

SUPPLEMENT 2023 PRACTICAL CEQA

**A Stepwise Guide to
California Environmental Quality Act
Compliance**



Antero Rivasplata, AICP, ICF



INTRODUCTION TO SUPPLEMENT 2023

The following is the second general update of *Practical CEQA: A Stepwise Guide to California Environmental Quality Act Compliance* since its publication. The update describes pertinent new legislation signed into law in 2022, new interpretations of CEQA from the California courts, and changes to National Environmental Policy Act regulations. The following discussions are organized by *Practical CEQA* chapter. Not all chapters have updates.

CHAPTER 2: WHO ARE THE PLAYERS?

Responsible Agency

When a responsible agency approves a project on the basis of the EIR prepared by the lead agency, the responsible agency must make the requisite findings under CEQA Guidelines Sections 15091 and 15093. This includes the Section 15091 finding regarding mitigation measures that are the responsibility of another agency. Failure to make CEQA findings can be grounds for a court to invalidate the responsible agency's approval. (*We Advocate Through Environmental Review v. City of Mount Shasta* (2022) 78 Cal.App.5th 629).

CHAPTER 3: WHAT'S A PROJECT?

Statutory Exemptions

In recent years, the Legislature has created several new statutory exemptions. New exemptions for residential projects have been established in the State Zoning Law (Government Code Section 65100 *et seq.*) rather than the Public Resources Code (PRC).

New Statutory Exemptions Enacted in 2022

Here are summaries of the CEQA statutes signed into law in 2022. For the full texts of the following bills, go to <https://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml> and search by bill number and the year 2022. With the exception of AB 2011, these statutory exemptions took effect on January 1, 2023.

AB 1642 (Chapter 859, Statutes of 2022): This bill adds PRC Section 21080.31 establishing a statutory exemption for wells that are part of a water system or domestic wells that have been designated by the State Water Resources Control Board as high risk or medium risk in the state board's drinking water needs assessment conducted and relied upon by the state board to inform its annual fund expenditure plan, and the project is designed to mitigate or prevent a failure of the well or the domestic well that would leave residents that rely on the well, the water system to which the well is connected, or the domestic well without an adequate supply of safe drinking water. The lead agency would be required to file a notice of exemption with the Office of Planning and Research (OPR) as well as the county clerk.



The well would be subject to the following restrictions:

- The well project is not designed primarily to serve irrigation or future growth.
- The well project does not affect wetlands or sensitive habitats.
- Unusual circumstances do not exist that would cause the well project to have a significant effect on the environment.
- The well project is not located on a listed hazardous materials/waste site.
- The well project does not have the potential to cause a substantial adverse change in the significance of a historical resource.
- The well project's construction impacts are fully mitigated consistent with applicable law.
- The cumulative impact of successive reasonably anticipated projects of the same type as the well project, in the same place, over time, is not significant.

Before determining that a well project is exempt pursuant to this section, a lead agency shall contact the state board to determine whether claiming the exemption under this section will affect the ability of the well project to receive federal financial assistance or federally capitalized financial assistance. A notice of exemption would be required to be filed with the State Clearinghouse identifying whether a Class 1 or Class 2 exemption was applied and, if not, why not. This statute would expire January 1, 2028.

AB 2011 (Chapter 647, Statutes of 2022): This bill adds Government Code Section 65912.100 *et seq.* creating a new statutory exemption by way of classifying permits for certain uses as ministerial. AB 2011 would make certain housing developments that meet specified affordability and site criteria and objective development standards a use by right within a zone where office, retail, or parking are a principally permitted use, and would subject development projects to one of two streamlined, ministerial review processes, depending upon the characteristics of the project. There are special provisions for projects within a “neighborhood plan” area. The bill requires a development proponent for a housing development project approved pursuant to the streamlined, ministerial review process to require, in contracts with construction contractors, that certain wage and labor standards will be met, including that all construction workers shall be paid at least the general prevailing rate of wages, as specified. This chapter takes effect on July 1, 2023 and will sunset on January 1, 2033.

SB 6 (Chapter 659, Statutes of 2022): This bill amends Government Code Section 65913.4 and adds Section 65852.24 to encourage the use of commercial properties for residential use. Section 65852.24 creates the Middle Class Housing Act of 2022, which would deem a housing development project, as defined, an allowable use on a neighborhood lot, which is defined as a parcel within an office or retail commercial zone that is not adjacent to an industrial use. The bill establishes the criteria for the residential use, and requires notification of and relocation assistance to all commercial tenants.



The bill requires the housing development to meet all other local requirements for a neighborhood lot, other than those that prohibit residential use, or allow residential use at a lower density than that required by the bill.

SB 6 provides that a housing development under these provisions is subject to all local zoning, parking, design, and other ordinances, local code requirements, and procedures applicable to the processing and permitting of a housing development in a zone that allows for the housing with the density required by the Act. If more than one zoning designation of the local agency allows for housing with the density required by the act, the bill would require that the zoning standards that apply to the closest parcel that allows residential use at a density that meets the requirements of the act would apply. If the existing zoning designation allows residential use at a density greater than that required by the act, SB 6 requires that the existing zoning designation for the parcel applies.

The bill will also require that a housing development under these provisions comply with public notice, comment, hearing, or other procedures applicable to a housing development in a zone with the applicable density. The bill will require that the housing development is subject to a recorded deed restriction with an unspecified affordability requirement. The bill will require that a developer either certify that the development is a public work, as defined, or is not in its entirety a public work, but that all construction workers will be paid prevailing wages, as provided, or certify that a skilled and trained workforce, as defined, will be used to perform all construction work on the development. The bill will require a local agency to require that a rental of any unit created pursuant to the bill's provisions be for a term longer than 30 days.

The bill authorizes a local agency to exempt a neighborhood lot from these provisions in its land use element of the general plan if the local agency concurrently reallocates the lost residential density to other lots so that there is no net loss in residential density in the jurisdiction, as provided. The bill specifies that it does not alter or affect the application of any housing, environmental, or labor law applicable to a housing development authorized by these provisions, including, but not limited to, the California Coastal Act, CEQA, the Housing Accountability Act, obligations to affirmatively further fair housing, and any state or local affordability laws or tenant protection laws. The bill requires an applicant of a housing development under these provisions to provide notice of a pending application to each commercial tenant of the neighborhood lot. The bill would repeal these provisions on January 1, 2029.

SB 6 amends the Housing Accountability Act (Gov. Code Section 65913.4) to permit an application for a ministerial permit, under the detailed conditions described in the Act, to be proposed for a site zoned for office or retail commercial use if the site has had no commercial tenants on 50 percent or more of its total usable net interior square footage for a period of at least three years prior to the submission of the application. The bill also provides that a project located on a neighborhood lot, as defined,



shall be deemed consistent with objective zoning standards, objective design standards, and objective subdivision standards if the project is consistent with the applicable provisions of the Neighborhood Homes Act.

SB 118 (Chapter 10, Statutes of 2022): This bill adds PRC Section 21080.09 on CEQA's application to campus long-range development plans (LRDPs). It would provide that once an LRDP has been approved, "[e]nrollment or changes in enrollment, by themselves, do not constitute a project as defined in Section 21065." In addition, if a court determines that increases in campus population exceed the projections adopted in the most recent LRDP and analyzed in the supporting EIR, and those increases result in significant environmental impacts, the court may order the campus or medical center to prepare a new, supplemental, or subsequent EIR. Only if a new, supplemental, or subsequent EIR has not been certified within 18 months of that order, the court may enjoin increases in campus population that exceed the projections adopted in the most recent LRDP and analyzed in the supporting EIR.

The purpose of this bill is to reverse a court's enjoining of UC Berkeley's LRDP because UC had approved enrollments exceeding the LRDP's project description without preparing a subsequent CEQA document. Accordingly, AB 168 would apply retroactively.

SB 886 (Chapter 663, Statutes of 2022): This bill adds PRC Section 21080.58, creating a statutory exemption for qualifying student, and faculty and staff, housing projects at public universities. The exemption is subject to the usual exceptions for biological, historical and other resources, and a project would be required to pay prevailing wage.

SB 922 (Chapter 987, Statutes of 2022): This bill amends PRC Sections 21080.20 and 21080.25. Section 21080.20 establishes a statutory exemption for bicycle transit plans. SB 922 would expand this exemption to include active transportation plans and pedestrian plans. An individual project that is a part of an active transportation plan or pedestrian plan would remain subject to CEQA unless another exemption applies to that project. The bill retains the January 1, 2030 expiration date for this statute.

Section 21080.25 establishes a statutory exemption for transit prioritization projects and projects for pedestrian and bicycle facilities or for the institution or increase of new bus rapid transit, bus, or light rail services on public or highway rights-of-way. SB 922 extends the expiration date for this section to January 1, 2030. In addition, the bill revises and recasts the exemption to, among other things, repeal the requirement that the exempted projects be located in an urbanized area, extend the exemption by revising the definition of transit prioritization projects, and require projects for the institution or increase of new bus rapid transit, bus, or light rail service to be located on a site that is wholly within the boundaries of an urbanized area or urban cluster, as designated by the United States Census Bureau. The bill also revises the requirements for the project business case and racial equity analysis and noticed public meetings to apply to exempted projects exceeding \$100,000,000 and would additionally require the lead



agency to complete an analysis of residential displacement and suggest anti-displacement strategies, designs, or actions for those projects for which at least 50 percent of the project or projects' stops and stations are located in an area at risk of residential displacement and will have a maximum of 15-minute peak headways. The applicable metropolitan planning organization would be responsible to define or identify areas at risk of residential displacement.

SB 922 provides that exempted projects exceeding \$50 million in value must hold at least three noticed public meetings in the project area to hear and respond to public comments; conduct at least two noticed public meetings annually during project construction for the public to provide comments; and hold these meetings in the form of either a public community planning meeting held in the project area or in the form of a regularly scheduled meeting of the governing body of the lead agency. Such meetings would be noticed as provided in the bill.

This bill defines, for the first time, the term "transportation demand management" for CEQA purposes.

CHAPTER 4: PROJECT DEFINITION AND EARLY ANALYSIS

Initial Study

Impacts—Determinations of Significance

CEQA applies to impacts of the project on the environment. CEQA does not apply to impacts of the environment on the project, except to the extent that the project's impacts exacerbate existing environmental hazards. (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369). This limits the breadth of analysis in comparison to pre-2015 practice. California Courts of Appeal have interpreted this to mean that CEQA analysis is not required of the impacts of geologic hazards (*Berkeley Hills Watershed Coalition v. City of Berkeley* (Jan. 30, 2019) 31 Cal.App.5th 880) and sea level rise (*Citizens' Committee to Complete the Refuge v. City of Newark* (2022) 74 Cal.App.5th 460). The key issue is whether the project would exacerbate the existing hazard, not simply whether such hazard exists. (*Newtown Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771).

CHAPTER 6: DRAFT ENVIRONMENTAL IMPACT REPORT

Environmental Analysis

Environmental Setting

In some situations, indirect impacts can dictate the scope of the environmental setting. For example, in a 2022 Court of Appeal decision, where a project's anticipated increase in regional vehicle miles travelled would adversely affect Lake Tahoe's water quality (as



a result of polluted run-off from roads), that effect on the lake must be analyzed and disclosed even though the project itself is located outside of the Tahoe Basin. The project would have increased vehicle miles travelled within the basin. (*League to Save Lake Tahoe, et al. v. County of Placer* (2022) 75 Cal.App.5th 63).

Alternatives Analysis

The alternatives to be analyzed in the draft EIR are selected based in part on their consistency with project objectives. The project objectives are identified as part of the project description. When identifying project objectives, the lead agency must not make these objectives so artificially narrow as to preclude all project alternatives. For example, objectives requiring the project to be located on the same site and include identical characteristics as the project are too narrow. (*We Advocate Through Environmental Review v. County of Siskiyou* (2022) 78 Cal.App.5th 683).

Technical Studies and Other Appendices

CEQA Guidelines Section 15128 states that an EIR is to “contain a statement briefly indicating the reasons that various possible significant effects of a project were determined not to be significant and were therefore not discussed in detail in the EIR. Such statement may be contained in an attached copy of an Initial Study.” A Court of Appeal decision has affirmed this approach to streamlining the text of an EIR. The Court held that when an Initial Study adequately analyzes a resource and determines that the project’s impact on that resource is less than significant with mitigation the project’s EIR does not need to discuss the resource impact in detail. The EIR in question properly included the Initial Study and related technical studies as appendices, summarized the findings of the Initial Study and technical studies in the EIR text, and committed to implementing the mitigation measures identified in the Initial Study and related technical studies. (*Ocean Street Extension Neighborhood Association v. City of Santa Cruz* (2022) 73 Cal.App.5th 985).

The practical effect of this decision is that an EIR can focus on discussing the project’s significant and unavoidable impacts with a summary of the impacts that the Initial Study has determined are less than significant with mitigation. The Initial Study must identify a potentially significant effect, analyze that effect in sufficient detail, explain the reasons why the potentially significant effect would not be significant, and identify feasible mitigation measures that will reduce that effect to a less than significant level. The *Ocean Street Extension Neighborhood Association* court opined that “nothing prohibits the discussion of impacts that are less than significant with mitigation in an initial study rather than in the EIR so long as the EIR complies with its purpose as an informational document.”



CHAPTER 7: AFTER THE DRAFT EIR

Recirculation Triggers

A substantial increase in the severity of an environmental impact triggers recirculation, even when the overall impact conclusion does not change between the draft and final EIRs. In *We Advocate Through Environmental Review v. County of Siskiyou* (2022) 78 Cal.App.5th 683, the California Court of Appeal held that a doubling in greenhouse gas emissions between the draft and final EIR due to a recalculation of emissions required recirculation even though the EIR's significance determination had not changed.

On the other hand, revising the project prior to approval does not require recirculation when the revised project is substantially similar to the alternatives already evaluated in the EIR. (*Southwest Regional Council of Carpenters v. City of Los Angeles* (2022) 76 Cal.App.5th 1154). Further, when “the new information provided in the final EIR only clarified or amplified the draft EIR’s discussion and conclusions and demonstrated the impact would be less than the draft EIR had disclosed but would remain significant.” (*League to Save Lake Tahoe, et al. v. County of Placer* (2022) 75 Cal.App.5th 63).

CHAPTER 8: MITIGATION

Deferred Mitigation

Court decisions in 2022 have offered some new insight into what is and what is not deferred mitigation. Best Management Practices (BMPs) that are either incorporated into the project description and required as conditions of approval or that are required by applicable regulations are not deferred mitigation. (*Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700). A mitigation measure based on a plan that has not been adopted and whose requirements and performance standards are unknown is improperly deferred mitigation. (*League to Save Lake Tahoe, et al. v. County of Placer* (2022) 75 Cal.App.5th 63).

CHAPTER 10: CEQA/NEPA JOINT DOCUMENTS

Similarities and Differences Between CEQ and NEPA

The Council on Environmental Quality (CEQ) adopted several revisions to the NEPA Regulations (40 CFR 1500, et seq.) on April 20, 2022. The revisions address the purpose and need of a proposed action, federal agency NEPA procedures for implementing NEPA, and the definition of effects. CEQ has stated that this is phase one of anticipated revisions to the 2020 revisions to the NEPA Regulations, with the intent to largely returning the regulations to pre-2020 provisions. Here is a summary of the 2022 revisions:



- Section 1502.13: The revision clarifies that in determining the project's purpose and need agencies have discretion to consider a variety of factors. This removes the previous provision that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority. The revision also makes a conforming edit to the definition of "reasonable alternatives" in Section 1508.1(z), clarifying that the selection of alternatives is at the agency's discretion, not the applicant's.
- Section 1507.3: The revision eliminates language that could be construed to limit agencies' flexibility to develop or revise procedures to implement NEPA specific to their programs and functions that may go beyond the CEQ regulatory requirements. This establishes that CEQ's NEPA Regulations are the floor for NEPA compliance, not the ceiling, and authorizes agencies to adopt more stringent requirements.
- Section 1508.1(g): The revision returns the definition of "effects" to including direct, indirect, and cumulative effects. The 2020 revisions had removed mention of the need to consider indirect and cumulative effects.

See CEQ's website for details of these revisions and the anticipated phase two: <https://ceq.doe.gov/laws-regulations/regulations.html>.

On June 30, 2022, in a 6–3 decision the U.S. Supreme Court overturned the federal Environmental Protection Agency's (EPA's) Clean Power Plan regulating carbon dioxide emissions from coal- and natural gas-fueled power plants. (*West Virginia v. EPA* 597 US __ (2022)). Under the "major questions doctrine" (for important questions an agency must point to "clear congressional authorization" for the authority it claims), the Court held that EPA did not have the authority under the Clean Air Act to regulate carbon dioxide emissions because Congress had not specifically delegated it that authority. Given the divided Congress's reticence to address climate change through legislation, this decision is expected to constrain the EPA's power to regulate GHG emissions moving forward.

NEPA was not at issue in the *West Virginia* decision and so the decision does not directly affect NEPA practice.

CHAPTER II: EVOLVING CEQA ISSUES

Greenhouse Gas Emissions

The U.S. Supreme Court's *West Virginia v. EPA* decision overturned the federal EPA's Clean Power Plan regulating carbon dioxide emissions from power plants. (*West Virginia v. EPA* 597 US __ (2022)). The Court held that the federal EPA did not have the authority under the Clean Air Act to regulate GHG emissions. In contrast, California's efforts to reduce GHG emissions through CEQA and by regulation are being undertaken under California law. As a result, they are not affected by the *West Virginia* decision.

CEQA and Affordable Housing

Ministerial Projects Where RHNA Obligations Are Not Met

SB 6 (Chapter 659, Statutes of 2022) amends Government Code Section 65913.4 to further state that qualifying residential projects are not subject to “any nonlegislative discretionary approval.” It also expands the statute to cover sites that are zoned for office or retail commercial and meet the requirements of Government Code Section 65852.24 (the Middle Class Housing Act of 2022). The new statute further provides that a project meeting the requirements of Section 65852.24(b) is “deemed consistent with objective zoning standards, objective design standards, and objective subdivision standards.”

Middle Class Housing Act of 2022

SB 6 also creates the Middle Class Housing Act of 2022 (Government Code Section 65852.24). The Act establishes that a housing development project is to be deemed an allowable use on a parcel that is “within a zone where office, retail, or parking are a primarily permitted use” if it meets certain requirements specified in the section. These requirements, briefly summarized, include:

- The housing density meets or exceeds the density deemed appropriate to accommodate lower income households set out under Housing Element law (Government Code Section 65583.2(c)(3)(B)).
- The housing development is subject to local zoning, parking, design, other ordinances, and local code requirements.
- The housing development complies with local agency public notice, comment, hearing, or other procedures in the applicable zoning designation.
- The project site is 20 acres or less.
- The project complies with all other objective local requirements such as impact fees and inclusionary housing requirements.
- The site is a legal parcel located within a Census-designated urban area, either a city or an unincorporated area, and is not on or adjoining a specified type of industrial site.
- The project is consistent with the applicable sustainable community strategy.
- The developer has certified to the local agency that the project is either a public work or will be subject to prevailing wage requirements. The project must also use “a skilled and trained workforce” unless specified conditions exist.

This statute has numerous specific requirements for agencies and project proponents that are not included in this short summary. Interested persons should refer to the statute itself for the whole story.



Affordable Housing and High Roads Jobs Act of 2022

AB 2011 (Chapter 647, Statutes of 2022) enacts the Affordable Housing and High Roads Jobs Act of 2022 (Government Code Section 65912.100 *et seq.*) establishing statutory exemptions for qualifying multifamily residential projects in office, retail, and parking zones that provide specified levels of affordable housing (Sections 65912.111 and 65912.112). Under this complex statute, when a development proponent submits a development application that the local agency determines meets the criteria for this type of housing project, the local agency must approve the development through a streamlined, ministerial process (Section 65912.114). If the local agency determines that the application doesn't meet either of these sets of criteria, it must advise the project proponent of the reasons for rejection within specified time frames (Section 65912.114). The local agency is limited to applying only objective development standards to the development (Section 65912.113). A development proponent must require in contracts with construction contractors that certain wage and labor standards will be met, including that all construction workers shall be paid at least the general prevailing rate of wages, as specified. (Government Code Sections 65912.130 and 65912.131).

This statute establishes a similar statutory exemption for mixed-income developments along commercial corridors in zones where office, retail, or parking are the principal permitted uses (Government Code Sections 65912.120—65912.124). The qualification criteria for this exemption are extensive. Location criteria are found at Government Code Section 65912.121, including excluded sites. Affordability criteria, including the mix of affordable units, are found at Government Code Section 65912.122. Basic objective development standards, including minimum density, are set out in Government Code Section 65912.123. Government Code Section 65912.124 sets out the responsibilities of local government when approving a proposed housing development under streamlined rules, and for denying a proposal to allow ministerial approval of such a project.

The two statutory exemptions created by AB 2011 apply different qualifying criteria. The two sets of multiple criteria by which each of these types of housing development projects may qualify are labyrinthine to say the least. The reader is referred to the specific Government Code sections for details. This statute takes effect on July 1, 2023, and will be repealed by its own terms on January 1, 2033. The entire CEQA statute can be found online in Public Resources Code Section 21000, *et seq.* Go to:

[https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.](https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=PRC&division=13.&title=&part=&chapter=&article=&nodetreepath=30)

[xhtml?tocCode=PRC&division=13.&title=&part=&chapter=&article=&nodetreepath=30](https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=PRC&division=13.&title=&part=&chapter=&article=&nodetreepath=30)