**ENHANCED CEQA ACTION TEAM**

**A Collaboration of the American Planning Association California and the Association of Environmental Professionals**

# LEGISLATIVE PROPOSALS TO ENHANCE FIVE KEY AREAS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

September 2011

## Preface

The American Planning Association California Chapter (APACA) and the California Association of Environmental Professionals (AEP) joined ranks in late 2010 to identify opportunities for enhancing key areas of the California Environmental Quality Act (CEQA) so as to improve the effectiveness and efficiency of the environmental review process in a manner that helps lead agencies protect the environment, promote public involvement, and make well-informed decisions. The APACA-AEP collaboration is guided by an all-volunteer task force of CEQA practitioners known as the Enhanced CEQA Action Team (ECAT).

The mission of the ECAT is to recommend legislative and regulatory changes to enhance CEQA's efficiency and effectiveness in achieving its original purposes, based on thoughtful consideration by CEQA practitioners who work with the law on a daily basis. ECAT consists of highly experienced environmental consultants, local-government planners, and environmental attorneys who represent this practitioner's viewpoint. The mission is founded on the premise that CEQA is an important and constructive element of California public agency decision-making that should continue to help ensure disclosure of environmental information, public involvement in the environmental review and decision-making process, and protection of the State's important environmental qualities. This essential state environmental law needs to be preserved through the incorporation of constructive enhancements.

California's environmental, social, and economic priorities have evolved in the 40+ years since CEQA's enactment. Over this time-frame it has become clear that the actions public agencies take in the interest of good environmental planning, such as infill urban development, efficient use of land and resources, greater reliance on renewable energy, and protection of environmental quality, are inextricably linked to economic prosperity and social equity. Making the CEQA process work better is especially important to the larger discussion among California policy makers and opinion leaders concerning the future of California as it emerges from the current recession. Public Resources Code (PRC) Section 21003(f) presents an element of CEQA's policy purpose that is particularly pertinent as State leaders seek solutions to State and local government priorities and finances:

> *"All persons and public agencies involved in the environmental review process [are] responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment."*

In other words, it is important to enhance CEQA in ways that apply precious social, governmental, and economic resources to actions that protect the environment, rather than to an unnecessarily complicated environmental process. To this end, ECAT has identified five key areas where enhancements can and should be addressed. Problem statements about the issues and legislative proposals are presented below. All proposed amendments are to the CEQA statute (Public Resources Code, commencing with Section 21000).

# 1. CEQA Litigation is Costly and Does Not Always Further CEQA's Basic Purposes

## Problem Statement

Litigation is a powerful tool used by citizens to ensure that CEQA's provisions are followed by government agencies. Indeed, many key holdings in major court decisions have subsequently been incorporated into the State CEQA Guidelines (Chapter 3 of Title 14, California Code of Regulations, commencing with Section 15000). In some situations CEQA litigation—and the threat of litigation—can also result in a more costly and time consuming process that does little to further the basic purposes of CEQA expressed in PRC Section 21003(f). Two issues are of particular concern regarding CEQA litigation provisions:

- Late input to the environmental review process that is disruptive and counterproductive; and
- The practical inability of a court to sever offending parts of a large project, which unnecessarily delays implementation of beneficial parts of a project not relevant to a decision finding noncompliance with CEQA.

***Late Input to the Environmental Review Process That Is Disruptive and Counterproductive.*** The statute allows potential CEQA litigation issues to be raised very late in the decision-making process, well after the close of the public comment period, and even after the certification or adoption of CEQA environmental documents. Despite prescribing very clear and publicly noticed review periods during which anyone can submit comments on the adequacy of CEQA documents, the statute also allows new information (and future causes of action in litigation) to be inserted into the process at any time prior to the close of the last public hearing before final project approval by the lead agency (PRC Section 21177[a]).

In principle and practice, the public must have the ability to submit relevant evidence and testimony to decision-makers prior to a decision being rendered. Public involvement is at the heart of CEQA's goals and policies. However, project opponents regularly take advantage of PRC Section 21177(a) to introduce voluminous information about environmental issues at the last minute, with the intent and effect of disrupting the project review process and delaying the decision while the lead agency scrambles to ensure that every issue is adequately addressed. At its most troublesome, this information consists of material that could have been known and submitted earlier or that duplicates earlier submittals. This practice diminishes the importance of the orderly public review opportunities included in the CEQA process and often introduces substantial uncertainty into the lead agency's decision-making process at the eleventh hour.

Citizen advocates raise an analogous issue when lead agencies insert new evidence into the process after certification or adoption of the CEQA document. For example, as part of findings of fact adopted at the time of project approval, a lead agency may add information about the economic feasibility of alternatives or mitigation measures after the

environmental process has concluded. If this occurs, the public can be deprived of the opportunity to review and comment on important evidence that supports a lead agency's decision on a project.

***Severability of Project Elements That Allow Beneficial Elements to Continue.*** When a court is considering the adequacy of a project's compliance with CEQA, current law allows the court to sever a portion of a project and let that portion proceed while considering the CEQA issue on the rest of the project (PRC Section 21168.9). In practice, this seldom happens. A court may sever project components "only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division" (PRC Section 21168.9). In judicial practice, courts rarely make these findings. Since the enactment of PRC Section 21168.9 in the early 1990s, only one or two published cases have included the severance of a portion of the project from the ongoing CEQA litigation. This is a problem when the entirety of a large, multi-faceted project is delayed by CEQA litigation where the noncompliance issue affects only a portion of the project. Severable parts of projects that may have important community benefits and no significant environmental impacts are delayed, along with the elements of the project at issue in the litigation.

## Legislative Proposal to Address Disruptive Late Input

***Rationale for the Proposal.*** The proposed revision links limits on the submittal of disruptive late input with improved opportunities for public input and expanded review of responses to comments on environmental documents. It limits the timing for introducing potential litigation issues by requiring issues to be raised during public comment periods for NDs, MNDs and EIRs. At the same time, the proposed revision includes an additional public review period for responses to comments on draft CEQA documents to enhance the public's opportunity for input on final environmental documents. A safety-net exception is included for issues that were not known and could not have been known during those public comment periods.

The revisions proposed below seek to expand the opportunity for public input earlier in the environmental review process to alleviate potential concerns that limiting late comments may have an unintended consequence of hindering public review or placing undue burden on concerned citizens. Also, proposed changes are intended to create more strict requirements regarding timeliness of comment submittals to promote effective public input. Enhanced public input opportunities involve expanded notice of and opportunities for public review and comment on certain types of CEQA documents, such as commenting on the response to public comments on a Draft EIR. Expanding the opportunities for public input within the framework of an orderly environmental review can help ensure that the affected public is aware of project impacts earlier than final project hearings. The intended result of this proposal is to enhance opportunities for public involvement in the environmental review process.

***Proposed Statutory Amendment.***

**1. Amend Section 21082.1 to read:**

(a) Any CEQA Document ~~draft environmental impact report, environmental impact report, negative declaration, or mitigated negative declaration~~ prepared pursuant to the requirements of this division shall be prepared directly by, or under contract to, a public agency.

*[NOTE TO READER: Please refer to Key Issue Area No. 3 for the proposed definition of "CEQA Document". This proposed amendment under Key Issue Area No. 1 can be applied either to the proposed "CEQA Document" definition or to current statutory definitions of environmental impact report, negative declaration, and mitigated negative declaration.]*

(b) This section is not intended to prohibit, and shall not be construed as prohibiting, any person from submitting information or other comments to the public agency responsible for preparing an environmental impact report, draft environmental impact report, negative declaration, or mitigated negative declaration~~.~~, except that any such information or comments must be submitted prior to the close of the public comment periods prescribed in this Division. The information or other comments may be submitted in any format, shall be considered by the public agency, if timely, and may be included, in whole or in part, in any report or declaration.

(c) The lead agency shall do all of the following:

(1) Independently review and analyze any report or declaration required by this division.

(2) Circulate draft documents that reflect its independent judgment.

(3) As part of the adoption or certification of a CEQA Document, ~~of a negative declaration or mitigated negative declaration, or certification of an environmental impact report~~, find that the report or declaration reflects the independent judgment of the lead agency.

(4) Submit a sufficient number of copies of the ~~draft environmental impact report, proposed negative declaration, or proposed mitigated negative declaration~~CEQA document, and a copy of the ~~report or declaration~~ document in an electronic form as required by the guidelines adopted pursuant to Section 21083, to the State Clearinghouse for review and comment by state agencies, if any of the following apply:

(A) A state agency is any of the following:

(i) The lead agency.

(ii) A responsible agency.

(iii) A trustee agency.

(B) A state agency otherwise has jurisdiction by law with respect to the project.

(C) The proposed project is of sufficient statewide, regional, or areawide environmental significance as determined pursuant to the guidelines certified and adopted pursuant to Section 21083.

**2. Amend Section 21083.9 to read:**

(a) Notwithstanding Section 21080.4, 21104, or 21153, a lead agency shall ~~call~~ conduct at least one public scoping meeting for either of the following:

(1) 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.

(2) A project of statewide, regional, or areawide significance.

(b) The lead agency shall provide notice of at least one public scoping meeting held pursuant to paragraph (2) of subdivision (a) to all of the following:

(1) A 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.

(2) A responsible agency.

(3) A public agency that has jurisdiction by law with respect to the project.

(4) A transportation planning agency or public agency required to be consulted pursuant to Section 21092.4.

(5) An organization or individual who has filed a written request for the notice.

(c) For an entity, organization, or individual that is required to be provided notice of a lead agency public meeting, the requirement for notice of a scoping meeting pursuant to subdivision (b) may be met by including the notice of a scoping meeting in the public meeting notice~~.~~ or by following notice requirements set forth in Section 21092.

(d) A scoping meeting that is held in the city or county within which the project is located pursuant to the National Environmental Policy Act (42 U.S.C. Sec. 4321 et seq.) and the regulations adopted pursuant to that act shall be deemed to satisfy the requirement that a scoping meeting be held for a project subject

to paragraph (2) of subdivision (a) if the lead agency meets the notice requirements of subdivision (b) or subdivision (c).

**3. Amend Section 21091 to read:**

21091. CEQA Documents~~Draft environmental impact reports, proposed negative declarations, and proposed mitigated negative declarations~~; review periods

(a) Public review periods for environmental impact reports shall not be less than:

(1) 30 days for a draft environmental impact report that is not required to be submitted to the State Clearinghouse.

(2) ~~(a) The public review period~~45 days for a draft environmental impact report ~~may not be less than 30 days. If the draft environmental impact report is submitted to the State Clearinghouse for review, the review period shall be at least 45 days~~that is required to be submitted to the State Clearinghouse, and the lead agency shall provide a sufficient number of copies of the document to the State Clearinghouse for review and comment by state agencies.

(3) 10 days for a final environmental impact report. The 10-day period shall run from the date a notice of completion of the final environmental impact report is posted by the Office of Planning and Research on the on-line list established by Section 21108(d).

(b) ~~The public~~Public review ~~period~~periods for a proposed negative declaration ~~or proposed~~, enhanced negative declaration, proposed mitigated negative declaration, or enhanced mitigated negative declaration ~~may~~shall not be less than :

(1)20 days~~. If the proposed negative declaration or proposed mitigated negative declaration is~~ if the document is not required to be submitted to the State Clearinghouse for review, ~~the review period shall be at least 30 days~~

(2)30 days, if the document is required to be submitted to the State Clearinghouse for review, and the lead agency shall provide a sufficient number of copies of the document to the State Clearinghouse for review and comment by state agencies

(3) 10 days for a final enhanced negative declaration or final enhanced mitigated negative declaration, consisting of responses to comments on, and any revisions to, the document initially circulated for review. The 10-day period shall run from the date a notice of completion of the final enhanced

negative declaration or final enhanced mitigated negative declaration is posted by the Office of Planning and Research on the on-line list established by Section 21108(d).

(c) (1) Notwithstanding subdivisions (a) and (b), if a ~~draft environmental impact report, proposed negative declaration, or proposed mitigated negative declaration~~CEQA document is submitted to the State Clearinghouse for review and the period of review by the State Clearinghouse is longer than the public review period established pursuant to subdivision (a) or (b), whichever is applicable, the public review period shall be at least as long as the period of review and comment by state agencies as established by the State Clearinghouse.

(2) The public review period for subdivisions (a) (1), (a) (2), (b)(1) and (b)(2) of this Section and the state agency review period may, but are not required to, begin and end at the same time. Day one of the state agency review period shall be the date that the State Clearinghouse distributes the draft or proposed CEQA document to state agencies.

(3) If the submittal of a CEQA document is determined by the State Clearinghouse to be complete, the State Clearinghouse shall distribute the document within three working days from the date of receipt. The State Clearinghouse shall specify the information that will be required in order to determine the completeness of ~~thesubmittal~~the submittal of a CEQA document.

(d) (1) The lead agency shall consider comments it receives on a ~~draft environmental impact report, proposed negative declaration, or proposed mitigated negative declaration~~CEQA document in a timely manner. C~~c~~omments are timely, if they are received within the ~~public review period~~applicable public review period set forth in subsections (a) and (b) of this Section. The lead agency may, but is under no obligation to consider untimely comments, and if it opts not to consider untimely comments, information contained within the untimely comments shall not be considered when determining whether substantial evidence supports the lead agency's CEQA conclusions and findings.

(2) (A) With respect to the consideration of comments received on a draft environmental impact report, an enhanced negative declaration, or enhanced mitigated negative declaration the lead agency shall evaluate comments on environmental issues that are received within the duly noticed public comment period ~~from persons who have reviewed the draft~~ and shall prepare a written response pursuant to subparagraph (B). The lead agency may ~~also~~, but is not required to consider or respond to comments that are received after the close of the ~~public review period~~duly noticed public review period, however, if the lead agency opts to consider any comment or comments submitted outside of a duly noticed public review period, it shall consider all untimely comments on the document. Nothing herein shall limit an

agency's authority to extend a comment period and establish an alternate deadline for submission of comments that creates a longer comment period.

(B) The written response shall describe the disposition of each significant environmental issue that is raised by commenters. The responses shall be prepared consistent with Section 15088 of Title 14 of the California Code of Regulations, as those regulations existed on June 1, ~~1993.~~1993, and as may be amended from time to time.

~~(3) (A) With respect to the consideration of comments received on a draft~~ (3) A final environmental impact report, a final enhanced negative declaration, or final enhanced mitigated negative declaration consisting of the draft document, timely comments, and responses thereto, and any changes made to the draft document in response to timely comments, shall be considered by the lead agency. A lead agency may choose, but is not required, to respond to comments received on the final environmental impact report, ~~proposed~~final enhanced negative declaration~~, proposed~~ or final enhanced mitigated negative declaration~~, or notice pursuant to Section 21080.4, the lead agency shall accept comments via e-mail and shall treat e-mail comments as equivalent to written comments~~.

(~~B~~4) Any law or regulation relating to written comments received on a ~~draft environmental impact report, proposed negative declaration, proposed mitigated negative declaration,~~CEQA document or notice received pursuant to Section 21080.4, shall also apply to e-mail comments received for those reasons.

(5) The Lead Agency shall only be required to consider comments on a final environmental impact report, final enhanced negative declaration, or final enhanced mitigated negative declaration that address one or more of following topics:

(A) The adequacy of responses to comments contained in the final environmental impact report, final enhanced negative declaration or final enhanced mitigated declaration.

(B) Significant new information, including a disclosure showing that:

(i) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.

(ii) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.

(iii) A feasible project alternative for an environmental impact report, or a feasible mitigation measure for an environmental impact report or enhanced mitigated negative declaration, that is considerably different from others previously analyzed and that would clearly lessen the significant environmental impacts of the project to a level of insignificance, but the project's proponents decline to adopt it.

(iv) The draft environmental impact report, proposed enhanced negative declaration, or proposed enhanced mitigated negative declaration was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

(v) Information meeting the following criteria shall not be significant new information:

(a) Mitigation measures that are replaced with equally or more effective measures.
(b) Project revisions added in response to written or verbal comments on the project's effects identified in the enhanced negative declaration or enhanced mitigated negative declaration that do not result in new avoidable significant effects.
(c) Measures or conditions of project approval added after circulation of the enhanced negative declaration or enhanced mitigated negative declaration that are not required by CEQA, that do not create significant environmental effects, and that are not necessary to mitigate an avoidable significant effect.
(d) New information added to the enhanced negative declaration or enhanced mitigated negative declaration that merely clarifies, amplifies, or makes insignificant modifications to the negative declaration.

(C) Information contained in comments that are outside the limits of the topics provided in this subdivision (5) shall not constitute substantial evidence.

(e) (1) Criteria for shorter review periods by the State Clearinghouse for documents that must be submitted to the State Clearinghouse shall be set forth in the written guidelines issued by the Office of Planning and Research and made available to the public.

(2) Those shortened review periods may not be less than 30 days for a draft environmental impact report and 20 days for a negative

declaration, mitigated negative declaration, enhanced negative declaration or enhanced mitigated negative declaration.

(3) A request for a shortened review period shall only be made in writing by the decision-making body of the lead agency to the Office of Planning and Research. The decision-making body may designate by resolution or ordinance a person authorized to request a shortened review period. A designated person shall notify the decision-making body of this request.

(4) A request approved by the State Clearinghouse shall be consistent with the criteria set forth in the written guidelines of the Office of Planning and Research.

(5) A shortened review period may not be approved by the Office of Planning and Research for a proposed project of statewide, regional, or areawide environmental significance as determined pursuant to Section 21083.

(6) An approval of a shortened review period shall be given prior to, and reflected in, the public notice required pursuant to Section 21092.

(f) Prior to carrying out or approving a project for which any type of negative declaration has been adopted, the lead agency shall consider the negative declaration together with comments that were received and considered pursuant to paragraph (1) of subdivision (d).

**4. Amend Section 21092 to read:**

(a) Any lead agency that is preparing an ~~environmental impact report or a negative declaration~~ CEQA Document or making a determination pursuant to subdivision (c) of Section 21157.1 shall provide public notice of that fact within a reasonable period of time prior to adoption or certification of the ~~environmental impact report, adoption of the negative declaration,~~ CEQA Document or making the determination pursuant to subdivision (c) of Section 21157.1.

(b) (1) The notice shall specify the period during which comments will be received on the draft environmental report or negative declaration, and shall include the date, time, and place of any public meetings or hearings on the proposed project, a brief description of the proposed project and its location, the significant effects on the environment, if any, anticipated as a result of the project, and the address where copies of the draft environmental impact report or negative declaration, and all documents referenced in the draft environmental impact report or negative declaration, are available for review. The notice shall clearly state whether the document to be prepared will be an environmental impact

report, a negative declaration, mitigated negative declaration, enhanced negative declaration, or enhanced mitigated negative declaration.

(2) This section shall not be construed in any manner that results in the invalidation of an action because of the alleged inadequacy of the notice content, provided that there has been substantial compliance with the notice content requirements of this section.

~~(3) The notice required by this section shall be given to the last known name and address of all organizations and individuals who have previously requested notice and shall also be given by at least one of the following procedures:~~ (3) Notice of the availability of a draft or final environmental impact report, or a proposed negative declaration or mitigated negative declaration, or a proposed enhanced negative declaration or enhanced mitigated negative declaration, the notice required by this section shall be provided by all of the following:

(A) Publication, no fewer times than required by Section 6061 of the Government Code, by the public agency in a newspaper of general circulation in the area affected by the proposed project. If more than one area will be affected, the notice shall be published in the newspaper of largest circulation from among the newspapers of general circulation in those areas.

(B) ~~Posting of notice by the lead agency on- and off-site in the area where the project is to be located.~~ By mail or electronic mail to the last known name and address of all organizations and individuals who have previously requested notice.

(C) By mail or electronic mail to responsible and trustee agencies.

(D) By mail or electronic mail to a project applicant, if different from the lead agency, and the applicant's duly authorized agent.

(4) In addition to the foregoing requirements, when a project involves construction, development, or redevelopment of facilities, buildings, or infrastructure, notice of the availability of the CEQA Document required by this section also shall be provided as follows:

~~(C) Direct mailing~~(A) ~~By~~ mail to the owner or owners of the subject property, the owner or owners' duly authorized agent or agents, and to all owners and occupants of ~~contiguous~~real property within 300 feet of the project site as shown on the latest equalized assessment roll. Instead of using the assessment roll, the lead agency may use records of the county assessor or tax collector if those records contain more recent information than the information contained on the assessment roll.

(B) If the number of property owners to whom notice would be mailed or delivered pursuant to subparagraph (1) above, is greater than 1,000, a lead agency may, in lieu of mailed or delivered notice, provide notice by placing a display advertisement of at least one-eighth page in at least one newspaper of general circulation within the local city or county or cities or counties where the project is located.

(c) For any project involving the burning of municipal wastes, hazardous waste, or refuse-derived fuel, including, but not limited to, tires, meeting the qualifications of subdivision (d), notice shall be given to all organizations and individuals who have previously requested notice and shall also be given by at least the procedures specified in subparagraphs (A), (B), ~~and~~ (C) and (D) of paragraph (~~3~~) of subdivision (b). In addition, notification shall be given by direct mailing to the owners and occupants of property within one-fourth of a mile of any parcel or parcels on which is located a project subject to this subdivision. This subdivision does not apply to any project for which notice has already been provided as of July 14, 1989, in compliance with this section as it existed prior to July 14, 1989.

(d) The notice requirements of subdivision (c) apply to both of the following:

(1) The construction of a new facility.

(2) The expansion of an existing facility which burns hazardous waste which would increase its permitted capacity by more than 10 percent. For purposes of this paragraph, the amount of expansion of an existing facility shall be calculated by comparing the proposed facility capacity with whichever of the following is applicable:

(A) The facility capacity approved in the facility's hazardous waste facilities permit pursuant to Section 25200 of the Health and Safety Code or its grant of interim status pursuant to Section 25200.5 of the Health and Safety Code, or the facility capacity authorized in any state or local agency permit allowing the construction or operation of a facility for the burning of hazardous waste, granted before January 1, 1990.

(B) The facility capacity authorized in the facility's original hazardous waste facilities permit, grant of interim status, or any state or local agency permit allowing the construction or operation of a facility for the burning of hazardous waste, granted on or after January 1, 1990.

(e) The notice requirements specified in subdivision (b) or (c) shall not preclude a public agency from providing additional notice by other means if the agency so desires, or 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.

**5. Amend Section 21108 to read:**

(a) Whenever a state agency approves or determines to carry out a project that is subject to this division, the state agency shall file notice of that approval or that determination with the Office of Planning and Research. The notice shall indicate the determination of the state agency whether the project will, or will not, have a significant effect on the environment and shall indicate whether an environmental impact report has been prepared pursuant to this division.

(b) Whenever a state agency determines that a project is not subject to this division pursuant to subdivision (b) of Section 21080 or Section 21172, and the state agency approves or determines to carry out the project, the state agency or the person specified in subdivision (b) or (c) of Section 21065 may file notice of the determination with the Office of Planning and Research. Any notice filed pursuant to this subdivision by a person specified in subdivision (b) or (c) of Section 21065 shall have a certificate of determination attached to it issued by the state agency responsible for making the determination that the project is not subject to this division pursuant to subdivision (b) of Section 21080 or pursuant to Section 21172. The certificate of determination may be in the form of a certified copy of an existing document or record of the state agency.

(c) All notices filed pursuant to this section shall be available for public inspection, and a list of these notices shall be posted on a weekly basis in the Office of Planning and Research. Each list shall remain posted for a period of 30 days. The Office of Planning and Research shall retain each notice for not less than 12 months.

(d) (1) In addition to other posting requirements all notices filed in accordance with subdivisions (a) and (b) of Section 21108, subdivision (a) and (b) of Section 21152, and Section 21172, shall be posted on an on-line list to be established and maintained by the Office of Planning and Research. The on-line listing shall include the capability to view the notices filed with the Office.

(2) Notices filed with the Office of Planning and Research shall be posted on the list within one business day after filing; however delays in posting shall not extend or otherwise impact the deadlines set forth in Section 21167. Notices shall remain on the list for no less than 45 days.

(3) The Office of Planning and Research may charge a fee that is reasonably related to the costs of processing the notices and maintaining the list required in this subsection (d).

**6. Amend the title of 21152 to read:**

21152. ~~LOCAL AGENCY; APPROVAL OR DETERMINATION TO CARRY OUT PROJECT; NOTICE; CONTENTS; PUBLIC INSPECTION; POSTING~~ FILE NOTICES WITH COUNTY CLERK AND OFFICE OF PLANNING AND RESEARCH; AND AMEND

(a) Whenever a local agency approves or determines to carry out a project that is subject to this division, the local agency shall file notice of the approval or the determination within five working days after the approval or determination becomes final, with the county clerk of each county in which the project will be located. The notice shall indicate the determination of the local agency whether the project will, or will not, have a significant effect on the environment and shall indicate whether an environmental impact report has been prepared pursuant to this division. The notice shall also include certification that the final environmental impact report, if one was prepared, together with comments and responses, is available to the general public.

(b) Whenever a local agency determines that a project is not subject to this division pursuant to subdivision (b) of Section 21080 or pursuant to Section 21172, and the local agency approves or determines to carry out the project, the local agency or the person specified in subdivision (b) or (c) of Section 21065 may file a notice of the determination with the county clerk of each county in which the project will be located. A notice filed pursuant to this subdivision by a person specified in subdivision (b) or (c) of Section 21065 shall have a certificate of determination attached to it issued by the local agency responsible for making the determination that the project is not subject to this division pursuant to subdivision (b) of Section 21080 or Section 21172. The certificate of determination may be in the form of a certified copy of an existing document or record of the local agency.

(c) All notices filed pursuant to this section shall be available for public inspection, and shall be posted within 24 hours of receipt in the office of the county clerk. A 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.

(d) In addition to other posting requirements, all notices filed in accordance with this section shall be filed with the Office of Planning and Research for posting on the on-line list established by Section 21108(d).

**7. Amend Section 21177. PRESENTATION OF GROUNDS FOR NON-COMPLIANCE; OBJECTIONS TO APPROVAL OF PROJECT to read:**

(a) ~~An~~ No action or proceeding ~~shall not~~ may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were

presented to the public agency orally or in writing by any person during the public comment periods provided ~~by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination~~ for a CEQA Document in Section 21091 with the following exception. With respect to alleged grounds for noncompliance relating to matters that were not known and could not have been known with reasonable diligence during the public comment period, an action or proceeding may be brought pursuant to Section 21167 if the alleged grounds for noncompliance with this division were presented to the public agency by any person as soon as reasonably feasible and prior to the close of the final public hearing on the project, or if there is no public hearing held, before final action on the project by the lead agency.

(b) ~~A~~ No person shall ~~not~~ maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment periods provided by this division or prior to the close of the public hearing on the ~~project before the issuance of the notice of determination~~. project's compliance with this division. If no separate public hearing is held on the project's compliance with this division or no other final opportunity to be heard by the decision maker is provided when no public hearing is required, a person may maintain an action or proceeding if that person objected to the approval of the project orally or in writing during the public comment periods provided for the CEQA Document in Section 21091, or prior to the close of the public hearing on the project or during any other final opportunity to be heard by the decision making body before final action is taken on the project.

(c) This section does not preclude any organization formed after the approval of a project from maintaining an action pursuant to Section 21167 if a member of that organization has complied with subdivisions (a) and (b). The grounds for noncompliance may have been presented directly by a member or by a member agreeing with or supporting the comments of another person.

(d) This section does not apply to the Attorney General.

(e) This section does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law.

(f) This section shall remain in effect only until January 1, 2016, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2016, deletes or extends that date.

## Legislative Proposal to Facilitate Judicial Severability.

***Rationale for the Proposal.*** This proposal would remove the findings requirement in Section 21168.9 and instead allow a court to fashion an order that permits all or part of a project to proceed pending compliance with CEQA and providing that (1) the order

promotes policies expressly stated in the CEQA statute, and (2) the order specifies the reasons for allowing all or part of a project to proceed. The proposal would give the court more practical discretion to allow beneficial projects or parts of projects to proceed while the lead agency cures the CEQA noncompliance called out in a decision.

Because this revision would allow a court to consider all CEQA policies (including protection of the environment), limiting the mandate in subdivision (a)(2) to only those activities that "could result in an adverse change or alteration to the physical environment" would not be necessary. Deleting that phrase would allow meritorious projects (ARB's AB32 Scoping Plan, for example) to proceed pending CEQA compliance despite arguable changes in the environment. These changes should be read in light of the existing provisions of this section stating that orders shall only include those mandates necessary to achieve compliance and recognizing courts' traditional equitable powers.

Finally, this proposal would add a new subdivision to clarify that any portion of a determination not found to violate CEQA would be conclusively presumed to comply with CEQA for purposes of later project approvals and further environmental review as may be required by the court's determination.

***Proposed Statutory Amendment.***

**8. Section 21168.9. FINDING THAT PUBLIC AGENCY FAILED TO COMPLY WITH DIVISION is amended to read:**

(a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following:

(1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.

(2) ~~If the court finds that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a~~ A mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities, pursuant to the determination, finding, or decision~~, that could result in an adverse change or alteration to the physical environment,~~ until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with this division.

(3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with this division.

(b) Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those

specific project activities in noncompliance with this division. The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. ~~However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division.~~ An order pursuant to subdivision (a)(2) may allow all or certain project activities to proceed pending compliance with this division provided that doing so would promote the legislative policies expressed in sections 21000, 21001, 21002, 21003 and elsewhere in this division. The factors supporting a determination that all or certain project activities may proceed shall be explained in the order.

(c) The trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division.

~~(c)~~ (d) Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way. Except as expressly provided in this section, nothing in this section is intended to limit the equitable powers of the court.

(e) Consistent with subdivision (c) of Section 21005, any portion of any determination, finding, or decision of a public agency that was not voided pursuant to subdivision (a) shall be conclusively presumed to comply with the provisions of this division for purposes of its use in connection with later project activities, unless the provisions of Section 21166 apply.

## 2. Despite Previous Efforts to Streamline CEQA for Infill Projects, Current Provisions Are Still Not Sufficiently Effective

### Problem Statement

Local governments, affordable housing advocates, urban planners, community-based organizations, environmental organizations, and developers have long sought to create effective streamlining provisions in CEQA for appropriate urban infill projects, particularly affordable housing. With increasing attention toward sustainable development concepts, even greater emphasis has been placed on the benefits of infill development when it offers opportunities for reduced automobile travel and use of established infrastructure and public services. Although multiple attempts have been made to create legislative and regulatory solutions, they have resulted primarily in exemptions with so many constraints that their utility and effectiveness are seriously limited.

One problem is the inequitable applicability of the infill categorical exemption to projects only within incorporated city limits. The Guidelines establish this categorical exemption for small (up to 5 acre) infill development projects (14 CCR Section 15332), but the restriction of the exemption to projects within city limits precludes its use in urbanized county territory that has similar urban density, public services, utilities, and transit characteristics.

The Legislature added Article 6 to CEQA (commencing with Section 21159.20), to provide conditional statutory exemptions for heavily qualified, low-income and infill housing projects. The conditions that must be met to qualify for an exemption under Article 6 are very complex and in some cases require avoidance of common, practically unavoidable urban impacts (e.g., traffic, noise) or subject projects to a fair-argument test that effectively disqualifies otherwise appropriate projects. These qualifying conditions make the exemptions unworkable for otherwise appropriate infill residential projects, even though the projects can help meet community housing needs, provide opportunity to reduce regional vehicle miles traveled, and are consistent with local plans and zoning.

SB 375 (Statutes of 2009) added “Sustainable Communities Strategies” to the CEQA lexicon (commencing with Section 21155) to streamline qualified housing and transit priority projects that meet strict criteria related to proximity to high quality transit corridors and other conditions. Because approval of Sustainable Communities Strategies will not occur for some years to come, it is premature to assess the practical benefits of the CEQA streamlining provisions made possible by SB 375. While more efficient environmental review of qualifying projects is a hope, SB 375 will not fully resolve the need for effective infill project streamlining.

The Governor’s Office of Planning and Research has conducted surveys of local governments regarding use of the infill exemptions as part of its annual California Planner’s Book of Lists. The survey results indicated that while many cities used the guidelines Section 15332 infill categorical exemption (as noted above, this provision is not available for urbanized areas of counties), few cities and counties were able to use

the statutory exemptions for infill housing. Overall, CEQA still lacks sufficiently effective streamlining strategies for appropriate infill development. Beneficial infill projects already face substantial hurdles, such as inadequate park and green space, poorly performing schools, financing limitations, and local opposition. Lack of effective CEQA streamlining should not add another hurdle.

As a result, instead of the Article 6 exemption providing the intended incentive, many infill projects have more difficulty getting through the environmental review process than "greenfield" developments that contribute to urban sprawl. The lack of a reliable statutory exemption is a lost opportunity to facilitate beneficial infill development.

## **Legislative Proposals to Improve Infill Streamlining Provisions**.

***Rationale for the Proposals.*** Although the current housing exemptions are intended to ensure that housing projects with unacceptable environmental impacts do not qualify for exemption, most agency planners, environmental consultants, and other CEQA practitioners have found, in practice, that the existing exemptions are laden with too many qualifications, which greatly limit their use. For that reason, the exemptions are rarely used. The proposed statutory amendments set forth below seek to either eliminate or modify some of the most difficult qualifications to expand the universe of qualifying projects, while still ensuring that projects with unacceptable impacts remain subject to CEQA.

One key proposed change is to eliminate the existing requirement that the project site has been subject to "community level environmental review" completed within the preceding few years, because very recent plan updates have not been prepared for many communities with beneficial infill opportunities. This requirement is particularly counterproductive in largely built-out cities and urbanized unincorporated areas (where infill projects are arguably very likely to otherwise occur) that, by their nature, have not recently completed a general plan or specific plan update. Because infill projects must be consistent with general plan and zoning regardless of the age of the last update or community plan, the existence of relatively "fresh" community plan and its environmental review provides relatively little value. Ironically, the communities most suitable for substantial infill development are typically so close to being fully built out that their general plans are older, whereas communities facing greenfield development proposals tend to find less resistance to environmental clearances for such projects compared to urban infill projects.

Another key proposed change is deletion of the "reasonable possibility" language from Sections 21159.22 and 21159.23. The existing language subjects the statutory exemptions to the "fair-argument" standard, which effectively negates the procedural advantage and certainty that would otherwise be provided by the statutory exemption. This language was purposefully left out of the infill provisions of SB 375 for that reason. If infill is important enough to be statutorily exempt – and we believe it should be – then it should have clear procedural advantages over greenfield development. This proposed revision is intended to establish that advantage.

Finally, the proposed amendments address an overlap between the existing “low-income infill housing exemption” (Section 21159.23) and the “infill housing exemption” (Section 21159.24). Both sections include low income conditions in order to qualify for a CEQA exemption. This proposal would delete the low income conditions of Section 21159.24 because Section 21159.23 adequately accounts for low income housing development. The low income qualification included in Section 21159.24 is not necessary and inhibits use of the exemption for otherwise appropriate infill housing projects.

***Proposed Statutory Amendments.***

**9. Amend Section 21159.20. DEFINITIONS to read:**

For the purposes of this article, the following terms have the following meanings:

(a) "Census-defined place" means a specific unincorporated land area within boundaries determined by the United States Census Bureau in the most recent decennial census.

~~(b) "Community-level environmental review" means either of the following:~~

~~(1) An environmental impact report certified on any of the following:~~

~~(A) A general plan.~~

~~(B) A revision or update to the general plan that includes at least the land use and circulation elements.~~

~~(C) An applicable community plan.~~

~~(D) An applicable specific plan.~~

~~(E) A housing element of the general plan, if the environmental impact report analyzed the environmental effects of the density of the proposed project.~~

~~(2) Pursuant to this division and the implementing guidelines adopted pursuant to this division that govern subsequent review following a program environmental impact report, or pursuant to Section 21157.1, 21157.5, or 21166, a negative declaration or mitigated negative declaration was adopted as a subsequent environmental review document, following and based upon an environmental impact report on any of the projects listed in subparagraphs (A), (C), or (D) of paragraph (1).~~

(b~~c~~) "Low-income households" means households of persons and families of very low and low income, as defined in Sections 50093 and 50105 of the Health and Safety Code.

(cd) "Low- and moderate-income households" means households of persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code.

**10. Amend Section 21159.21 CRITERIA TO QUALIFY FOR HOUSING PROJECT EXEMPTIONS to read:**

A housing project qualifies for an exemption from this division pursuant to Section 21159.22, 21159.23, or 21159.24 if it meets the criteria in the applicable section and all of the following criteria:

(a) The project is consistent with any applicable general plan, specific plan, and local coastal program, including any mitigation measures required by a plan or program, as that plan or program existed on the date that the application was deemed complete and with any applicable zoning ordinance, as that zoning ordinance existed on the date that the application was deemed complete, except that:

(1) a project shall not be deemed to be inconsistent with the zoning designation for the site if that zoning designation is inconsistent with the general plan only because the project site has not been rezoned to conform with a more recently adopted general plan.

(2) a project shall not be deemed to be inconsistent with a general plan, specific plan, or local coastal program, or the zoning ordinance, solely as a result of a density bonus, modification, waiver, concession or incentive authorized by Government Code section 65915.

(b) Community-level environmental review has been adopted or certified. (c) The project and other projects approved prior to the approval of the project can be adequately served by existing utilities, and the project applicant has paid, or has committed to pay, all applicable in-lieu or development fees.

(cd) The site of the project does not have a significant effect on biological resources, unless any significant effect on biological resources can be mitigated to a level of insignificance. For purposes of this subdivision, "biological resources" means contain wetlands, as wildlife habitat for, and the project does not harm any species protected by the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.) or by the Native Plant Protection Act (Chapter 10 (commencing with Section 1900) of Division 2 of the Fish and Game Code), the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code), or and the project does not cause the destruction or removal of any species protected by a local ordinance in effect at the time the application for the project was deemed complete. For the purposes of this subdivision, "wetlands" has the same meaning as in Section 328.3 of Title 33 of the Code of Federal Regulations and "wildlife habitat" means the ecological

communities upon which wild animals, birds, plants, fish, amphibians, and invertebrates depend for their conservation and protection.

(~~c~~d) The site of the project is not included on any list of facilities and sites compiled pursuant to Section 65962.5 of the Government Code.

(e) The site of the project is subject to an environmental ~~preliminary endangerment~~ assessment prepared by a registered environmental assessor that is adequate to determine the existence of any release of a hazardous substance on the site and to determine the potential for exposure of future occupants to significant health hazards from any nearby property or activity. A preliminary endangerment assessment, as that term is defined in Section 25401.1 of the Health and Safety Code, shall be adequate for this purpose.

(1) If a release of a hazardous substance is found to exist on the site, the release shall be removed, or any significant effects of the release shall be mitigated to a level of insignificance in compliance with state and federal requirements.

(2) If a potential for exposure to significant hazards from surrounding properties or activities is found to exist, the effects of the potential exposure shall be mitigated to a level of insignificance in compliance with state and federal requirements.

(~~d~~f) The project does not have a significant effect on historical resources pursuant to Section 21084.1 or any significant effect on historical resources can be mitigated to a level of insignificance.

(~~h~~g) The project site is not subject to any of the following:

(1) A wildland fire hazard, as determined by the Department of Forestry and Fire Protection, unless the applicable general plan or zoning ordinance contains provisions to mitigate the risk of a wildland fire hazard.

(2) An unusually high risk of fire or explosion from materials stored or used on nearby properties.

(3) Risk of a public health exposure at a level that would exceed the standards established by any state or federal agency.

(4) Within a delineated earthquake fault zone, as determined pursuant to Section 2622, or a seismic hazard zone, as determined pursuant to Section 2696, unless the applicable general plan or zoning ordinance contains provisions to mitigate the risk of an earthquake fault or seismic hazard zone.

(5) Landslide hazard, flood plain, flood way, or restriction zone, unless the applicable general plan or zoning ordinance contains provisions to mitigate the risk of a landslide or flood.

(~~i~~h) (1) The project site is not located on developed open space.

(2) For the purposes of this ~~subdivision~~,subsection, "developed open space" means land that meets all of the following criteria:

(A) Is publicly owned, or financed in whole or in part by public funds.

(B) Is generally open to, and available for use by, the public.

(C) Is predominantly lacking in structural development other than structures associated with open spaces, including, but not limited to, playgrounds, swimming pools, ballfields, enclosed child play areas, and picnic facilities.

(3) For the purposes of this subdivision, "developed open space" includes land that has been designated for acquisition by a public agency for developed open space, but does not include lands acquired by public funds dedicated to the acquisition of land for housing purposes.

(i) The project site is not located within the boundaries of a state conservancy.

(j) The lead agency's determination that a project meets the criteria in this section shall be reviewed under the substantial evidence standard.

(k) Nothing in this section shall be understood to eliminate or modify the ability of an agency to impose conditions of approval, exactions, dedications, fees, or other local requirements addressing matters such as the need for infrastructure, public services and utilities, open space, housing construction, and other matters relating to public health and safety or the general welfare of the community.

**11. Amend Section 21159.22 AGRICULTURAL EMPLOYEE HOUSING EXEMPTION to read:**

(a) This division does not apply to any development project that meets the requirements of subdivision (b), and meets either of the following criteria:

(1) Consists of the construction, conversion, or use of residential housing for agricultural employees, and meets all of the following criteria:

(A) Is affordable to lower income households, as defined in Section 50079.5 of the Health and Safety Code.

(B) Lacks public financial assistance.

(C) The developer of the development project provides sufficient legal commitments to the appropriate local agency to ensure the continued availability and use of the housing units for lower income households for a period of at least 15 years.

(2) Consists of the construction, conversion, or use of residential housing for agricultural employees and meets all of the following criteria:

(A) Is housing for very low, low-, or moderate-income Households as defined in paragraph (2) of subdivision (h) of Section 65589.5 of the Government Code.

(B) Public financial assistance exists for the development project.

(C) The developer of the development project provides sufficient legal commitments to the appropriate local agency to ensure the continued availability and use of the housing units for low- and moderate-income households for a period of at least 15 years.

(b)(1) If the development project is proposed within incorporated city limits or within a census defined place with a minimum population density of at least 5,000 persons per square mile, it is located on a project site that is adjacent, on at least two sides, to land that has been developed, and consists of not more than 45 units, or is housing for a total of 45 or fewer agricultural employees if the housing consists of dormitories, barracks, or other group living facilities.

(2) If the development project is located on a project site zoned for general agricultural use, and consists of not more than 20 units, or is housing for a total of 20 or fewer agricultural employees if the housing consists of dormitories, barracks, or other group living facilities.

(3) The project satisfies the criteria in Section 21159.21.

(4) The development project is not more than five acres in area, except that a project site located in an area with a population density of at least 1,000 persons per square mile shall not be more than two acres in area.

(c) Notwithstanding subdivision (a), if a project satisfies the criteria described in subdivisions (a) and (b), but does not satisfy the criteria described in paragraph (1) of subdivision (b), this division does not apply to the project if the project meets all of the following criteria:

(1) Is located within either an incorporated city or a census-defined place.

(2) The population density of the incorporated city or census-defined place has a population density of at least 1,000 persons per square mile.

(3) The project site is adjacent on at least two sides to land that has been developed and the project consists of not more than 45 units, or the project consist of dormitories, barracks, or other group housing facilities for a total of 45 or fewer agricultural employees.

~~(d) Notwithstanding subdivision (c), this division shall apply to a project that meets the criteria described in subdivision (c) if a public agency that is carrying out or approving the project determines that there is a reasonable possibility that the project, if completed, would have a significant effect on the environment due to unusual circumstances or that the cumulative impact of successive projects of the same type in the same area, over time, would be significant.~~

For the purposes of this section, "agricultural employee" has the same meaning as defined by subdivision (b) of Section 1140.4 of the Labor Code.

**12. Amend Section 21159.23 Low-income housing exemption to read:**

(a) This division does not apply to any development project that consists of the construction, conversion, or use of residential housing consisting of 200~~100~~ or fewer that is affordable to low-income households if both of the following criteria are met:

(1) The developer of the development project provides sufficient legal commitments to the appropriate local 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.

(2) The development project meets all of the following requirements:

(A) The project satisfies the criteria described in Section 21159.21.

(B) The project site meets one of the following conditions:

(i) Has been previously developed for qualified urban uses.

(ii) The parcels immediately adjacent to the site are Developed with qualified urban uses, or at least 75 percent of the perimeter of the site adjoins parcels that are developed with qualified urban uses and the remaining 25 percent of the perimeter of the site adjoins parcels that have previously been developed for qualified urban uses, and the site has not been developed for urban uses ~~and no parcel within the site has been created within 10 years prior to the proposed development of the site~~.

(C) The project site is not more than ~~five~~ eight acres in area.

(D) The project site is located within an urbanized area or within a census-defined place with a population density of at least ~~5,000~~ 1,000 persons per square mile or, if the project consists of ~~50~~ 10 or fewer units, within an incorporated city with a population density of at least ~~2,500~~ 500 persons per square mile and a total population of at least 25,000 persons.

(b) Notwithstanding subdivision (a), if a project satisfies all of the criteria described in subdivision (a) except subparagraph (D) of paragraph (2) of that subdivision, this division does not apply to the project if the project is located within either an incorporated city or a census defined place with a population density of at least1,000 persons per square mile.

(c) ~~Notwithstanding subdivision (b), this division applies to a project that meets the criteria of subdivision (b), if there is a reasonable possibility that the project would have a significant effect on the environment or the residents of the project due to unusual circumstances or due to the related or cumulative impacts of reasonably foreseeable projects in the vicinity of the project.~~

~~(d)~~ For the purposes of this section, "residential" means a use consisting of either of the following:

(1) Residential units only.

(2) Residential units and primarily neighborhood-serving goods, services, or retail uses that do not exceed 15 percent of the total floor area of the project.

**13. Section 21159.24, INFILL HOUSING EXEMPTION to read:**

(a) ~~Except as provided in subdivision (b), t~~This division does not apply to a project if all of the following criteria are met:

(1) The project is a residential or predominantly residential project on an infill site.

(2) The project is located within an urbanized area.

(3) The project satisfies the criteria of Section 21159.21.

(4) ~~Within five years of the date that the application for the project is deemed complete pursuant to Section 65943 of the Government Code, community-level environmental review was certified or adopted.~~

~~(5)~~ The site of the project is not more than ~~four~~ 10 acres in total area.

(6) The project does not contain more than ~~100~~ 400 residential units.

(7) ~~Either of the following criteria are met:~~

~~(A) (i) At least 10 percent of the housing is sold to families of moderate income, or not less than 10 percent of the housing is rented to families of low income, or not less than 5 percent of the housing is rented to families of very low income.~~

~~(ii) The project developer provides sufficient legal Commitments to the appropriate local agency to ensure the continued availability and use of the housing units for very low, low-, and moderate-income households at monthly housing costs determined pursuant to paragraph (3) of subdivision (h) of Section 65589.5 of the Government Code.~~

~~(B) The project developer has paid or will pay in-lieu fees pursuant to a local ordinance in an amount sufficient to result in the development of an equivalent number of units that would otherwise be required pursuant to subparagraph (A).~~

~~(8)~~ The project is within one-half mile of a bus or rail ~~major~~ transit stop.

(8~~9~~) The project does not include any single level building that exceeds ~~100,000~~ 40,000 square feet.

(910) The project promotes higher density infill housing. A project with a density of at least 20 units per acre shall be conclusively presumed to promote higher density infill housing. A project with a density of at least 10 units per acre and a density greater than the average density of the residential properties within 1,500 feet shall be presumed to promote higher density housing unless the preponderance of the evidence demonstrates otherwise.

~~(b) Notwithstanding subdivision (a), this division shall apply to a development project that meets the criteria described in subdivision (a), if any of the following occur:~~

~~(1) There is a reasonable possibility that the project will have a project-specific, significant effect on the environment due to unusual circumstances.~~

~~(2) Substantial changes with respect to the circumstances under which the project is being undertaken that are related to the project have occurred since community-level environmental review was certified or adopted.~~

~~(3) New information becomes available regarding the circumstances under which the project is being undertaken and that is related to the project, that was not known, and could not have been known, at the time that community-level environmental review was certified or adopted.~~

~~(c) If a project satisfies the criteria described in subdivision (a), but is not exempt from this division as result of satisfying the criteria described in subdivision (b), the analysis of the environmental effects of the project in the environmental impact report or the negative declaration shall be limited to an analysis of the project-specific effect of the projects and any effects identified pursuant to paragraph (2) or (3) of subdivision (b).~~

(~~d~~b) For the purposes of this section, (1) "residential" means a use consisting of ~~either of the following: (1) R~~ residential units only and (2) "predominantly residential" means a use consisting of~~. (2) R~~ residential units and ~~primarily~~ neighborhood serving goods, services, or retail uses that do not exceed ~~15~~ 25 percent of the total floor area of the project.

## 3. Well-Prepared and Thorough MNDs and NDs Are Difficult to Defend in Light of the Fair Argument Standard

### Problem Statement

The fair argument standard creates a very low threshold for a lead agency's decision to prepare an EIR instead of an ND or MND. This reflects one of CEQA's fundamental policies: "The EIR requirement is the heart of CEQA" (14 CCR Section 15003[a]). In many cases the standard has appropriately encouraged lead agencies to be accountable for sound environmental planning. However, the fair argument standard has not evolved, while the level of detail and sophistication of environmental analysis in ND/MNDs have improved dramatically in the nearly four decades since the standard was codified in *County of Inyo v. Yorty*. Consequently, unnecessary and costly EIRs have been required in some circumstances where well-prepared ND/MNDs can and should suffice. In CEQA's early years, an EIR was truly the only way to ensure a comprehensive and in-depth analysis of a project's environmental impacts. NDs were often perfunctory documents consisting mainly of a bare checklist and little or no supporting analysis or documentation.

As CEQA practice has matured, NDs and, particularly, MNDs, have evolved such that many now contain a thorough, well-supported discussion of environmental impacts and mitigation measures, with technical studies and other substantial evidence included to support the conclusion that "clearly no significant effect on the environment would occur" after mitigation (14 CCR Section 15064[f][2]). In this way, many MNDs now fulfill the essential disclosure and mitigation purposes of CEQA: informing decision-makers and the public about a project's environmental effects and avoiding or reducing impacts to a less-than-significant level. An MND cannot defer mitigation and mitigation measures adopted as part of an MND are held to a higher standard than those adopted with an EIR. Further, an MND cannot be used if the project would result in significant and unavoidable impacts. So, arguably, an MND results in mitigation that is at least as complete as in an EIR (both must mitigate to the extent feasible). While the ND or MND does not and should not replace the EIR in CEQA's hierarchy of environmental documents, they are clearly a reasonable and effective option for many projects.

It is also important to acknowledge that the evolution of NDs and MNDs has, in part, been driven by economic necessity. Since CEQA's adoption, the cost and time needed to prepare an EIR have increased exponentially, prompting lead agencies to look for ways to meet their obligations under CEQA in a more streamlined and less costly way.

The CEQA Guidelines require preparation of an EIR, rather than an ND or MND, whenever there is substantial evidence supporting a "fair argument" that the project may have a significant effect on the environment (14 CCR Section 15064[f][1]). Thus, despite this evolution in the effectiveness of ND/MNDs, the only question that really matters is whether any substantial evidence exists to suggest that the project may have a significant impact. Under the fair argument standard, an EIR is required even when other substantial evidence clearly and convincingly shows that the project will not have a significant effect. In fact, when deciding whether to prepare an ND or MND instead of an

EIR, the lead agency is effectively unable to rely on such compelling evidence, regardless of the magnitude by which it outweighs even a small amount of evidence supporting a fair argument. Thus, the CEQA Guidelines and numerous court decisions set a very low threshold for preparation of an EIR, even when ND/MND documentation is thorough, valid, informative, and compelling in its conclusions.

For a project opponent, "a fair argument that the project may have a significant impact on the environment" is usually an easy threshold to meet, despite the lead agency having made a diligent and good faith effort to analyze the project with the MND. Ironically, this creates an unfair outcome where projects that can be convincingly and objectively shown to have minimal environmental impacts—and clearly no significant impacts in an MND—are required to undergo a more expensive and time-consuming EIR process that does not contribute much additional value in the environmental information provided for the lead agency's decision or changes in impact conclusions or mitigation. While the fair-argument standard is important and EIRs are clearly justified in many instances, unnecessary EIRs that do not contribute value to public agency decisions or environmental protections are burdensome and consume substantial staff and economic resources of all involved parties.

## Legislative Proposal to Improve Defensibility of Well-Prepared and Thorough MNDs or NDs

***Rationale for the Proposal.*** This proposal would create a new, optional type of negative declaration with enhanced, more stringent standards for responses to public comments and greater opportunities for public review than current versions. In return for the elevated procedural standards, the new documents, called an "enhanced ND" or an "enhanced MND," would be subject to a more deferential test when considering its compliance with CEQA. The enhanced standards include an obligation of the lead agency to prepare responses to comments, and an additional opportunity for the public and interested parties to review those responses for 10 days prior to the lead agency's decision. (The 10-day review is included in the proposed amendments to Section 21091, described in proposed amendment No. 3, above.)

With the additional process and documentation consistent with state-of-the-art CEQA practice, challenges to the sufficiency of an "enhanced" ND or MND should be subject to a standard of review that takes into account the quality of the environmental information and public process of the enhanced ND or MND, rather than using the fair-argument standard for whether the agency has proceeded in a manner required by law. The proposed standard would require the lead agency to prepare clear and convincing evidence in the enhanced ND or MND that a significant effect on the environment will not occur and conduct the more extensive public process of an enhanced ND or MND, as described below.

***Proposed Legislative Amendments.***

**14. Add a new Section 21060.2 to read:**

Section 21060.2 “CEQA DOCUMENT”

“CEQA Document” is an inclusive term that means a draft environmental impact report, final environmental impact report, negative declaration, mitigated negative declaration, enhanced negative declaration, or enhanced mitigated negative declaration.

**15. Add a new Section 21064.1 to read:**

21064.1 "ENHANCED NEGATIVE DECLARATION" OR "ENHANCED MITIGATED NEGATIVE DECLARATION".

"Enhanced Negative Declaration" or " Enhanced Mitigated Negative Declaration" means a negative declaration or mitigated negative declaration for which written responses to comments have been prepared and made available for public comment pursuant to Section 21092 of this division, and which includes the proposed negative declaration or mitigated negative declaration, comments on the proposed negative declaration or mitigated negative declaration, responses to significant environmental points raised in the comments, and revisions to the proposed negative declaration or mitigated negative declaration as may be warranted based on the responses to comments.

**16. Amend Section 21080 to read:**

(c) If a lead agency determines that a proposed project, not otherwise exempt from this division, would not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect. The negative declaration shall be prepared for the proposed project in ~~either~~ any of the following circumstances:

(1) There is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.

(2) An initial study identifies potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment.

(3) The lead agency weighs all substantial evidence in the record related to whether the project may result in a significant adverse environmental impact, and finds that there is clear and convincing evidence showing that the project will not have a significant adverse impact on the environment, and an enhanced negative declaration or enhanced mitigated negative declaration has been prepared, and made available for public review in accordance with the provisions of Section 21092.

(d) Except as provided in Section 21080(c)(3), if there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.

Amend Section 21082.2(d) to read the same as Section 21080(d).

**17. Amend Section 21151 (a) to read:**

(a) All local agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project that they intend to carry out or approve which may have a significant effect on the environment, unless an enhanced negative declaration or enhanced mitigated negative declaration is prepared in accordance with the requirements of Section 21080 (c)(3). When a report is required by Section 65402 of the Government Code, the environmental impact report may be submitted as part of the report.

# 4. Legally Vulnerable and Ineffective Tiering Provisions Continue to Necessitate Redundant Environmental Documentation

## Problem Statement

CEQA's tiering provisions are intended to "help a public agency to focus upon issues ripe for decision at each level of environmental review … in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports" (PRC Section 21093). However, this intent cannot be fulfilled when the first-tier EIR identifies a significant, unavoidable impact. In these circumstances the lead agency must prepare a second-tier EIR, rather than an ND or MND, despite the fact that the unavoidable impacts have been previously evaluated, mitigated to the extent feasible, and overridden by the lead agency as a result of the prior EIR. The second EIR does not provide additional environmental protection nor does it add useful information to the decision making process. But it does lead to costly, duplicative documentation and an extended environmental review process.

The fair argument standard applies to new environmental issues encountered in analysis of the later project. Therefore, if that project were to result in a new significant impact or would substantially worsen the significant impacts disclosed in the first-tier EIR, a second-tier EIR would be appropriate. There is, however, no practical benefit (i.e., better environmental protection or more complete environmental information for decision-making) to require a second-tier EIR when: (1) a significant unavoidable impact has previously been disclosed and overridden, (2) the later project would not substantially worsen that impact or create a new significant impact, and (3) an ND or MND would otherwise be allowed. If the statute were amended to allow an ND or MND in this circumstance, a second statement of overriding considerations could still be adopted by the lead agency to acknowledge the unavoidable significant effect and the fact that mitigation to a less-than-significant level is still infeasible.

## Legislative Proposal to Make Tiering More Effective

***Rationale for the Proposals*.** This proposal has three parts that, taken as a whole, will facilitate streamlining of environmental review for qualifying projects while ensuring that significant unavoidable effects are properly considered in second tier environmental review. The proposal consists of amendments to Sections 21083.3, 21093, and 21094.

Section 21083.3 currently exempts certain categories of impacts for projects consistent with general plans, community plans, or zoning actions for which EIRs have previously been prepared and certified. The proposed amendments would do three things:

- Expand the universe of projects eligible for this exemption by adding projects consistent with a *specific plan* for which an EIR has previously been prepared. Specific plans, by definition, include land use designations and implementing actions comparable to general plans and zoning programs. This change would eliminate an existing disparity in CEQA, whereby specific plans do not enjoy the

same level of streamlining as projects consistent with other types of prior legislative planning actions (although *purely residential* projects consistent with approved specific plans enjoy a partial exemption from CEQA pursuant to Government Code section 65457 and CEQA Guidelines section 15182).

- Expand the universe of previously approved "uniformly applied development policies or standards" that can be the basis for finding an impact to not be "peculiar". The current statutory language limits such policies and standards to those adopted by cities or counties, and allows such policies or standards to be relied on for exemption only where, at the time they were adopted, the city or county had the foresight to make a finding that they would "substantially mitigate" the impacts to which they are addressed. The proposed amendments would expand qualifying policies or standards to include "other environmental regulations or standards" adopted by an air pollution control district, air quality management district, or other agency."

- Eliminate the undefined and confusing term "substantially mitigate" and substitute a term with a clear and known meaning, "mitigate to a less-than-significant level." Just as CEQA Guidelines section 15183 has done since the late 1990s, the amendments would also allow an agency that did not make a mitigation finding at the time of adoption of such policies or standards to make the finding at the time of consideration of action on a proposed project, provided that the agency holds a hearing on the question of whether, indeed, the policies or standards would mitigate the impacts at issue to a less-than-significant level, based on substantial evidence.

- Lay out a roadmap for how agencies should determine which impacts of proposed projects are exempt from CEQA.

The proposed amendments would clarify the use of negative declarations (and mitigated negative declarations) as "lower tier" documents in Section 21094. Currently, both Sections 21093 and 21094 read as though EIRs are the only legitimate second- or third-tier environmental documents.

With respect to Section 21094, the proposed amendments would among other things:

- Allow agencies to prepare negative declarations for lower tier projects with "cumulatively considerable" incremental contributions to previously identified significant cumulative effects, but only where the agency finds that additional mitigation for such effects remains infeasible despite "consideration of new information, regulatory opportunities, and/or technological advancements not addressed" previously.

- Borrow a concept from CEQA Guidelines Section 15168, authorizing the use of program EIRs. Section 15168 allows an agency to conclude that a "later activity" is "within the scope of the project covered by the program EIR," so that "no new environmental document would be required." Section 21094, as amended, would include language authorizing a similar finding.

***Proposed Legislative Amendments***

**18. Amend Section 21083.3. APPLICATION OF DIVISION TO APPROVAL OF SUBDIVISION MAP OR OTHER PROJECT; LIMITATION; MITIGATION MEASURES UNDER PRIOR ENVIRONMENTAL IMPACT REPORT; PUBLIC HEARING; FINDING to read:**

(a) If a parcel has been zoned to accommodate a particular density of development or has been designated in a community plan or specific plan to accommodate a particular density of development and an environmental impact report was certified for that zoning or planning action, the application of this division to the approval of any subdivision map or other project that is consistent with the zoning, ~~or~~ community plan, or specific plan shall be limited to effects upon the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report.

(b) If a development project is consistent with the general plan of a local agency and an environmental impact report was certified with respect to that general plan, the application of this division to the approval of that development project shall be limited to effects on the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report.

(c) Nothing in this section affects any requirement to analyze potentially significant offsite impacts and cumulative impacts of the project not discussed in the prior environmental impact report with respect to the general plan. However, all public agencies with authority to mitigate the significant effects shall undertake or require the undertaking of any feasible mitigation measures specified in the prior environmental impact report relevant to a significant effect which the project will have on the environment or, if not, then the provisions of this section shall have no application to that effect. The lead agency shall make a finding, at a public hearing, as to whether those mitigation measures will be undertaken.

(d) An effect of a project upon the environment shall not be considered peculiar to the parcel or to the project, for purposes of this section, if uniformly applied development policies or standards or other environmental regulations or standards have been previously adopted by a~~the~~ city, ~~or~~ county, air pollution control district, air quality management district, or other public agency, with a finding based upon substantial evidence, which need not include an environmental impact report, that the ~~development~~ policies, ~~or~~ standards, or regulations will ~~substantially~~ mitigate to a less-than-significant level that environmental effect when applied to future projects, unless substantial new information shows that the policies, ~~or~~ standards, or regulations will not ~~substantially~~ mitigate the environmental effect to such a degree. Where an

agency is considering relying on previously adopted, uniformly applied development policies or standards or other environmental regulations or standards pursuant to this subdivision but the agency that adopted or enacted such standards did not, in adopting or enacting them, previously make a finding that they would mitigate the effects of future projects to less-than-significant levels, the decision-making body of an agency, prior to approving a project pursuant to this section, shall hold a noticed public hearing for the purpose of considering whether, as applied to the project, such standards, policies, or regulations would mitigate the effects of the project to less-than-significant levels. Such a public hearing need only be held, however, if the agency is considering reliance on policies, standards, or regulations as permitted in this subdivision.

(e) Where a community plan is the basis for application of this section, any rezoning action consistent with the community plan shall be a project subject to exemption from this division in accordance with this section. As used in this section, "community plan" means a part of the general plan of a city or county which (1) applies to a defined geographic portion of the total area included in the general plan, (2) complies with Article 5 (commencing with Section 65300) of Chapter 3 of Division 1 of Title 7 of the Government Code by including or referencing each of the mandatory elements specified in Section 65302 of the Government Code, and (3) contains specific development policies adopted for the area included in the community plan and identifies measures to implement those policies, so that the policies which will apply to each parcel can be determined.(f) No person shall have standing to bring an action or proceeding to attack, review, set aside, void, or annul a finding of a public agency made at a public hearing pursuant to subdivision (a) with respect to the conformity of the project to the mitigation measures identified in the prior environmental impact report for the zoning or planning action, unless he or she has participated in that public hearing. However, this subdivision shall not be applicable if the local agency failed to give public notice of the hearing as required by law. For purposes of this subdivision, a person has participated in the public hearing if he or she has either submitted oral or written testimony regarding the proposed determination, finding, or decision prior to the close of the hearing.

(g) Any community plan adopted prior to January 1, 1982, which does not comply with the definitional criteria specified in subdivision (e) may be amended to comply with that criteria, in which case the plan shall be deemed a "community plan" within the meaning of subdivision (e) if (1) an environmental impact report was certified for adoption of the plan, and (2) at the time of the conforming amendment, the environmental impact report has not been held inadequate by a court of this state and is not the subject of pending litigation challenging its adequacy.

(h) In approving a project meeting the requirements of this section, a public agency shall limit its examination of environmental effects to those which the agency determines, based on substantial evidence:

(1) Are peculiar to the project or the parcel on which the project would be located.

(2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan, community plan, or specific plan with which the project is consistent.

(3) Are potentially significant off-site impacts and cumulative impacts that were not discussed in the prior EIR prepared for the general plan, community plan, specific plan, or zoning action, or

(4) Are previously identified significant effects that, as a result of substantial new information not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR.

**19. Amend Section 21093. LEGISLATIVE FINDINGS AND DECLARATION; PUBLIC AGENCIES MAY TIER ENVIRONMENTAL IMPACT REPORTS to read:**

(a) The Legislature finds and declares that tiering of environmental impact reports will promote construction of needed housing and other development projects by (1) streamlining regulatory procedures, (2) avoiding repetitive discussions of the same issues in successive CEQA Documents ~~environmental impact reports~~, and (3) ensuring that CEQA Documents ~~environmental impact reports~~ prepared for later projects which are consistent with a previously approved policy, plan, program, or ordinance concentrate upon environmental effects which may be mitigated or avoided in connection with the decision on each later project. The Legislature further finds and declares that tiering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports.

(b) To achieve this purpose, environmental impact reports shall be tiered whenever feasible, as determined by the lead agency.

**20. Amend Section 21094. LATER PROJECTS; TIERED ENVIRONMENTAL IMPACT REPORTS; INITIAL STUDY; USE OF PRIOR REPORTS to read:**

(a) (1) If a prior ~~environmental impact report~~ CEQA Document has been prepared and certified for a program, plan, policy, or ordinance, the lead agency for a later project that meets the requirements of this section shall examine significant effects of the later project upon the environment by using a tiered ~~environmental impact report~~, CEQA Document except that the report on the later project is not required to examine those effects that the lead agency determines were either of the following:

(A) Mitigated to the extent feasible as identified in the prior CEQA Document, though not necessarily to a less-than-significant level, ~~or avoided~~ pursuant to paragraph (1) of ~~paragraph (1) of~~ subdivision (a) of Section 21081 as a result of the prior ~~environmental impact report~~ CEQA Document.

(B) Examined at a sufficient level of detail in the prior ~~environmental impact report~~ CEQA Document to enable those effects to be mitigated to a less-than-significant level ~~or avoided~~ by site specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project.

(2) If a prior environmental impact report has been prepared and certified for a program, plan, policy, or ordinance, and the lead agency makes a finding of overriding consideration pursuant to subdivision (b) of Section 21081, the lead agency for a later project that uses a tiered environmental impact report from that program, plan, policy, or ordinance may incorporate by reference that finding of overriding consideration if all of the following conditions are met:

(A) The lead agency determines that the project's significant impacts on the environment are not greater than or different from those identified in the prior environmental impact report.

(B) The lead agency incorporates into the later project all the applicable mitigation measures identified by the prior environmental impact report.

(C) The prior finding of overriding considerations was not based on a determination that mitigation measures should be identified and approved in a subsequent environmental review.

(D) The prior environmental impact report was certified not more than three years before the date findings are made pursuant to Section 21081 for the later project.

(E) The lead agency has determined that the mitigation measures or alternatives found to be infeasible in the prior environmental impact report pursuant to paragraph (3) of subdivision (a) of Section 21081 remain infeasible based on the criteria set forth in that section.

(3) On and after January 1, 2016, a lead agency shall not take action pursuant to paragraph (2) with regard to incorporating by reference a prior finding of overriding consideration, and paragraph (2) shall become inoperative on January 1, 2016.

(b) This section applies only to a later project that the lead agency determines is all of the following:

(1) Consistent with the program, plan, policy, or ordinance for which an environmental impact report has been prepared and certified.

(2) Consistent with applicable local land use plans and zoning of the city, county, or city and county in which the later project would be located (except where a rezone is necessary to achieve or maintain conformity with an updated general plan).

(3) Not subject to Section 21166.

(c) (1) For purposes of compliance with this section, an initial study or comparably detailed analysis shall be prepared to assist the lead agency in making the determinations required by this section. The initial study or comparably detailed analysis shall analyze whether (A) the proposed later project is within the scope of the project covered by the earlier CEQA Document, so that no new environmental document will be required or (B) the later project, if not within the scope of such earlier project, may cause significant effects on the environment that either were not examined in the prior environmental impact report, or were mitigated to the extent feasible, though not necessarily to a less-than-significant level, by mitigation previously adopted pursuant to subdivision (a) of Section 21081. With respect to any effects examined in the prior environmental impact report and mitigated pursuant to Section 21081, subdivision (a), but not to a less-than-significant level, the initial study or comparably detailed analysis shall assess whether, in light of information, regulatory opportunities, or technological advancements not addressed in the prior environmental impact report or findings, additional feasible mitigation may be available to mitigate it to a less-than-significant level. Where such additional feasible mitigation is available, no environmental impact report need be prepared with respect to the effect to which the additional mitigation is addressed if the project proponent agrees to incorporate the mitigation into the project prior to public release of any mitigated negative declaration for the project. Nor shall an environmental impact report be required solely because of a project's cumulatively considerable incremental contribution to a significant cumulative effect, if such an incremental effect has been adequately addressed pursuant to subdivision (e)(4)(C) of this Section.

(2) Whether a later project is within the scope of a previous CEQA Document is a question of fact to be determined by a lead agency based on substantial evidence. Where a lead agency approves a later project without any new CEQA Document because the later project is within the scope of the project covered by the earlier CEQA Document, the lead agency shall file a notice of its determination pursuant to Section 21108, subdivision (a), or Section 21152, subdivision (a).

(3) If a later project is within the scope of a previous environmental impact report and the prior environmental impact report included a significant effect on the environmental that could not be feasibly reduced to a less-than-significant level, the later CEQA Document must include a statement disclosing the prior

unavoidable significant impact and the lead agency's determination about its disposition.

(4) If the public agency approves a project that would result in an unavoidable significant effect on the environment using a tiered CEQA document, it shall adopt overriding considerations at the time of the approval action using information in the whole of the record before the public agency.

(d) All public agencies that propose to carry out or approve the later project may utilize the prior environmental impact report and the environmental impact report on the later project to fulfill the requirements of Section 21081.

(e) (1) If a lead agency determines pursuant to this subdivision that a cumulative effect has been adequately addressed in a prior environmental impact report, that cumulative effect is not required to be examined in a later environmental impact report, mitigated negative declaration, or negative declaration for purposes of subparagraph (B) of paragraph (1) of subdivision (a).

(2) When assessing whether there is new significant cumulative effect, the lead agency shall consider whether the incremental effects of the project are cumulatively considerable.

(3) (A) For purposes of paragraph (2), if the lead agency determines the incremental effects of the project are significant when viewed in connection with the effects of past, present, and probable future projects, the incremental effects of a project are cumulatively considerable.

(B) If the lead agency determines incremental effects of a project are cumulatively considerable, the later environmental impact report, mitigated negative declaration, or negative declaration shall examine those effects.

(4) If the lead agency makes one of the following determinations, the otherwise cumulatively considerable incremental contribution of a project to significant cumulative effects ~~of a project~~ are adequately addressed for purposes of paragraph (1):

(A) The incremental contribution to the significant cumulative effect has been mitigated to a less than considerable level ~~or avoided~~ as a result of the prior environmental impact report and findings adopted pursuant to paragraph (1) of subdivision (a) of Section 21081 as a result of the prior environmental impact report.

(B) The incremental contribution to the significant cumulative effect has been examined at a sufficient level of detail in the prior environmental impact report to enable the effect to be mitigated to a less-than-significant level ~~or avoided~~ by site-specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project.

(C) The incremental contribution to the significant cumulative effect cannot be mitigated to a less-than-considerable level despite the project proponent's willingness to accept all feasible mitigation measures, notwithstanding consideration of new information, regulatory opportunities, and/or technological advancements not addressed in the prior environmental impact report or findings, and the only purpose of including analysis of the cumulatively considerable effect in another environmental impact report would be to put the agency in a position to adopt a statement of overriding considerations with respect to the effect.

(f) If tiering is used pursuant to this section, a~~n environmental impact report~~ CEQA Document prepared for a later project shall refer to the prior environmental impact report and state where a copy of the prior environmental impact report may be examined.

(g) This section shall remain in effect only until January 1, 2016, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2016, deletes or extends that date.

# 5. CEQA Lacks Effective Tools or Guidance for Analyzing Cumulative Impacts in Already Poor Environmental Conditions

## Problem Statement

CEQA does not provide practical guidance for the analysis of cumulative impacts in the context of already poor environmental conditions. When there is a cumulative impact (i.e., poor air quality), CEQA requires an examination of whether a project may make a "cumulatively considerable" contribution to that impact.

A cumulative impact consists of "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (CEQA Guidelines Section 15355). "Cumulatively considerable" means that "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." (PRC Section 21083(b)(2)). For purposes of cumulative impact analysis, a cumulatively considerable contribution is equivalent to a significant impact. A project's incremental contribution to a cumulative impact can be considerable (i.e., significant) even when the project's individual impact is less than significant and the magnitude of the contribution is extremely small in practical terms.

A CEQA review must consider three aspects of cumulative impact: (1) whether there is a cumulative impact to which the project may contribute; (2) whether the project is contributing to or taking part in a program designed to avoid the cumulative impact; and (3) whether the project's incremental contribution is "considerable." In the first case, the review need not include cumulative impacts to which the project does not contribute. In the second case, when determining whether the project's contribution is considerable, the review must take into account project compliance with existing programs and project-specific mitigation measures that would avoid the contribution.

There are three common problems with cumulative impact analysis. First, rather than examining the significance of the project's incremental contribution, the CEQA document instead focuses on disclosing the significant cumulative impacts in the area (sometimes, even when they are not pertinent to the project). This results in a failure to consider the importance of the project's incremental contribution. Second, the CEQA document equates the significance of the project's individual impact to the significance of its incremental contribution. This can lead to an incorrect conclusion regarding the significance of the project's contribution. Third, projects making extremely small incremental contributions may be characterized as having a cumulatively significant effect, even when the contribution is miniscule and, in reality, inconsequential.

Neither the CEQA statute and guidelines nor case law are helpful in explaining how cumulative impact analysis is to be done from a practical standpoint. Case law has established that an incremental contribution of one molecule or less is not cumulatively considerable. At the same time, case law advises that "the greater the existing environmental problems are, the lower the threshold should be for treating a project's

contribution to cumulative impacts as significant" (*Communities for a Better Environment v. California Resources Agency* [2002] 103 Cal.App.4th 98 [invalidating prior CEQA Guidelines "de minimis" standard]). For the same reason, case law also rejects the use of a ratio when determining whether a project's contribution is considerable. (*Communities for a Better Environment v. California Resources Agency, supra*) Taken together, this implies that while there is no "one-molecule rule" for determining whether a contribution is considerable, anything above a single molecule contribution might still be considerable when the cumulative impact is particularly severe. While it is important to not overlook the role of small contributions in worsening a cumulatively significant environmental effect, it is not helpful to sound environmental decision-making nor effective for reducing cumulative effects to require environmental impact reports for contributions that are so miniscule to be demonstrated to have no consequence related to that impact, i.e., an inconsequential contribution.

The CEQA Guidelines allow a lead agency to determine (subject to fair argument) that a proposed project's compliance with an existing plan or mitigation program for reducing a significant cumulative impact will reduce that project's contribution so that it is not cumulatively considerable (14 CCR Section 15064[h][3]). Although this provision is helpful when determining significance, plans and mitigation programs do not exist for many local cumulative impacts. Therefore, this provision has limited practical application.

As a result, in areas where there is an existing significant cumulative impact (i.e., an air quality non-attainment area, an over-drafted groundwater basin, etc.) any later project that would make *any* contribution to that impact, no matter how inconsequential, should arguably be the subject of an EIR. Requiring EIRs in such situations does not result in a demonstrable lessening of the significant cumulative effect. At best, a project's mitigation measures may avoid an additional contribution to the cumulative effect, but Constitutional law on unlawful "takings" prohibits the imposition of mitigation measures that would require the project to mitigate more than its incremental contribution (*Nollan v. California Coastal Commission* [1987] 483 U.S. 825 [requiring an essential nexus between the impact and the measure to mitigate that impact] and *Dolan v. City of Tigard* [1994] 114 S.Ct. 2309 [requiring proportionality between extent of impact and extent of required mitigation]). As a result of this Constitutional limitation, mitigation under CEQA cannot solve cumulative impacts because it cannot rectify existing conditions. Beyond that, projects that are not subject to CEQA (e.g., building permits) are generally exempt from contributing to the mitigation of any significant cumulative impact. Therefore, project-by-project CEQA mitigation is ineffective in solving the underlying significant cumulative impact.

## **Legislative Proposal to Improve Cumulative Impact Analysis**.

***Rationale for the Proposal.*** These changes are intended to make it easier for lead agencies to avoid unnecessary EIRs based solely on significant cumulative impacts if the project's incremental contribution to the cumulative impact is environmentally inconsequential or can be rendered less than cumulatively considerable. The proposed statutory amendments would:

- Respond to the court's elimination of the "de minimis" provisions in the CEQA Guidelines and allow lead agencies to determine that a project's incremental contribution to a cumulative effect is so miniscule or has other characteristics that can be shown, based on substantial evidence, to have no real consequence for that cumulative impact, i.e., to be environmentally inconsequential, and therefore, not a cumulatively considerable contribution.

- Allow a lead agency to determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable when the incremental contribution will be avoided by the imposition of project-specific on-site or off-site mitigation measures.

- Expand the ability of a lead agency to rely on previously adopted or approved plans or mitigation programs to render a project's contribution to a cumulative impact less than cumulatively considerable. Specifically, three changes to the 15064(h) approach are recommended that would allow agencies to (a) find that an incremental contribution has been rendered less than cumulatively considerable if it *is consistent with* a plan or mitigation program (rather than just compliance with the plan); (b) rely on mitigation programs in previously certified EIRs prepared by non-regulatory agencies (e.g., RTP EIRs); or (c) use the substantial evidence standard to review decisions that compliance with plans or programs has rendered cumulative contributions less than cumulatively considerable. This latter provision can help incentivize the preparation of plans and programs for reducing cumulatively significant impacts to less-than-significant levels, which can have substantial environmental benefits over time as more cumulative impacts are addressed by such plans and programs.

***Proposed Statutory Amendment***

**21. Amend Section 21082.2 to read:**

(a) The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record.

(b) The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment.

(c) Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment, is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

(d) If there is substantial evidence, in light of the whole record before the lead agency, that a project may have a significant effect on the environment, an environmental impact report shall be prepared.

(e) Statements in an environmental impact report and comments with respect to an environmental impact report shall not be deemed determinative of whether the project may have a significant effect on the environment.

(f)(1) When assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact is significant and whether the contributions 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, may be 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 reasonably foreseeable, probable future projects.

(2) A lead agency may determine, based on substantial evidence in light of the whole of the record, that a project's incremental contribution to a cumulative effect is so small or has other characteristics that render it environmentally inconsequential and, therefore, not cumulatively considerable.

(3) A lead agency may determine in a CEQA Document 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 or enhanced mitigated negative declaration, the initial study shall briefly indicate and explain how the contribution has been rendered less than cumulatively considerable.

(4) A lead agency may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable if the incremental impact will be avoided by the imposition of project-specific on-site or off-site mitigation measures, so that there is no net contribution to the cumulative effect.

(5) A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable using previously approved or adopted plans or mitigation programs under the following circumstances.

> (A) 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 or is consistent with the requirements in a previously approved plan or 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 enforceable requirements that will mitigate the significant cumulative impact to a less-than-significant level 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 following at least one public hearing.

(B) A lead agency may also determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with or is consistent with an adopted mitigation program in a certified EIR that provides specific requirements that will mitigate the significant cumulative impact to a less-than-significant level within the geographic area in which the project is located.

(C) When relying on a plan, regulation or program, the lead agency shall explain, based on substantial evidence, how implementing the requirements in the plan, regulation or program ensure that the project's incremental contribution to the cumulative effect is not cumulatively considerable.

(D) Notwithstanding Sections 21082.2 (a) and (d), an EIR need not be prepared for a project when there is substantial evidence in the record that the incremental effects of a project have been rendered less than cumulatively considerable pursuant to this section. A lead agency's decision not to prepare an EIR under these circumstances shall be reviewed under the substantial evidence standard.

(6) 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.