

4. Other Considerations

Rural Projects Outside of MPOs

In rural areas of non-MPO counties (i.e., areas not near established or incorporated cities or towns), fewer options may be available for reducing VMT, and significance thresholds may be best determined on a case-by-case basis. Note, however, that clustered small towns and small town main streets may have substantial VMT benefits compared to isolated rural development, similar to the transit oriented development described above.

Impacts to Transit

Because criteria for determining the significance of transportation impacts must promote "the development of multimodal transportation networks" pursuant to Public Resources Code section 21099, subd. (b)(1), lead agencies should consider project impacts to transit systems and bicycle and pedestrian networks. For example, a project that blocks access to a transit stop or blocks a transit route itself may interfere with transit functions. Lead agencies should consult with transit agencies as early as possible in the development process, particularly for projects that are located within one half mile of transit stops.

When evaluating impacts to multimodal transportation networks, lead agencies generally should not treat the addition of new transit users as an adverse impact. An infill development may add riders to transit systems and the additional boarding and alighting may slow transit vehicles, but it also adds destinations, improving proximity and accessibility. Such development also improves regional vehicle flow by adding less vehicle travel onto the regional network.

Increased demand throughout a region may, however, cause a cumulative impact by requiring new or additional transit infrastructure. Such impacts may be adequately addressed through a fee program that fairly allocates the cost of improvements not just to projects that happen to locate near transit, but rather across a region to all projects that impose burdens on the entire transportation system, since transit can broadly improve the function of the transportation system.

F. Considering the Effects of Transportation Projects on Vehicle Travel

Many transportation projects change travel patterns. A transportation project which leads to additional vehicle travel on the roadway network, commonly referred to as "induced vehicle travel," would need to quantify the amount of additional vehicle travel in order to assess air quality impacts, greenhouse gas emissions impacts, energy impacts, and noise impacts. Transportation projects also are required to

examine induced growth impacts under CEQA. (See generally, Pub. Resources Code, §§ 21065 [defining "project" under CEQA as an activity as causing either a direct or reasonably foreseeable indirect physical change], 21065.3 [defining "project-specific effect" to mean all direct or indirect environmental effects], 21100, subd. (b) [required contents of an EIR].) For any project that increases vehicle travel, explicit assessment and quantitative reporting of the amount of additional vehicle travel should not be omitted from the document; such information may be useful and necessary for a full understanding of a project's environmental impacts. (See Pub. Resources Code, §§ 21000, 21001, 21001.1, 21002, 21002.1 [discussing the policies of CEQA].) A lead agency that uses the VMT metric to assess the transportation impacts of a transportation project may simply report that change in VMT as the impact. When the lead agency uses another metric to analyze the transportation impacts of a roadway project, changes in amount of vehicle travel added to the roadway network should still be analyzed and reported.[33]

While CEQA does not require perfection, it is important to make a reasonably accurate estimate of transportation projects' effects on vehicle travel in order to make reasonably accurate estimates of GHG emissions, air quality emissions, energy impacts, and noise impacts. (See, e.g., *California Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 [EIR failed to consider project's transportation energy impacts]; *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 266.) Appendix 2 describes in detail the causes of induced vehicle travel, the robust empirical evidence of induced vehicle travel, and how models and research can be used in conjunction to quantitatively assess induced vehicle travel with reasonable accuracy.

If a project would likely lead to a measurable and substantial increase in vehicle travel, the lead agency should conduct an analysis assessing the amount of vehicle travel the project will induce. Project types that would likely lead to a measurable and substantial increase in vehicle travel generally include:

- Addition of through lanes on existing or new highways, including general purpose lanes, HOV lanes, peak period lanes, auxiliary lanes, or lanes through grade-separated interchanges

Projects that would not likely lead to a substantial or measurable increase in vehicle travel, and therefore generally should not require an induced travel analysis, include:

- Rehabilitation, maintenance, replacement, safety, and repair projects designed to improve the condition of existing transportation assets (e.g., highways; roadways; bridges; culverts; Transportation Management System field elements such as cameras, message signs, detection, or signals; tunnels; transit systems; and assets that serve bicycle and pedestrian facilities) and that do not add additional motor vehicle capacity
- Roadside safety devices or hardware installation such as median barriers and guardrails

[33] See, e.g., California Department of Transportation (2006) *Guidance for Preparers of Growth-related, Indirect Impact Analyses*, available at http://www.dot.ca.gov/ser/Growth-related_IndirectImpactAnalysis/GRI_guidance06May_files/gri_guidance.pdf.

- Roadway shoulder enhancements to provide “breakdown space,” dedicated space for use only by transit vehicles, to provide bicycle access, or to otherwise improve safety, but which will not be used as automobile vehicle travel lanes
- Addition of an auxiliary lane of less than one mile in length designed to improve roadway safety
- Installation, removal, or reconfiguration of traffic lanes that are not for through traffic, such as left, right, and U-turn pockets, two-way left turn lanes, or emergency breakdown lanes that are not utilized as through lanes
- Addition of roadway capacity on local or collector streets provided the project also substantially improves conditions for pedestrians, cyclists, and, if applicable, transit
- Conversion of existing general purpose lanes (including ramps) to managed lanes or transit lanes, or changing lane management in a manner that would not substantially increase vehicle travel
- Addition of a new lane that is permanently restricted to use only by transit vehicles
- Reduction in number of through lanes
- Grade separation to separate vehicles from rail, transit, pedestrians or bicycles, or to replace a lane in order to separate preferential vehicles (e.g., HOV, HOT, or trucks) from general vehicles
- Installation, removal, or reconfiguration of traffic control devices, including Transit Signal Priority (TSP) features
- Installation of traffic metering systems, detection systems, cameras, changeable message signs and other electronics designed to optimize vehicle, bicycle, or pedestrian flow
- Timing of signals to optimize vehicle, bicycle, or pedestrian flow
- Installation of roundabouts or traffic circles
- Installation or reconfiguration of traffic calming devices
- Adoption of or increase in tolls
- Addition of tolled lanes, where tolls are sufficient to mitigate VMT increase
- Initiation of new transit service
- Conversion of streets from one-way to two-way operation with no net increase in number of traffic lanes
- Removal or relocation of off-street or on-street parking spaces
- Adoption or modification of on-street parking or loading restrictions (including meters, time limits, accessible spaces, and preferential/reserved parking permit programs)
- Addition of traffic wayfinding signage
- Rehabilitation and maintenance projects that do not add motor vehicle capacity
- Addition of new or enhanced bike or pedestrian facilities on existing streets/highways or within existing public rights-of-way
- Addition of Class I bike paths, trails, multi-use paths, or other off-road facilities that serve non-motorized travel
- Installation of publicly available alternative fuel/charging infrastructure
- Addition of passing lanes, truck climbing lanes, or truck brake-check lanes in rural areas that do not increase overall vehicle capacity along the corridor

1. Recommended Significance Threshold for Transportation Projects

As noted in Section 15064.3 of the CEQA Guidelines, lead agencies for roadway capacity projects have discretion, consistent with CEQA and planning requirements, to choose which metric to use to evaluate transportation impacts. This section recommends considerations for evaluating impacts using vehicle miles traveled. Lead agencies have discretion to choose a threshold of significance for transportation projects as they do for other types of projects. As explained above, Public Resources Code section 21099, subdivision (b)(1), provides that criteria for determining the significance of transportation impacts must promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses. (*Id.*; see generally, adopted CEQA Guidelines, § 15064.3, subd. (b) [Criteria for Analyzing Transportation Impacts].) With those goals in mind, OPR prepared and the Agency adopted an appropriate transportation metric.

Whether adopting a threshold of significance, or evaluating transportation impacts on a case-by-case basis, a lead agency should ensure that the analysis addresses:

- Direct, indirect and cumulative effects of the transportation project (CEQA Guidelines, § 15064, subds. (d), (h))
- Near-term and long-term effects of the transportation project (CEQA Guidelines, §§ 15063, subd. (a)(1), 15126.2, subd. (a))
- The transportation project's consistency with state greenhouse gas reduction goals (Pub. Resources Code, § 21099)[34]
- The impact of the transportation project on the development of multimodal transportation networks (Pub. Resources Code, § 21099)
- The impact of the transportation project on the development of a diversity of land uses (Pub. Resources Code, § 21099)

The CARB Scoping Plan and the CARB Mobile Source Strategy delineate VMT levels required to achieve legally mandated GHG emissions reduction targets. A lead agency should develop a project-level threshold based on those VMT levels, and may apply the following approach:

1. Propose a fair-share allocation of those budgets to their jurisdiction (e.g., by population);

[34] The California Air Resources Board has ascertained the limits of VMT growth compatible with California containing greenhouse gas emissions to levels research shows would allow for climate stabilization. (See *The 2017 Climate Change Scoping Plan: The Strategy for Achieving California's 2030 Greenhouse Gas Target* (p. 78, p. 101); *Mobile Source Strategy* (p. 37).) CARB's *Updated Final Staff Report on Proposed Update to the SB 375 Greenhouse Gas Emission Reduction Targets* illustrates that the current Regional Transportation Plans and Sustainable Communities Strategies will fall short of achieving the necessary on-road transportation-related GHG emissions reductions called for in the 2017 Scoping Plan (Figure 3, p. 35). Accordingly, OPR recommends not basing GHG emissions or transportation impact analysis for a transportation project solely on consistency with an RTP/SCS.

2. Determine the amount of VMT growth likely to result from background population growth, and subtract that from their "budget";
3. Allocate their jurisdiction's share between their various VMT-increasing transportation projects, using whatever criteria the lead agency prefers.

2. Estimating VMT Impacts from Transportation Projects

CEQA requires analysis of a project's potential growth-inducing impacts. (Pub. Resources Code, § 21100, subd. (b)(5); CEQA Guidelines, § 15126.2, subd. (d).) Many agencies are familiar with the analysis of growth inducing impacts associated with water, sewer, and other infrastructure. This technical advisory addresses growth that may be expected from roadway expansion projects.

Because a roadway expansion project can induce substantial VMT, incorporating quantitative estimates of induced VMT is critical to calculating both transportation and other impacts of these projects. Induced travel also has the potential to reduce or eliminate congestion relief benefits. An accurate estimate of induced travel is needed to accurately weigh costs and benefits of a highway capacity expansion project.

The effect of a transportation project on vehicle travel should be estimated using the "change in total VMT" method described in *Appendix 1*. This means that an assessment of total VMT without the project and an assessment with the project should be made; the difference between the two is the amount of VMT attributable to the project. The assessment should cover the full area in which driving patterns are expected to change. As with other types of projects, the VMT estimation should not be truncated at a modeling or jurisdictional boundary for convenience of analysis when travel behavior is substantially affected beyond that boundary.

Transit and Active Transportation Projects

Transit and active transportation projects generally reduce VMT and therefore are presumed to cause a less-than-significant impact on transportation. This presumption may apply to all passenger rail projects, bus and bus rapid transit projects, and bicycle and pedestrian infrastructure projects. Streamlining transit and active transportation projects aligns with each of the three statutory goals contained in SB 743 by reducing GHG emissions, increasing multimodal transportation networks, and facilitating mixed use development.

Roadway Projects

Reducing roadway capacity (for example, by removing or repurposing motor vehicle travel lanes) will generally reduce VMT and therefore is presumed to cause a less-than-significant impact on transportation. Generally, no transportation analysis is needed for such projects.

Building new roadways, adding roadway capacity in congested areas, or adding roadway capacity to areas where congestion is expected in the future, typically induces additional vehicle travel. For the types of projects previously indicated as likely to lead to additional vehicle travel, an estimate should be made of the change in vehicle travel resulting from the project.

For projects that increase roadway capacity, lead agencies can evaluate induced travel quantitatively by applying the results of existing studies that examine the magnitude of the increase of VMT resulting from a given increase in lane miles. These studies estimate the percent change in VMT for every percent change in miles to the roadway system (i.e., "elasticity").[35] Given that lead agencies have discretion in choosing their methodology, and the studies on induced travel reveal a range of elasticities, lead agencies may appropriately apply professional judgment in studying the transportation effects of a particular project. The most recent major study, estimates an elasticity of 1.0, meaning that every percent change in lane miles results in a one percent increase in VMT.[36]

To estimate VMT impacts from roadway expansion projects:

1. Determine the total lane-miles over an area that fully captures travel behavior changes resulting from the project (generally the region, but for projects affecting interregional travel look at all affected regions).
2. Determine the percent change in total lane miles that will result from the project.
3. Determine the total existing VMT over that same area.
4. Multiply the percent increase in lane miles by the existing VMT, and then multiply that by the elasticity from the induced travel literature:

[% increase in lane miles] x [existing VMT] x [elasticity] = [VMT resulting from the project]

This method would not be suitable for rural (non-MPO) locations in the state which are neither congested nor projected to become congested. It also may not be suitable for a new road that provides new connectivity across a barrier (e.g., a bridge across a river) if it would be expected to substantially shorten existing trips. If it is likely to be substantial, the trips-shortening effect should be examined explicitly.

The effects of roadway capacity on vehicle travel can also be applied at a programmatic level. For example, in a regional planning process the lead agency can use that program-level analysis to

[35] See U.C. Davis, Institute for Transportation Studies (Oct. 2015) *Increasing Highway Capacity Unlikely to Relieve Traffic Congestion*; Boarnet and Handy (Sept. 2014) *Impact of Highway Capacity and Induced Travel on Passenger Vehicle Use and Greenhouse Gas Emissions*, California Air Resources Board Policy Brief, available at https://www.arb.ca.gov/cc/sb375/policies/hwycapacity/highway_capacity_brief.pdf.
[36] See Duranton and Turner (2011) *The Fundamental Law of Road Congestion: Evidence from US cities*, available at http://www.nber.org/papers/w15376.

streamline later project-level analysis. (See CEQA Guidelines, § 15168.) A program-level analysis of VMT should include effects of the program on land use patterns, and the VMT that results from those land use effects. In order for a program-level document to adequately analyze potential induced demand from a project or program of roadway capacity expansion, lead agencies cannot assume a fixed land use pattern (i.e., a land use pattern that does not vary in response to the provision of roadway capacity). A proper analysis should account for land use investment and development pattern changes that react in a reasonable manner to changes in accessibility created by transportation infrastructure investments (whether at the project or program level).

Mitigation and Alternatives

Induced VMT has the potential to reduce or eliminate congestion relief benefits, increase VMT, and increase other environmental impacts that result from vehicle travel.[37] If those effects are significant, the lead agency will need to consider mitigation or alternatives. In the context of increased travel that is induced by capacity increases, appropriate mitigation and alternatives that a lead agency might consider include the following:

- Tolling new lanes to encourage carpools and fund transit improvements
- Converting existing general purpose lanes to HOV or HOT lanes
- Implementing or funding off-site travel demand management
- Implementing Intelligent Transportation Systems (ITS) strategies to improve passenger throughput on existing lanes

Tolling and other management strategies can have the additional benefit of preventing congestion and maintaining free-flow conditions, conferring substantial benefits to road users as discussed above.

G. Analyzing Other Impacts Related to Transportation

While requiring a change in the methodology of assessing transportation impacts, Public Resources Code section 21099 notes that this change "does not relieve a public agency of the requirement to analyze a project's potentially significant transportation impacts related to air quality, noise, safety, or any other impact associated with transportation." OPR expects that lead agencies will continue to address mobile source emissions in the air quality and noise sections of an environmental document and the corresponding studies that support the analysis in those sections. Lead agencies should continue to address environmental impacts of a proposed project pursuant to CEQA's requirements, using a format that is appropriate for their particular project.

[37] See National Center for Sustainable Transportation (Oct. 2015) *Increasing Highway Capacity Unlikely to Relieve Traffic Congestion*, available at http://www.dot.ca.gov/newtech/researchreports/reports/2015/10-12-2015-NCST_Brief_InducedTravel_CS6_v3.pdf; see Duranton and Turner (2011) *The Fundamental Law of Road Congestion: Evidence from US cities*, available at http://www.nber.org/papers/w15376.

Because safety concerns result from many different factors, they are best addressed at a programmatic level (i.e., in a general plan or regional transportation plan) in cooperation with local governments, metropolitan planning organizations, and, where the state highway system is involved, the California Department of Transportation. In most cases, such an analysis would not be appropriate on a project-by-project basis. Increases in traffic volumes at a particular location resulting from a project typically cannot be estimated with sufficient accuracy or precision to provide useful information for an analysis of safety concerns. Moreover, an array of factors affect travel demand (e.g., strength of the local economy, price of gasoline), causing substantial additional uncertainty. Appendix B of OPR's General Plan Guidelines summarizes research which could be used to guide a programmatic analysis under CEQA. Lead agencies should note that automobile congestion or delay does not constitute a significant environmental impact (Pub. Resources Code, §21099(b)(2)), and safety should not be used as a proxy for road capacity.

H. VMT Mitigation and Alternatives

When a lead agency identifies a significant impact, it must identify feasible mitigation measures that could avoid or substantially reduce that impact. (Pub. Resources Code, § 21002.1, subd. (a).) Additionally, CEQA requires that an environmental impact report identify feasible alternatives that could avoid or substantially reduce a project's significant environmental impacts.

Indeed, the California Court of Appeal recently held that a long-term regional transportation plan was deficient for failing to discuss an alternative which could significantly reduce total vehicle miles traveled. In *Cleveland National Forest Foundation v. San Diego Association of Governments, et al.* (2017) 17 Cal.App.5th 413, the court found that omission "inexplicable" given the lead agency's "acknowledgment in its Climate Action Strategy that the state's efforts to reduce greenhouse gas emissions from on-road transportation will not succeed if the amount of driving, or vehicle miles traveled, is not significantly reduced." (*Cleveland National Forest Foundation*, *supra*, 17 Cal.App.5th at p. 436.) Additionally, the court noted that the project alternatives focused primarily on congestion relief even though "the [regional] transportation plan is a long-term and congestion relief is not necessarily an effective long-term strategy." (*Id.* at p. 437.) The court concluded its discussion of the alternatives analysis by stating: "Given the acknowledged long-term drawbacks of congestion relief alternatives, there is not substantial evidence to support the EIR's exclusion of an alternative focused primarily on significantly reducing vehicle trips." (*Ibid*.)

Several examples of potential mitigation measures and alternatives to reduce VMT are described below. However, the selection of particular mitigation measures and alternatives are left to the discretion of the lead agency, and mitigation measures may vary, depending on the proposed project and significant impacts, if any. Further, OPR expects that agencies will continue to innovate and find new ways to reduce vehicular travel.

Potential measures to reduce vehicle miles traveled include, but are not limited to:

- Improve or increase access to transit.
- Increase access to common goods and services, such as groceries, schools, and daycare.
- Incorporate affordable housing into the project.
- Incorporate neighborhood electric vehicle network.
- Orient the project toward transit, bicycle and pedestrian facilities.
- Improve pedestrian or bicycle networks, or transit service.
- Provide traffic calming.
- Provide bicycle parking.
- Limit or eliminate parking supply.
- Unbundle parking costs.
- Provide parking cash-out programs.
- Implement roadway pricing.
- Implement or provide access to a commute reduction program.
- Provide car-sharing, bike sharing, and ride-sharing programs.
- Provide transit passes.
- Shifting single occupancy vehicle trips to carpooling or vanpooling, for example providing ride-matching services.
- Providing telework options.
- Providing incentives or subsidies that increase the use of modes other than single-occupancy vehicle.
- Providing on-site amenities at places of work, such as priority parking for carpools and vanpools, secure bike parking, and showers and locker rooms.
- Providing employee transportation coordinators at employment sites.
- Providing a guaranteed ride home service to users of non-auto modes.

Notably, because VMT is largely a regional impact, regional VMT-reduction programs may be an appropriate form of mitigation. In lieu fees have been found to be valid mitigation where there is both a commitment to pay fees and evidence that mitigation will actually occur. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140-141; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727–728.) Fee programs are particularly useful to address cumulative impacts. (CEQA Guidelines, § 15130, subd. (a)(3) [a "project's incremental contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact"].) The mitigation program must undergo CEQA evaluation, either on the program as a whole, or the in-lieu fees or other mitigation must be evaluated on a project-specific basis. (*California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026.) That CEQA evaluation could be part of a larger program, such as a regional transportation plan, analyzed in a Program EIR. (CEQA Guidelines, § 15168.)

Examples of project alternatives that may reduce vehicle miles traveled include, but are not limited to:

- Locate the project in an area of the region that already exhibits low VMT.
- Locate the project near transit.
- Increase project density.
- Increase the mix of uses within the project or within the project's surroundings.
- Increase connectivity and/or intersection density on the project site.
- Deploy management strategies (e.g., pricing, vehicle occupancy requirements) on roadways or roadway lanes.

Appendix 1. Considerations About Which VMT to Count

Consistent with the obligation to make a good faith effort to disclose the environmental consequences of a project, lead agencies have discretion to choose the most appropriate methodology to evaluate project impacts.[38] A lead agency can evaluate a project's effect on VMT in numerous ways. The purpose of this document is to provide technical considerations in determining which methodology may be most useful for various project types.

Background on Estimating Vehicle Miles Traveled

Before discussing specific methodological recommendations, this section provides a brief overview of modeling and counting VMT, including some key terminology.

Here is an illustrative example of some methods of estimating vehicle miles traveled. Consider the following hypothetical travel day (all by automobile):

1. Residence to Coffee Shop
2. Coffee Shop to Work
3. Work to Sandwich Shop
4. Sandwich Shop to Work
5. Work to Residence
6. Residence to Store
7. Store to Residence

Trip-based assessment of a project's effect on travel behavior counts VMT from individual trips to and from the project. It is the most basic, and traditionally the most common, method of counting VMT. A trip-based VMT assessment of the residence in the above example would consider segments 1, 5, 6 and 7. For residential projects, the sum of home-based trips is called *home-based* VMT.

A *tour-based* assessment counts the entire home-back-to-home tour that includes the project. A tour-based VMT assessment of the residence in the above example would consider segments 1, 2, 3, 4, and 5 in one tour, and 6 and 7 in a second tour. A tour-based assessment of the workplace would include segments 1, 2, 3, 4, and 5. Together, all tours comprise *household* VMT.

[38] The California Supreme Court has explained that when an agency has prepared an environmental impact report:

> [T]he issue is not whether the [lead agency's] studies are irrefutable or whether they could have been better. The relevant issue is only whether the studies are sufficiently credible to be considered as part of the total evidence that supports the [lead agency's] finding[.]

(*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 409; see also *Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 372.)

Both trip- and tour-based assessments can be used as measures of transportation efficiency, using denominators such as per capita, per employee, or per person-trip.

Trip- and Tour-based Assessment of VMT

As illustrated above, a tour-based assessment of VMT is a more complete characterization of a project's effect on VMT. In many cases, a project affects travel behavior beyond the first destination. The location and characteristics of the home and workplace will often be the main drivers of VMT. For example, a residential or office development located near high quality transit will likely lead to some commute trips utilizing transit, affecting mode choice on the rest of the tour.

Characteristics of an office project can also affect an employee's VMT beyond the work tour. For example, a workplace located at the urban periphery, far from transit, can require an employee to own a car, which in turn affects the entirety of an employee's travel behavior and VMT. For this reason, when estimating the effect of an office development on VMT, it may be appropriate to consider total employee VMT if data and tools, such as tour-based models, are available. This is consistent with CEQA's requirement to evaluate both direct and *indirect* effects of a project. (See CEQA Guidelines, § 15064, subd. (d)(2).)

Assessing Change in Total VMT

A third method, estimating the *change in total VMT* with and without the project, can evaluate whether a project is likely to divert existing trips, and what the effect of those diversions will be on total VMT. This method answers the question, "What is the net effect of the project on area VMT?" As an illustration, assessing the total change in VMT for a grocery store built in a food desert that diverts trips from more distant stores could reveal a net VMT reduction. The analysis should address the full area over which the project affects travel behavior, even if the effect on travel behavior crosses political boundaries.

Using Models to Estimate VMT

Travel demand models, sketch models, spreadsheet models, research, and data can all be used to calculate and estimate VMT (see Appendix F of the preliminary discussion draft). To the extent possible, lead agencies should choose models that have sensitivity to features of the project that affect VMT. Those tools and resources can also assist in establishing thresholds of significance and estimating VMT reduction attributable to mitigation measures and project alternatives. When using models and tools for those various purposes, agencies should use comparable data and methods, in order to set up an "apples-to-apples" comparison between thresholds, VMT estimates, and VMT mitigation estimates.

Models can work together. For example, agencies can use travel demand models or survey data to estimate existing trip lengths and input those into sketch models such as CalEEMod to achieve more

accurate results. Whenever possible, agencies should input localized trip lengths into a sketch model to tailor the analysis to the project location. However, in doing so, agencies should be careful to avoid double counting if the sketch model includes other inputs or toggles that are proxies for trip length (e.g., distance to city center). Generally, if an agency changes any sketch model defaults, it should record and report those changes for transparency of analysis. Again, trip length data should come from the same source as data used to calculate thresholds to be sure of an "apples-to-apples" comparison.

Additional background information regarding travel demand models is available in the California Transportation Commission's "2010 Regional Transportation Plan Guidelines," beginning at page 35.

Appendix 2. Induced Travel: Mechanisms, Research, and Additional Assessment Approaches

Induced travel occurs where roadway capacity is expanded in an area of present or projected future congestion. The effect typically manifests over several years. Lower travel times make the modified facility more attractive to travelers, resulting in the following trip-making changes:

- **Longer trips.** The ability to travel a long distance in a shorter time increases the attractiveness of destinations that are farther away, increasing trip length and vehicle travel.
- **Changes in mode choice.** When transportation investments are devoted to reducing automobile travel time, travelers tend to shift toward automobile use from other modes, which increases vehicle travel.
- **Route changes.** Faster travel times on a route attract more drivers to that route from other routes, which can increase or decrease vehicle travel depending on whether it shortens or lengthens trips.
- **Newly generated trips.** Increasing travel speeds can induce additional trips, which increases vehicle travel. For example, an individual who previously telecommuted or purchased goods on the internet might choose to accomplish those tasks via automobile trips as a result of increased speeds.
- **Land Use Changes.** Faster travel times along a corridor lead to land development farther along that corridor; that new development generates and attracts longer trips, which increases vehicle travel. Over several years, this induced growth component of induced vehicle travel can be substantial, making it critical to include in analyses.

Each of these effects has implications for the total amount of vehicle travel. These effects operate over different time scales. For example, changes in mode choice might occur immediately, while land use changes typically take a few years or longer. CEQA requires lead agencies to analyze both short-term and long-term effects.

Evidence of Induced Vehicle Travel. A large number of peer reviewed studies[39] have demonstrated a causal link between highway capacity increases and VMT increases. Many provide quantitative estimates of the magnitude of the induced VMT phenomenon. Collectively, they provide high quality evidence of the existence and magnitude of the induced travel effect.

[39] See, e.g., Boarnet and Handy (Sept. 2014) Impact of Highway Capacity and Induced Travel on Passenger Vehicle Use and Greenhouse Gas Emissions, California Air Resources Board Policy Brief, available at https://www.arb.ca.gov/cc/sb375/policies/hwycapacity/highway_capacity_brief.pdf; National Center for Sustainable Transportation (Oct. 2015) *Increasing Highway Capacity Unlikely to Relieve Traffic Congestion*, available at http://www.dot.ca.gov/research/researchreports/reports/2015/10-12-2015-NCST_Brief_InducedTravel_CS6_v3.pdf.

Most of these studies express the amount of induced vehicle travel as an "elasticity," which is a multiplier that describes the additional vehicle travel resulting from an additional lane mile of roadway capacity added. For example, an elasticity of 0.6 would signify an 0.6 percent increase in vehicle travel for every 1.0 percent increase in lane miles. Many of these studies distinguish "short run elasticity" (increase in vehicle travel in the first few years) from "long run elasticity" (increase in vehicle travel beyond the first few years). Long run elasticity is larger than short run elasticity, because as time passes, more of the components of induced vehicle travel materialize. Generally, short run elasticity can be thought of as excluding the effects of land use change, while long run elasticity includes them. Most studies find a long run elasticity between 0.6 and just over 1.0,[40] meaning that every increase in lanes miles of one percent leads to an increase in vehicle travel of 0.6 to 1.0 percent. The most recent major study finds the elasticity of vehicle travel by lanes miles added to be 1.03; in other words, each percent increase in lane miles results in a 1.03 percent increase in vehicle travel.[41] (An elasticity greater than 1.0 can occur because new lanes induce vehicle travel that spills beyond the project location.) In CEQA analysis, the long-run elasticity should be used, as it captures the full effect of the project rather than just the early-stage effect.

Quantifying Induced Vehicle Travel Using Models. Lead agencies can generally achieve the most accurate assessment of induced vehicle travel resulting from roadway capacity increasing projects by applying elasticities from the academic literature, because those estimates include vehicle travel resulting from induced land use. If a lead agency chooses to use a travel demand model, additional analysis would be needed to account for induced land use. This section describes some approaches to undertaking that additional analysis.

Proper use of a travel demand model can capture the following components of induced VMT:

- Trip length (generally increases VMT)
- Mode shift (generally shifts from other modes toward automobile use, increasing VMT)
- Route changes (can act to increase or decrease VMT)
- Newly generated trips (generally increases VMT)
    - Note that not all travel demand models have sensitivity to this factor, so an off-model estimate may be necessary if this effect could be substantial.

However, estimating long-run induced VMT also requires an estimate of the project's effects on land use. This component of the analysis is important because it has the potential to be a large component of

[40] See Boarnet and Handy (Sept. 2014) *Impact of Highway Capacity and Induced Travel on Passenger Vehicle Use and Greenhouse Gas Emissions*, California Air Resources Board Policy Brief, p. 2, available at https://www.arb.ca.gov/cc/sb375/policies/hwycapacity/highway_capacity_brief.pdf.

[41] Duranton and Turner (2011) *The Fundamental Law of Road Congestion: Evidence from US cities*, available at http://www.nber.org/papers/w15376.

the overall induced travel effect. Options for estimating and incorporating the VMT effects that are caused by the subsequent land use changes include:

1. *Employ an expert panel.* An expert panel could assess changes to land use development that would likely result from the project. This assessment could then be analyzed by the travel demand model to assess effects on vehicle travel. Induced vehicle travel assessed via this approach should be verified using elasticities found in the academic literature.
2. *Adjust model results to align with the empirical research.* If the travel demand model analysis is performed without incorporating projected land use changes resulting from the project, the assessed vehicle travel should be adjusted upward to account for those land use changes. The assessed VMT after adjustment should fall within the range found in the academic literature.
3. *Employ a land use model, running it iteratively with a travel demand model.* A land use model can be used to estimate the land use effects of a roadway capacity increase, and the traffic patterns that result from the land use change can then be fed back into the travel demand model. The land use model and travel demand model can be iterated to produce an accurate result.

A project which provides new connectivity across a barrier, such as a new bridge across a river, may provide a shortened path between existing origins and destinations, thereby shortening existing trips. In rare cases, this trip-shortening effect might be substantial enough to reduce the amount of vehicle travel resulting from the project below the range found in the elasticities in the academic literature, or even lead a net reduction in vehicle travel overall. In such cases, the trip-shortening effect could be examined explicitly.

Whenever employing a travel demand model to assess induced vehicle travel, any limitation or known lack of sensitivity in the analysis that might cause substantial errors in the VMT estimate (for example, model insensitivity to one of the components of induced VMT described above) should be disclosed and characterized, and a description should be provided on how it could influence the analysis results. A discussion of the potential error or bias should be carried into analyses that rely on the VMT analysis, such as greenhouse gas emissions, air quality, energy, and noise.

TAB 8

2018 Year in Review – Wetlands & Protected Species

During the last year, a flurry of court cases and regulatory actions addressed the scope of the Clean Water Act, but the fundamental question of when the Act applies remains unclear. The U.S. Army Corps of Engineers and Environmental Protection Agency have proposed new regulations to redefine the key term "waters of the United States," but litigation is certain once the regulations are finalized and it is not clear whether the new rules will be deemed consistent with the Supreme Court's seminal 2006 decision in *Rapanos v. United States*.

To add to the uncertainty, there is a robust circuit split on the question of whether the Clean Water Act regulates discharges of pollution that flow through groundwater to reach a surface water body that is covered by the Act, with the Fourth and Ninth Circuit holding that the Act applies to such a discharge and the Sixth Circuit holding that it does not.

A clear and definitive resolution of these issues, which has proved elusive in past years, may very well require action by the Supreme Court, or Congress.

With regard to the Endangered Species Act, a notable Supreme Court case has limited the grounds for designating critical habitat, and there are several pending regulatory proposals to further scale back the Act's requirements. As in past years, the U.S. Court of Appeals for the Ninth Circuit has gone against the grain, as it continues to strike down agency decisions as inconsistent with the ESA's requirements.

Lastly, while the federal government has taken the position that the Migratory Bird Treaty Act does not apply to the accidental or incidental take of covered birds, and instead applies only to a take that is purposeful, the State of California has both challenged this position in court and emphasized that the comparable provisions of state law prohibit incidental as well as purposeful take.

As in past years, this area of law continues to evolve in rapid and dramatic fashion, with continued uncertainty as a reliable constant.

A. The Clean Water Act

Three important legal developments are discussed below: (1) the current status of the 2015 Clean Water Rule and the newly proposed regulation to replace that Rule and to establish a more limited definition of the key term "waters of the United States"; (2) the federal circuit split on whether the Clean Water Act covers discharges of pollutants that flow through groundwater before reaching the receiving surface water; and (3) the Ninth Circuit decision upholding the "practicable" alternatives analysis under Section 404 of the Act for the Newhall Ranch project in Los Angeles County.

1. Drowning in Confusion: What is a "Water of the United States"?

Rapanos and its Aftermath. The Clean Water Act applies to "navigable waters," which the Act defines merely as "waters of the United States." A clear and consistent definition of this critically important phrase has proved elusive ever since the Supreme Court issued its fragmented 4-1-4 decision in *Rapanos v. United States*, 547 U.S. 715 (2006). In that case, the four dissenting justices argued that the Court should uphold the historically broad interpretation utilized by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, the two federal agencies charged with implementing the Clean Water Act. In a plurality opinion authored by the late Justice Scalia, four other justices argued that the Act should apply only to traditional navigable waters (such as a lake, river or bay) and to other waterbodies with a "continuous surface connection" to such traditional navigable waters. In his oft-cited concurring opinion, Justice Kennedy agreed with the plurality in ruling to strike down the agencies' broad interpretation, but he did not agree with Justice Scalia's "continuous surface connection" test and instead articulated a standard covering any waterbody with a "significant nexus" to a traditional navigable water.

Following the *Rapanos* decision, most courts (including the Ninth Circuit) have used Justice Kennedy's significant nexus test to define the boundaries of Clean Water Act jurisdiction. The rationale is that a waterbody meeting this test would qualify as a "water of the United States" for five of the justices (namely, Justice Kennedy plus the four dissenting justices), whereas only four of the justices argued for the narrower "continual surface connection" test.

The problem is that Justice Kennedy's significant nexus test is highly open-ended and fact-specific. In 2008, the Bush administration published interpretive guidance on how to apply the test, but the guidance was not legally binding, was itself open-ended and indeterminate on a number of key issues, and ultimately did little to clarify when the Clean Water Act applies and when it does not.

As a result, the permitting process under the Act for small, ephemeral or intermittent waterbodies (such as small ponds and wetlands, seasonal drainage channels, and other non-navigable features that are not located near a river, lake or bay) has become quite confused, expensive and time-consuming. As the Supreme Court noted a few years ago, one study found that the average applicant for a site-specific individual Clean Water Act fill permit from the Army Corps spent more than two years and over $250,000 on the process, without counting costs of mitigation or project design changes. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016).

The 2015 Clean Water Rule. In 2015, the Obama administration sought to resolve the uncertainty by issuing a regulation that defined in detail what constitutes a "water of the United States." *See* 80 Fed. Reg. 37,054 (June 29, 2015) (the "Rule" or "Clean Water Rule"). But industry groups and numerous states filed various lawsuits to challenge the Rule as an overly broad and impermissible interpretation of the Clean Water Act. In August 2015, the federal district court in North Dakota issued a temporary injunction to stay the Rule from taking effect in 13 states (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). *State of North Dakota et al. v. U.S. Environmental Protection Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

A few months later, the Sixth Circuit ruled in a separate lawsuit that it would determine the validity of the Clean Water Rule and that the federal district courts lacked jurisdiction to decide the matter. The Sixth Circuit stayed the effectiveness of the Rule nationwide until the merits of the case were resolved. *See In re EPA and Dept. of Defense Final Rule*, 803 F.3d 804 (6th Cir. 2015). The pending district court cases addressing the Rule were either dismissed or held in abeyance.

The New Administration. Then, in February 2017, President Trump issued an Executive Order directing the Army Corps and the EPA to rescind or revise the 2015 Clean Water Rule. *See* "Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule'" (Feb. 28, 2017). The Executive Order directed the agencies to look to Justice Scalia's "continual surface connection" standard in the Supreme Court's 2006 *Rapanos* decision, instead of Justice Kennedy's "significant nexus" test.

To implement the Executive Order, the EPA and the Corps announced a proposed two-step rulemaking process, first to rescind the 2015 Clean Water Rule, and then to replace it with a new definition of "waters of the United States." The agencies issued a proposed regulation in July 2017 to accomplish the first step. *See* 82 Fed. Reg. 143, 34899 (July 27, 2017). This proposed regulation would repeal the 2015 Clean Water Rule in its entirety and recodify the regulations that were in effect before that Rule was adopted. Thus, the proposal would reinstitute the agencies' 2008 interpretive guidance, which sought to clarify the *Rapanos* decision, as the governing definition of what constitutes a water of the United States – at least until the second step of the rulemaking process was completed to provide a new regulatory framework. The proposal states that this approach would provide continuity and certainty for regulated entities, the states, the public and federal agency staff. But as noted above, the 2008 interpretive guidance has demonstrably failed to provide clarity or certainty with respect to the reach of the Clean Water Act.

2018 – More Chaos and Confusion. This chronology brings us to 2018, which witnessed a dizzying flurry of court decisions and regulatory actions:

- In January 2018, the Supreme Court reversed the Sixth Circuit's ruling that the Clean Water Rule was subject to direct appellate review in the federal courts and that the district courts could not hear challenges to the Rule. The Supreme Court made it clear that it is the federal district courts, and not the circuit courts, that have original jurisdiction under the Clean Water Act's judicial review provisions to decide the merits of the dispute over the 2015 Clean Water Rule. *Nat'l Ass'n of Manufacturers v. Dept. of Defense*, 138 S. Ct. 617 (2018). Pursuant to the Supreme Court's ruling, in February 2018, the Sixth Circuit dismissed the challenge to the Clean Water Rule that was pending before it and dissolved the nationwide stay of the Rule that it previously had issued. *In re U.S. Dept. of Defense and EPA Final Rule*, 713 Fed. Appx. 489 (6th Cir. 2018) (unpublished).

- But before the Sixth Circuit dissolved its nationwide stay such that the 2015 Clean Water Rule would take effect, the agencies adopted a regulation that delayed the effective date of the Rule until February 2020. *See* 83 Fed. Reg. 5200 (Feb. 6, 2018). This regulation sought to preserve the status quo, by having the practical

effect of extending the Sixth Circuit's nationwide stay while the agencies developed a new regulatory definition for "waters of the United States."

- Meanwhile, the district court cases involving the Clean Water Rule − which had been halted due to the Sixth Circuit's ruling that the district courts lacked jurisdiction to hear the matter − were revived by the Supreme Court's decision. This meant that the 2015 North Dakota district court decision that had stayed the Clean Water Rule in 13 states was resuscitated. Eleven more states were added to the stay list in June 2018, as a result of a district court decision that stayed the Clean Water Rule in Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and Kentucky. *State of Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018).

- Four more states were added to the stay list (Texas, Louisiana, Mississippi and Iowa) as a result of two new district court orders in September 2018. *State of Texas v. U.S. Environmental Protection Agency*, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018); *State of North Dakota v. U.S. Environmental Protection Agency*, Case 3:15-cv-00059-DLH-ARS (D.N.D. Order filed Sept. 18, 2018) (unpublished).

- To add to this patchwork of district court decisions, in August 2018, a federal district court in South Carolina issued an injunction against implementing or enforcing the agencies' regulation extending the effective date of the Clean Water Rule until 2020. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018). The court found that agencies, in adopting this regulation in February 2018, failed to satisfy the requirements of the Administrative Procedure Act, by refusing to consider comments addressing the substance of the definition of "waters of the United States" and instead considering only comments addressing whether to modify the effect date of the 2015 Clean Water Rule. As of January 10, 2019, the case is on appeal to the U.S. Court of Appeals for the Fourth Circuit.

- Then, in November 2018, a federal district court in Seattle, following the same reasoning as the South Carolina district court, ruled that the regulation delaying the effective date of the Clean Water Rule was invalid and must be set aside. *Puget Soundkeeper Alliance v. Wheeler*, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018).

As a result of these various court rulings, the 2015 Clean Water Rule presently is in effect as the governing standard for defining "waters of the United States" in 22 states (California, Oregon, Washington, Hawaii, Minnesota, Michigan, Illinois, Ohio, Tennessee, Oklahoma, Pennsylvania, Maryland, Virginia, Delaware, New York, New Jersey, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, as well as the District of Columbia). In the other 28 states, the Clean Water Rule is stayed, which means that the 2008 Bush administration interpretive guidance applies instead.

These two standards (namely, the 2015 Clean Water Rule and the 2008 interpretive guidance on *Rapanos*) differ in many important respects on paper. However, both standards are both based on interpretations of Justice Kennedy's "significant nexus" test, and it can be difficult to ascertain how the

standards are applied differently in practice by Army Corps and EPA staff in their review of individual projects and Clean Water Act permit applications.

Not surprisingly, the agencies have now proposed new regulations that deviate significantly from both the 2015 Clean Water Rule and the 2008 interpretive guidance.

The Proposed New Definition of "Waters of the United States." On December 11, 2018, the agencies released a pre-publication version of a proposed rule that essentially would abandon Justice Kennedy's significant nexus test and would instead define "waters of the United States" along the lines articulated by Justice Scalia's "continuous surface connection" text. This proposed rule represents "step two" of the agencies' "rescind and replace" approach for the 2015 Clean Water Rule, although as of January 10, 2019, the agencies' "step one" rescission rule has yet to be finalized. The pre-publication version of the proposed "step two" rule is available on the EPA's website at: https://www.epa.gov/wotus-rule/revised-definition-waters-united-states-proposed-rule.

Six Categories of Jurisdiction. The December 2018 proposed rule lists six categories of waters subject to federal jurisdiction under the Clean Water Act:

- **Traditional Navigable Waters.** The proposed rule would maintain federal jurisdiction over waters currently used, used in the past, or susceptible to use in interstate or foreign commerce, including territorial seas and waters subject to the ebb and flow of the tide.

- **Tributaries.** The proposed rule would maintain jurisdiction over "tributaries" of traditional navigable waters, but would significantly change the prior definition of this term. The proposed rule no longer defines a tributary based on the presence of physical indicators of a bed, banks and an ordinary high-water mark. Rather, a tributary is defined by having perennial or intermittent flow. "Perennial flow" is continuous year-round surface water flow in a typical year. "Intermittent flow" is continuous surface water flow during certain times in a typical year and not merely in direct response to precipitation. Ephemeral channels of water that flow only in direct response to a precipitation event would be excluded under the proposed rule.

- **Wetlands.** The proposed rule would significantly limit jurisdiction over wetlands. A wetland would be jurisdictional only if it is "adjacent" to a jurisdictional water, which means it either abuts (i.e., touches at least one point or side of) a jurisdictional water or has a direct hydrologic surface connection to a jurisdictional water. The proposed rule would exclude wetlands that have only subsurface hydrologic connections to a jurisdictional water.

- **Ditches.** The proposed rule retains jurisdiction over some ditches (i.e., artificial channels) if they (1) are, were, or may be susceptible of being used in interstate or foreign commerce; (2) are constructed in a tributary or relocate or alter a tributary, and satisfy the definition of a tributary; or (3) are constructed in an adjacent wetland and satisfy the definition of a tributary. Notably, the preamble to the proposed rule clarifies that "the burden of proof would be on the agencies to determine the historic

status of the ditch construction, and if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or an adjacent wetland then a determination would be made that the ditch is not jurisdictional under this proposed rule."

- **Lakes and Ponds.** Lakes and ponds are jurisdictional if they (1) contribute perennial or intermittent flow to a traditional navigable water in a typical year (either directly or indirectly), or (2) are flooded by a non-wetland jurisdictional water in a typical year.

- **Impoundments.** The proposed rule retains federal jurisdiction over impoundments of jurisdictional waters.

Exclusions. The proposed rule excludes ephemeral features (defined as surface water that flows or pools only in direct response to precipitation) and diffuse stormwater runoff. The proposed rule also retains many existing exemptions, including for groundwater, prior converted cropland, artificially irrigated areas, upland artificial lakes and ponds, artificial depressions such as mining and construction pits, upland wastewater recycling structures, stormwater control features and waste treatment systems.

Other Notable Changes. In addition, the following significant elements of the 2015 Clean Water Rule would be abandoned:

- The proposed rule eliminates a category of jurisdictional waters known as "adjacent waters," which were defined based on their distance from other jurisdictional waters.

- The proposed rule no longer provides for certain wetlands and water bodies to be jurisdictional if they are determined, on a case-by-case basis, to have a "significant nexus" (either chemically, physically or biologically) to jurisdictional waters.

- The proposed rule removes "interstate waters" as an independent category of jurisdictional waters.

Conclusion. The proposed rule states that it is intended to provide greater clarity and regulatory certainty by providing bright-line rules for delineating the jurisdictional reach of the Clean Water Act. On the whole, the proposed rule would significantly limit federal jurisdiction, particularly over wetlands and tributaries. The new definition of "tributary" is particularly notable for many parts of the Western United States where ephemeral washes in response to rain events are fairly common; those features would no longer be subject to the Clean Water Act, even if they have a clearly defined bed, banks and ordinary high-water mark.

Further, by limiting the circumstances in which a Clean Water Act permit would be required, the proposed rule would limit the circumstances in which an environmental impact analysis is required under the National Environmental Policy Act. Particularly in the arid West, a Clean Water Act permit may be the only basis for subjecting a project to NEPA review and analysis. And once NEPA is triggered, the statute's connected action and cumulative impact doctrines generally require that the environmental analysis extend well beyond the individual project component requiring a Clean Water Act permit.

If the proposed rule is finalized, it will inevitably be challenged in court. As a result, the scope of the Clean Water Act is likely to remain in flux for at least the next few years.

2. More Clean Water Act Uncertainty: What is a "Discharge" of Pollutants?

In 2018, courts and regulators grappled with another important threshold question under the Clean Water Act: assuming there is a "water of the United States," what is a "discharge" of pollutants requiring a federal permit? EPA previously has stated that the Clean Water Act may apply to a discharge of pollutants from a point source (which is defined as any discernible, confined and discrete conveyance from which pollutants are discharged) that reaches a jurisdictional surface water such as a river, lake or bay, even if the discharge first flows through groundwater before reaching the surface. But the cases in 2018 were split on this issue and the dispute may be headed to the Supreme Court. And the agencies appear to be rethinking their prior position, as they have formally requested that interested parties submit comments on this issue. *See* 83 Federal Register 7126 (Feb. 20, 2018).

The 2018 Circuit Court Cases. In *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), the County disposed of treated municipal wastewater into a set of underground injection wells – it was undisputed that some of the treated effluent flowed through underground springs to the Pacific Ocean. But the County argued that the Clean Water Act regulates only *direct* conveyances of pollutants from a point source to a surface water body, and not *indirect* conveyances that flow through groundwater before reaching the surface water body. The court flatly rejected this argument, emphasizing that the key question was whether pollution was in fact discharged from a point source (such as a well, pipe or channel) to a water of the United States, and that it was irrelevant whether groundwater acted as a conduit for the discharge.

In *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018), the Fourth Circuit adopted a similar view. This case involved an underground pipeline that ruptured, resulting in the release of several hundred thousand gallons of gasoline, which then seeped through groundwater into various surface wetlands and waterways in the Savannah River watershed. The court emphasized that the Act's plain language regulates point source discharges to a surface water body that flow through groundwater with a direct hydrologic connection to that water body. *But see Sierra Club v. Virginia Electric Power Co.*, 903 F.3d 403 (4th Cir. 2018) (relying on *Upstate Forever* to confirm that pollutant discharges to groundwater that end up reaching surface water can violate the Clean Water Act, but finding that the discharges at issue – which seeped through soil via rainwater – were too diffuse to constitute "point source" discharges that were subject the Act).

But the Sixth Circuit has taken a different view. In *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), the court expressly disagreed with the Sixth Circuit's decision in *Upstate Forever* and the Ninth Circuit's decision in *Hawaii Wildlife Fund*. The case involved pollution in coal ash ponds that seeped into groundwater and then reached a nearby lake. The court reasoned that groundwater is not a point source, but rather a diffuse medium that seeps in all directions, and that the Clean Water Act does not regulate the flow of pollutants through such nonpoint sources. The court thus concluded that the Clean Water Act "does not extend liability to pollution that reaches surface waters via groundwater." *See also Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018) (same holding). The same judge dissented in both Sixth Circuit decisions, finding that the majority opinions conflicted with the Clean Water Act and agreeing with the positions

articulated by the Fourth and Ninth Circuits.

Possible Supreme Court Review: As of January 10, 2019, petitions for certiorari were pending before the Supreme Court in the *Upstate Forever* and *Hawaii Wildlife Fund* cases, which both held that the Clean Water Act applied to discharges that flowed through groundwater. The Supreme Court requested that the Solicitor General file a brief expressing the views of the United States, which may indicate the Court's willingness to accept the matter for review. In a brief filed on January 3, the Solicitor General urged the Court to grant certiorari and resolve the circuit split. Thus, the issue may very well be headed for Supreme Court resolution.

3. What is a "Practicable" Alternative?

Under Section 404 of the Clean Water Act, the Army Corps may grant a permit to fill a "water of the United States," only if the permit applicant demonstrates that there are no "practicable" alternatives to the fill that would be less environmentally damaging. The Clean Water Act regulations specify that an alternative is "practicable" if "it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose." 40 C.F.R. § 230.10(a)(2).

In *Friends of the Santa Clara River v. United States Army Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018), the Corps approved a fill permit for the infrastructure needed for the large-scale, mixed-use Newhall Ranch project in northwestern Los Angeles County. The Corps explained that the overall project purpose was to develop a large master planned community in accordance with the Specific Plan that the County had approved for the project, and it determined there were no "practicable" alternatives to the fill permit that would be less environmentally damaging. The project opponents argued that the Corps relied too heavily on the project proponent's objectives in defining the project purpose, and thereby impermissibly narrowed the range of "practicable" alternatives.

In rejecting this claim, the Ninth Circuit explained that the Corps was *required* under the case law and the governing regulations to consider the objectives of the project proponent and the Specific Plan, provided those objectives are not so narrowly defined as to preclude the consideration of alternatives. The court further explained that the Corps appropriately considered and rejected various different project alternatives, which would reduce the size of the development so as to render the project too costly and thus impracticable.

Additionally, the court rejected the plaintiffs' objections to the Corps' methodology for assessing project costs. The court emphasized that the governing regulations "do not require the Corps to use any particular metric for analyzing costs; rather, they merely instruct the Corps to assess alternatives in light of their cost, existing technology, and logistics." Thus, so long as the Corps' evaluation of costs is reasonable, the court "must defer to it." The court then applied this deferential standard in rejecting the plaintiffs' claims that the Corps (a) should have assessed costs on a per-residential unit or per-commercial floor space basis, rather than on a per-acre basis; (b) should have given more thorough consideration to project revenues, in addition to costs; and (c) should have excluded land acquisition costs as sunk costs.

The case reinforces two important principles. First, in conducting an evaluation of "practicable" alternatives under Section 404 of the Clean Water Act, the Corps may properly consider, and is in fact *required* to consider, the objectives of the project proponent, as long as those objectives do not

preclude the consideration of alternatives. Second, the Corps has considerable latitude in terms of how it evaluates project costs as part of this analysis, as long as it uses a reasonable methodology.

B. Protected Species

Four key legal developments are discussed below: (1) the Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* restricting the grounds for designating critical habitat under the Endangered Species Act; (2) the proposed regulations addressing (a) the protections for "threatened" species; (b) the procedures and criteria for listing, delisting and reclassifying species and designating critical habitat; and (c) the Section 7 consultation process, which is used to determine whether a federal action would jeopardize a listed species' continued existence or result in an adverse modification of the species' designated critical habitat; (3) the new guidance on the issuance of Incidental Take Permits under Section 10 of the Endangered Species Act; and (4) the Ninth Circuit decision overturning the determination by the U.S. Fish & Wildlife Service not to list the arctic grayling as an endangered or threatened species.

1. Supreme Court Limits Authority to Designate Critical Habitat

In a unanimous decision with immediate repercussions for the administration of the Endangered Species Act, the U.S. Supreme Court held that an area is eligible for designation as critical habitat under the ESA only if it qualifies as "habitat" for the species within the meaning of the statute. The Court also ruled that federal courts can review the decision not to exclude areas from critical habitat based on economic impacts and other factors. *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018).

Critical Habitat Designation under the ESA. The U.S. Fish and Wildlife Service (Service), upon listing a species as endangered, must also designate its "critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat to include: (1) areas occupied by the species that contain "physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection," and (2) areas not occupied by the species but determined by the Service to be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A).

As part of its proposed critical habitat designation, the Service must also consider the costs of that designation. 15 U.S.C. § 1533(b)(2). Unless it would result in the extinction of the species, the Service is authorized to exclude from critical habitat an area where the benefits of excluding that area outweigh the benefits of designation. *Id*.

The Litigation over the Dusky Gopher Frog. The dusky gopher frog once lived in longleaf pine forests throughout Alabama, Louisiana and Mississippi. Due in large part to the loss of these forests, the frog's wild population dwindled by 2001 to a group of 100 individuals at a single pond in southern Mississippi. That year, the Service listed the frog as endangered.

In 2012, the Service designated nearly 6,500 acres in Louisiana and Mississippi as dusky gopher frog critical habitat. This included all four areas known by the Service to host dusky gopher frog populations. The Service found these areas possessed three features "essential to the conservation" of the frog: ephemeral ponds for breeding; upland open-canopy forest with holes and burrows to live in; and open-canopy forest connecting the two.

The critical habitat designation also included 1,544 acres of closed-canopy timber plantation (dubbed "Unit 1") not occupied by the frog in several decades. According to the Service, Unit 1 was essential for the conservation of the species and met the definition of unoccupied critical habitat by virtue of its high-quality ephemeral breeding ponds and proximity to existing frog populations. And although much of Unit 1 lacked the type of open-canopy forest required by the frog, the Service found that such forest habitat could be restored there "with reasonable effort."

As required by the ESA, the Service commissioned a report on the probable economic impact of its proposed critical habitat designation, which concluded that designating Unit 1 could cost private landowners up to $33.9 million in lost development value. The Service nonetheless determined the conservation benefits of designating Unit 1 outweighed the benefits of excluding Unit 1 from critical habitat.

Private property owners within Unit 1 challenged the critical habitat designation, which both the U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit upheld. The Supreme Court granted certiorari to consider: (1) whether "critical habitat" must also be habitat, and (2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation. The Court's 8-0 decision resolves these issues in the affirmative.

Critical Habitat Must Be Habitat. First, the Court ruled that only habitat of an endangered species is eligible for designation as critical habitat: "According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.' Adjectives modify nouns – they pick out a subset of a category that possesses a certain quality. It follows that 'critical habitat' is the subset of 'habitat' that is 'critical' to the conservation of an endangered species." The term "habitat," however, is not defined in the ESA or regulations.

The Court remanded the case for consideration of two disputed issues: (1) whether an endangered species' habitat can include areas that would require some modifications to support the species, and (2) whether the dusky gopher frog could survive in Unit 1 without any modifications to the existing features.

Courts May Review Agency Exclusions from Critical Habitat. The Service argued that a decision not to exclude an area from critical habitat is wholly discretionary and therefore unreviewable. The Court disagreed, finding the decision reviewable for abuse of discretion.

The Court emphasized the strong presumption in favor of judicial review of administrative action and concluded that the ESA provisions regarding decisions not to exclude an area from critical habitat were not drawn so narrowly as to deny the court a meaningful standard to apply. Rather, this claim – that the agency did not appropriately consider all of the relevant factors that the ESA sets forth in guiding the Service's critical habitat exclusion decisions – is of the sort that federal courts "routinely assess" for abuse of agency discretion.

Because the Fifth Circuit found this issue unreviewable, it did not decide whether the Service's assessment of the costs and benefits of critical habitat designation was flawed in a way that rendered the decision to exclude Unit 1 arbitrary, capricious or an abuse of discretion. The Supreme Court remanded for consideration of this question.

Conclusion. The Supreme Court's ruling is a significant victory for property owners and developers, including companies in the timber products and energy industries. The decision limits the areas that can be designated as critical habitat by requiring the Service to first find that an area is "habitat." In practice, the extent of this limitation will depend on how courts interpret the term "habitat" – the major question for the Fifth Circuit on remand is whether a species' habitat can include areas that require modification to be habitable. The Court's decision is also an invitation for the Service to promulgate a new regulation to define the term "habitat."

The ruling also opens the door for private parties to challenge the Service's cost-benefit analyses underlying critical habitat designations. While this will likely lead to more litigation over critical habitat designations, review for abuse of discretion is highly deferential to an agency's decision.

The Supreme Court's decision came on the heels of several recent agency-level attempts to limit the scope and regulatory burden of the ESA. In April, the Service issued a guidance memorandum that narrowed the circumstances under which the Service would consider an incidental take permit for habitat modification appropriate. And in July, the Service proposed significant revisions to its ESA regulations that would, among other things, limit the Service's ability to designate unoccupied areas as critical habitat. Both of these regulatory actions are discussed below.

2. Major Changes Proposed to Endangered Species Act Regulations

On July 25, 2018, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) published three proposed rules that would revise the regulations implementing portions of the Endangered Species Act. The proposed rules would change the criteria and procedures (1) for establishing protections for "threatened" species; (2) for the listing and delisting of species and the designation of critical habitat; and (3) for the interagency consultation process under Section 7 of the ESA, which is used to determine whether a federal action would jeopardize a listed species' continued existence or result in an adverse modification of the species' designated critical habitat.

Any change to the ESA regulations is certain to attract scrutiny and the proposed rules are undoubtedly significant. But the proposed regulatory revisions are measured and less dramatic than what some had predicted.

a. Rescission of FWS Blanket 4(d) Rule

In the first proposed rule, FWS would rescind its blanket rule under Section 4(d) of the ESA. This blanket rule automatically establishes the same protections for threatened species as for endangered species, unless otherwise specified. This move would align FWS's regulatory approach with that of NMFS, which does not have a similar blanket rule. In place of the blanket rule, FWS would craft rules for each threatened species on a case-by-case basis, so that the applicable prohibitions, protections and restrictions are tailored specifically to the conservation needs of that species.

These changes would not affect the protections that are afforded to species that already have been listed as "threatened." Instead, the changes would apply only to future decisions to list a species as threatened, or to reclassify a species from endangered to threatened.

b. The Section 4 Rule

In a second, joint proposed rule, the Services have put forward several changes to the criteria and procedures for listing, delisting and reclassifying species and designating critical habitat. Specifically, this proposed rule would:

- Require that the Services, when making a critical habitat designation, first evaluate areas currently occupied by the species before considering unoccupied areas.

- Require that the Services, when including as part of a critical habitat designation an area that is not occupied by the species, make a finding that "there is a reasonable likelihood that the area will contribute to the conservation of the species."

- Provide a non-exhaustive list of circumstances where the Services may find that designating critical habitat for a species would not be prudent.

- Remove the prohibition in the regulations against referencing the economic and other impacts on landowners as part of a listing decision. The rationale is that this regulatory prohibition is unnecessary and redundant, as the statute itself already expressly requires listing determinations to be based "solely upon biological criteria." The proposed rule would not allow listing decisions to be based on economic or other impacts, but would allow referencing these impacts when making such decisions if doing so "may be informative to the public."

- Define the term "foreseeable future" (which is part of the definition of "threatened species") to make clear that the meaning of this term "extends only so far into the future as the Services can reasonably determine that both the future threats [i.e., the conditions potentially posing a danger of extinction] and the species' responses to those threats are probable."

- Clarify that the standard for delisting a species is "the same as the standard" for listing a species, and make several changes to the reasons that a species should no longer be listed, including that the species is extinct or does not fall within a taxonomic group that qualifies as a "species" within the ESA's definition of that term.

c. The Section 7 Rule

The third proposed rule would change the ESA's interagency consultation procedures. Under Section 7 of the ESA, when a federal agency undertakes, funds or approves an action that may affect a listed species or its designated critical habitat, that agency must consult with FWS or NMFS (depending on the species) to ensure that the action is not likely to jeopardize the species' continued existence or result in the destruction or adverse modification of the species' designated critical habitat.

Definitions. The proposed rule would change the definitions of several key terms under Section 7:

- "Destruction or adverse modification" of critical habitat: The rule would add "as a whole" to the end of the definition, such that this term would mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole …." The rule also would eliminate the second sentence of the definition, which currently provides examples of prohibited habitat alterations ("Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.").

- "Effects of the action": The rule would eliminate the references in the current definition to "indirect effects" and the effects of "interrelated or interdependent" actions, such that the term would be simplified to mean "all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action." Causation would be determined by a "but for" test, under which "[a]n effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur."

- "Environmental baseline": The definition of this term would be retained, but would be moved from the definition of "effects of the action" to its own standalone definition.

- "Programmatic consultation": This definition would codify an optional process designed to improve efficiency. This process could be used to evaluate multiple actions within a particular geographic area, or broad agency programs that guide the implementation of future actions by establishing standards, guidelines or governing criteria for such future actions. Of note, the current regulations already include a definition of "framework programmatic action," and thus contemplate programmatic consultation, which – although not specifically defined – is done in practice today.

Moreover, the Section 7 Rule would add a new section clarifying the definition of the term "reasonably certain to occur" in two contexts: (1) activities that are caused by, but are not part of, the proposed action and (2) activities that are considered cumulative effects to those of the proposed action. This new provision is designed to "avoid inclusion of activities whose occurrences would be considered speculative, but also to avoid requiring an expectation that the activity is absolutely certain to occur." The proposed rule includes a non-exhaustive list of factors, including relevant plans and past experiences, to help inform the determination of what is "reasonably certain to occur."

"Jeopardy" Standards. The Section 7 Rule also emphasizes that a federal action is prohibited by the ESA only if the action causes "appreciable" harm to a listed species or its critical habitat. This is an important point, as several recent court cases have ruled that when a species already is jeopardized by degraded baseline conditions, any additional adverse impact is prohibited. The proposed rule rejects this approach as "inconsistent with the statute and our regulations" and takes the position that "there is no 'baseline jeopardy' status even for the most imperiled species."

Initiation of Formal Consultation. In addition, the Section 7 Rule would clarify what is necessary to initiate the formal consultations process, by further describing the information (commonly called the "initiation package") that the federal agency undertaking, funding or approving the action that triggers the consultation must provide to FWS or NMFS, as applicable. In turn, the Section 7 Rule would allow the Services to adopt all or part of the initiation package in the biological opinion.

Expedited Consultation. The Section 7 Rule would provide for a new "expedited consultation" process, which would provide opportunities to streamline consultation for actions that have minimal or predictable effects based on previous consultation experience. This process is intended to apply to projects ranging from those with a minimal impact to those that have a potentially broad range of effects that are known and predictable, but unlikely to cause jeopardy or adverse modification.

Reasonable and Prudent Alternatives. The Section 7 Rule would establish that reasonable and prudent alternatives included in a biological opinion to avoid, minimize or offset the effects of the action "are considered like other portions of the action and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources."

Reinitiation of Consultation. With regard to the reinitiation of consultation based on new circumstances or information, the Section 7 Rule would not strictly require that such a reinitiation lead to a new formal consultation process, thus providing potential opportunities for less formal reinitiation procedures. Also, the rule would establish that the duty to reinitiate does not apply to an existing programmatic land management plan when a new species is listed or new critical habitat is designated.

Additional Issues. Finally, the Section 7 Rule seeks comment on three specific issues:

- Whether to revise the definition of the environmental baseline "as it relates to ongoing Federal actions," by adding language that it "is the state of the world absent the action under review" and includes "ongoing impacts of all past and ongoing" projects in the action area.

- Whether to clarify when federal agencies are not required to consult, including where "the Federal agency does not anticipate take and the proposed action" will: (1) not affect the species or critical habitat; (2) have effects that are manifested through global processes; or (3) result in wholly beneficial effects or effects that cannot be measured or detected in a meaningful way.

- Whether to adopt a 60-day or other deadline for informal consultation and how to appropriately implement such a deadline.

d. Impacts of the Proposed Rules

The first two rules (under Section 4 of the ESA) may have greater significance in the long term – especially as they may affect the number of species that are listed and the extent to which "threatened" species receive protection. But these changes will have relatively little effect in the near term, because they mostly relate to future decisions to list, delist or reclassify a species.

By contrast, if finalized, the Section 7 Rule would have a more immediate effect, because it would change the way interagency consultations are conducted. While some of the changes reflected in the Section 7 Rule are more technical in nature – simplifying the language and clarifying existing requirements, rather than removing such requirements – other changes may have more of an impact, such as rejecting the notion of a pre-existing "baseline jeopardy" and specifying that mitigation actions need not be binding or definite. Additionally, the three questions posed about Section 7 consultation clearly signal that the administration is considering potentially broader changes to the ESA consultation process, in particular the issue of "whether to clarify when Federal agencies are not required to consult" and whether to impose a 60-day deadline on informal consultation.

Unlike draft House and Senate legislation regarding the ESA, which may face long odds in Congress, the administration's regulatory proposals require no congressional approval and could have a substantial short- and long-term effect on the implementation of the ESA. While the administration's proposed changes are more measured than what some had predicted, as the proposed rules move forward, they are certain to attract significant public interest, and potentially opposition from various stakeholders – including from those that believe the proposed rules go too far, and from others that believe more substantial revisions are required. And it remains to be seen whether the administration will propose additional, broader procedural and substantive changes to the ESA consultation process.

3. Guidance on Endangered Species Act Incidental Take Permits

In April 2018, the U.S. Fish and Wildlife Service issued a guidance memorandum addressing when an incidental take permit may be needed under Section 10(a)(1)(B) of the Endangered Species Act for projects that modify habitat of federally listed species. The guidance memorandum seeks to ensure that the Service operates "in a consistent manner, with clear standards," when assessing what types of habitat modification may trigger the need for a Section 10 Permit.

Legal Background. The ESA prohibits the "take" of listed species, which can occur through direct harm to one or more members of the species or indirectly through modification of the species' habitat as a result of development. The ESA defines "take" as: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct." 16 U.S.C. § 1542(b). In turn, regulations under the ESA define "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." The regulations further define "harm" as an act "which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

In 1982, Congress amended the ESA to authorize the Service to issue permits for "incidental" takes – which can occur, for example, when the otherwise lawful construction of a development project results in the death or injury of members of a listed species. To receive an incidental take permit under Section 10(a)(1)(B) of the ESA (commonly referred to as a Section 10 Permit), an applicant must design, implement and secure funding for a binding Habitat Conservation Plan (or HCP) that minimizes and mitigates harm to the impacted species during the proposed project. Historically, preparation of an HCP and obtaining a Section 10 Permit has often been an onerous, complex and very time-consuming task.

The Guidance Memorandum. Recognizing the importance of applying correct and consistent interpretations of the ESA statutory and regulatory provisions, the guidance memorandum attempts to ensure that all non-federal project proponents receive clear, uniform information about whether their actions may trigger the need for a Section 10 Permit. The guidance memorandum and an accompanying questionnaire are required to be posted on the Service headquarters website, and all Service regional and field staff must include direction to that web page when project proponents inquire about Section 10 permitting.

The guidance memorandum emphasizes that it is "vital" for Service staff to recognize that whether to apply for a Section 10 Permit "is a decision of the applicant" and admonishes that "it is not appropriate to use mandatory language (e.g., a permit is 'required')" in the course of staff communications with non-federal parties. Thus, while there may be significant legal risks for proceeding with a project without a Section 10 Permit if a prohibited "take" occurs, including potential civil and criminal penalties, the guidance memorandum makes clear that the risks, detriments and benefits of pursuing or foregoing a permit are ultimately up to the project applicant to determine, rather than any compulsory directive from the Service.

Further, the guidance memorandum states that the Service should avoid processing applications purely "as insurance" for potential "takes" that in fact may never occur, and sets clear boundaries for when a permit may (or may not) be appropriate. Specifically, the guidance memorandum instructs staff to advise potential applicants that a Section 10 Permit is appropriate only where a "take" is reasonably certain to occur. The guidance memorandum explains that habitat modification, standing alone, does not necessarily call for a Section 10 Permit, and instead constitutes a "take" only when it meets all the elements of the regulatory definition of "harm."

The guidance memorandum thus poses the following three questions for assessing whether a habitat modification may trigger the need for a Section 10 Permit:

- Is the modification of habitat significant?
- If so, does that modification also significantly impair an essential behavior pattern of a listed species?
- And, is the significant modification of the habitat, with a significant impairment of an essential behavior pattern, likely to result in the actual killing or injury of wildlife?

The guidance memorandum concludes that "[a]ll three components of the definition are necessary to meet the regulatory definition of 'harm' as a form of take through habitat modification … with the 'actual killing or injury of wildlife' as the most significant component …." The guidance memorandum therefore appears designed to safeguard against potential regulatory overreach by Service staff in requiring and issuing Section 10 Permits.

In documenting the rationale for this approach, the guidance memorandum examines past and current regulatory definitions of "harm" and "harass," and explains how various revisions to each of these terms inform the Service's position. For example, because the Service ultimately "restricted" the term "harass" to include only those "acts or omissions which are done intentionally or negligently," the guidance memorandum reasons that "harass" is not a form of take that may be permitted under Section 10, which authorizes only takes that are "incidental to, but not the purpose of, the carrying out of an otherwise lawful activity." The regulatory definition of "harm," by contrast, expressly includes habitat modification and, according to the Guidance Memorandum, makes the actual death or injury of a listed species the paramount concern. The guidance memorandum notes, for example, that while the term "harm" has been redefined several times, it was "always with the intention to clarify that 'harm' relates to activities that are likely to result in the actual death or injury to species." Moreover, U.S. Supreme Court and U.S. Court of Appeals for the Ninth Circuit caselaw that have upheld the regulatory definition of "harm" as applied to habitat modification, have consistently concluded that every term in the definition of harm is "subservient to the phrase 'an act which actually kills or injures wildlife.'" From this, the guidance memorandum concludes that the "law is clear"—"in order to find that habitat modification constitutes a taking of listed species … all aspects of the harm definition must be triggered," with an actual injury to listed species of principal importance.

Conclusion. While not its stated goal, the guidance memorandum accords with other Trump administration efforts to expedite environmental review and permitting for new projects and to ensure that regulatory agencies appropriately support those efforts.

At bottom, the guidance memorandum is a clear attempt to ensure that different Service offices provide consistent treatment to prospective applicants for a Section 10 Permit. It provides the governing standard (and supporting rationale) to determine whether actions that include habitat alteration may result in the "take" of listed species, and attempts to ensure that – across all Service Regions – only those projects that meet this standard are considered for inclusion in the Section 10 Permit process. And, by reiterating that the permit process is applicant-driven, and emphasizing that habitat modification must meet a clear and relatively high standard before it may constitute a prohibited "take," the guidance memorandum appears to show the administration's desire to prevent the Section 10 Permit process from being used as a cudgel or threat against project proponents or being artificially expanded to include projects that do not meet the applicable regulatory requirements and definitions.

4. Ninth Circuit Decision Overturns FWS Determination Not to List Species

In *Center for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018), the court overturned the determination by the U.S. Fish & Wildlife Service not to list the arctic grayling, a cold-water fish that currently exists only in Montana and that has lost most of its historic range, as an endangered or threatened species under the Endangered Species Act.

The court decided the first issue in favor of FWS. In deciding whether or not to list a species, the Act requires an evaluation of the whether the species faces the danger of extinction "throughout all or a significant portion of its range." See 16 U.S.C. §§ 1532(6), (20) (definitions of "endangered" and "threatened"). In 2014, FWS adopted a policy to define the term "range," which is not defined in the Act. *See* 79 Fed. Reg. 37578 (July 1, 2014). According to this definition, lost historical range is relevant to the overall analysis of the species and its status, but does not constitute a significant portion of a species' range. The court rejected the plaintiffs' challenge to use of the 2014 policy in this case, finding that the term "range" in the statutory text was ambiguous, and that FWS' interpretation was reasonable and thus entitled to deference.

However, the court found that FWS erred in its decision not to list the species because it failed to use the best scientific data that was available. Specifically, the court questioned FWS' finding that the fish population was increasing, as that finding neglected a 2014 study by FWS' own scientists that determined that the population actually was in decline. The court stated: "Although FWS has broad discretion to choose which expert opinions to rely on when making a listing decision, it cannot ignore available biological data."

The court similarly questioned FWS' finding that the fish population possessed the ability to migrate to cold water refugia to survive during the summer months, in face of the increasing threats posed by lower stream flows and higher stream temperatures. This finding was based on a study that FWS previously had considered in determining that the ability of the fish to migrate to cold water refugia was not sufficient to nullify the threats posed during the summer months. The court faulted FWS for failing to explain this inconsistency and the agency's change of position on this issue.

Lastly, the court admonished FWS for using scientific uncertainty as a reason to avoid making any determinations about the threat to the species posed by climate change. The court found that the agency failed to explain *how* this uncertainty justifies its conclusion. The court therefore overturned FWS' decision not to list the species and remanded the matter to FWS to reassess its decision.

C. The Migratory Bird Treaty Act

On November 29, 2018, the California Department of Fish and Wildlife and the California Attorney General issued a joint advisory regarding California's state law protections for migratory birds. The three-page advisory affirms that "California law continues to provide robust protections for birds, including a prohibition on incidental take of migratory birds, notwithstanding the recent reinterpretation of the Migratory Bird Treaty Act (MBTA) by the U.S. Department of the Interior (DOI)."

The MBTA prohibits the "take" of migratory birds, but it does not specify whether that is limited to intentional takes only, or whether it also includes "incidental takes"—which are unintentional takes that are incidental to an otherwise lawful activity. The advisory explains that the "longstanding interpretation" of the MBTA is that it prohibits incidental take. This position was affirmed by the Obama administration in a January 2017 DOI memorandum. However, in December 2017, the acting DOI solicitor issued a new memorandum reversing course and concluding that the MBTA does not prohibit incidental take.

The advisory notes that three lawsuits, including one joined by the attorney general, are challenging the new DOI memorandum's legality. In the meantime, "California's protections for migratory birds, including a prohibition against incidental take, remain clear and unchanged." The advisory then describes California's robust protection of migratory birds, pointing to several provisions in the California Fish and Game Code, as well as California Supreme Court caselaw, prohibiting the take of migratory birds.

The advisory states that more than 600 migratory bird species live in or migrate through California. It concludes by asserting that "CDFW and the Attorney General will continue to implement and enforce California law to protect these birds."

TAB 9

Professional Biography

CECILY T. BARCLAY | PARTNER

Firmwide Chair, Real Estate & Land Use Practice

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7117
CBarclay@perkinscoie.com

Cecily Barclay focuses her practice on land use and entitlements, real estate acquisition and development and local government law. She regularly assists landowners, developers and public agencies throughout Northern California in all aspects of acquisition, entitlement and development of land, including land use application processing, drafting and negotiating purchase and sale agreements, negotiating and securing the approval of development agreements, general plan amendments, specific plans, planned development zoning, annexations, initiatives and referenda, and tentative and final subdivision maps. She also advises clients on riparian and appropriative water rights, including in connection with vineyard and agricultural properties.

In addition to processing entitlements for redevelopment and for expansion of regional retail centers, resort hotels and entertainment centers, Biotech/R & D campuses, large mixed-use master planned communities, and multi-faceted reuse of former military facilities and other infill development sites, Cecily also has significant experience advising on land use initiatives and negotiating school fee mitigation agreements, preparing conservation easements to mitigate for loss of biological resources, drafting affordable housing programs, Williamson Act contracts and related issues pertaining to agricultural properties; and assisting local agencies in drafting ordinances relating to updating general plans and housing elements, planned development zoning, specific plans, mitigation fees, affordable housing and growth management.

Cecily is a lead author of *Curtin's California Land Use and Planning Law*, a well-known publication which definitively summarizes the major provisions of California's land use and planning laws. Cecily also co-authored *Development by Agreement*, an ABA publication providing a national analysis of laws and practices concerning various forms of development agreements. She regularly speaks and writes on topics involving land use and local government law, including programs and articles for the American Bar Association, American Planning Association, California Continuing Education of the Bar, League of California Cities, University of California Extension programs, Urban Land Institute, and other state and national associations and conferences. Cecily's practice also focuses on how agencies and developers must comply with state housing laws, particularly anti-NIMBY (Housing Accountability Act) and density bonus laws. For over a decade, Cecily served as the president of two nonprofit affordable housing corporations in Oakland and currently serves on the ABA, state and local government Section's Publications Oversight Board.

Professional Biography

ANNE BEAUMONT | COUNSEL

SAN DIEGO, CA

11988 El Camino Real
Suite 350
San Diego, CA US
+1.858.720.5767
ABeaumont@perkinscoie.com

Anne Beaumont is a counsel with the firm's Environment, Energy & Resources practice. She has extensive experience representing clients in environmental, regulatory and litigation matters involving natural resources, tribal issues, telecommunications, land use and the siting and defense of large-scale infrastructure and energy projects.

Infrastructure Development and Natural Resources

Anne represents utilities, energy developers, and others in the development of cutting-edge energy and infrastructure projects. She has been involved in landmark transmission line and renewable energy projects in California and the Southwest. Anne regularly represents clients before federal and state agencies, including the California Public Utilities Commission, Bureau of Land Management, U.S. Forest Service, U.S. Fish and Wildlife Service, California Department of Fish and Wildlife, National Park Service, California State and Regional Water Boards and U.S. Army Corps of Engineers.

Anne advises clients on compliance with federal and state environmental statutes, including the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), federal and California Endangered Species Acts (ESA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),Clean Water Act, Migratory Bird Treaty Act (MBTA), Federal Aviation Act, and Bald and Golden Eagle Protection Act.

Administrative Proceedings and Enforcement Actions

Anne has extensive knowledge in administrative proceedings (including evidentiary and rule-making proceedings) and enforcement actions. These proceedings often relate to large-scale infrastructure project applications before state and federal agencies, complex telecommunications proceedings before the California Public Utilities Commission and enforcement actions brought by federal and state agencies. In these administrative proceedings, Anne frequently works closely with expert witnesses, conducts discovery and prepares witness examinations, briefings and comments.

Complex Civil Litigation and Appeals

Anne also has substantial experience in complex civil litigation and appeals, representing clients in both state and federal court. Her litigation matters cover a wide range of topics, including environmental issues, natural resources, telecommunications, tribal matters and employment law. Her appellate experience includes challenges to federal and state approvals of infrastructure and energy projects and appeals from the California Public Utilities Commission.

Pro Bono

Anne maintains an active pro bono practice, representing clients in immigration court hearings and appeals regarding asylum and cancellation of removal. Her pro bono experience includes first-chairing a number of complicated immigration issues,

including those raising issues of first impression. In addition to immigration matters, Anne's pro bono work includes counseling nonprofits on a wide range of legal issues, including regulations governing nonprofit fundraising and National Park Service regulations.

Professional Biography

MARC R. BRUNER | PARTNER

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7171
MBruner@perkinscoie.com

Marc Bruner represents governmental entities and private companies in a wide variety of environmental matters. He regularly works with clients in resolving complex compliance issues under the federal Clean Water Act, the California Porter-Cologne Water Quality Control Act, the federal and California Endangered Species Acts, the National Environmental Policy Act, the California Environmental Quality Act, the California Integrated Waste Management Act, and the panoply of California laws and regulations governing water supply, air quality, coastal development, development along the banks of streams and rivers, historic resources, and the management and disposal of solid and hazardous wastes.

Marc is particularly well-versed in the rules and regulations governing the management of industrial, municipal and construction stormwater and the treatment and discharge of process wastewater under federal NPDES permits and state law waste discharge requirements. He is very familiar with the recent developments in this rapidly emerging area of the law, and with the regulations and proceedings of the State Water Resources Control Board and the California Regional Water Quality Control Boards. He has advised companies and local governments on a broad range of stormwater and wastewater compliance issues.

Marc has a keen understanding of the differences between the federal and state law requirements as well as the areas of overlap and the opportunities and best practices for coordination. Marc also understands the strategic and practical considerations involved in negotiating compliance issues with the federal and state regulators.

Marc is co-author of the chapters covering wetlands and endangered species in *Curtin's California Land Use and Planning Law*, a leading treatise routinely relied upon by landowners, developers and local governments throughout the state. He speaks regularly on environmental and land use topics, including CEQA, NEPA, water quality, wetlands and endangered species and water supply requirements for new developments.

Professional Biography

GARRETT COLLI | COUNSEL

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7160
GColli@perkinscoie.com

As a counsel in the firm's Real Estate & Land Use practice, Garrett Colli focuses on coordinating land use entitlements and environmental compliance for residential, commercial, industrial, and renewable energy projects. Garrett also negotiates purchase and sale agreements, leases, easements, and related transactional documents in support of development projects. Garrett regularly advises clients regarding California Environmental Quality Act (CEQA) compliance, and is experienced in securing approvals under the Subdivision Map Act, the Clean Water Act, the Federal Land Policy Management Act, and the California Surface Mining and Reclamation Act. He frequently represents clients at public hearings to obtain zoning approvals, and has also defended clients in regulatory enforcement proceedings, including actions by the U.S. Environmental Protection Agency, regional water quality boards and local agencies.

Garrett's clients include developers, financial institutions, landowners, energy companies, and public agencies. His recent work includes representing one of the country's largest mixed-use developers in projects in San Francisco accounting for more than 20,000 units of housing with related commercial and retail components. This past year, Garrett represented a private real estate investment company in securing entitlements to transition a dated mall in Laguna Hills, California into a premier regional mixed-use destination with nearly 1,000,000 square feet of commercial use and 988 condominium units. Garrett is currently representing a developer in negotiations for a disposition and development agreement, preparation of a specific plan and CEQA compliance with respect to the redevelopment of a former Navy base.

Professional Biography

MATTHEW S. GRAY | PARTNER

Firmwide Chair, Land Development Industry Group

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7082
MGray@perkinscoie.com

Matthew Gray focuses his practice on land use entitlement processing, environmental compliance, and real estate transactions. He represents real estate developers, landowners, and local agencies in all stages of the land use entitlement and development process. He negotiates and secures approval of development agreements, general plan amendments, specific plans, zoning, subdivision approvals, and annexation of property into cities and special districts; regularly appears before planning commissions and city councils; and advises clients on compliance with the California Environmental Quality Act and other federal and state regulatory programs during the development process. Matt also has experience negotiating affordable housing agreements, mitigation fee agreements and conservation easements; forming land-based financing mechanisms, including Mello-Roos Districts; advising clients on issues relating to water supply; and using the initiative and referendum process in the land use planning context. Matt negotiates purchase and sale agreements; site development agreements; CC&R's and easement agreements; and related transactional documents in connection with mixed-use, commercial, and residential development projects.

Matt has worked on a wide variety of significant land use projects throughout California, including large urban redevelopment projects, military base reuse projects, mixed-use waterfront developments, renewable energy and related infrastructure projects, regional shopping centers, and master-planned residential communities.

Matt teaches an Annual Land Use Law Review and Update course at University of California Davis Extension. He has also taught Planning Law and Legal Process at University of California Berkeley Extension. He regularly lectures on the Subdivision Map Act through California Continuing Education of the Bar (CEB) and before local municipal engineers' associations.

He is an active member of San Francisco Planning and Urban Research (SPUR). He has served on the board of directors of the AIDS Legal Referral Panel and as chair of the Amicus Committee of Bay Area Lawyers for Individual Freedom.

Professional Biography

JULIE JONES | PARTNER

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7108
JJones@perkinscoie.com

Julie focuses on environmental and land use counseling and litigation for complex development projects. She resolves issues that arise under the California Environmental Quality Act, the National Environmental Policy Act, the Clean Water Act, federal and state species protection statutes, and a range of other local, state and federal statutes and common law doctrines that affect land use. An experienced litigator in California and federal courts, Julie defends projects and uses this experience to help clients obtain the approvals they need while minimizing litigation risk.

Julie's strategic problem solving has assisted private and public entities in permitting major university, traditional and renewable energy, water supply, marine terminal, residential and commercial projects. Recent accomplishments include:

- Securing approvals for faculty and below-market-rate housing developments, as well as office and R&D developments, in Palo Alto. In spite of controversy regarding traffic and other issues, no litigation was filed and all projects are either complete or under construction.
- Assisting Stanford University in obtaining Precise Plan and subsequent approvals for a 1.5-million-square-foot office, research and development and medical clinic project in Redwood City. The effort involved complex traffic, air quality and greenhouse gas issues. No litigation was filed.
- Successfully defending the environmental impact report for a major oil company's marine oil terminal against CEQA litigation brought by environmental groups.
- Successfully defending a medical clinic against CEQA claims brought by clinic protesters.

Additional litigation successes include defending a transportation sales tax ballot measure; a city/county agreement for urban services; a transportation authority's light rail extension; and a university development and roadway project. Julie also represented a port in the successful defense of major expansion and dredging projects against NEPA and Endangered Species Act claims.

Julie is the author of the sustainable development chapter of *California Land Use and Planning Law* and has co-authored the treatise's chapters on federal and state wetland regulation and endangered species protections. She is also a regular contributor to the California Land Use and Development Law Report, and lectures on CEQA and NEPA for clients, professionals and industry associations.

Professional Biography

MEREDITH JONES-MCKEOWN | PARTNER

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7097
MJonesMcKeown@perkinscoie.com

California construction and real estate lawyer Meredith Jones-McKeown is an experienced trial attorney who has also negotiated and structured numerous contracts for complex construction projects. Her multifaceted practice focuses on construction, environmental, government contracts and real estate litigation and transactions. Meredith has successfully tried cases in state and federal court as well as private arbitration.

Ranked by *Chambers USA*, which recognized her tenacity and command in complex matters, Meredith has extensive experience in litigation on all aspects of construction projects, both private and public, including delay and disruption, mechanic's liens, stop notice and payment remedies and construction defect. Her clients include property owners, universities, hospitals and healthcare facilities, energy providers, contractors, private developers, design professionals and subcontractors.

When working with clients on sophisticated construction contracts, Meredith drafts and negotiates a range of agreements, including EPC contracts, design-build contracts, professional/consultant contracts and modified AIA documents. Her project experience includes solar-generation and other energy facilities, large-scale commercial projects, mixed-use housing developments, medical facilities, university developments, condominium projects and public-bond funded construction.

Meredith has received several accolades, including recently being named one of the "Most Influential Women in Bay Area Business" by the *San Francisco Business Times*. She has been designated a "Rising Star" by *Northern California Super Lawyers* every year since 2011, ranked by *Chambers USA* as one of "America's Leading Lawyers for Business" as an "Up and Coming" Lawyer in Construction Law and was described as a "very solid construction lawyer with experience beyond her years" by the *Legal 500*.

Professional Biography

ALAN MURPHY | PARTNER

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7126
AMurphy@perkinscoie.com

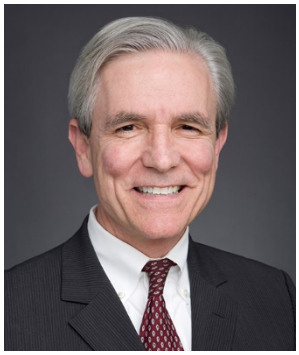
Alan Murphy focuses his practice on land use and development matters, including associated environmental review. He secures and defends land use entitlements and counsels clients in preparing development applications, throughout the approval process and in due diligence. Alan has significant experience with general plans, specific plans, zoning codes, use permits, variances, the Density Bonus Law, other state housing legislation, the Subdivision Map Act, development agreements, the California Environmental Quality Act (CEQA) and San Francisco's discretionary review process.

In his practice, Alan strives to identify innovative solutions to complex and politically sensitive development challenges. He routinely interacts with public agency staff and regularly appears on behalf of clients before city councils and boards of supervisors, planning commissions and local appellate boards. He also represents property owners in zoning enforcement actions.

Among Alan's clients are developers, landowners, educational and financial institutions, energy companies and public agencies. His experience includes representing clients in securing entitlements to redevelop over 500,000 square feet of office and R&D uses in both Foster City and Mountain View; preparing a citizens' initiative for a major project; advocating before San Francisco decision-making bodies to establish new residential units; and analyzing multifamily residential development options on properties between San Francisco and San Jose.

Alan co-chairs CLE International's conference on California land use law and speaks publicly in this area, especially on issues associated with multifamily housing development. Alan served as chair of the Program Committee for the Association of Environmental Professionals 2017 state conference, and he also participates in a local Urban Land Institute committee.

Professional Biography



GEOFFREY L. ROBINSON | PARTNER

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7174
GRobinson@perkinscoie.com

Geoff Robinson focuses his practice on land use and development entitlements and related litigation. He represents clients in civil and administrative proceedings involving planning and zoning laws, CEQA, development fees and exactions, environmental remediation and public facilities financing. Geoff is an authority on writs of mandate in the trial court and court of appeal, and is co-author of the treatise *California Administrative Mandamus* (CEB, Third Edition - 2017) and other publications on civil writ practice. He also has substantial experience in the area of development mitigation and has litigated scores of cases involving challenges to development exactions, mitigation requirements and public facilities financing. Water law matters are also part of Geoff's practice, including a ground water basin rights adjudication and appellate litigation involving the validity of a water supply assessment and an Urban Water Management Plan.

Geoff has been an active participant in pro bono efforts, representing individuals, nonprofits and public agencies before state and federal courts, including several matters in the California Supreme Court. He is the former co-chair of the California Commission on Access to Justice and has served on the boards of OneJustice and the California State Bar Foundation. He is the recipient of the California State Bar President's Pro Bono Award.

Geoff served as law clerk to Judge Thomas J. MacBride of the U.S. District Court for the Eastern District of California and as extern to Judge Joseph T. Sneed of the U.S. Court of Appeals for the Ninth Circuit.

Professional Biography

BARBARA J. SCHUSSMAN | PARTNER

San Francisco Office Managing Partner

SAN FRANCISCO, CA

505 Howard Street
Suite 1000
San Francisco, CA US
+1.415.344.7168
BSchussman@perkinscoie.com

Barbara Schussman, a partner in the firm's Environment, Energy & Resources practice, focuses on securing federal, state and local agency approvals needed to develop a wide range of private and public projects, including industrial scale solar facilities, university campuses, hospitals, research and development facilities, water supply and storage projects, oil refineries, maritime port and airport expansions, and numerous industrial, commercial, housing and mixed use developments. Barbara counsels clients regarding compliance with the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA), legislative and quasi-adjudicatory approvals required under the California Planning and Zoning Law, and permits and approvals required by other land use and environmental regulations, including the Clean Air Act, Clean Water Act, federal and state Endangered Species Acts, California Coastal Act and the Subdivision Map Act. She also is an experienced litigator, and has defended approvals and environmental permits in both the state and federal courts, including the California Supreme Court.

She is the author of the CEQA chapter of *Curtin's California Land Use and Planning Law*. She also teaches and lectures on CEQA and NEPA compliance and litigation issues for a variety of organizations.

Barbara's recent successes include:

- CEQA and CEQA+ compliance and permitting for a public project to recycle agricultural and other sources of wastewater for groundwater injection and reuse as drinking water in Monterey County.
- New zoning, conditional use permit, development agreement and CEQA compliance for Stanford Hospital and Lucile Packard Children's Hospital's $5 billion hospital replacement and expansion project in Palo Alto.
- Defense of CEQA and Clean Air Act challenges to Chevron's Richmond Refinery modernization project.
- County and BLM approvals for a 445-megawatt photovoltaic solar project in Riverside County, and defense of CEQA litigation filed by the Colorado River Indian Tribes.
- Harbor Commission, Army Corps of Engineers and Coastal Act approvals and CEQA and NEPA compliance for two major marine terminal projects at the Port of Los Angeles.
- Defense of Coastal Act, Clean Air Act and CEQA challenges to rulemaking actions by the South Coast Air Quality Management District.
- CEQA and NEPA compliance and approvals for expansion of a drinking water reservoir in Contra Costa County and new Delta water supply diversion intake.
- Published appellate decision holding that an individual development project can be fully approved through the initiative process.

Professional Biography

LAURA GODFREY ZAGAR | PARTNER

SAN DIEGO, CA

11988 El Camino Real
Suite 350
San Diego, CA US
+1.858.720.5748
LZagar@perkinscoie.com

Laura Zagar guides clients in the development of multijurisdictional water, energy and infrastructure projects and complex litigation. Laura plays a prominent part in innovative energy, water and infrastructure projects in the Western United States, including proposed offshore wind projects in California and Hawaii, the proposed restoration of the Klamath River through removal of four dams, the proposed Lake Powell Pipeline in Utah and Arizona, and SCE's completed Tehachapi Renewable Transmission Project. She also provides counsel on the innovative recycling of stormwater, agricultural runoff and wastewater for potable and irrigation purposes under development by Monterey One Water.

From permitting and environmental regulatory review to completion of construction, Laura directs her clients' large-scale projects at every stage. Her effective counseling and leadership on projects often require collaboration with environmental, energy and engineering experts on natural and cultural resources, transmission planning, geology, energy modeling, toxicology, fate and transport, remediation and other issues. Laura also advises emerging clean tech companies on regulatory compliance for technologies new to the market.

Water, Energy and Infrastructure Project Development

From pipelines to reservoirs and dams, the flow and use of water is a core component of Laura's practice. Laura has advised on projects related to water transportation, storage, hydropower and recycling, including Monterey's wastewater recycling project seen as an exemplar for California cities.

In the energy sector, Laura represents utilities, energy developers, public agencies and others before federal, state and local agencies. Her project experience includes numerous major electric transmission lines; renewable generation (including offshore wind, onshore wind, hydropower, solar, wind and biomass); conventional generation; and telecommunications.

Laura has extensive knowledge about proceedings before the California Public Utilities Commission (CPUC) and other state agencies, as well as the transmission planning process conducted by the California Independent System Operator (CAISO). As environmental and energy regulatory issues often arise during financing and other transactions, Laura provides counsel on due diligence for transactions involving the development and operation of energy and infrastructure projects.

Environmental and Natural Resources Regulatory Counsel

Highly experienced with federal, state and local authorities overseeing the development of energy and infrastructure projects, Laura represents clients before federal and state regulatory bodies.

Regulatory authorities and agencies that Laura has built productive relationships with include the Bureau of Land Management (BLM), U.S. Forest Service, U.S. Fish and Wildlife Service (USFWS), U.S. Army Corps of Engineers (USACE), U.S. National

Park Service, Bureau of Reclamation, NOAA National Marine Fisheries Service (NMFS), NOAA National Marine Sanctuaries, Bureau of Ocean Energy Management (BOEM), California Public Utilities Commission (CPUC), the California Energy Commission (CEC), California Department of Fish and Wildlife (CDFW), California's State Water Resources Control Board and the Regional Water Quality Control Boards, California State Lands Commission and California Coastal Commission.

Laura provides clients with comprehensive counseling on compliance with a wide array of environmental statutes. Areas of her focus include the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), federal and California Endangered Species Acts (ESA), Migratory Bird Treaty Act (MBTA), Bald and Golden Eagle Protection Act, Clean Air Act, Clean Water Act, California's Porter-Cologne Act, Federal Aviation Act, and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Laura also advises clients on statutes and regulations governing the use of federal lands, including the Federal Land Policy and Management Act (FLPMA) and the National Forest Management Act.

Litigation and Administrative Proceedings

Laura represents clients in complex and appellate federal and state litigation over the approval of energy and infrastructure projects as well as environmental and toxic tort litigation. Laura has represented clients in appeals of agency decisions, including those issued by the California Public Utilities Commission. Laura has also successfully defended labor and employment claims in federal courts.

Legal and Community Leadership

A leader in the community, Laura serves on the board of directors of Cleantech San Diego and the board of advisors for University of San Diego's Energy Policy Initiatives Center (EPIC). She also serves on the executive committee of the board of directors for the Equality California Institute, the largest statewide LGBTQ rights organization in the nation. Laura is the Chair of Perkins Coie's Firmwide Pro Bono Committee and handles immigration and natural resource-related pro bono matters.