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PRACTICAL CEQA

A Stepwise Guide to California Environmental Quality Act Compliance

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INTRODUCTION

The following is the third 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 2023, 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 3. WHAT'S A PROJECT?

Ministerial v. Discretionary

The Court of Appeal in *Tulare Lake Canal Company v. Stratford Public Utility District* (2023) 92 Cal.App.5th 280 clarified for us that the grant of an easement is a discretionary action subject to CEQA review. CEQA applies to agency actions that would have direct or reasonably foreseeable indirect impacts. An agency cannot take such actions without CEQA review – which may result in use of an exemption, or preparation of a negative declaration or EIR.

Statutory Exemptions

In recent years, the Legislature has created several new statutory exemptions. In addition to the Public Resources Code (PRC) where CEQA resides, new exemptions for residential projects have also been legislated in the State Zoning Law (Government Code Section 65100, et seq.). The texts of the 2023 legislation can be found at: https://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml. Search by bill number and year of passage.

New Statutory Exemptions Enacted in 2023

Here are summaries of the key CEQA statutes relating to statutory exemptions signed into law in 2023.

AB 127 (Chapter 45, Statutes of 2023): Among many issues, this bill adds PRC Section 21080.12 which creates a statutory exemption for actions of the Office of Planning and Research (OPR) its subsidiary entities to provide financial assistance for planning, research, or project implementation related to land use or climate resiliency, adaptation, or mitigation when the project that is the subject of the application for financial assistance will be reviewed by another public agency pursuant to CEQA, or by a tribe pursuant to an alternative process or program the tribe implements for evaluating environmental impacts.

AB 130 (Chapter 39, Statutes of 2023): Among many issues, this bill amends Government Code Section 65913.4, which establishes certain residential or mixed-use

projects as being ministerial and statutorily exempt from CEQA. The amendment is intended to improve the agency's ability to enforce the labor requirements.

AB 785 (Chapter 726, Statutes of 2023): This bill amends PRC Section 21080.27 that currently establishes a statutory exemption for certain activities approved or carried out by the City of Los Angeles and other eligible public agencies, as defined, related to supportive housing and emergency shelters in the City of Los Angeles. Under existing law, this exemption requires the lead agency to file a notice of exemption with OPR and the County Clerk for the County of Los Angeles.

AB 785 expands this exemption to affordable housing, low barrier navigation centers, supportive housing, and transitional housing for youth and young adults, as those terms are defined by the bill, within the City of Los Angeles and similar activities undertaken by the County of Los Angeles related to affordable housing, low barrier navigation centers, supportive housing, and transitional housing for youth and young adults within the unincorporated areas of the County of Los Angeles and parcels owned by the County of Los Angeles within the City of Los Angeles. In addition, this bill extends the expiration date of this statute to January 1, 2030.

AB 1449 (Chapter 761, Statutes of 2023): AB 1449 adds PRC Section 21080.40 establishing a statutory exemption for affordable housing projects that consist of multi-family residential uses only, or a mix of multi-family residential and nonresidential uses, when at least two-thirds of the square footage of the project is designated for residential use. In addition to development entitlements, this exemption applies to rezoning, specific plan amendments, or general plan amendments required specifically and exclusively to allow the construction of an affordable housing project. A project must meet all of the following basic qualifications: it meets specified labor standards; it is dedicated to lower income households; it is either located within city boundaries or an urbanized area, or within 1/2-mile of a high-quality transit corridor or stop, or is in a very low vehicle travel area, or is proximal to six or more of the amenities described in the statute; and parcels that are developed with urban uses adjoin at least 75 percent of the perimeter of the project site or at least three sides of a four-sided project site. Proximal amenities include a supermarket or grocery store, public park, community center, pharmacy or drugstore, medical clinic or hospital, public library, and K-12 school.

Additional criteria for a project: it will be subject to a recorded California Tax Credit Allocation Committee regulatory agreement; its site can be adequately served by existing utilities or extensions; it complies with the limitations on location found in Government Code 65913.4(a)(6(B-K); if the site is vacant it does not contain tribal cultural resources; a Phase 1 environmental assessment has been completed and the site remediated if necessary; and additional criteria applicable to sites where multi-family housing is not permitted. This statute will expire on its own terms on January 1, 2033.

AB 1633 (Chapter 768, Statutes of 2023): This bill amends Government Code Section 65589.5, the existing Housing Accountability Act that prohibits a local agency from disapproving a housing development project unless it makes certain written findings based on a preponderance of the evidence in the record. AB 1633 defines "disapprove the housing development project" to also include any instance in which a local agency fails to issue an exemption from CEQA for which a project is eligible, as described, or fails to adopt a negative declaration or addendum for the project, to certify an EIR for the project, or to approve another comparable environmental document, if certain conditions are satisfied. Among other conditions, the bill requires a housing development project subject to these provisions to be located within an urbanized area, as defined, and meet or exceed 15 dwelling units per acre.

AB 1633 further provides that a local agency's failure to make a determination that the project is exempt from CEQA or commitment of an abuse of discretion, or failure to adopt, approve, or certify a CEQA document, is deemed a final disapproval of the housing project for purposes of filing a court petition to enforce the provisions of the act if the applicant gives timely written notice to the local agency, as specified, and the agency does not issue the exemption or adopt, approve, or certify a CEQA document within 90 days of the applicant's notice.

In addition, this bill establishes provisions under which an applicant can file a notice claiming that the local agency's action does not meet the requirements of the Housing Accountability Act. The local agency will be required to post this notice with the County Clerk within 5 days of receiving it.

SB 4 (Chapter 771, Statutes of 2023): This bill adds Government Code Section 65913.16 to allow by right (statutory exemption) certain affordable housing projects on land owned by an "independent institution of higher education or religious institution." A residential developer will be required to submit a request to invoke this statute and a local government will be required to either grant the request or provide the developer with an explanation of why the application does not comply with this statute. SB 4 is complex, with many qualifying criteria/limitations and labor requirements.

SB 91 (Chapter 732, Statutes of 2023): SB 91 amends PRC Code Sections 21080.50 and 21168.6.9. Section 21080.50 establishes a statutory exemption for CEQA projects related to the conversion of a structure with a certificate of occupancy as a motel, hotel, residential hotel, or hostel to supportive or transitional housing, as defined, that meet certain conditions until January 1, 2025. This bill extends the Section 21080.50 exemption indefinitely.

Section 21168.6.9 establishes specified procedures for the preparation of EIRs for, and judicial review of the certification of the EIR and approvals granted for, an environmental leadership transit project, as defined, proposed by a public or private entity or its affiliates that is located wholly within the County of Los Angeles or connects to an existing transit project wholly located in that county and that is approved by the

lead agency on or before January 1, 2024. This section was set to expire on January 1, 2025. SB 91 extends these procedures for environmental leadership transit projects to January 1, 2026 for projects approved on or before January 1, 2025.

SB 149 (Chapter 60, Statutes of 2023): This bill is worth reading in detail; it is very exacting in its requirements.

The Jobs and Economic Improvement Through Environmental Leadership Act of 2021 (Leadership Act) authorizes the Governor, before January 1, 2024, to certify projects that meet specified requirements for streamlining benefits related to CEQA, including the requirement that judicial actions challenging the action of a lead agency for projects certified by the Governor be resolved, to the extent feasible, within 270 days after the filing of the record of proceedings with the court, and a requirement that the applicant agrees to pay the costs of preparing the record of proceedings for the project concurrent with review and consideration of the project, as specified. The Leadership Act provided that if a lead agency fails to approve a project certified by the Governor before January 1, 2025, the certification is no longer valid and the Act was to be repealed on January 1, 2026.

SB 149 extends the Governor's authority to certify a qualifying project to before January 1, 2032. The bill expressly provides that the cost of preparing the record of proceedings for the project is not recoverable from the plaintiff or petitioner before, during, or after any litigation. The bill provides that if a lead agency fails to approve a project certified by the Governor before January 1, 2033, the certification is no longer valid. The Leadership Act's repeal date is extended to January 1, 2034.

SB 149 adds PRC Sections 21189.80 through 21189.91 establishing a procedure for the Governor to certify certain infrastructure projects for streamlined CEQA litigation. The bill authorizes a project applicant to apply to the Governor for the certification of a project as an infrastructure project. The bill requires the lead agency, within 10 days of the certification of a project, to provide a public notice of the certification with specific language.

The record of proceedings for a certified project is required to be frontloaded (PRC Section 21189.86). The record, including the draft EIR (DEIR), must be placed on the agency website at the time the DEIR is released for review. Comments on the DEIR submitted in electronic format must be posted on the agency website within 5 days of receipt. Comments submitted in another format must be converted to electronic format and posted on the website within 7 days of receipt. The cost of preparing the record shall be paid by the project applicant.

AB 149 requires litigation challenging either the certification of an EIR for those projects or the granting of any project approvals, including any potential appeals to the court of appeal or the Supreme Court, to be resolved to the extent feasible, within 270 days of the filing of the record of proceedings with the court (PRC Section 21189.85).

SB 149 describes in detail the types of projects that are eligible for certification by the Governor. In very general terms, this includes:

- Electrical transmission facility projects that facilitate delivery of electricity from renewable energy sources, including zero-carbon resources, or from energy storage projects.
- Energy infrastructure projects including renewable energy resource; new energy storage systems of 20 megawatts or more (including a pumped hydro facility only if it is less than or equal to 500 megawatts and has been directly appropriated funding by the state before January 1, 2023); various types of large manufacturing, production, or assembly; electric transmission facility; and energy infrastructure projects no utilizing hydrogen as a fuel.
- Infrastructure project including an energy infrastructure project, semiconductor or microelectronic project, transportation-related project and water-related project.

The bill defines transportation-related projects and water-related projects in detail. Here's the language from PRC Section 21189.81subsections (g) and (h).

(g) (1) "Transportation-related project" means a transportation infrastructure project that advances one or more of, and does not conflict with, the following goals related to the Climate Action Plan for Transportation Infrastructure adopted by the Transportation Agency:

(A) Build toward an integrated, statewide rail and transit network.

(B) Invest in networks of safe and accessible bicycle and pedestrian infrastructure.

(C) Include investments in light-, medium-, and heavy-duty zero-emission vehicle infrastructure.

(D) Develop a zero-emission freight transportation system.

(E) Reduce public health and economic harms and maximize community benefits.

(F) Make safety improvements to reduce fatalities and severe injuries of all users towards zero.

(G) Assess and integrate assessments of physical climate risk.

(H) Promote projects that do not significantly increase passenger vehicle travel.

(I) Promote compact infill development while protecting residents and businesses from displacement.

(J) Protect natural and working lands.

(2) Transportation-related projects are public works for the purposes of Section 1720 of the Labor Code and shall comply with the applicable provisions of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

(h) (1) "Water-related project" means any of the following:

(A) A project that is approved to implement a groundwater sustainability plan that the Department of Water Resources has determined is in compliance with Sections 10727.2 and 10727.4 of the Water Code or to implement an interim groundwater sustainability plan adopted pursuant to Section 10735.6 of the Water Code.

(B) (i) A water storage project funded by the California Water Commission pursuant to Chapter 8 (commencing with Section 79750) of Division 26.7 of the Water Code. (ii) In addition to clause (i), the applicant shall demonstrate that the project will minimize the intake or diversion of water except during times of surplus water and prioritizes the discharge of water for ecological benefits or to mitigate an emergency, including, but not limited to, dam repair, levee repair, wetland restoration, marshland restoration, or habitat preservation, or other public benefits described in Section 79753 of the Water Code.

(C) Projects for the development of recycled water, as defined in Section 13050 of the Water Code.

(D) Contaminant and salt removal projects, including groundwater desalination and associated treatment, storage, conveyance, and distribution facilities. This shall not include seawater desalination.

(E) Projects exclusively for canal or other conveyance maintenance and repair.

(2) Water-related projects are public works for the purposes of Section 1720 of the Labor Code and shall comply with the applicable provisions of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

(3) "Water-related project" does not include the design or construction of through-Delta conveyance facilities of the Sacramento-San Joaquin Delta.

If a lead agency fails to approve a project certified as an infrastructure project before January 1, 2033, the bill specifies that the certification will no longer be valid. The bill repeals itself on January 1, 2034.

SB 406 (Chapter 150, Statutes of 2023): PRC Section 21080.10 currently exempts from CEQA actions taken by the Department of Housing and Community Development or the California Housing Finance Agency to provide financial assistance or insurance for the development and construction of residential housing, as provided. SB 406 amends this section to extend this statutory exemption to include actions taken by a local agency that is not acting as a lead agency to provide financial assistance or insurance for the development and construction of residential housing.

SB 423 (Chapter 778, Statutes of 2023): This bill amends Government Code Section 65913.4, which establishes a streamlined ministerial approval process for residential, urban infill development projects of at least 2 units that meet specified criteria in jurisdictions that have not met their regional housing needs allocations (colloquially known

as SB 35). SB 423 requires that contractors on such projects pay a prevailing wage and includes other concessions to labor.

Section 65913.4 limits local requirements on qualifying project to "objective planning standards." SB 423 provides that all departments of the local government that are required to issue an approval of the development prior to the granting of an entitlement shall comply with the requirements of the section. SB 423 also states that:

Notwithstanding any law, a local government shall not require any of the following prior to approving a development that meets the requirements of this section:

1. Studies, information, or other materials that do not pertain directly to determining whether the development is consistent with the objective planning standards applicable to the development.
2. (A) Compliance with any standards necessary to receive a postentitlement permit.

   (B) This paragraph does not prohibit a local agency from requiring compliance with any standards necessary to receive a postentitlement permit after a permit has been issued pursuant to this section.

   (C) For purposes of this paragraph, "postentitlement permit" has the same meaning as provided in subparagraph (A) of paragraph (3) of subdivision (j) of Section 65913.3.

For developments proposed in a census tract that is designated either as a moderate resource area, low resource area, or an area of high segregation and poverty on the most recent "CTAC/HCD Opportunity Map" published by the California Tax Credit Allocation Committee and the Department of Housing and Community Development, within 45 days after receiving a notice of intent, and before the development proponent submits an application for the proposed development that is subject to the streamlined, ministerial approval process, the local government shall provide for a public meeting to be held by the city council or county board of supervisors to provide an opportunity for the public and the local government to comment on the development.

This bill expands the prohibitions on ministerial approval to properties in the Coastal Zone when certain qualifiers are met. It also eliminates the strict prohibition on application of this section to properties within high or very high severity fire zones in favor of some other provision to be determined by the Legislature in the future.

This bill modifies the objective planning standard that prohibits a development subject to the streamlined, ministerial approval process from being located in a high fire severity zone by deleting the prohibition for a development to be located within a high or very high fire hazard severity zone as indicated on maps adopted by the Department of Forestry and Fire Protection, and instead prohibits a development from being located with the state responsibility area, as defined, unless the site has adopted

specified standards. The bill also removes an exception for sites excluded from specified hazard zones by a local agency, as specified.

SB 423 also establishes that for purposes of Section 65913.4 and for development on property owned by or leased to the state, the Department of General Services may act in the place of a locality or local government, at the discretion of the department.

This bill establishes a new January 1, 2036 expiration date for Government Code Section 65913.4.

Categorical Exemptions

It's well established that a project that requires mitigation cannot qualify for a categorical exemption. In *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App4th 1098, the Court of Appeal opined that: "[m]itigation measures may support a negative declaration, but not a categorical exemption." How does this principle apply when the project is subject to a development standard? In general, development standards are not mitigation measures. For example, the decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943 [upholding a Class 31 exemption for a single-family residence in the Berkeley Hills] concluded that imposing a standard traffic management plan as required by Berkeley code for projects adjoining narrow roads was not an added mitigation measure.

In *Historic Architecture Alliance v. City of Laguna Beach* (2023) 96 Cal.App.5th 186, the Court of Appeal has held that meeting the Secretary of Interior's Standards for the Treatment of Historic Properties is not a mitigation measure. The case upheld a Class 31 exemption that was applied to the renovation and expansion of a home that was listed on the city's Historic Resources Inventory. In the Court's words: "If the agency finds the project follows the Secretary's Standards, the agency's finding establishes the project does not have a significant impact on the historical resource and the historical resource exception would not bar reliance on the historical resource exemption. (CEQA Guidelines, § 15064.5, subd. (b)(3).)"

Projects subject to the Class 32 exemption must be consistent with "all applicable general plan policies." (CEQA Guidelines Section 15332). In *United Neighborhoods for Los Angeles v. City of Los Angeles* (2023) 93 Cal.App.5th 1074, the Court of Appeal concluded that the Class 32 exemption could not be used for a 156-room hotel to replace 40 existing rent-controlled residences because the project was not consistent with the Los Angeles General Plan's goals and policies calling for the preservation of affordable housing. Specifically, while the project was consistent with many general plan policies, it was not consistent with Housing Element goals and policies for the preservation of housing.

Notice of Exemption

After approval of a project for which a statutory or categorical exemption was applied, the lead agency may file a Notice of Exemption (NOE). The NOE constitutes

constructive notice that the 35-day statute of limitations for lawsuits challenging use of the exemption has begun. Amended PRC Section 21152 requires that when a local lead agency files an NOE with the County Clerk, it must also file the NOE with the State Clearinghouse (SCH) in the Office of Planning and Research. Per the SCH's rules, the filing will be electronic.

CHAPTER 4. PROJECT DEFINITION AND EARLY ANALYSIS.

Project Description

CEQA Guidelines Section 15124 states that a project description "should not supply extensive detail beyond that needed for evaluation and review of the environmental impact." Courts have interpreted this section on a project-by-project basis, depending upon the facts in each case. The Court of Appeal in *The Claremont Canyon Conservancy v. The Regents of the University of California* (2023) 92 Cal.App.5th 474 held that the EIR for its proposed Wildfire Vegetative Fuel Maintenance Plan (covering approximately 121 acres of forested, fire-prone land) had sufficient detail to allow informed decision-making. As the Court explained:

> When, as here, a project is subject to variable future conditions — for example, unusual rainy weather, tree growth, impact of pests and diseases, changing natural resources, etc. — the "project description must be sufficiently flexible to account for [those] conditions." (*Buena Vista, supra*, 76 Cal. App.5th at p. 580.) [Plaintiff] insists the conditions within the project areas "will not change in any substantive or unforeseen way" during EIR preparation or project completion. This argument is unavailing, as substantial evidence supports the Regents' conclusion that the challenged projects are subject to changing weather and topography conditions. So long as the EIR provides sufficient information to analyze environmental impacts — including the objective criteria being used — a project description for large-scale vegetation removal that is subject to changing future conditions need not specify, on a highly detailed level, the number of trees removed. (citations excluded).

The decision of the Court of Appeal in *Save Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655 found that the EIR certified for demolition and reconstruction of a portion of the state capitol building failed to maintain a stable project description. In this case, the description of the design of the new Capitol Annex changed substantially between the draft and final EIRs. In particular, the new Annex was originally described as designed to retain the Historic Capitol's general character and integrity, including a "one-building feel," and would minimize the use of exterior glass. Instead, the revised design would have a T configuration and its exterior would be mostly glass with the one-building feel applying to the interior space, not the

building exterior. The Court noted that the revised design of the Annex and its glass exterior "is so different from the Historic Capitol that DGS no longer stated the new Annex's materials would be consistent with the Historic Capitol."

As the Court explained:

> Because the changed project description happened in the final EIR, the conflicting descriptions in the earlier EIRs may have misled the public about the nature of the Annex's design and adversely affected their ability to comment on it. When they commented on the earlier EIRs, the public believed only that the new Annex's design and materials would be consistent with the Historic Capitol and create a "one-building" feel. When the final EIR disclosed the actual design of a glass curtain, the public was foreclosed from commenting meaningfully on the glass exterior's impact on the Capitol. Providing such conflicting descriptions to the reviewing public of such a key project element for purposes of determining the project's impact on a historical resource is inadequate under CEQA. The unstable description of the new Annex's exterior design literally drew "a red herring across the path of public input." (*County of Inyo, supra*, 71 Cal.App.3d at p. 198.) It prevented the people from commenting on significant environmental effects on what is truly the people's capitol.
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> DGS argues the project description became more detailed as the CMAR [construction manager at risk] process proceeded but it was always sufficient to perform an informed analysis. We have rejected the last point as to the new Annex's exterior design. The point contradicts DGS's admission in the draft EIR that it could not meaningfully analyze the project's impact on historical resources without knowing the new Annex's exterior design. Nowhere does DGS explain how it or any member of the public could meaningfully analyze the new Annex's impact on the Historic Capitol as a historic resource without knowing what the Annex would look like. Indeed, a project's compatibility with a historical resource "is properly analyzed as an aesthetic impact." (*Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129, 1134.)
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> Furthermore, DGS cites no CEQA authority addressing how CEQA may apply to or be modified for a project whose design occurs during environmental review. Neither we nor CEQA attempt to tell DGS what delivery method it must use to produce the project. But whether CMAR or some other method is chosen, that method must comply with CEQA. It does not drive CEQA. The public cannot be denied its opportunity to participate meaningfully in the CEQA process merely because the project's design and delivery method is dynamic and fluid.

Initial Study

There are particular environmental effects that are not subject to CEQA analysis under certain circumstances.

PRC Section 21081.3 establishes the Dilapidated Building Refurbishment Act, which provides that a lead agency is not to consider the aesthetic effects of a project that involves the refurbishment, conversion, repurposing, or replacement of an existing building that meets certain requirements. AB 356 (Chapter 116, Statutes of 2023) extends the repeal date for this section to January 1, 2029. AB 356 further provides that the lead agency is required to file a notice with OPR and the County Clerk of the county in which the project is located if the lead agency determines that it is not required to evaluate the aesthetic effects of a project and determines to approve or carry out that project. This statute expires on its own terms on January 1, 2029.

AB 1307 (Chapter 160, Statutes of 2023) enacts PRC Section 21085 establishing that the effects of noise generated by a residential project's occupants and guests on human beings is not a significant effect on the environment. Accordingly, the lead agency cannot impose mitigation under CEQA for the anticipated noise effects on nearby residents.

On the litigation front, the Court of Appeal in *Yerba Buena Neighborhood Consortium, LLC v. The Regents of the University of California* (2023) 95 Cal.App.5th 779 held that the visual impacts of new development contemplated in a proposed LRDP were not subject to CEQA analysis because PRC Section 21099(d)(1) provides that the aesthetic effects of an "employment center project on an infill site within a transit priority area" are not significant impacts on the environment.

CHAPTER 5: NEGATIVE DECLARATION AND MITIGATED NEGATIVE DECLARATION

Notice of Determination and Post-Approval Action

Amended PRC Section 21152 requires local lead agencies to file all NODs with the State Clearinghouse (SCH) in the Office of Planning and Research, in addition to filing with the County Clerk. Per the SCH's rules, the filing will be electronic. NODs must be posted in the office and the internet website of the County Clerk, and the internet website of the SCH within 24 hours of receipt.

CHAPTER 6: DRAFT ENVIRONMENTAL IMPACT REPORT

Alternatives Analysis

New PRC Section 21085.2 provides that institutions of public higher education shall not be required in an EIR prepared for a residential or mixed-use housing project (where at least two-thirds of the square footage of the development is designated for

residential use), to consider alternatives to the location of that project if both of the following requirements are met:

- The project is located on a site that is no more than five acres in area and is substantially surrounded by qualified urban uses.
- The project has already been evaluated in the EIR for the campus' most recent Long Range Development Plan (LRDP).

The Court of Appeal addressed the issue of whether an EIR must examine an alternative addressing the economic impacts of a project in *Planning and Conservation League v. Dept. of Water Resources* (2024) __ Cal.App.5th __. PCL challenged the EIR for the agency's reauthorization and amendment of contracts for delivery of water from the State Aqueduct. PCL raised the issue that changing water contracts could have an economic impact and argued that the EIR should include an alternative that addressed that alleged economic impact. The Court rejected PCL's call for an economic alternative because CEQA "is not an economic protection statute" and upheld the EIR on that and other grounds.

CHAPTER 7. AFTER THE DRAFT EIR

Notice of Determination

Amended PRC Section 21152 requires local lead agencies to file all NODs with the SCH in addition to filing with the County Clerk. Per the SCH's rules, the filing will be electronic. NODs must be posted in the office and the internet website of the County Clerk, and the internet website of the SCH within 24 hours of receipt.

CHAPTER 8: MITIGATION

Feasibility of Mitigation

The definition of mitigation includes: "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." (CEQA Guidelines Section 15170(e)). The Court of Appeal in *Preservation Action Council v. City of San Jose* (2023) 91 Cal.App.5th 517 has found that compensatory mitigation is not suitable in the context of historic resources. Offsite mitigation for loss of unique historic resources was not feasible because such mitigation would not be proportional, nor is there a nexus for the City to require the project to provide "financial contributions to support preservation of other buildings within the city."

Deferred Mitigation

Court decisions in 2023 have offered some additional insight into what constitutes properly deferred mitigation. The case of *East Oakland Stadium Alliance v. City of*

Oakland (2023) 89 Cal.App.5th 1226 examined the EIR certified for a proposed baseball stadium on the Oakland waterfront. It offers examples of how to and how not to draft mitigation measures.

The Alliance contended that the EIR's greenhouse gas emissions mitigation measure GHG-1 was inadequate. The Court disagreed and held that the mitigation measure met the requirements of CEQA Guidelines Section 15126.4 for properly deferred mitigation (i.e., commitment to mitigation, specific performance standards for developing final mitigation, and identification of the specific actions that will allow performance standards to be met). The EIR found that GHG emissions would be unavoidable, and included a mitigation measure that would not allow additional net emissions from the future project. The mitigation measure included specific performance standards and monitoring requirements sufficient to ensure its feasibility and effectiveness. The Court explained:

> [The mitigation measures describes the] contents of the required emissions reduction plan, including the manner in which emissions are to be measured and estimated. Emission reduction measures must be specified separately for each project phase and must be "verifiable and feasible to implement," and the plan is required to identify the person or entity responsible for monitoring each reduction measure. The plan must incorporate the EIR's air quality mitigation measures and must adopt other on-site and off-site emissions reduction measures from a detailed, five-page list as necessary to meet the significance standard.
>
> … Mitigation Measure GHG-1 did not merely suggest for consideration a handful of vague measures of uncertain efficacy. As noted, it listed and fully described five pages of detailed measures, some of which are mandatory and all of which must be implemented if necessary to prevent additional emissions. It is not the case, as suggested by petitioners, that the EIR leaves specific mitigation measures to future determination. Rather, as permitted by Section 15126.4, subdivision (a)(1)(B), the mitigation measure leaves only the "specific details of a mitigation measure" for later determination. In short, the mitigation measure represents a good-faith attempt to ensure no increase in GHG emissions while coping with the uncertainties created by years of construction, development, and the anticipated evolution of GHG reduction technology.

However, the EIR's mitigation measure for wind effects failed to meet the standard for deferred mitigation. The EIR disclosed that the project would result in a significant and unavoidable increase in wind speeds. The EIR's wind mitigation measure requires a wind tunnel analysis for each proposed building over 100 feet tall prior to issuance of a building permit. If the analysis determines that the building "would not create a net increase in hazardous wind hours or locations . . . compared to then-existing

conditions" then no further mitigation is required. If the building's design would cause an increase in significant wind impacts, then the project sponsor is required to "work with the wind consultant to identify feasible mitigation strategies, including design changes (e.g., setbacks, rounded/chamfered building corners, or stepped facades), to eliminate or reduce wind hazards to the maximum feasible extent without unduly restricting development potential. Wind reduction strategies could also include features such as landscaping and/or installation of canopies along building frontages, and the like."

The Court found this mitigation measure was too "vague" to meet the requirements of Section 15126.4 for deferred mitigation. As the Court explained:

> This performance standard fails to satisfy Section 15126.4 for the simple reason that it is not "specific." By requiring a reduction in wind impacts "to the maximum feasible extent without unduly restricting development potential," the mitigation measure appears to seek a balance between competing factors, mitigating adverse wind impacts only to the extent possible without "unduly" impairing the commercial value of the buildings. (Italics added.) Even assuming that a mitigation measure may, in appropriate circumstances, strike a balance between the reduction of environmental impacts and commercial functionality, the mitigation measure must inform the public where that balance has been struck. Mitigation measures "need not include precise quantitative performance standards" (*Sierra Club, supra*, 6 Cal.5th at p. 523), but Section 15126.4's reference to "specific" performance standards implies a reasonably clear and objective measure of compliance. One purpose of the specificity requirement is presumably to permit the public, the responsible regulator, and the project sponsor to determine the type and extent of mitigation that must be considered and to provide a standard for judging compliance with the mitigation measure once the details are finalized. Unless the performance standard is expressed in reasonably clear, objective terms, the interested parties cannot know how the mitigation measure should be interpreted and applied.

CHAPTER 9. THE FOUNDATIONS OF TIERING AND SUBSEQUENT DOCUMENTATION

Program EIR

Where a 2006 program EIR was used as the basis for an addendum examining a later action within the original project's scope, the Court of Appeal concluded that the lead agency could evaluate transportation impacts from the later action on the basis of "level of service" rather than the current standard of "vehicle miles travelled." (*Olen Properties Corp. v. City of Newport Beach* (2023) 93 Cal.App.5th 270). The Court noted that "[p]

laintiff makes no attempt to explain how the City could compare LOS apples to VMT oranges to determine whether there have been substantial changes in the Project or the circumstances under which the Project was undertaken."

CHAPTER 10. CEQA/NEPA JOINT DOCUMENTS

Joint Documents

Existing law allows Caltrans to assume responsibility for NEPA compliance for state roadway projects and the California High-Speed Rail Authority to assume responsibility for NEPA compliance for the high-speed rail program and several associated projects. SB 146 (Chapter 58, Statutes of 2023) adds Government Code Section 13979.4 allowing Caltrans to assume NEPA responsibilities for federally funded regional and local transportation projects upon the request of a regional or local agency. Assumption of these responsibilities will be upon entering into a memorandum of understanding between the state and federal government, so the decision will not be solely Caltrans'. The provisions apply to any railroad, local public transportation, or multimodal project implemented by the requesting local or regional agency. The statute remains in effect until January 1, 2033.

Similarities and Differences Between CEQA and NEPA

The White House's Council on Environmental Quality (CEQ) began in 2023 the administrative rulemaking process for its Phase 2 revisions to the 2020 CEQ NEPA rules. In general, the proposed Phase 2 would largely roll back the regulatory changes made in 2020 to reinstate the use of context and intensity to determine significance, and would incorporate the statutory changes to NEPA made by the 2023 Fiscal Responsibility Act. For specific information on the final rule, check the CEQ's website: https://ceq.doe.gov/laws-regulations/regulations.html.

CHAPTER 11. EVOLVING CEQA ISSUES

Greenhouse Gas Emissions

In *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204, the California Supreme Court held that the California Department of Fish and Wildlife lacked substantial evidence to support its use of the Air Resources Board Scoping Plan as the basis for GHG analysis in the EIR for a large mixed-use development. A key shortcoming was the failure to base the analysis on project-specific emissions (the analysis instead relied on the broad emissions inventory and threshold contained in the Scoping Plan). Later, the Court of Appeal disallowed San Diego County's GHG thresholds because "the service population number relies on statewide service population and [GHG] inventory data; it does not address the County specifically, and it does not explain why using statewide data is appropriate for setting the

metric for the County" (*Golden Door Properties v. County of San Diego* (2018) 27 Cal. App.5th 892). In addition, the efficiency metric applied evenly to most project types rather than accounting for variations between different types of development.

The Court of Appeal upheld the GHG analysis in Sacramento County's EIR for the Mather South Community Master Plan, a proposed mixed-use development located on an 848 acre rural site, because in keeping with the *Center for Biological Diversity* and *Golden Door* decisions, it was based on data specific to Sacramento County gathered from energy providers and accepted methodology for evaluating transportation-based emissions. The County properly developed county-specific thresholds of significance for different emissions sectors and then compared the project's emissions against those numeric thresholds of significance. (*Tsakopoulos Investments, LLC v. County of Sacramento* (2023) 95 Cal.App.5th 280).

CEQA and Affordable Housing

Ministerial Projects Where RHNA Obligations are Not Met

Government Code Section 65913.4 was amended in 2023 by two bills. AB 130 (Chapter 39, Statutes of 2023) revises the agency's ability to enforce the statute's construction labor requirements. SB 423 (Chapter 778, Statutes of 2023) is summarized in the discussion of Chapter 3 Statutory Exemptions above.