



2017 Update to the CEQA Deskbook, 3rd edition

By Antero Rivasplata, AICP

ICF International

Includes all 2015 case law to December 30, 2015, and any changes needed to the 2015 Update and 2013 Addendum.

CEQA Deskbook, 3rd edition

By Ronald E. Bass, Kenneth M. Bogdan and Antero A. Rivasplata

Published by Solano Press Books, 2012

ISBN 978-0-923956-48-6

2017 Update for the *CEQA Deskbook, 3rd Edition*

By Antero Rivasplata, AICP

ICF International

Amend the first paragraph under “Thresholds of Significance” on page 69 to read:

Each public agency is encouraged to develop and publish thresholds of significance to aid that agency in determining the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative, or performance level of a particular environmental effect. Noncompliance with this performance level would normally be determined to be significant by the agency, and compliance would normally be determined to be considered less than significant (Guidelines § 15064.7). Keep in mind that compliance with a threshold of significance does not preclude application of the fair argument standard in determining whether an impact may be significant. A fair argument that the project may result in a significant impact can be raised even when a project’s impacts fall below the threshold. (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322; *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714) Further, reliance on a threshold of significance without providing substantial evidence for its validity may also be subject to challenge. (*East Sacramento Partnership for a Liveable City v. City of Sacramento* (Nov. 7, 2016) __ Cal.App.5th __)

The following 2013 Addendum addition to the end of the discussion of Impact of the Environment on Projects, page 145 is deleted:

~~The question of whether CEQA applies to impacts of the environment on a project is now before the California Supreme Court in the case of *California Building Industry Association v. Bay Area Air Quality Management District*. The issue to be heard will be limited to the following: “Under what circumstances, if any, does the California Environmental Quality Act (Pub. Resources Code Section 21000 et seq.) require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?” The outcome of this case will settle the matter.~~

Revise the paragraph under “Economic and Social Effects” on page 150 as follows:

Effects analyzed under CEQA must be related to a physical change in the environment (Guidelines § 15358(b)). Economic and social effects are not considered environmental effects under CEQA unless they relate to physical changes. For example, school overcrowding is a social effect and is not a CEQA impact (*Goleta Union School District v. Regents of the University of California* (1995) 37 Cal. App. 4th 1025), while school construction that is a reasonably foreseeable effect of new development is a subject for CEQA analysis (*Chawanakee Unified School District v. County of Madera* (June 20, 2011) 196

Cal.App.4th 1016). Similarly, “[t]he need for additional fire protection services is not an *environmental* impact that CEQA requires a project proponent to mitigate” (emphasis in original). (*City of Hayward v. Board of Trustees of the California State University* (Nov. 30, 2015) 242 Cal.App.4th 833).

Economic and social effects need to be considered in EIRs only if they would lead to an environmental effect. For example, an EIR is required to analyze the economic effect on existing businesses from construction of a large shopping mall if the mall would result in “urban decay,” as manifested in long-term vacancies and the physical deterioration of structures (*see, for example, Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184). When not related to a physical change in the environment, the evaluation of economic or social effects is generally treated as optional; agencies may, but are not required to, evaluate them, and sometimes do include an analysis of economic or social effects of the proposed project (Guidelines § 15131). General socio-economic effects such as “community character” are not CEQA issues. (*Preserve Poway v. City of Poway* (March 9, 2016) 245 Cal.App.4th 560 [change in community character resulting from closure of riding stable was an issue of political policy, not a CEQA concern]).

Add the following before “A Ten-Step Approach to Water Supply Analysis in CEQA Documents” on Page 156:

Consideration of Groundwater Supplies. If a water supply for a proposed project includes groundwater, Section 10910(f) requires the following additional information to be included in the water supply assessment:

(1) A review of any information contained in the urban water management plan relevant to the identified water supply for the proposed project.

(2)(A) A description of any groundwater basin or basins from which the proposed project will be supplied.

(B) For those basins for which a court or the board has adjudicated the rights to pump groundwater, a copy of the order or decree adopted by the court or the board and a description of the amount of groundwater the public water system, or the city or county if either is required to comply with this part pursuant to subdivision (b), has the legal right to pump under the order or decree.

(C) For a basin that has not been adjudicated that is a basin designated as high- or medium-priority pursuant to Section 10722.4, information regarding the following:

(i) Whether the Department of Water Resources (DWR) has identified the basin as being subject to critical conditions of overdraft pursuant to Section 12924.

(ii) If a groundwater sustainability agency has adopted a groundwater sustainability plan or has an approved alternative, a copy of that alternative or plan.

(D) For a basin that has not been adjudicated that is a basin designated as low- or very low priority pursuant to Section 10722.4, information as to whether DWR has identified the basin or basins as overdrafted or has projected that the basin will become overdrafted if present management conditions continue, in the most current bulletin of DWR that characterizes the condition of the groundwater basin, and a detailed description by the public water system, or the city or county if either is required to comply with this part pursuant to Section 10910(b), of the efforts being undertaken in the basin or basins to eliminate the long-term overdraft condition.

(3) A detailed description and analysis of the amount and location of groundwater pumped by the public water system, or the city or county if either is required to comply with this part pursuant to Section 10910(b), for the past five years from any groundwater basin from which the proposed project will be supplied. The description and analysis shall be based on information that is reasonably available, including, but not limited to, historic use records.

(4) A detailed description and analysis of the amount and location of groundwater that is projected to be pumped by the public water system, or the city or county if either is required to comply with this part pursuant to Section 10910(b), from any basin from which the proposed project will be supplied. The description and analysis shall be based on information that is reasonably available, including, but not limited to, historic use records.

(5) An analysis of the sufficiency of the groundwater from the basin or basins from which the proposed project will be supplied to meet the projected water demand associated with the proposed project. A water supply assessment shall not be required to include the information required by this paragraph if the public water system determines, as part of the review required by paragraph (1), that the sufficiency of groundwater necessary to meet the initial and projected water demand associated with the project was addressed in the description and analysis required by paragraph (4) of subdivision (b) of Section 10631.

Revise the first paragraph on page 160 as follows:

The lead agency must include the water supply analysis in the EIR. Also, at the time it makes a decision on the project, the lead agency must determine whether the projected water supplies will be sufficient to satisfy the demands of the proposed project, in addition to existing and planned future uses. If the lead agency determines that water supplies will not be sufficient, it must include that determination in its findings for the project. Note that the finding of sufficiency cannot rely on “hailed water” (e.g., water hauled to the site rather than distributed through a water supply system).

Add the following before the last paragraph (beginning with: “The use of subsequent and supplemental EIRs...”) on Page 201:

The subsequent EIR and addendum sections of the Guidelines (sections 15162 and 15164) also apply to situations where the original document was a negative declaration or mitigated negative declaration. As with an original EIR, the analysis is limited to the modifications in the project and whether those modifications are substantial enough to trigger the need for a subsequent document. However, unlike

the situation with an original EIR, when the original document is a negative declaration or mitigated negative declaration the determination of significance is based on the “fair argument” standard of review. (*Friends of the College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937)

The following addition of the 2013 Addendum to the discussion of Subsequent and Supplemental EIR, top of page 202 is deleted:

~~The Supreme Court will hear the question of when a change in a project is substantial enough to qualify as a new project. In *Friends of the College of San Mateo Gardens v. San Mateo County Community College District*, the Court of Appeal held in an unpublished decision that the college’s proposal to demolish rather than renovate a small building as part of its previously approved plan to renovate the campus amounted to a new project. As a result, the addendum for the demolition was overturned. The Supreme Court will consider the extent to which Public Resources Code Section 21166 and the related CEQA Guidelines Sections 15162-15164 allow changes to previously approved projects to proceed under a subsequent environmental review.~~

Add the following before “Pretrial Settlement” on page 231:

Senate Bill 122 (Chapter 476, Statutes of 2016) establishes an optional, alternative process for preparing the administrative record. An applicant may request within 30 days of the determination to prepare a negative declaration or EIR that the lead agency prepare the administrative record concurrently with the administrative process. If the lead agency agrees to do so, all documents and other materials placed in the record of proceedings would be required to be posted on, and be downloadable from, a web site maintained by the lead agency commencing with the date of the release of the draft environmental document. If the lead agency cannot maintain a suitable web site with the information, the lead agency would be required to provide a link on the agency’s web site to that information. Further, a document prepared by the lead agency or submitted by the applicant after the date of the release of the draft environmental document that is a part of the record of the proceedings would be required to be made publicly available in a readily accessible electronic format within five business days after the document is released or received by the lead agency. The lead agency would be required to make any comment received in an electronic format during review of the document available to the public in a readily accessible electronic format within five business days of its receipt. Any comment that is not in an electronic format would be required to be converted to a readily accessible electronic format and made available to the public in that format within seven business days after being received. The lead agency would be required to place a notice that the above requirements were being met in the negative declaration or EIR being released for public review. The lead agency is required to certify the record of proceedings within 30 days after the filing of the notice of determination. (Public Resources Code Section 21167.6.2).

Add the following summaries of California Supreme Court decisions to page 243 in addition to the revision made by the 2015 and 2016 updates of the CEQA Deskbook:

***Friends of the College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th**

937. At issue was the CEQA addendum adopted by the College District for a change in the San Mateo City College Campus Master Plan that had been previously approved under a Mitigated Negative Declaration (MND). The change amounted to the demolition of a small building and part of an adjoining garden that had previously been slated for rehabilitation in the Master Plan. The addendum examined the potential for the changes in the project to result in a new or more severe impact that had not been analyzed in the MND.

The Supreme Court case focused on whether the CEQA Guidelines' subsequent document section (15162) applies to MNDs, whether the lead agency or the courts make the decision over whether a later activity is part of the originally approved project (thereby making it eligible for consideration under the subsequent CEQA document section), and whether determining the need for a subsequent EIR is subject to a "fair argument" standard when the original CEQA document was an MND. Friends argued that no subsequent document could issue where the original document was an MND, the courts alone could determine whether a later action was part of the original project, and that the fair argument should apply to the determination of significance for this change in the project that was the subject of the original MND.

The court dismissed most of Friends' arguments. It began its opinion with a detailed discussion of how Public Resources Section 21166 and CEQA Guidelines Section 15162 (which derives from Section 21166) limit the subsequent environmental review of a project that has previously been approved and was the subject of a CEQA document. In the Court's words:

It follows that, for purposes of determining whether an agency may proceed under CEQA's subsequent review provisions, the question is not whether an agency's proposed changes render a project new in an abstract sense. Nor does the inquiry turn on the identity of the project proponent, the provenance of the drawings, or other matters unrelated to the environmental consequences associated with the project. (Cf. *Save Our Neighborhood*, *supra*, 140 Cal.App.4th at p. 1300.) Rather, under CEQA, when there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations "turn[] on the value of the new information to the still pending decisionmaking process." (*Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 374 (*Marsh*)). If the original environmental document retains some informational value despite the proposed changes, then the agency proceeds to decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects. [footnotes omitted]

In summary on the other decisions in the case:

- In the interest of finality, Section 15162 applies to limit the need for subsequent documents when the previously adopted CEQA document is an MND. Even though CEQA doesn't expressly state that this is the case in Public Resources Code Section 21166 (which creates the subsequent EIR provision), the Natural Resources Agency has the authority to interpret CEQA and has properly done so in adopting CEQA Guidelines Section 15162. Section 21166 limits the need for subsequent review when the project has already received CEQA review and the time for challenging that document has passed. This principle applies to MNDs as well as EIRs. "The alternative that plaintiff proposes — which would restart the CEQA process every time plans or circumstances change, or whenever new information comes to light — 'would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.' (*Marsh, supra*, 490 U.S. at p. 373; see also *Laurel Heights, supra*, 47 Cal.3d at p. 396 [noting the original environmental review process includes consideration of reasonably foreseeable future expansions to the project, and that subsequent EIRs are necessary when evaluating future action *not* considered in the initial review].)"
- Determining whether the later activity is part of the original project is a question of fact, not a question of law. This means that the court will defer to the judgment of the lead agency, provided that the lead agency's decision is supported by substantial evidence. The court does not substitute its judgment for the agency's, as it would if it were a question of law.
- The determination of whether substantial changes are needed to the original CEQA document (thereby triggering an subsequent EIR or subsequent MND) is not subject to fair argument. It's up to the lead agency to decide, on the basis of substantial evidence in the record. "In short, the substantial evidence standard prescribed by CEQA Guidelines section 15162 requires an agency to prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved, and courts must enforce that standard. (See *Friends of "B" Street v. City of Hayward, supra*, 106 Cal.App.3d at p. 1002.) It therefore does not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects. So understood, CEQA Guidelines section 15162 constitutes a valid gap-filling measure as applied to projects initially approved via negative declaration, including the project at issue in this case."

Subsequent to this decision, the Supreme Court decertified the Appellate Court decision in *Coastal Hills Rural Protection v. County of Sonoma* [mitigated negative declaration upheld based on the "substantial evidence standard"]. In doing so, the Supreme Court clarified that when the original document is a negative declaration or MND, then the "fair argument" standard of review applies to the determination of whether a subsequent EIR must be prepared. That differs from the situation when an EIR is the original document. In that case, "substantial evidence" is the standard.