Holder Law Group
holderecolaw.com
317 Washington Street, #177
Oakland, CA 94607
(510) 338-3759
jason@holderecolaw.com

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VIA EMAIL AND U.S. MAIL

Humboldt County Board of Supervisors
Email: Virginia Bass, vbass@co.humboldt.ca.us
Steve Madrone, smadrone@co.humboldt.ca.us
Mike Wilson, mike.wilson@co.humboldt.ca.us
Michelle Bushnell, mbushnell@co.humboldt.ca.us
Rex Bohn, rbohn@co.humboldt.ca.us
Attn: Clerk of the Board, cob@co.humboldt.ca.us
825 5th Street, Room 111
Eureka, CA 95501

John Ford, Director
Humboldt County Planning and Building Department
3015 H Street
Eureka, California 95501
Email: jford@co.humboldt.ca.us

Re: **Pattern of Inaccurate Characterizations of CEQA's Standards and Requirements**

Dear Honorable Members of the Humboldt County Board of Supervisors and Director Ford:

On behalf of Northcoast Environmental Center ("NEC") and Citizens for a Sustainable Humboldt ("CSH"), we respectfully submit the following general comments with the intention of fostering improved adherence to and compliance with established standards and mandatory requirements of the California Environmental Quality Act ("CEQA").[1] Over the course of several recent Planning Commission and Board of Supervisor meetings, where proposed large development projects have been considered for approval, NEC and CSH members have observed repeated inaccurate characterizations of CEQA's standards and requirements. The inaccurate characterizations – advanced by planning staff, project applicants' counsel, and, occasionally, even by Commissioners and Supervisors – have tended to:

- downplay the important procedural and substantive differences between an Environmental Impact Report ("EIR") and a Mitigated Negative Declaration ("MND");

[1] Public Resources Code ("PRC") §§ 21000, et seq.; CEQA Guidelines, 14 CCR §§ 15000, et seq. The 2021 CEQA statute and CEQA Guidelines are available to download at: https://www.califaep.org/statute_and_guidelines.php.

- portray the "fair argument" test under CEQA, which establishes the low threshold for requiring an EIR, as a higher burden of proof for project challengers than it actually is under the statute and controlling caselaw;

- advance a double standard, where County planning staff and project applicants are permitted to present absolute conclusions dismissing the potential for significant environmental impacts that are nothing more than unsubstantiated opinion while at the same time staff and applicant's criticize substantiated comments from the public, other agencies, and County planners concerning potentially significant impacts that may be caused by proposed projects as lacking sufficient evidentiary and expert support; and

- imply that County decision-makers have discretion to decide to prepare an MND instead of an EIR based on practical considerations, such as whether more in-depth environmental impact analysis would change the outcome, rather than on the required factual and legal basis.

The above inaccurate characterizations appear to be based on several fundamental misunderstandings of the CEQA statute and CEQA Guidelines and their application to discretionary project approvals. NEC and CSH submit the following general comments with the hope of improving understanding of CEQA's standards and requirements as they apply to important land use decisions with substantial environmental implications. NEC and CSH seek to inform decision-makers and the public about CEQA's substantive and procedural requirements in order to foster improved public participation and help ensure decisions with major long-term implications for the environment are based on an accurate understanding of these important legal concepts.

At the most recent Planning Commission meeting on Thursday, April 22, 2021, in response to a question from Commissioner Noah Levy concerning the criteria the Planning Department uses when determining whether an MND rather than an EIR should be prepared, Planning Director John Ford made several inaccurate statements concerning CEQA's requirements for EIRs and MNDs.[2] For example, Director Ford falsely claimed that the two types of documents "do very much the same thing," provide essentially the "same analysis," and the level of study is "very similar."[3] The primary distinguishing feature between the two documents, according to the Director, is that, with an EIR, the identified potentially significant impacts do not all have to be mitigated to less-than-significant levels – for impacts that are not fully mitigated, the lead agency can make "findings of overriding considerations" and approve the project anyway. In addition to falsely equating an MND and an EIR, the Planning Director did not mention that, even with an EIR, all feasible mitigation measures must be adopted

[2] See video of Planning Commission meeting for April 22, 2021, hearing re Arcata Land Company, LLC, Conditional Use Permit (PLN-12255-CUP), at hour mark 2:03 to 2:10, available at: http://humboldt.granicus.com/MediaPlayer.php?view_id=5&clip_id=1489.

[3] *See id.* at approximately 2:07, 2:09, 2:10 marks of the video.

before a lead agency can adopt a Statement of Overriding Considerations. Also, by omitting any mention of the "fair argument" standard – CEQA's "low threshold requirement for preparing an EIR," [4] the Planning Director side-stepped the Commissioner's direct question on the criteria used by staff to determine whether an EIR should be prepared. We address the implications of each of these problematic issues below.

The explanation provided by the Director in response to Commissioner Levy's question is unresponsive, inaccurate, and potentially misleading in several respects. For example, the Director's statements (1) do not address the Commissioner's question of what criteria the Planning Department uses to determine whether an EIR, as opposed to an MND, is required (see video at 2:03 mark) and (2) inaccurately characterize the substantive requirements for both types of CEQA documents as equivalent, when they most assuredly are not.

With respect to the first point above, the Director did not acknowledge that, pursuant to the mandatory language of the CEQA statute and CEQA Guidelines, an MND is only allowed when the Initial Study demonstrates with substantial evidence that, after incorporating mitigation measures, a proposed project will "clearly" not cause "any significant effect on the environment."[5] In contrast, an EIR is required when there is a fair argument, based on substantial evidence, that a project "may" cause one or more potentially significant impacts.[6] In other words, when an MND is prepared, the burden is on the lead agency (here the County) to demonstrate with supporting evidence and transparent analysis that, with incorporated mitigation measures and project design changes, there is no possibility that the proposed project may cause significant impacts. If commenters present any substantial evidence supporting a fair argument that the project may cause significant impacts, then an EIR is required – even if there is also substantial evidence that the project may not cause significant

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[4] *See Sierra Club v. California Dept. of Forestry & Fire Protection* (2007) 150 Cal. App. 4th 370, 380, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84 and citing *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309–310.

[5] *See* PRC, §§ 21064.5, 21080(c); *see* CEQA Guidelines, §§ 15070 and 15369.5; *see also* Exhibit A: Excerpts from Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (11th ed. 2007), pp. 249-256, 262-263, 312-313, 329.

*Note: While the Guide to CEQA has not been republished since 2007, this painstakingly thorough treatise on the substantive and procedural requirements of CEQA remains an authoritative reference resource, repeatedly cited by appellate courts, concerning California's most important environmental statute. (*See*, *e.g.*, *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201, 1207, 1211, quoting Guide to CEQA; *see also Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139, same; *see also California Clean Energy Committee v. City of San Jose* (2013) 220 Cal.App.4th 1325, 1336, fn. 3, same.) The thoughtful explanations in the Guide to CEQA concerning CEQA's general structure and requirements remain relevant and informative. However, all citations to the statute and to caselaw in this treatise should be double-checked to ensure accurate and up-to-date information.

[6] *See id.* at p. 329; *see also*, e.g., *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320, citing *No Oil, supra*, 13 Cal.3d at p. 75 and *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504-505.

impacts. An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.[7] According to the Guide to CEQA, "credible expert testimony that a project may have a significant impact, even if contradicted, is generally dispositive and under such circumstances an EIR must be prepared. [Citation.] Indeed, an EIR is required precisely in order to resolve the dispute among experts."[8]

The Director's conspicuous omission of any reference to the "fair argument" standard is potentially misleading to both the decision-makers and to the public because it ignores altogether the central threshold question placed directly at issue in Commissioner Levy's question. Unfortunately, the pattern of mischaracterizing CEQA's standards and requirements goes deeper and further back. Several weeks ago, a project applicant's attorney went further by actually misrepresenting the "fair argument" standard when defending the Planning Commission's approval of a large commercial cannabis project in remote McCann.[9] During that meeting, counsel for the applicant quoted non-controlling dicta in an outlying appellate court decision as support for his argument that, under the "fair argument" test, project challengers must present substantial evidence showing that a project "will" have a significant impact on the environment.[10] As the undersigned pointed out at the time and again after the hearing, this characterization of the applicable standard is inconsistent with the language of the CEQA statute, the CEQA Guidelines, and controlling caselaw.[11] The applicant's characterization of the standard would improperly shift the burden to project opponents to analyze a proposed project's impacts. No one from the County – not planning staff or county counsel – corrected this blatant mischaracterization of a central legal principle.[12] On the contrary, planning staff's

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[7] *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318.

[8] *See* Exh. A – Guide to CEQA, p. 262.

[9] *See* video of Board of Supervisors meeting on March 9, 2021, concerning the Rolling Meadow Ranch appeal, hour mark: 4:59; available at: http://humboldt.granicus.com/MediaPlayer.php?view_id=5&clip_id=1479, accessed April 27, 2021.

[10] *See id.* at approximately 5:00 hour mark; stating "Under the fair argument standard, an environmental impact report is required if there is substantial evidence that a project will have a significant effect on the environment, even if there is also substantial evidence to the contrary", emphasis in the original, quoting *Friends of the Sierra R.R. v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 661 [holding transfer or land to tribe not a "project" under CEQA], citing CEQA Guidelines, § 15064(f)(1) [guideline provision using the word "may"].

[11] *See* Public Resources Code, §§ 21064.5, 21080(c)(1)-(2), 21080(d), 21082.2; *see also* CEQA Guidelines, §§ 15002(f), 15002(k), 15063, 15064(b)(1), 15064(f), 15064(g); *see also*, *e.g.*, *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310 ["The test is whether 'it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact"], emphasis added, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75. The undersigned sent a letter to counsel for the applicant, the Planning Director, and County Counsel the day after the appeal hearing, requesting correction of this mischaracterization.

[12] During the appeal hearing, Director Ford did address the "fair argument" test but only insofar as to claim that the substantial evidence cited by appellants and other commenters, including CDFW, concerning the project's potential to cause significant impacts, was not sufficiently substantial to meet the "fair argument" test. *See id.* at hour mark: 5:08 – 5:09.

internally inconsistent characterizations of (1) the expert opinion and agency comments supporting project challenger's arguments in support of an EIR as insufficient and (2) unsupported conclusions by planning staff and unqualified third parties (e.g., a well driller) as sufficient reveal a blatant double-standard that is inconsistent with CEQA's definition of "substantial evidence." These instances where the "fair argument" standard has been disregarded, misrepresented, and/or misapplied have the potential to mislead the public and undermine sound decision making.

With respect to the second point, contrary to the Planning Director's characterization of the MNDs and EIRs providing the "same analysis," CEQA imposes heightened substantive requirements for an EIR that do not apply to an MND. These requirements, specific to an EIR, tend to result in a much more robust analysis of environmental impacts and a more comprehensive consideration of the ways those impacts can be reduced through mitigation or avoided through alternatives and project design changes.

For example, the CEQA statute and CEQA Guidelines provide that an EIR must provide an analysis of project alternatives that can avoid or reduce a project's potentially significant impacts.[13] An MND need not address alternatives to a proposed project. As a consequence, decision makers have no opportunity to consider a project alternative for approval, rather than the project as proposed by the applicant. MND's constrain the opportunities for impact minimization and avoidance.

As an illustration, if an EIR had been prepared for the Rolling Meadow Ranch project, as opposed to the adopted MND, an analysis of a reasonable range of feasible project alternatives would have been required. County decision-makers could have considered this range of project alternatives for approval – such feasible alternatives could have included (as suggested by Supervisor Madrone on March 9th) a fully sun-grown, in the ground, cannabis cultivation project alternative with improved road access for fire safety and increased rainwater catchment and seasonal groundwater pumping forbearance – an alternative that, in connection with natural cycles, is seasonally closed during the winter when the McCann Bridge on the Eel River is submerged.

Further, under Public Resources Code, section 21081, when an EIR has been prepared, the lead agency is required to make specific findings of fact that are not required when an MND is the operative CEQA document.[14] This is the area where the Board has some discretion and limited latitude to find that overriding considerations make a project worth approving, despite its unavoidable significant impacts. But in order to make this finding, the board must first do all

[13] PRC sections 21002.1(a), 21061, and 21153, and CEQA Guidelines, sections 15082, 15083, 15121, 15124, 15126, 15126.6; *see also* Exh. A – Guide to CEQA, pp. 413, 494-495.

[14] *See* PRC, § 21081; CEQA Guidelines, § 15093; *see also* Exh. A – Guide to CEQA, p. 411.

it feasibly can to mitigate and avoid the significant impact.[15] The Planning Director's recent explanation of "findings of significant impacts" suggested that, when proceeding with an EIR, the lead agency may have less of a responsibility to fully mitigate impacts than when adopting an MND, and this is simply not the case. With either document, the lead agency has a mandatory duty to adopt feasible mitigation measures for every identified significant environmental impact.

Preparing an EIR is an iterative multi-step process, where the lead agency (or an applicant's consultant with staff direction) conducts preliminary review or prepares an initial study to determine the potential for significant environmental impacts, conducts scoping in consultation with responsible and trustee agencies, and prepares a draft EIR covering a number of mandatory issues.[16] Public and responsible agencies are provided an opportunity to comment on the draft EIR, and, pursuant to Public Resources Code, section 21091(d)(2), the lead agency is required to respond to public and agency comments and revise the analysis, if necessary, in a final EIR.[17] In contrast, the lead agency is not required to respond to public and agency comments on an MND. The practical result of this requirement, where the lead agency is required to answer – in real time – for its Draft EIR analysis, is that the Final EIR is typically both more thorough in its initial evaluation of potentially significant environmental impacts and, through a process of disclosure, comments, responses, and revisions, is better grounded in factual and scientific information.

NEC and CSH acknowledge that, for smaller projects located in already developed areas, an MND may be sufficient to provide the appropriate level of impact analysis. With these projects, it is more likely that the Initial Study can determine, after completion of a thorough investigation in an Initial Study, that "clearly" the project will not cause any significant environmental impacts. However, for larger projects and projects proposed for undeveloped "greenfield" sites in remote areas of the County, an EIR may be necessary to fully analyze the project's potentially significant impacts and identify feasible mitigation measures and alternatives that can minimize and avoid impacts. This is especially true for projects that have garnered significant public controversy over clearly legitimate factually-grounded concerns. No matter which CEQA document is prepared for individual projects, it is incumbent on County

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[15] *See King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 852 ["'Even when a project's benefits outweigh its unmitigated effects, agencies are still required to implement all mitigation measures unless those measures are truly infeasible.' [Citation] Stated another way, 'if the County were to approve a project that did not include a feasible mitigation measure, such approval would amount to an abuse of discretion'"], quoting *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 525-526.

[16] *See* CEQA Guidelines, §§ 15060, 15063, 15064, 15080-15097 [EIR Process], 15120- 15132 [EIR Contents]; *see also* Exh. A – Guide to CEQA, pp. 329, 413.

[17] *See* PRC, §§ 21091(d)(2), 21092.5; CEQA Guidelines, § 15088, 15088.5(f); *see also* Exh. A – Guide to CEQA, p. 371-374, 411.

decision makers to ensure that the appropriate level of analysis is performed, based on sound investigation of the facts and faithful application of the correct legal standards.

NEC and CSH appreciate the opportunity to provide these general comments to County planning staff and to the County's elected decision-makers. We sincerely hope that the explanations and clarifications herein – supported by the attached treatise experts and citations to the CEQA statute, CEQA Guidelines, and caselaw – provide helpful information that will lead to improved public participation, more robust environmental review for projects that have the potential to cause significant environmental impacts, and sound decision-making.

Please contract us if you have any questions, concerns, or other responses to the issues raised in these general comments.

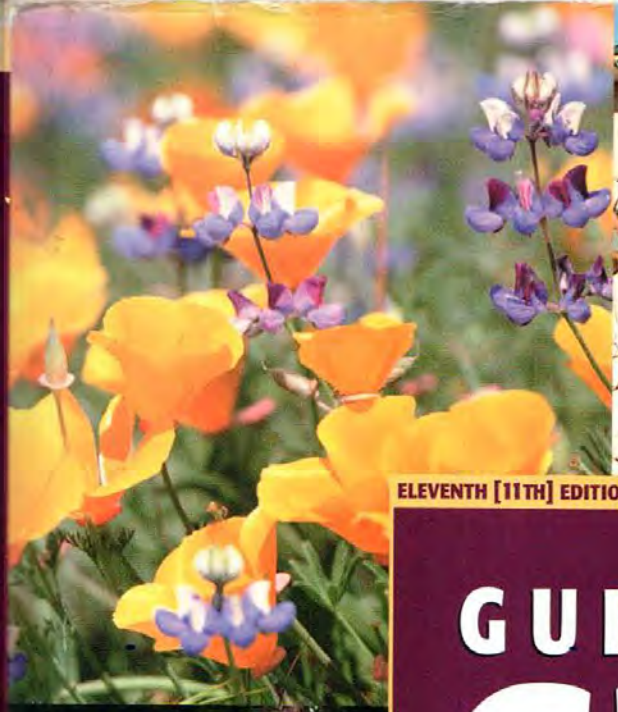
Very truly yours,

Jason W. Holder
Holder Law Group

cc: (via email only)
Humboldt County Planning Commission (c/o: Planningclerk@co.humboldt.ca.us)
Jefferson Billingsley, Humboldt County Counsel (Countycounsel@co.humboldt.ca.us)
Client contacts

Attachments:
Exhibit A – Relevant excerpts from Guide to the California Environmental Quality Act (Remy, et al., 2007), with highlighted text.

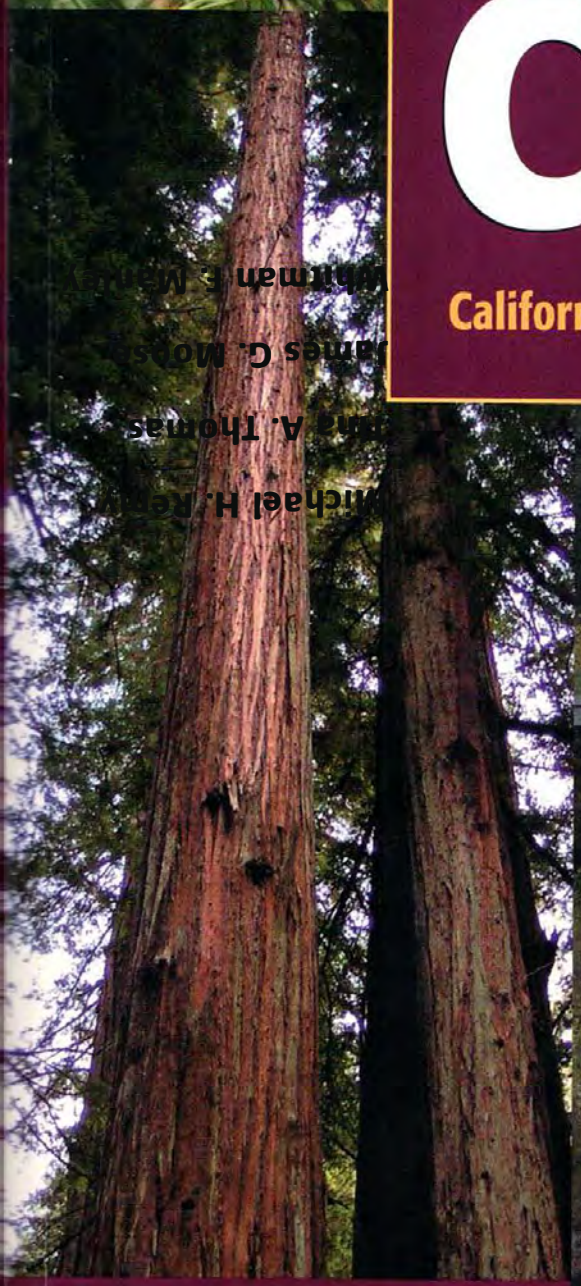
Exhibit Y



ELEVENTH [11TH] EDITION

GUIDE TO CEQA

California Environmental Quality Act



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at a glance...

CHAPTER VIII

The Initial Study

A. In General

The initial study is the preliminary analysis that the lead agency prepares in order to determine whether to prepare a negative declaration or an EIR and, if necessary, to identify the impacts to be analyzed in the EIR.

CEQA = California Environmental Quality Act
EIR = Environmental impact report

Under CEQA, it is the responsibility of the lead agency to determine whether an EIR shall be required. Initially, "[t]he task of the lead agency is not to determine whether the project will have a significant effect on the environment, but only whether it might have such an effect." *Friends of Davis v. City of Davis* (3d Dist. 2000) 83 Cal. App. 4th 1004, 1016 [100 Cal. Rptr. 2d 413]. Accordingly, the initial study is the "preliminary analysis" that the lead agency prepares in order to determine whether to prepare a negative declaration or an EIR and, if necessary, to identify the impacts to be analyzed in the EIR. CEQA Guidelines, § 15365.[1] "The initial study is largely a creature of the Guidelines [citation omitted]; CEQA refers to it only glancingly (*e.g.*, [Pub. Resources Code,] § 21080, subd. (c)(2)." *Gentry v. City of Murrieta* (4th Dist. 1995) 36 Cal. App. 4th 1359, 1376 [43 Cal. Rptr. 2d 170].

When the agency determines that an EIR is unnecessary, the study serves the purpose of "[p]rovid[ing] documentation of the factual basis" for concluding that a negative declaration will suffice. CEQA Guidelines, § 15063, subd. (c)(5). Any person may submit any information in any form to assist a lead agency in preparing an initial study. *Id.* at subd. (e). "An initial study may rely upon expert opinion supported by facts, technical studies or other substantial evidence to document its findings. However, an initial study is neither intended nor required to include the level of detail required in an EIR." *Id.* at subd. (a)(3).

At least in some situations, a lead agency may defer the preparation of an initial study until the agency has developed a project description based on preliminary consultants' reports, staff recommendations, public input, and/or direction from appointed or elected decisionmakers. *Uhler v. City of Encinitas* (4th Dist. 1991) 227 Cal. App. 3d 795, 799–804 [278 Cal. Rptr. 157], disapproved on other grounds in *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (4th Dist. 1994) 29 Cal. App. 4th 1597, 1603 [35 Cal. Rptr. 2d 470].[2]

CHAPTER IX

Negative Declarations

A. The "Fair Argument" Standard

A "negative declaration" is "a written statement by the lead agency briefly describing the reasons that a proposed project...will not have a significant effect on the environment and therefore does not require the preparation of an EIR." CEQA Guidelines, § 15371.[1]

An EIR is required, in contrast, whenever substantial evidence in the record supports a "*fair argument*" that significant impacts *may* occur. Even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75 [118 Cal. Rptr. 34] (*No Oil I*); *Friends of "B" Street v. City of Hayward* (1st Dist. 1980) 106 Cal. App. 3d 988, 1000–1003 [165 Cal. Rptr. 514].[2]

The "fair argument" standard creates a "low threshold" for requiring preparation of an EIR. *Citizens Action to Serve All Students v. Thornley* (1st Dist. 1990) 222 Cal. App. 3d 748, 754 [272 Cal. Rptr. 83]; *Sundstrom v. County of Mendocino* (1st Dist. 1988) 202 Cal. App. 3d 296, 310 [248 Cal. Rptr. 352] (*Sundstrom*) (quoting *No Oil I, supra*, 13 Cal. 3d at p. 75). The standard is founded upon the principle that, because adopting a negative declaration has a "terminal effect on the environmental review process" (*Citizens of Lake Murray Area Assn. v. City Council* (4th Dist. 1982) 129 Cal. App. 3d 436, 440 [181 Cal. Rptr. 123]), an EIR is necessary to "substitute some degree of factual certainty for tentative opinion and speculation" and to resolve "uncertainty created by conflicting assertions" (*No Oil I, supra*, 13 Cal. 3d at p. 85 (quoting *County of Inyo v. Yorty* (3d Dist. 1973) 32 Cal. App. 3d 795, 814 [108 Cal. Rptr. 377])). As one court recently put it, "[t]hese legal standards reflect a preference for requiring an EIR to be prepared." *Mejia v. City of Los Angeles* (2d Dist. 2005) 130 Cal. App. 4th 322, 332 [29 Cal. Rptr. 3d 788].

The CEQA Guidelines define a "significant effect on the environment" as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." CEQA

at a glance...

CEQA = California Environmental Quality Act
EIR = Environmental impact report

Guidelines, § 15382. The determination of whether an impact is "significant" "calls for careful judgment on the part of the agency involved, based to the extent possible on scientific and factual data. An iron clad definition of significant effect is not always possible because the significance of an activity may vary with the setting." CEQA Guidelines, § 15064, subd. (b); *see City of Orange v. Valenti* (4th Dist. 1974) 37 Cal. App. 3d 240, 249 [112 Cal. Rptr. 379] (analysis of project's traffic impacts necessarily depends on existing environmental setting).

In some instances, the Legislature has directed that the lead agency must find an impact significant.

In some instances, the Legislature has directed that the lead agency *must* find an impact significant. Pub. Resources Code, § 21083, subd. (a); CEQA Guidelines, § 15065. For a discussion of these "mandatory findings of significance," *see* chapter VII (Application of CEQA), section E. In other instances, the Legislature has directed that, for certain types of projects, the lead agency must always prepare an EIR. For a discussion of these sorts of projects, *see* chapter VII (Application of CEQA), section F.

In the absence of an impact necessarily deemed significant, the lead agency has discretion to adopt standards for determining whether an impact is significant.

In the absence of an impact necessarily deemed significant, the lead agency has discretion to adopt standards for determining whether an impact is significant. In recent years, interest has focused on encouraging agencies to develop standardized "thresholds of significance," rather than to continue making ad hoc determinations in the context of particular projects. CEQA provides agencies with authority to develop and formally adopt such thresholds. CEQA Guidelines, § 15064.7; Pub. Resources Code, § 21082. Such thresholds provide a benchmark for measuring a project's impacts, and thus serve an important function in determining whether the agency must prepare an EIR. For a discussion of the development and use of thresholds of significance, including standards formally adopted for the purpose of environmental protection, *see* chapter VII (Application of CEQA), section D.

1. Evolution of the "Fair Argument" Standard

a. The First District Court of Appeal's Articulation of the "Fair Argument" Rule in *Friends of "B" Street* and Its Progeny. Perhaps the most influential Court of Appeal case articulating the so-called "fair argument" standard is *Friends of "B" Street v. City of Hayward* (1st Dist. 1980) 106 Cal. App. 3d 988, 1000–1103 [165 Cal. Rptr. 514] (*Friends of "B" Street*), in which the First District Court of Appeal required an EIR for a proposed road improvement project, despite the respondent city's insistence that a negative declaration sufficed. Although in recent years *Friends of "B" Street* has been cited with decreasing frequency, the decision spawned a thriving line of cases adopting its approach. *Friends of "B" Street* and its progeny are discussed in detail below.

i. *Friends of "B" Street v. City of Hayward* (1980) 106 Cal. App. 3d 988 [165 Cal. Rptr. 514]. In *Friends of "B" Street v. City of Hayward* (1980) 106 Cal. App. 3d 988 [165 Cal. Rptr. 514], the court applied a variant of the traditional "substantial evidence" standard of review. Under the traditional rule as applied in most administrative law contexts, a reviewing court typically defers to an agency's factual determinations where they are supported by credible evidence–even where the administrative record includes equally or more credible contrary evidence. Under such a standard of review, agencies' findings of fact are difficult to challenge successfully. *See* 2 Longtin, California Land Use (2d ed. 1987) §§ 12.03[3], pp. 1062–1063, 12.04[4], pp. 1069–1070; *id.* (2005 Supp.), §§ 12.03[3], pp. 857–859, 12.04[4], pp. 866–868.

Under the *Friends of "B" Street* approach, however, reviewing courts are not so deferential to agency decisions. Where the question before the agency is whether a proposed project may cause significant environmental effects, the obligation to prepare an EIR may exist even where the agency can point to substantial evidence indicating that no such effects will occur. Where the record includes some substantial evidence supporting a "fair argument" that significant effects may occur, it does not matter whether the agency finds such evidence persuasive. The agency's task is not to weigh competing evidence and to determine whether, in fact, a significant impact on the environment *will* occur; rather, the proper task is to determine whether the record before the agency contains substantial evidence supporting a fair argument that a significant impact *may* occur. The agency need not find such evidence compelling; the agency must simply find that the "fair argument" has been presented, and is supported by substantial evidence. Thus, a reviewing "trial court's function is to determine whether substantial evidence supported the agency's conclusion as to whether the prescribed '*fair argument*' could be made." 106 Cal. App. 3d at p. 1002 (italics added).[3]

Although this approach ostensibly requires a court to determine whether substantial evidence supports the *agency's* assessment of whether a fair argument can be made, in practice reviewing courts have often exercised their own judgment in searching the record:

> Stated another way, if the *trial court* perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency's action is to be set aside because the agency abused its discretion by failing to proceed "in a manner required by law."

Id. at p. 1002 (italics added)

After the Court of Appeal issued its decision in *Friends of "B" Street*, the Legislature codified the "fair argument" rule. Pub. Resources Code, §§ 21080, subds. (c), (d), 21100, subd. (a). The CEQA Guidelines also incorporate this standard. CEQA Guidelines, § 15064, subd. (f)(1).

ii. ***Lucas Valley Homeowners Association v. County of Marin*** (1st Dist. 1991) 233 Cal. App. 3d 130 [284 Cal. Rptr. 427]. In reviewing an agency's application of the "fair argument" standard, a court must undertake an independent review of the record. The purpose of such review is to determine whether substantial evidence supports the agency's conclusion regarding whether the record supports a "fair argument" that the project may have a significant impact on the environment. *Lucas Valley Homeowners Association v. County of Marin* (1st Dist. 1991) 233 Cal. App. 3d 130, 142 [284 Cal. Rptr. 427] (*Lucas Valley*).[4] Thus, in *Lucas Valley*, the Court of Appeal both independently reviewed the record to determine whether it contained substantial evidence that a synagogue would induce future growth, and otherwise "comb[ed] the record for substantial evidence supporting a fair argument of significant effects on the environment." *Id.* at pp. 161–162. The court then dismissed the evidence relied upon by the petitioners as mere opinions and generalized concerns. *Id.* at pp. 163–164.

In reviewing an agency's application of the fair argument standard, a court must undertake an independent review of the record.

iii. ***Sierra Club v. County of Sonoma*** (1st Dist. 1992) 6 Cal. App. 4th 1307 [8 Cal. Rptr. 2d 473]. In *Sierra Club v. County of Sonoma* (1st Dist. 1992) 6 Cal. App. 4th 1307 [8 Cal. Rptr. 2d 473] (*Sierra Club*), the Court of Appeal for the First District explained that a court

reviewing an agency's decision as to whether a "fair argument" has been made is presented with an issue of "law," as opposed to one of "fact":

> A court reviewing an agency's decision not to prepare an EIR in the first instance must set aside the decision if the administrative record contains substantial evidence that a proposed project might have a significant environmental impact; in such a case, the agency has not proceeded as required by law. [Citation.] Stated another way, *the question is one of law, i.e., "the sufficiency of the evidence to support a fair argument."* [Citation.] Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.

6 Cal. App. 4th at pp. 1317–1318 (italics added)[5]

The court went on to hold that, in the case at hand, expert testimony that expanded gravel operations might have a significant impact on the environment constituted substantial evidence supporting a "fair argument," notwithstanding the contrary opinions of other experts. 6 Cal. App. 4th at pp. 1322–1323.

iv. Other First District Decisions Following *Friends of "B" Street*. In addition to *Lucas Valley Homeowners Association v. County of Marin* (1st Dist. 1991) 233 Cal. App. 3d 130 [284 Cal. Rptr. 427] and *Sierra Club v. County of Sonoma* (1st Dist. 1992) 6 Cal. App. 4th 1307 [8 Cal. Rptr. 2d 473], other decisions of the First District Court of Appeal have cited and followed *Friends of "B" Street v. City of Hayward* (1980) 106 Cal. App. 3d 988 [165 Cal. Rptr. 514] in cases involving the propriety of agencies' reliance on negative declarations rather than EIRs:

- *City of Livermore v. Local Agency Formation Commission* (1st Dist. 1986) 184 Cal. App. 3d 531, 540–542 [230 Cal. Rptr. 867] (EIR was required for a proposed revision to respondent LAFCO's "sphere of influence guidelines")
- *City of Antioch v. City Council* (1st Dist. 1986) 187 Cal. App. 3d 1325, 1330– 1331 [232 Cal. Rptr. 507] (EIR was ordered for a road and sewer construction project, even in the absence of specific development proposals)
- *Heninger v. Board of Supervisors* (1st Dist. 1986) 186 Cal. App. 3d 601, 605–607 [231 Cal. Rptr. 1[illegible]] (EIR was required for enactment of an ordinance allowing the use of "alternative sewage disposal systems")
- *Cathay Mortuary, Inc. v. San Francisco Planning Commission* (1st Dist. 1989) 207 Cal. App. 3d 275 [254 Cal. Rptr. 778] (even under the "fair argument" standard, no EIR was required for the condemnation of a funeral parlor site for development of a public park)
- *Citizen Action to Serve All Students v. Thornley* (1st Dist. 1990) 222 Cal. App. 3d 748 [272 Cal. Rptr. 83] (EIR was not required for a school closure plan); and
- *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1st Dist. 1997) 52 Cal. App. 4th 896, 904–905 [60 Cal. Rptr. 2d 821] (negative declaration was inappropriate for a project involving the demolition of an historical resource)

b. Other Appellate Interpretations of the "Fair Argument" Standard. The other five appellate districts have also embraced the standard articulated by the First District Court of Appeal in *Friends of "B" Street v. City of Hayward* (1st Dist. 1980) 106 Cal. App. 3d 988, 1000–1003 [165 Cal. Rptr. 514]:

The other five appellate districts have also embraced the standard articulated by the First District Court of Appeal in Friends of "B" Street v. City of Hayward.

- *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (2d Dist. 1982) 134 Cal. App. 3d 491, 504 [184 Cal. Rptr. 664] (if an agency does not prepare an EIR despite substantial evidence that the project may have environmental impacts, the agency has abused its discretion)
- *Pistoresi v. City of Madera* (5th Dist. 1982) 138 Cal. App. 3d 284, 288 [188 Cal. Rptr. 136] (if there is substantial evidence the project might have a significant environmental impact, "evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR...because it could be 'fairly argued' the project might have a significant environmental impact")
- *Christward Ministry v. Superior Court* (4th Dist. 1986) 184 Cal. App. 3d 180, 187 [228 Cal. Rptr. 868] ("[o]n a claim an EIR rather than a negative declaration should have been prepared, the courts look to see if there was substantial evidence to support the agency's conclusion it could not be 'fairly argued' the project would have a significant environmental impact")
- *Schaeffer Land Trust v. San Jose City Council* (6th Dist. 1989) 215 Cal. App. 3d 612, 621 [263 Cal. Rptr. 813] (a reviewing court must uphold the agency's decision not to prepare an EIR if "substantial evidence supports a conclusion that it cannot be fairly argued on the basis of substantial evidence that the project may have significant environmental impact")
- *Oro Fino Gold Mining Corp. v. County of El Dorado* (3d Dist. 1990) 225 Cal. App. 3d 872, 881 [274 Cal. Rptr. 720] ("[i]f the initial study reveals the project 'may' have a significant environmental effect, an EIR must be prepared; the word 'may' connotes a reasonable possibility")
- *Leonoff v. Monterey County Board of Supervisors* (6th Dist. 1990) 222 Cal. App. 3d 1337, 1348 [272 Cal. Rptr. 372] ("[a] public agency should not file a negative declaration for a project if it can be fairly argued that the project might have a significant environmental impact")
- *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (4th Dist. 1994) 29 Cal. App. 4th 1597, 1603 [35 Cal. Rptr. 2d 470] (in applying the appropriate standard of review, courts must "review the record and determine whether there is substantial evidence in support of a fair argument the [project] may have a significant environmental impact, while giving the City the benefit of the doubt on any legitimate, disputed issues of credibility")[6]
- *Gentry v. City of Murrieta* (4th Dist. 1995) 36 Cal. App. 4th 1359, 1400 [43 Cal. Rptr. 2d 170] (lead agency's determination under "fair argument" standard is "largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument")
- *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (5th Dist. 1995) 33 Cal. App. 4th 144, 151 [39 Cal. Rptr. 2d 54] (when reviewing an

agency's determination that an EIR is not required, the court's application of the applicable standard of review "is a question of law and deference to the agency's determination is not appropriate")

- *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (5th Dist. 1996) 42 Cal. App. 4th 608, 617–618 [49 Cal. Rptr. 2d 494] ("[w]hen a challenge is brought to an agency's determination an EIR is not required, 'the reviewing court's "function is to determine whether substantial evidence supported the agency's conclusion as to whether a 'fair argument' could be made"'"); and
- *The Pocket Protectors v. City of Sacramento* (3d Dist. 2004) 124 Cal. App. 4th 903, 929–932 [21 Cal. Rptr. 3d 971] (court holds that fair argument can be made where project opponents adduce substantial evidence that a proposed project would conflict with a land use plan, policy, or regulation "adopted for the purpose of" environmental protection (citing CEQA Guidelines, appen. G, § IX, subd. (b)))

2. Judicial Review of the "Substantiality" of Evidence in Support of a Fair Argument

Under CEQA, the question of whether an agency's administrative record contains substantial evidence supporting the agency's decision is one of law.

Under CEQA, the question of whether an agency's administrative record contains substantial evidence supporting the agency's decision is one of law. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 570–574 [38 Cal. Rptr. 2d 139] (*WSPA*). This principle–as applied to the evidence purporting to support the need for an EIR–is reflected in decisions such as:

- *Sierra Club v. County of Sonoma* (1st Dist. 1992) 6 Cal. App. 4th 1307, 1317–1318 [8 Cal. Rptr. 2d 473] (review of an agency's decision not to prepare an EIR is a question of law, "i.e., 'the sufficiency of the evidence to support a fair argument[ ]'"; "[u]nder this standard, deference to the agency's determination is not appropriate")
- *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (4th Dist. 1994) 29 Cal. App. 4th 1597, 1603 [35 Cal. Rptr. 2d 470] (when reviewing an agency's decision not to prepare an EIR, the court applies a "hybrid, quasi-independent standard of review")
- *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (5th Dist. 1995) 33 Cal. App. 4th 144, 151 [39 Cal. Rptr. 2d 54] (when reviewing an agency's determination that an EIR is not required, the court's application of the applicable standard of review "is a question of law and deference to the agency's determination is not appropriate")
- *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1st Dist. 1997) 52 Cal. App. 4th 896, 904–905 [60 Cal. Rptr. 2d 821] (the question of whether a fair argument can be made such that an EIR must be prepared is one of law, "i.e., 'the sufficiency of the evidence to support a fair argument'" (quoting *Bowman v. City of Petaluma* (1st Dist. 1986) 185 Cal. App. 3d 1065, 1073 [230 Cal. Rptr. 413]))
- *Silveira v. Las Gallinas Valley Sanitary District* (1st Dist. 1997) 54 Cal. App. 4th 980, 986–987 [63 Cal. Rptr. 2d 244] ("the applicable standard of review appears to involve a question of law requiring a certain degree of independent

review of the record, rather than the typical substantial evidence standard which usually results in great deference being given to the factual determination of an agency" (quoting *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1602 [35 Cal. Rptr. 2d 470]))

According to the logic of *WSPA* and these other cases, a reviewing court, applying the fair argument standard, must independently scrutinize the record to determine whether substantial evidence supports a fair argument. That inquiry is legal, rather than factual.[7] This formulation implies that a reviewing court should not defer to an agency's assessment of whether a fair argument exists that a project may have a significant effect on the environment.

Even under the non-deferential approach identified in Friends of "B" Street v. City of Hayward *and its progeny, a reviewing court should carefully examine the evidence on which a petitioner bases its demand for an EIR.*

a. To Require Preparation of an EIR, Evidence Supporting a Fair Argument That the Project May Result in a Significant Environmental Impact Must Be "Substantial" When Viewed "in Light of the Whole Record." Even under the non-deferential approach identified in *Friends of "B" Street v. City of Hayward* (1st Dist. 1980) 106 Cal. App. 3d 988, 1000–1003 [165 Cal. Rptr. 514] and its progeny, a reviewing court should carefully examine the evidence on which a petitioner bases its demand for an EIR. Importantly, evidence that, if viewed in isolation, might seem to give rise to a "fair argument" may ultimately prove insubstantial after all if other information in the record shows that the "evidence" is merely speculation or unsubstantiated opinion, or is inaccurate or misleading. As the Court of Appeal recently observed, the "fair argument" threshold is low, but it is not so low as to be non-existent. *See Apartment Association of Greater Los Angeles v. City of Los Angeles* (2d Dist. 2001) 90 Cal. App. 4th 1162, 1173–1176 [109 Cal. Rptr. 2d 504]. Speculative possibilities do not constitute substantial evidence, and "pure speculation with no evidentiary support" cannot trigger environmental review requirements:

> We do not believe an expert's opinion which says nothing more than "it is reasonable to assume" that something "potentially... may occur" constitutes... substantial evidence...."Substantial evidence" is defined in the CEQA guidelines to include "expert opinion supported by facts." It does not include "[a]rgument, speculation, unsubstantiated opinion or narrative."

90 Cal. App. 4th at p. 1176

Like the court in the *Apartment Association of Greater Los Angeles* case, the authors of this book believe that both the law and common sense preclude uncritical acceptance of opinions or testimony offered–whether by experts or by lay persons–as "substantial evidence" of the alleged significant adverse environmental effects of a project. Agencies often receive such opinions or testimony at the eleventh-hour of the project approval process from opponents of controversial development proposals; in situations where the testimony "is inherently improbable or if the witness is biased," or is "unsupported by the facts from which it is derived," such testimony does not constitute "substantial evidence." *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (2d Dist. 1982) 134 Cal. App. 3d 491, 504 [184 Cal. Rptr. 664]. Thus, the decisionmaker properly may disregard it and adopt a negative declaration. *Ibid.*

That said, agencies and project proponents should be aware that appellate courts in recent years seem to have been looking with an increasingly skeptical eye at negative declarations and mitigated negative declarations, especially in the context of controversial projects. Of the nine substantive challenges to negative declarations

set out in the published opinions in 2004 and 2005, only three negative declarations withstood judicial review. *Compare The Pocket Protectors v. City of Sacramento* (3d Dist. 2004) 124 Cal. App. 4th 903 [21 Cal. Rptr. 3d 791 (found mitigated negative declaration inadequate); *Architectural Heritage Association v. County of Monterey* (6th Dist. 2004) 122 Cal. App. 4th 1095 [19 Cal. Rptr. 3d 469] (same); *Ocean View Estates Homeowners Assn., Inc. v. Montecito Water District* (2d Dist. 2004) 116 Cal. App. 4th 396 [10 Cal. Rptr. 3d 451] (same); *Mejia v. City of Los Angeles* (2d Dist. 2005) 130 Cal. App. 4th 322 [29 Cal. Rptr. 3d 788] (same); *Lighthouse Field Beach Rescue v. City of Santa Cruz* (6th Dist. 2005) 131 Cal. App. 4th 1170 [31 Cal. Rptr. 3d 901] (found negative declaration inadequate); *County Sanitation Dist. No. 2 v. County of Kern* (5th Dist. 2005)127 Cal. App. 4th 1544 [27 Cal. Rptr. 3d 28] (same); *with Bowman v. City of Berkeley* (1st Dist. 2004) 122 Cal. App. 4th 572 [18 Cal. Rptr. 3d 814] (upheld mitigated negative declaration); *El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (3d Dist. 2004) 122 Cal. App. 4th 1591 [20 Cal. Rptr. 3d 224] (same); *Sierra Club v. The West Side Irrigation Dist.* (3d Dist. 2005) 128 Cal. App. 4th 690 [27 Cal. Rptr. 3d 223] (same). For this reason, when undertaking a project involving public controversy of any significant level, agencies and applicants would be prudent to exercise caution in proceeding with a negative declaration or mitigated negative declaration.

When undertaking a project involving public controversy of any significant level, agencies and applicants would be prudent to exercise caution in proceeding with a negative declaration or mitigated negative declaration.

Principles regarding the assessment of the substantiality of evidence supporting a "fair argument" that a project may result in significant adverse environmental effects are discussed in detail in the following sections.

Non-CEQA case law describes substantial evidence in two ways: first, as evidence of ponderable legal significance–reasonable in nature, credible, and of solid value; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

i. "Substantial" Evidence. Non-CEQA case law describes "substantial evidence" in two ways: first, as evidence of "ponderable legal significance…reasonable in nature, credible, and of solid value"; and second, as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion[.]" *County of San Diego v. Assessment Appeals Board No. 2* (4th Dist. 1983) 148 Cal. App. 3d 548, 555 [195 Cal. Rptr. 895] (citations and internal quotations omitted).[8] As discussed below, these general principles also apply in the CEQA context.

(A) Definition. CEQA expressly defines "substantial evidence," as that term is used in the context of a decision whether to prepare a negative declaration or an EIR:

> [S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. [¶] Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

Pub. Resources Code, § 21080, subds. (e)(1)–(2)[9]

Similarly, the CEQA Guidelines define the term "substantial evidence" as:

> [E]nough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.... [¶] Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

CEQA Guidelines, § 15384, subds. (a), (b)[10]

The court reasoned that the "positive effects of the project do not absolve the public agency from the responsibility of preparing an EIR to analyze the potentially significant negative environmental effects of the project, because those negative effects might be reduced through the adoption of feasible alternatives or mitigation measures adopted in the EIR." *Id.* at p. 1558; *see also* CEQA Guidelines, § 15063, subd. (b)(1) (fair argument test requires EIR where substantial evidence indicates the project may have significant impacts "regardless of whether the overall effect of the project is adverse or beneficial").[17]

Expert testimony that a project would not have a significant impact, if uncontradicted, constitutes substantial evidence in support of the agency's decision to adopt a negative declaration.

(C) Expert Testimony May Constitute Substantial Evidence. Expert testimony that a project would not have a significant impact, if uncontradicted, constitutes substantial evidence in support of the agency's decision to adopt a negative declaration. *Uhler v. City of Encinitas* (4th Dist. 1991) 227 Cal. App. 3d 795, 805 [278 Cal. Rptr. 157], disapproved on other grounds by *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (4th Dist. 1994) 29 Cal. App. 4th 1597, 1603 [35 Cal. Rptr. 2d 470] (*Quail Botanical Gardens*).

Credible expert testimony that a project may have a significant impact, even if contradicted, is generally dispositive; and under such circumstances, an EIR must be prepared.

At the same time, credible expert testimony that a project *may* have a significant impact, even if contradicted, is generally dispositive; and under such circumstances, an EIR must be prepared. *See City of Livermore v. Local Agency Formation Com.* (1st Dist. 1986) 184 Cal. App. 3d 531, 541–542 [230 Cal. Rptr. 867]. *But see Bowman v. City of Berkeley* (1st Dist. 2004) 122 Cal. App. 4th 572, 582, 583 [18 Cal. Rptr. 3d 814] (lead agency is entitled to discount expert testimony that lacks credibility). Indeed, an EIR is required precisely in order to resolve the dispute among experts. In *City of Carmel-by-the-Sea v. Board of Supervisors* (6th Dist. 1986) 183 Cal. App. 3d 229 [227 Cal. Rptr. 899] (*City of Carmel-by-the-Sea*), for example, the existence of disagreement among experts was a factor in the court's decision to require an EIR. Experts disagreed as to the extent of the wetlands that would be affected by the development project made possible by the proposed rezone. The experts in question applied differing definitions of "wetlands" and offered substantially different estimates of the amount of wetlands on the subject site. Faced with such contention, the court reasoned that "[t]he very uncertainty created by the conflicting assertions made by the parties...underscores the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation." *Id.* at pp. 247–249 (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 85 [118 Cal. Rptr. 34] (*No Oil I*)).[18]

Substantial evidence relevant to the agency's conclusions regarding the existence of a fair argument may come–perhaps unwittingly–from the lead agency itself.

(1) The Agency's Initial Study or Other Statements May Constitute Substantial Evidence Supporting a Fair Argument. Substantial evidence relevant to the agency's conclusions regarding the existence of a fair argument may come–perhaps unwittingly–from the lead agency itself. For example, in *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (5th Dist. 1995) 33 Cal. App. 4th 144 [39 Cal. Rptr. 2d 54] (*Stanislaus Audubon Society*), the Court of Appeal invalidated a negative declaration adopted by the respondent county in approving a project consisting of a golf course and club house. The court found that the record contained "overwhelming" evidence that the project would have significant, adverse, growth-inducing impacts. *Id.* at p. 152. In reaching this conclusion, the court noted that "[m]uch of the evidence of the potential growth-inducing impact of the proposed country club was generated by the County itself[,]" and included, among other things, an initial study prepared by the county "unequivocally" concluding that the "proposed project may act as a

catalyst to residential development," as well as statements from the county's air pollution control district, a member of the Planning Commission, and the California Department of Conservation to the effect that the project would be "growth-inducing." *Id.* at pp. 153–156.

The real party in interest argued that a revised initial study prepared by the county, which concluded that the analysis of residential development should be deferred into the future, "relegated the first initial study to oblivion." *Stanislaus Audubon Society, supra*, 33 Cal. App. 4th at p. 154. According to the real party, the revised study demonstrated that the county planning department had ultimately concluded that the project would not have a growth-inducing impact. In rejecting these arguments, the court stated that "[t]he fact that a *revised* initial study was later prepared does not make the first initial study any less a record entry nor does it diminish its significance, particularly when the revised study does not conclude that the project would not be growth inducing but instead simply proceeds on the assumption that evaluation of future housing can be deferred until such housing is proposed." *Ibid.* (italics in original).[19]

As in *Stanislaus Audubon Society*, the respondent county in *Architectural Heritage Association v. County of Monterey* (6th Dist. 2004) 122 Cal. App. 4th 1095 [19 Cal. Rptr. 3d 469] sought to disassociate itself from the substantial evidence placed in the record by agency staff in support of a fair argument, arguing that the expert opinions of its own staff were "subordinate to [those of] agency decision makers" and thus did not constitute substantial evidence because they were contradicted by the opinions of agency decisionmakers. *Id.* at p. 1115. Arguments of this nature are more typical in the context of an EIR, when agency staff and decisionmakers disagree over how to resolve conflicts in the evidence. In that context, the agency decisionmakers have the final word on how to resolve such conflicts. This sort of argument, however, is not typically advanced in the context of a negative declaration where the fair argument standard is at play, and for good reason–because it is unpersuasive. Under the fair argument standard, an agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a proposed project may have a significant effect on the environment. If such evidence is found, it cannot be overcome by substantial evidence to the contrary. Thus, under the fair argument standard, the decisionmakers are not asked to resolve conflicts in the evidence, but merely to determine whether substantial evidence exists to support a fair argument. In this case, the court concluded that the opinions of staff were substantial evidence supporting a fair argument, even where the agency's decisionmakers ultimately disagreed with those opinions.

Under the fair argument standard, the decisionmakers are not asked to resolve conflicts in the evidence, but merely to determine whether substantial evidence exists to support a fair argument.

Similarly, in *The Pocket Protectors v. City of Sacramento* (3d Dist. 2004) 124 Cal. App. 4th 903, 934 [21 Cal. Rptr. 3d 971], the court found that the findings of the planning commission constituted substantial evidence in support of a fair argument, even when the findings were later overruled by the city council. The planning commission denied a project and declined to adopt a negative declaration after finding that the project would cause previously unidentified significant land use impacts. The planning commission was later overruled in all respects by the city council. Nevertheless, the Court of Appeal held that the planning commission's conclusions, when supported by findings of fact in the record, were substantial evidence of a fair argument.

things the trier of fact is entitled to consider in passing on the credibility of witnesses are their motives and interest in the result of the case...and the inherent improbability of their testimony"); *Hamilton v. Abadjian* (1947) 30 Cal. 2d 49, 53 [179 P. 2d 804] ("[i]n passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case, his motive, the manner in which he testifies, and contradictions appearing in the evidence").

iii. Judicial Deference to Agency Credibility Determinations. Under the cases discussed in this chapter, section A.2.c, if the lead agency concludes that evidence that a project may have a significant environmental impact is insubstantial because it is unreliable, incredible, or inherently improbable, then a reviewing court may accord that determination some deference. In the authors' view, to qualify for such deference the lead agency should take care to identify the evidence in question with particularity, document the existence of a disputed issue of credibility with respect to the evidence, and explain why the agency regards the evidence as insubstantial. Absent this information, a reviewing court might have an inadequate basis for deferring to the agency's determinations regarding the substantiality of that evidence.

If the lead agency concludes that evidence that a project may have a significant environmental impact is insubstantial because it is unreliable, incredible, or inherently improbable, then a reviewing court may accord that determination some deference.

The need for limited deference in this context presents a conceptual problem: namely, how to square such deference with the normal lack of deference appropriate on the purely legal question of whether an administrative record includes substantial evidence supporting a "fair argument" that a project may cause significant environmental effects. This seeming anomaly can be resolved through a recognition that, in assessing the credibility of evidence, a lead agency engages in a limited form of "fact-finding," as to which judicial deference is appropriate. Thus, although a lead agency normally does not engage in any real fact-finding when it simply receives evidence submitted by members of the public or by sister agencies, the agency may cease to be passive, and instead act as a fact-finder, when, of its own volition or in reaction to the prompting of others, the agency chooses to assess whether particular items of evidence for some reason lack credibility, either in whole or in part.

3. Public Controversy

The lead agency must provide the public with an opportunity to review a proposed negative declaration. CEQA Guidelines, § 15073, subd. (a). Before the lead agency adopts a proposed negative declaration and approves a project, the agency must consider comments received during the public review process. CEQA Guidelines, § 15074, subd. (b).

The lead agency must provide the public with an opportunity to review a proposed negative declaration.

Until 1997, the CEQA Guidelines, in recognition of earlier case law, stated further that in "marginal cases" the existence of serious public controversy over a project could tip the scales in favor of preparing a full EIR. Former CEQA Guidelines, § 15064, subd. (h)(1); *see No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 85–86 [118 Cal. Rptr. 34] (*No Oil I*) ("the existence of serious public controversy concerning the environmental effect of a project in itself indicates that preparation of an EIR is desirable") (footnote omitted); *Brentwood Assn. for No Drilling v. City of Los Angeles* (2d Dist. 1982) 134 Cal. App. 3d 491, 505–506 [184 Cal. Rptr. 664] (noting in dicta that EIR should be prepared when there is a serious public controversy regarding the environmental effects of a project); *City of Carmel-by-the-Sea v. Board of Supervisors of Monterey County* (6th Dist. 1986) 183 Cal. App. 3d 229, 245–247 [227 Cal. Rptr. 899]

(pointing to existence of substantial opposition to proposed project as one factor supporting court's decision to require an EIR).[34]

The existence of public controversy over the environmental effects of a project does not require preparation of an EIR 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.

In subsequent years, however, the Legislature retreated from this principle. CEQA now provides: "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." Pub. Resources Code, § 21082.2, subd. (b) (italics added); *see also* CEQA Guidelines, § 15064, subd. (f)(4) (same). Under CEQA Guideline amendments approved in 1997, the lead agency must "*consider* the views held by members of the public in all areas affected as expressed in the whole record before the lead agency." CEQA Guidelines, § 15064, subd. (c) (italics added). Prior to 1997, however, this same section of the Guidelines had stated that, if the lead agency expected a "substantial body of opinion that considers or will consider the effects to be adverse," then the agency "shall regard the effect as adverse." CEQA Guidelines, § 15064, subd. (c). The 1997 amendment thus suggests that public opinion is no longer determinative.[35]

Absent any substantial evidence of potentially significant environmental effects, the public controversy surrounding a project does not preclude a negative declaration.

a. *Leonoff v. Monterey County Board of Supervisors* (6th Dist. 1990) 222 Cal. App. 3d 1337 [272 Cal. Rptr. 372]. In *Leonoff v. Monterey County Board of Supervisors* (6th Dist. 1990) 222 Cal. App. 3d 1337, 1359 [272 Cal. Rptr. 372], the court held that, "absent any substantial evidence of potentially significant environmental effects, the public controversy" surrounding a proposed contractor's service center "did not preclude a negative declaration." Citing Public Resources Code section 21082.2,[36] the court stated that "[p]ublic controversy unsupported by substantial evidence of environmental effects does not require an EIR. [Citation omitted.] In other words, feelings are not facts to govern environmental decisions." *Id.* at p. 1359.[37]

b. *Meridian Ocean Systems, Inc. v. California State Lands Com.* (2d Dist. 1990) 222 Cal. App. 3d 153 [271 Cal. Rptr. 445]. In *Meridian Ocean Systems, Inc. v. California State Lands Commission* (2d Dist. 1990) 222 Cal. App. 3d 153 [271 Cal. Rptr. 445], the court upheld an agency's decision to require an EIR in connection with permits authorizing underwater geophysical testing. The court rejected the claim that no serious *environmental* controversy had been raised because of the apparent partial economic motivation of fishermen who pointed to evidence that the underwater testing in question was harming fisheries. "While those whose livelihood depends upon being able to catch fish may have pecuniary motivations to bring the matter to public attention, the fact [that] marine and fish life is being threatened is surely a legitimate environmental concern." *Id.* at pp. 170–171.

c. *Perley v. County of Calaveras* (3d Dist. 1982) 137 Cal. App. 3d 424 [187 Cal. Rptr. 53]. In *Perley v. County of Calaveras* (3d Dist. 1982) 137 Cal. App. 3d 424, 436 [187 Cal. Rptr. 53], the court held that "the opposition of a few neighbors" did not rise to the level of a "serious public controversy," because the neighbors had merely expressed "their fears and desires" without any "objective basis for challenge." This decision thus implies that, to trigger the requirement to prepare an EIR, the controversy must have a substantial evidentiary basis. Though *Perley* was decided before the enactment of statutory language essentially eliminating mere public controversy as a basis for requiring EIRs, this implication is consistent with the current state of the law.

4. Disagreement Among Expert Opinion

"[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, . . . [i]f there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, [then] the Lead Agency shall treat the effect as significant and shall prepare an EIR." CEQA Guidelines, § 15064, subd. (g); *see City of Carmel-by-the-Sea v. Board of Supervisors of Monterey County* (6th Dist. 1986) 183 Cal. App. 3d 229, 245 [227 Cal. Rptr. 899] (*City of Carmel-by-the-Sea*) (EIR required to resolve conflicting expert testimony regarding extent of wetlands on project site).

Conflicting expert testimony may take different forms. Experts may disagree regarding whether an impact will occur, or regarding the scope or extent of the impact. *City of Carmel-by-the-Sea, supra*, exemplifies this sort of dispute. In this case, the experts disagreed regarding the extent of wetlands on the site, and thus on the amount of wetlands that the project would disturb. The court held that the agency had to prepare an EIR to resolve this factual dispute. 183 Cal. App. 3d at pp. 247–249.[38]

Alternatively, experts may agree on the scope or extent of the impact, but disagree regarding whether the impact is significant. In other words, the focus of the experts' dispute may be not on *facts*, but on how to *characterize* those facts–i.e., the lead agency's determination regarding the appropriate standard of significance for the impact at issue.[39] In these instances, it is less clear whether such a dispute triggers the duty to prepare an EIR. *Citizen Action to Serve All Students v. Thornley* (1st Dist. 1990) 222 Cal. App. 3d 748 [272 Cal. Rptr. 83] suggests that disputes of this sort do not trigger the duty to prepare an EIR. There, the record showed that closing a high school would increase traffic at an already congested intersection by approximately two percent. The only point of contention was whether such an increase was "significant." The petitioner cited to expert testimony that any increase over one percent was, in the expert's opinion, significant. The city responded by pointing to a traffic study stating that any increase of less than ten percent was insignificant.[40] Notwithstanding this dispute, the court upheld the city's adoption of a negative declaration. 222 Cal. App. 3d at pp. 755–756. *But see* CEQA Guidelines, § 15064, subd. (g) (in "marginal cases," "[i]f there is a disagreement among expert opinion supported by facts over the *significance* of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR") (italics added).[41]

5. The "Fair Argument" Standard and Certified Regulatory Programs

An agency with a certified regulatory program may, under appropriate circumstances, use a short-form environmental analysis that is functionally equivalent to a negative declaration.

An agency with a certified regulatory program may, under appropriate circumstances, use a "short-form" environmental analysis that is functionally equivalent to a negative declaration. *See* CEQA Guidelines, § 15252, subd. (a)(2); Discussion following CEQA Guidelines, § 15252.[42]

In *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1st Dist. 1997) 52 Cal. App. 4th 1383 [61 Cal. Rptr. 2d 297], the court held that the "fair

Board of Supervisors (1981) 116 Cal. App. 3d 265, 273–274 [171 Cal. Rptr. 875] (a notice of exemption was ineffective because it did not substantially comply with guidelines).

If the lead agency is a state agency, the agency must file the NOD with the Governor's Office of Planning and Research within five working days after approval.

If the lead agency is a state agency, the agency must file the NOD with the Governor's Office of Planning and Research (OPR) within five working days after approval. CEQA Guidelines, § 15075, subd (c). If the lead agency is a local agency, then the agency must file the NOD with the county clerk(s) of the county or counties in which the project will be located and, if the project requires discretionary approval from any state agency, with OPR; the NOD must be filed with the clerk and OPR within five working days after approval. Pub. Resources Code, § 21152, subd. (a); CEQA Guidelines, § 15075, subd. (d). The Guidelines encourage, but do not require, agencies to post their NODs on the internet. CEQA Guidelines, § 15075, subd. (h).

OPR = Governor's Office of Planning and Research

When a local agency files an NOD with the county clerk,[96] the clerk must post the NOD within 24 hours of receipt. Pub. Resources Code, § 21152, subd. (c); CEQA Guidelines, § 15075, subd. (e). Because this requirement carries no sanctions, however, it appears to be merely "directory" rather than mandatory.[97] *Cf. Meridian Ocean Systems, Inc. v. California State Lands Com.* (2d Dist. 1990) 222 Cal. App. 3d 153, 168 [271 Cal. Rptr. 445] (no penalty for failure to comply with directory provision requiring lead agency to decide whether to prepare an EIR within 30 days after receiving a complete application for a proposed project).

State and local agencies must send copies of their NODs to "any person who has filed a written request for notices with either the clerk of the governing body or, if there is no governing body, with the director of the agency." Pub. Resources Code, § 21092.2. The agencies may charge the recipients of such documents a fee "reasonably related to the costs of providing this service." *Ibid.*

Once the notice is posted for public inspection, the 30-day statute of limitation period begins to run.

Once the notice is posted for public inspection, the 30-day statute of limitation period begins to run. *Citizens of Lake Murray Assn. v. San Diego City Council* (4th Dist. 1982) 129 Cal. App. 3d 436, 440–441 [181 Cal. Rptr. 123]; Pub. Resources Code, § 21167, subds. (b), (c), (e); CEQA Guidelines, §§ 15075, subd. (g), 15094, subd. (g), 15112, subd. (c)(1). If a local agency decides to file two NODs, even if only one was required, then the statute of limitation begins to run on the posting of the second NOD. *El Dorado Union School District v. City of Placerville* (3d Dist. 1983) 144 Cal. App. 3d 123, 129–130 [192 Cal. Rptr. 480]. If separate NODs are filed for successive phases of the same overall project, then the 30-day statute of limitation to challenge the subsequent phase begins to run when the second NOD is filed and posted. *Chamberlain v. City of Palo Alto* (6th Dist. 1986) 186 Cal. App. 3d 181, 188 [230 Cal. Rptr. 454].

The date of posting of the NOD is crucial in determining whether a petition for writ of mandate has been filed within the applicable statute of limitation.

The date of posting of the NOD is crucial in determining whether a petition for writ of mandate has been filed within the applicable statute of limitation. For this reason, agencies or persons with an interest in a project would be prudent to obtain a conformed copy of the NOD showing the date the clerk or OPR posted the document.

E. Mitigated Negative Declarations

As explained earlier in this chapter, sometimes an initial study will reveal substantial evidence that significant environmental effects might occur, but the project proponent can modify the project so as to eliminate all such possible signifi-

impacts or to reduce them to a level of insignificance. In such instances, a lead agency can satisfy its CEQA obligations by preparing and circulating a so-called "mitigated negative declaration." Pub. Resources Code, § 21064.5.

1. Public Resources Code Section 21064.5

Public Resources Code section 21064.5 provides:

> "Mitigated negative declaration" means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) 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 (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.

Pub. Resources Code, § 21064.5[98]

2. Application of the "Fair Argument" Test in Situations Involving Mitigated Negative Declarations

a. *San Bernardino Valley Audubon Society v. Metropolitan Water District* (4th Dist. 1999) 71 Cal. App. 4th 382 [83 Cal. Rptr. 2d 836]. In *San Bernardino Valley Audubon Society v. Metropolitan Water District* (4th Dist. 1999) 71 Cal. App. 4th 382 [83 Cal. Rptr. 2d 836], petitioner argued that an EIR should have been prepared to analyze the potentially significant adverse effects of adopting a "Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan" for approximately 6,000 acres in Riverside County. The Metropolitan Water District (MWD) owned the land affected by the habitat conservation plan and had approved the proposal based on a mitigated negative declaration.

ESA = Endangered Species Act
MWD = Metropolitan Water District

According to the public notice issued in connection with the mitigated negative declaration, the habitat conservation plan would create a "Multiple Species Reserve" and "would serve as the basis for the issuance of incidental take permits pursuant to the provisions of Section 10 of the federal Endangered Species Act (ESA) to authorize the take of 6 currently listed species and 59 additional species that may become listed." *Id.* at p. 387. The mitigated negative declaration further explained that the plan had the potential to result in significant adverse impacts related to biological and cultural resources, but that mitigation measures had been incorporated into the plan to avoid such effects or reduce them to a level of insignificance. Such mitigation included the creation of a mitigation bank to be comprised of lands owned by MWD and the Riverside County Habitat Conservation Agency. On the basis of the conclusion that all impacts to biological resources would be mitigated, the agencies would receive take authorization "now for future projects that may take endangered species." *Id.* at p. 388.

Petitioner challenged the plan, contending that, because the plan was intended to serve as the basis for take authorization, it might have significant effects on the 65 species it attempted to address, and that "such a comprehensive project dealing

with so many endangered and threatened species requires the preparation of an environmental impact report." *Ibid.* According to petitioner, the habitat conservation plan was "a thinly disguised method to allow MWD to take, i.e., destroy or kill, endangered and threatened species in the course of its future construction activities throughout Southern California over the next 50 years." *Ibid.*

MWD maintained, on the other hand, that the plan was not a development project, but "primarily a mitigation bank that will provide important environmental mitigation for potential biological impacts resulting from existing and planned [projects]." *Ibid.* As such, MWD asserted, "the program will result in a cumulative net benefit for conservation of species in western Riverside County. The impacts on the species from future projects would be mitigated by designating habitat land in the mitigation bank as compensation for species or habitat which is taken by future construction." *Ibid.*

In reviewing the dispute as to whether an EIR, rather than a mitigated negative declaration, should have been prepared to evaluate the plan, the court stated that the "fair argument" standard applied, as follows:

If the initial study identifies potentially significant effects on the environment but revisions in the project plans would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and there is no substantial evidence that the project as revised may have a significant effect on the environment, a mitigated negative declaration may be used.

> If the initial study identifies potentially significant effects on the environment but revisions in the project plans "would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur" and there is no substantial evidence that the project as revised may have a significant effect on the environment, a mitigated negative declaration may be used. (§ 21064.5.) As the comment to the Guidelines explains: "A Mitigated Negative Declaration is not intended to be a new kind of document. . . . [¶] [It] provides efficiencies in the process where the applicant can modify his project to avoid all potential significant effects. The applicant can avoid the time and costs involved in preparing an EIR and qualify for a Negative Declaration instead. The public is still given an opportunity to review the proposal to determine whether the changes are sufficient to eliminate the significance of the effects." [Citations.]
>
> Thus, "[u]pon the issuance of [a mitigated negative declaration], the project opponent must demonstrate by substantial evidence that the proposed mitigation measures are inadequate and that the project as revised and/or mitigated may have a significant adverse effect on the environment." [Citation.]

71 Cal. App. 4th at p. 390 (quoting Discussion following CEQA Guidelines, § 15070 and *Citizens' Com. to Save Our Village v. City of Claremont* (4th Dist. 1995) 37 Cal. App. 4th 1157, 1167 [44 Cal. Rptr. 2d 288])

The parties did not disagree as to the standard of review; petitioner argued, therefore, that substantial evidence in the record supported a fair argument that the proposed plan might have significant adverse environmental effects, "even after mitigation." 71 Cal. App. 4th at p. 390.

The court agreed with petitioner. The court noted that, having prepared a mitigated negative declaration for the plan, MWD acknowledged that "[t]he Project will clearly have potentially significant impacts on the environment." *Id.* at p. 391. The question for the court was whether the plan's acknowledged impacts would "be mitigated to a level of insignificance," such that adoption of a mitigated negative

declaration was appropriate. *Id.* at p. 392. The court explained that, under the applicable standard, it must consider "whether there is substantial evidence in the record to support a fair argument that the stated mitigation measures may not achieve this goal." *Ibid.*

In the court's view, petitioner had identified at least five defects in the agency's mitigation program that constituted a fair argument that the project, as mitigated, could result in significant adverse impacts. First, the agency's proposed mitigation bank would allow MWD "to set aside habitat land now so that future projects could use the bank as mitigation, thus ensuring that the future construction projects could proceed with take and construction no matter how many of the listed endangered or threatened plant or animal species were found on a future construction project site." *Id.* at pp. 393–394.

"The second, and most troublesome" aspect of the proposed mitigation scheme involved "outside projects," which provided that some mitigation bank credits—and the associated take permits issue for the mitigation bank—could be sold to third parties, "and that no further permits will be required, no matter what effect the outside project will have on threatened or endangered species." *Id.* at pp. 394–395, fns. 4 and 5. "It therefore appears," the court explained, "that [petitioner's] interpretation is the correct one. Obviously, the effective elimination of the requirement of a take permit for outside projects may have a significant effect on the threatened or endangered species." *Id.* at p. 394, fn. 4.

Third, the court reasoned, petitioner "could fairly argue that it is improper and ineffective to allow *actual* take to be mitigated by *potential* habitat." *Id.* at p. 396 (italics added). The court explained that, under MWD's proposed mitigation banking framework, "an animal with limited range, such as the western spadefoot toad, would be taken in an outside project and the mitigation bank would provide mitigation for the take merely because it is potentially suitable habitat, not because any toads actually live there." *Ibid.*

The court further found that petitioner "could fairly argue that calculations under the habitat value formula will have a significant effect on the endangered and threatened species," because the mitigation ratios embodied in the "complex" formula had not been sufficiently analyzed to determine whether mitigation banking as proposed would "allow for a result different from an acre-for-acre or specie-by-specie exchange." *Id.* at p. 397.

Fifth, the court concluded that petitioner "could fairly argue that the Plan may have significant cumulative impacts." *Id.* at p. 398. The court was persuaded by petitioner's complaint that "[t]here is no evidence in the administrative record that the take of 65 targeted species for the next 50 years will not have negative cumulative impacts on endangered species, therefore [Public Resources Code] section 21083 and Guidelines section 15065 mandate an EIR be prepared." *Id.* at p. 398. Finding that the mitigated negative declaration prepared for the project provided only a "summary discussion of cumulative effects," the court expressed concern that the proposed habitat conservation plan was "so inclusive and far-reaching, especially with regard to outside and third party projects, that it is at least potentially possible that there will be incremental impacts to the various species that will have a cumulative effect on the survival of one or more of the species." *Id.* at p. 399.

Arguably, petitioner in this case provided only speculation and unsubstantiated opinion as to the alleged defects in MWD's mitigation program. The court rejected this contention, however, on the basis that:

> The fair argument is not speculative or hypothetical because the [agency's] documents themselves" reveal at least a fair argument that (1) mitigation bank credits can be sold to outside developers of future projects in Southern California, thus allowing for future take of endangered and threatened species throughout the region; (2) the mitigation measures stated in the mitigated negative declaration are inadequate to compensate for the take of endangered and threatened species; (3) allowing actual take to be mitigated by potential habitat is insufficient; (4) use of the habitat value formula, which provides for mitigation banking on habitat rather than specie basis, may have a significant effect on the endangered and threatened species; (5) the Plan may have significant cumulative effects on the 65 threatened, endangered and presently unlisted species; and (6) these cumulative effects should be considered and discussed in an EIR. [¶] Since the documents can be read in the manner advocated by [petitioner], we are constrained to agree with its conclusion that there is at least a fair argument that establishment of the mitigation bank will have a potentially significant unmitigated effect on a substantial number of endangered and threatened species, as well as other species that may be listed as endangered or threatened in the future.

Id. at pp. 400–401

The court therefore found that the record supported a fair argument that the potentially significant effects of the project identified in the mitigated negative declaration had not been mitigated into insignificance. *Id.* at p. 401. "Most troubling in this regard," the court explained:

> [I]s the mandatory finding of significance in the environmental checklist that the Project will have the potential to reduce habitat, cause a wildlife population to drop below self-sustaining levels, or reduce the number or restrict the range of a rare or endangered plant or animal. [Footnote omitted.] The Guidelines provide that, if such a finding is made, the lead agency "shall find that the project may have a significant effect on the environment and thereby require an EIR to be prepared for the project...." (Guidelines, § 15065.) [¶] Despite the contrary claim in the mitigated negative declaration, our attention has not been directed to any part of the record which shows that these effects can be mitigated into insignificance, especially for the outside projects. Thus, the proper procedure for such a far-reaching project is to prepare an EIR, with the requisite public participation, and to approve it only after making findings that changes have been made which mitigate or avoid the significant effects on the environment. (§ 21081.)

71 Cal. App. 4th at pp. 401–402

Because the *San Benardino* court repeatedly emphasized that, by mitigating some of the biological impacts of future development, the mitigation bank would essentially facilitate that development and its attendant impacts, the authors of this book interpret the case as strongly implying that EIRs should generally be prepared

the lead agency has prepared an initial study.[100] In such cases, under Public Resources Code section 21064.5, a project modification permitting the use of a mitigated negative declaration must be made before the agency has issued a proposed negative declaration for public review. *See also* CEQA Guidelines, § 15071, subd. (e) ("[a] negative declaration circulated for public review shall include... [m]itigation measures, if any, included in the project to avoid potentially significant effects").

The statutory definition of "mitigated negative declaration" supports the notion that the public must have an opportunity to review a negative declaration that describes the proposed project as modified, rather than as originally proposed, so that comments can be made on the project in its changed form. The language of both Public Resources Code section 21080, subdivision (c)(2), and CEQA Guidelines section 15070, subdivision (b)(1), and the holdings of *Perley v. County of Calaveras* (3d Dist. 1982) 137 Cal. App. 3d 424, 431, fn. 3 [187 Cal. Rptr. 53], and *Plaggmier v. City of San Jose* (1st Dist. 1980) 101 Cal. App. 3d 842, 853–854 [161 Cal. Rptr. 886] all support this view. Indeed, in *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (4th Dist. 1994) 29 Cal. App. 4th 1597, 1606 fn. 4 [35 Cal. Rptr. 2d 470], the court stated:

> [W]e note the City cannot rely on post-approval mitigation measures adopted during the subsequent design review process. Such measures will not validate a negative declaration. As one court stated, "There cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval." [Citations omitted.] Further, we note the CEQA Guidelines require project plans to be revised to include mitigation measures "before the proposed negative declaration is released for public review...." ([CEQA Guidelines,] § 15070, subd. (b)(1).) [101] Thus, any necessary mitigation measures must be specifically set forth at the time of publication of a mitigated negative declaration in advance of the City's adoption of it. [Citations omitted.]

See also Gentry v. City of Murrieta (4th Dist. 1995) 36 Cal. App. 4th 1359, 1393 [43 Cal. Rptr. 2d 170] (finding that the City of Murrieta improperly added mitigation conditions after it released its proposed mitigated negative declaration for public review)[102]

For further information regarding the circumstances under which an agency must recirculate a negative declaration, *see* this chapter, section E.4, *infra*.

4. Recirculation

To qualify for a mitigated negative declaration, the lead agency must add mitigation measures needed to render environmental impacts less than significant before the agency circulates the document.

To qualify for a mitigated negative declaration, the lead agency must add mitigation measures needed to render environmental impacts less than significant before the agency circulates the document. Pub. Resources Code, §§ 21064.5, 21080, subd. (c)(2); CEQA Guidelines, § 15070, subd. (b)(1). By implication, if the agency adds such measures in response to comments on a proposed negative declaration, then the agency must revise and recirculate the document. *See Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (4th Dist. 1994) 29 Cal. App. 4th 1597, 1605, fn. 6 [35 Cal. Rptr. 2d 470] ("any necessary mitigation measures must be specifically set forth at the time of publication of a mitigated negative declaration"); *Perley v. County of Calaveras* (3d Dist. 1982) 137 Cal. App. 3d 424, 431, fn. 3 [187 Cal. Rptr. 53] (implying that public has a right to review a project in its changed form); *Plaggmier*

City of San Jose (1st Dist. 1980) 101 Cal. App. 3d 842, 853 [161 Cal. Rptr. 886] (emphasizing the "terminal effect" on the CEQA process of the use of a negative declaration); *cf. Friends of the Old Trees v. Department of Forestry & Fire Protection* (1st Dist. 1997) 52 Cal. App. 4th 1383, 1395 [61 Cal. Rptr. 2d 297] (noting Department of Forestry and Fire Protection's concession that a timber harvesting plan modified to incorporate mitigation measures is subject to public review and comment).[103]

If the agency adds mitigation measures that address an impact that is already less than significant even without the new measures, then the agency need not recirculate the proposed negative declaration.

If, however, the agency adds mitigation measures that address an impact that is already less than significant even without the new measures, then the agency need not recirculate the proposed negative declaration. *See Leonoff v. Monterey County Board of Supervisors* (6th Dist. 1990) 222 Cal. App. 3d 1337, 1357 [272 Cal. Rptr. 372] (*Leonoff*) (no need to recirculate a proposed negative declaration where an agency added new conditions addressing effects that would not be significant even without the new measures); *Citizen Action to Serve All Students v. Thornley* (1st Dist. 1990) 222 Cal. App. 3d 748, 759 [272 Cal. Rptr. 83] (no recirculation required where measures were added to reduce impacts that were not otherwise significant); *Long Beach Savings & Loan Association v. Long Beach Redevelopment Agency* (2d Dist. 1986) 188 Cal. App. 3d 249, 263–264 [232 Cal. Rptr. 772] (negative declaration that already had been circulated for public review did not require recirculation because of addition of two minor mitigation measures); *Gentry v. City of Murrieta* (4th Dist. 1995) 36 Cal. App. 4th 1359, 1392–1393 [43 Cal. Rptr. 2d 170] ("conditions which do not address an otherwise significant environmental effect need not be publicly circulated"); *cf. El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (3d Dist. 2004) 122 Cal. App. 4th 1591, 1603 [20 Cal. Rptr. 3d 224] (recirculation was unnecessary after measures were added to a reclamation plan to address the impacts of past mining activities; the new measures were an "added bonus" for the environment and were not needed to address the impacts of the reclamation project at hand).

If the agency determines that it must recirculate the proposed negative declaration, then the agency must provide notice in accordance with CEQA Guidelines sections 15072 and 15073.

If the agency determines that it must recirculate the proposed negative declaration, then the agency must provide notice in accordance with CEQA Guidelines sections 15072 and 15073. CEQA Guidelines, § 15073.5.

a. CEQA Guidelines Section 15073.5. Section 15073.5 provides that the agency must recirculate a negative declaration whenever the agency must "substantially revise[]" the document after the agency has issued public notice of the document's availability but before the agency adopts the negative declaration. CEQA Guidelines, § 15073.5, subd. (a). A "[s]ubstantial revision" of a proposed negative declaration can take one of two forms. First, the lead agency may identify a new avoidable significant effect, and add new measures or revisions to reduce the effect to a less than significant level. *Id.* at subd. (b)(1). Second, the lead agency may add new measures or revisions to address a previously-identified effect because the original measures or revisions did not reduce the effect to a less than significant level. *Id.* at subd. (b)(2).

In contrast, the agency need not recirculate the proposed negative declaration if: (1) the agency, pursuant to section 15074.1 (discussed below), eliminates measures and substitutes others that are equally or more effective; (2) the project is revised in response to comments on the project's effects, where the effects at issue "are not new avoidable significant effects"; (3) measures or conditions of approval are added to the project, but those measures or conditions are not required by CEQA, do

CHAPTER X

The EIR Process

at a glance...

A. Decision to Prepare an EIR

CEQA requires an EIR whenever the initial study has produced, or the record otherwise includes, substantial evidence supporting a fair argument that the proposed project may produce significant environmental effects. Pub. Resources Code, §§ 21080, subd. (d), 21082.2, subd. (d); CEQA Guidelines, § 15064, subd. (f)(1).[1] For a full discussion of the law governing an agency's decision whether to adopt a negative declaration or to prepare an EIR, see chapter IX (Negative Declarations), section A.

CEQA requires an EIR whenever the initial study has produced, or the record otherwise includes, substantial evidence supporting a fair argument that the proposed project may produce significant environmental effects.

B. Time of Preparation

"EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." CEQA Guidelines, § 15004, subd. (b).[2] EIR preparation and review also "should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively." CEQA Guidelines, § 15004, subd. (c).[3]

CEQA = California Environmental Quality Act
EIR = Environmental impact report

The lead agency must commence EIR preparation well in advance of the target date for approving a project, since approval cannot occur until the public and every responsible agency has had an opportunity to examine and comment on the document. CEQA Guidelines, § 15004, subd. (a); Pub. Resources Code, § 21061; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 266 [104 Cal. Rptr. 761]. Project "approval" is "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval." CEQA Guidelines, § 15352, subd. (a). "With private projects, approval occurs upon the earliest commitment" of the public agency

The lead agency must commence EIR preparation well in advance of the target date for approving a project, since approval cannot occur until the public and every responsible agency has had an opportunity to examine and comment on the document.

p. 130 (citing CEQA Guidelines, § 15126.4, subd. (a)(1)(D)). Interestingly, the court did not invoke the already-established principle that "significant new information" includes a disclosure showing that "[a] feasible...mitigation measure considerably different from others previously analyzed would clearly lessen the significant impacts of the project, but the project's proponents declined to adopt it." CEQA Guidelines, § 15088.5, subd. (a)(3). Since the project proponent in *Save Our Peninsula Committee*, far from declining to adopt the measure, had in fact proposed it, perhaps the court did not apply the quoted principle because it was not evident from the record that the offset measure could "clearly lessen" the proposed project's impacts on groundwater pumping. *But compare Laurel Heights II, supra*, 6 Cal. 4th at p. 1135 (court should uphold decision not to recirculate draft EIR where such decision is supported by substantial evidence).

CEQA Guidelines section 15088.5, subdivision (a)(1), requires recirculation where a new mitigation measure proposed to be implemented has its own significant effects.

CEQA Guidelines section 15088.5, subdivision (a)(1), requires recirculation where a new mitigation measure proposed to be implemented has its own significant effects. Although the court did not expressly find evidence that the new mitigation measure proposed by the applicants had associated significant impacts, the court seemed swayed by the arguments by agencies and the lay public that the mitigation measure might induce growth and displace agriculture, and that such impacts needed further analysis. The county, for its part, apparently failed to cite to substantial evidence that this new mitigation measure would not be accompanied by significant environmental effects. Thus, the authors of this book suggest that, where a new mitigation measure is added after circulation of the draft EIR, the agency should consider recirculation of the draft EIR unless the agency has substantial evidence that the mitigation measure will not in fact have its own potentially significant impacts.

As to its holding that a new draft EIR should include a detailed discussion of the applicant's asserted riparian right to extract water from a subterranean stream, the court in *Save Our Peninsula Committee* could be understood to have found flaws in the portions of the draft EIR dealing with "environmental setting," "mitigation measures," and "significant environmental effects" (*see* CEQA Guidelines, §§ 15125, 15126.2, and 15126.4). The court was concerned that the exercise of such a right, if it existed, could adversely affect other water users, especially during droughts; cause growth-inducement by setting a precedent that could facilitate new development; be inconsistent with local policies limiting water for new development; or prompt the need for addition mitigation measures. 87 Cal. App. 4th at p. 134. Thus, *Save Our Peninsula Committee*, like *Cadiz*, can be understood to interpret CEQA Guidelines section 15088.5, subdivision (a)(4), to require recirculation when "critical" parts of an EIR are significantly and fundamentally flawed, even though the document as a whole is not "fundamentally and basically inadequate and conclusory in nature." The authors note as well that *Save Our Peninsula Committee*, like *Cadiz*, involved problems with establishing an appropriate baseline for environmental review for what the court termed "critical" water issues. The *Save Our Peninsula Committee* court, like the court in *Cadiz*, seemed to feel strongly that the information at issue–involving water use controversies in areas where water supply is particularly scarce–was simply too important and too complex to come into play for the first time after completion of formal public review. Moreover, because this court interpreted the

problem as involving the environmental "baseline," the court seemed to infer that this problem undermined the entire underpinnings of the EIR. The *Save Our Peninsula Committee* court, for instance, "underscored" the "importance of an adequate baseline description, for without such description, analysis of impacts, mitigation measures and project alternatives becomes impossible." *Save Our Peninsula Committee, supra*, 87 Cal. App. 4th at p. 124.

In sum, in holding that the Draft EIR should have been recirculated pursuant to CEQA Guidelines section 15088.5, subdivision (a), the court in *Save Our Peninsula Committee*, like the court in *Cadiz*, clearly focused on what it believed was necessary for "meaningful public review and comment," and applied a low threshold for finding draft EIRs to be "fundamentally and basically inadequate and conclusory in nature." In finding new information to be significant, the courts examined the complete administrative records presented to them, and seemed to grapple with factors such as the following: (i) the complexity of the new information at issue; (ii) the extent to which such information implicated possible harm to the environment; (iii) the possible severity of any such harm; (iv) the degree of demonstrated public interest in the subject matter; (v) the extent to which the party presenting the information (*e.g.*, an applicant or a project opponent) might have had an incentive to portray the information without complete objectivity; (vi) the extent to which additional public scrutiny was likely to refine and improve the quality of the information, or lead to improved mitigation; and (vii) the extent to which such information, and public responses to it, was necessary to informed agency decisionmaking.

I. Evaluation and Response to Comments

"The evaluation and response to public comments is an essential part of the CEQA process. Failure to comply with the requirement can lead to disapproval of a project." Discussion following CEQA Guidelines, § 15088.[87] In the final EIR, the lead agency must evaluate and respond to all the environmental comments on the draft EIR it receives within the public review period. Pub. Resources Code, § 21091, subd. (d)(2)(A). The agency may, but need not, respond to comments received after that period ends. Pub. Resources Code, § 21091, subd. (d)(2)(A); CEQA Guidelines, § 15088, subd. (a). The lead agency must provide its draft responses to comments received from public agencies to those agencies at least 10 days before certifying the EIR. Pub. Resources Code, § 21092.5, subd. (a); CEQA Guidelines, § 15088, subd. (b).

In the final EIR, the lead agency must evaluate and respond to all the environmental comments on the draft EIR it receives within the public review period.

The written responses must describe the disposition of the "significant environmental issues" raised in the comments (*e.g.*, suggestions for revising the proposed project to mitigate anticipated impacts). Pub. Resources Code, § 21091, subd. (d)(2)(B); CEQA Guidelines, § 15088, subd. (c). The lead agency must specifically explain its reasons for rejecting suggestions received in comments and for proceeding with the project despite its environmental impacts. "There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice." CEQA Guidelines, § 15088, subd. (c).[88]

The written responses must describe the disposition of the significant environmental issues raised in the comments.

In *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2d Dist. 2003) 106 Cal. App. 4th 715 [131 Cal. Rptr. 2d 186], for example, petitioners'

comments on the draft EIR questioned calculations regarding water supply for a large southern California residential development. *Id.* at p. 722. The responses to such comments explained that water supply calculations assumed that the responsible water district would receive 100 percent of its contract "entitlement" from the Department of Water Resources (DWR) in wet years, and 50 percent of its entitlement for periods of extreme drought. The Court of Appeal found the county's response to petitioners' concerns to be inadequate. The court criticized the response because it "contain[ed] no estimates from the DWR... as to how much water it can deliver, whether in wet years, average years and in periods of drought." *Id.* at p. 722. "It may be that no such reliable estimates are available[, but, i]f that is the case, the EIR should say so." *Ibid.* The court concluded that "[t]he requirement of a detailed analysis in response [to comments] ensures that stubborn problems or serious criticism are not swept under the rug." *Id.* at p. 732 (citations and internal quotation marks omitted).

DWR = Department of Water Resources

Where the responses make important changes in the information contained in the text of the draft EIR, the lead agency should either revise the relevant text or add marginal notes showing that the information is revised in the response to comments.

The responses may take the form of a revision to the draft EIR or may be a separate section in the final EIR. Where the responses make important changes in the information contained in the text of the draft EIR, the lead agency should either revise the relevant text or add marginal notes showing that the information is revised in the response to comments. CEQA Guidelines, § 15088, subd. (d). "Either of these approaches will make the final EIR more useful and informative to the decision-makers when they consider the EIR with the project." Discussion following CEQA Guidelines, § 15088.

Public Resources Code section 21092.5, subdivision (a), provides that, at least ten days before certifying a final EIR, a lead agency "shall provide a written proposed response to a public agency on comments made by that agency" in conformance with CEQA standards.

If the approving agency holds a hearing on the final EIR, project opponents should voice any complaints about the adequacy of the agency's responses, to avoid having the agency argue in court that they failed to exhaust their administrative remedy.

If the approving agency holds a hearing on the final EIR, project opponents should voice any complaints they have about the adequacy of the agency's responses to comments, in order to avoid having the agency argue in court that they failed to exhaust their administrative remedy on that issue. *Towards Responsibility in Planning v. City Council* (6th Dist. 1988) 200 Cal. App. 3d 671, 682 [246 Cal. Rptr. 317].[89]

1. Agency Discretion to Determine Extent of Response

When comments suggest that further data be gathered, it is not "mandatory for an agency to conduct every test and perform all research, study and experimentation recommended to it to determine true and full environmental impact, before it can approve a proposed project." *Society for California Archaeology v. County of Butte* (3d Dist. 1977) 65 Cal. App. 3d 832, 838 [135 Cal. Rptr. 679]. "Just as an agency has the discretion for good reason to approve a project which will admittedly have an adverse environmental impact, it has discretion to reject a proposal for additional testing or experimentation." *Id.* at pp. 838–839.[90]

In *Twain Harte Homeowners Association, Inc. v. County of Tuolumne* (5th Dist. 1982) 138 Cal. App. 3d 664, 678–687 [188 Cal. Rptr. 233], the Court of Appeal upheld an EIR against attacks on various responses to comments. In doing so, the court suggested some principles of potentially broad application. One such precept

appears to be that, where an agency's responses to comments, viewed "as a whole[,] evince good faith and a reasoned analysis" and "adequately serve the disclosure purpose which is central to the EIR process," the fact that, in certain respects, "the responses are not exhaustive or thorough" need not be fatal to the agency. *Id.* at p. 686. The court also stated generally that "[t]he determination of the sufficiency of [the lead agency's] responses to comments... turns upon the detail required in such responses." *Ibid.* In *Twain Harte*, because the challenged project was a general plan, the court required less detail in responses than it might have done if the project at issue involved a site-specific construction project. *Id.* at pp. 677, 681.

Where a particular response adequately addresses an environmental issue raised by one commenter, additional responses to that same issue, as identified by other commenters, may refer the reader to the prior response.

Notably, the court indicated that, where a particular response adequately addresses an environmental issue raised by one commenter, additional responses to that same issue, as identified by other commenters, may refer the reader to the prior response. *Id.* at pp. 680–681, 683–684; *compare Cleary v. County of Stanislaus* (1981) 118 Cal. App. 3d 348, 359–360 [173 Cal. Rptr. 390] (in upholding a response that referred the commenter to the draft EIR but did not add new analysis, the court described the comment in question as "general," and as raising "no new issues," and found the response adequate "when considered in conjunction with the draft EIR"). The *Twain Harte* court also indicated that, where a response is imprecise, and even arguably misleading, such imperfection need not be prejudicial where the record as a whole is not misleading on the subject at issue. 138 Cal. App. 3d at p. 682. Finally, the court described *People v. County of Kern* (5th Dist. 1974) 39 Cal. App. 3d 830, 841–842 [115 Cal. Rptr. 67] as holding that "letters received from individuals which raised no new environmental issue which the draft EIR had not recognized or which was not noted in the comment of the state agencies did not require response." *Id.* at p. 679 (citing 118 Cal. App. 3d at p. 360).

2. Responding to Mitigation Proposals

In determining how to respond to a comment proposing a new or modified mitigation measure, agencies must first ascertain whether the impact to which it is addressed would otherwise be significant and unavoidable, and then assess whether the proposed measure may be feasible.

In determining how to respond to a comment proposing a new or modified mitigation measure, agencies must first ascertain whether the impact to which it is addressed would otherwise be significant and unavoidable, and then assess whether the proposed measure may be feasible. In *Los Angeles Unified School District v. City of Los Angeles* (2d Dist. 1997) 58 Cal. App. 4th 1019, 1028–1030 [68 Cal. Rptr. 2d 367], a school district, in commenting on a draft EIR for a specific plan covering a 1.5 square mile portion of the San Fernando Valley, suggested that development-related air pollution impacts near a school could be feasibly mitigated by the installation of air conditioning and filtration within the school, thereby allowing it to close its windows to protect its students. *Ibid.* The responses to comments within the final EIR had not directly responded to this suggestion. *Id.* at p. 1029. In finding the response deficient, the Court of Appeal offered the following principles and observations:

> [A]n EIR need not analyze every *imaginable* alternative or mitigation measure; its concern is with *feasible* means of reducing environmental effects. [Citation.] Under the CEQA statute and guidelines a mitigation measure is 'feasible' if it is 'capable of being accomplished in a successful manner within a reasonable

> period of time, taking into account economic, environmental, social, and technological factors.' ([Public Resources Code,] § 21061.1; and *see* [CEQA] Guidelines, § 15364.) [¶] In keeping with the statute and guidelines, an adequate EIR must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible. [Citations.] While the response need not be exhaustive, it should evince good faith and a reasoned analysis. [Citations.]

Id. at pp. 1029, 1030 (italics in original; footnote deleted; internal quotation marks deleted)

J. Preparation of Final EIR

Before approving any nonexempt proposed project that may have a significant environmental effect, the lead agency must prepare a final EIR.

Before approving any nonexempt proposed project that may have a significant environmental effect, the lead agency must prepare a final EIR. CEQA Guidelines, § 15089, subd. (a). The final EIR incorporates by reference the contents of the draft EIR, and, in addition, includes the following: the comments received, either verbatim or in summary; the lead agency's responses thereto; and a list of persons, organizations, and public agencies that submitted comments. CEQA Guidelines, §§ 15132, 15362, subd. (b).

The lead agency under CEQA may, but need not, provide an opportunity for the public to review an final EIR. CEQA Guidelines, § 15089, subd. (b). As noted in the previous section, however, Public Resources Code section 21092.5, subdivision (a), provides that, at least ten days before certifying a final EIR, a lead agency "shall provide a written proposed response to a public agency on comments made by that agency" in conformance with CEQA standards. Such responses may be offered separately from the final EIR, or made part of that document. If the lead agency chooses, however, to simply send a commenting agency a copy of a final EIR, the latter document cannot be certified until ten days later.

K. Certification of Final EIR

Before approving the project analyzed in the EIR, the lead agency must certify the final EIR.

Before approving the project analyzed in the EIR, the lead agency must "certify" the final EIR. According to the CEQA Guidelines, "certification" consists of three separate steps. The agency's decision-making body must conclude, first, that the document "has been completed in compliance with CEQA"; second, that the body has reviewed and considered the information within the EIR prior to approving the project; and third, that "the final EIR reflects the lead agency's independent judgment and analysis." CEQA Guidelines, § 15090, subd. (a).[91] The certification of a legally inadequate EIR is a prejudicial abuse of discretion. Pub. Resources Code, § 21168.5, subd. (a); *Citizens to Preserve the Ojai v. County of Ventura* (2d Dist. 1985) 176 Cal.App. 3d 421, 428 [222 Cal. Rptr. 247].[92]

1. *Environmental Council of Sacramento v. Board of Supervisors* (3d Dist. 1982) 135 Cal. App. 3d 428 [185 Cal. Rptr. 363]

One Court of Appeal opinion suggests that, after certifying an EIR but prior to approving the project in question, the lead agency decision-making body may

at a glance...

CHAPTER XI

Substantive Requirements of Environmental Impact Reports

A. Lead Agencies' Duties with Respect to EIRs

An environmental impact report, or "EIR," is "a detailed statement prepared under CEQA describing and analyzing the significant effects of a project and discussing ways to mitigate or avoid the effects." CEQA Guidelines, § 15362.[1] Although the lead agency must consider the information in an EIR, the document's conclusions do not control the lead agency's discretion to approve or disapprove a proposed project. CEQA Guidelines, § 15121, subd. (b).[2] The EIR can force certain other kinds of actions, however. Before approving a project, a lead agency must respond to each significant effect identified in the EIR by making one or more of the following findings:

Although the lead agency must consider the information in an EIR, the document's conclusions do not control the lead agency's discretion to approve or disapprove a proposed project.

- That the project has been changed to avoid or substantially lessen the significant effects;
- That the necessary changes are within the responsibility and jurisdiction of another public agency, and have been or can and should be adopted by that agency; and/or
- That, due to specific economic, legal, social, technological, or other considerations, including consideration for the provision of employment opportunities for highly trained workers, the mitigation measures or project alternatives recommended in the final EIR are infeasible.

CEQA = California Environmental Quality Act
EIR = Environmental impact report

Pub. Resources Code, § 21081, subd. (a); CEQA Guidelines, § 15091, subd. (a)

These findings must be supported by substantial evidence. Pub. Resources Code, § 21081.5; CEQA Guidelines, § 15091, subd. (b).

B. Format and Substance of an EIR

EIRs must be "organized and written in a manner that will be meaningful and useful to decision makers and to the public." Pub. Resources Code, § 21003,

subd. (b). Public Resources Code section 21100 describes the mandatory content of EIRs, and states that "[w]henever feasible, a standard format shall be used for" EIRs. Pub. Resources Code, § 21100, subd. (a).[3] The degree of specificity required in an EIR depends on the specificity of the underlying activity described in the EIR. CEQA Guidelines, § 15146.[4] The text of draft EIRs should normally be less than 150 pages, or, for projects of unusual scope or complexity, less than 300 pages. CEQA Guidelines, § 15141.

The degree of specificity required in an EIR depends on the specificity of the underlying activity described in the EIR.

EIRs should:

- Embody "an interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the consideration of qualitative as well as quantitative factors." CEQA Guidelines, § 15142
- "Omit unnecessary descriptions of projects and emphasize feasible mitigation measures and feasible alternatives to projects." Pub. Resources Code, § 21003, subd. (c)
- Follow a "clear format" and be written in "plain language." CEQA Guidelines, §§ 15006, subds. (q), (r), 15120, 15140[5]
- Be "analytic rather than encyclopedic." CEQA Guidelines, §§ 15006, subd. (o), 15142
- Include summarized technical data, maps, plot plans, diagrams, and similar relevant information. Highly technical and specialized analysis should be attached in appendices, rather than in the body of the document. CEQA Guidelines, § 15147
- Use graphics to enhance the understanding of decisionmakers and the public. CEQA Guidelines, § 15140

If a lead agency's approval of a project is challenged in court, the information in the EIR constitutes substantial evidence on which the agency is entitled to rely.

If a lead agency's approval of a project is challenged in court, the information in the EIR constitutes substantial evidence on which the agency is entitled to rely. CEQA Guidelines, § 15121, subd. (c); *Karlson v. City of Camarillo* (2d Dist. 1980) 100 Cal. App. 3d 789, 801 [161 Cal. Rptr. 260]; *City of Carmel-by-the-Sea v. Board of Supervisors* (1st Dist. 1977) 71 Cal. App. 3d 84, 94 [139 Cal. Rptr. 214]

1. Lead Agencies Should Focus on Potentially Significant Effects

Public Resources Code section 21002.1, subdivision (e), provides that, in order "[t]o provide more meaningful public disclosure, reduce the time and cost required to prepare an [EIR], and focus on potentially significant effects on the environment of a proposed project, lead agencies shall... focus the discussion in the [EIR] on those potential effects on the environment... which the lead agency has determined are or may be significant. Lead agencies may limit discussion on other effects to a brief explanation as to why those effects are not potentially significant."

This language underscores the importance of devoting the bulk of an EIR to those impacts that are or may be significant. Public Resources Code section 21100 also provides that each EIR must contain "a statement briefly indicating the reasons for determining that various effects on the environment of a project are not significant and consequently have not been discussed in detail in the [EIR]." Pub. Resources Code, § 21100, subd. (c).[6]

2. Mandatory Contents of a Draft EIR

The draft EIR must include the following:

- A table of contents;
- A brief summary of the proposed project and its consequences in language as clear and simple as is reasonably practical;
- The proposed project's location; a description of the environmental setting, both local and regional, in which the proposed project will occur;
- A discussion of any inconsistencies between the proposed project and applicable general and/or regional plans;
- A description of the significant environmental effects of the proposed project, explaining which, if any, can be mitigated;
- A statement of the measures, if any, proposed to mitigate such environmental impacts;
- An analysis of a range of reasonable alternatives to the proposed project; an analysis of the proposed project's "growth-inducing impacts";
- A statement explaining why impacts identified as insignificant were determined to be such;
- A list of all federal, state, and local agencies, other organizations, and private individuals consulted in preparing the draft EIR, and
- The persons, firm, or agency preparing the document, by contract or other authorization; and an analysis of the proposed project's cumulative impacts.

CEQA Guidelines, §§ 15122–15130; *see also* Pub. Resources Code, § 21100

The following kinds of projects have an additional content requirement: the adoption, amendment, or enactment of a plan, policy, or ordinance of a public agency; the adoption by a local agency formation commission of a resolution making determinations; and any project that will require an environmental impact statement pursuant to NEPA. For such projects, EIRs must address any significant irreversible environmental changes that would be involved in the proposed action should it be implemented. CEQA Guidelines, §§ 15127, 15126.2, subd. (c).

Prior to 1995, the EIRs for such projects were also required to include a section addressing "[t]he relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity," but this requirement was deleted from Public Resources Code section 21100 in 1994. *See* Stats. 1994, ch. 1230, § 9. Because NEPA documents must still address this subject, however, a "joint EIR/EIS" must still address the topic. 40 C.F.R. § 1502.16. The rules governing the preparation of "joint documents" are addressed in chapter XIII (Means of Avoiding Redundancy in Preparing EIRs), section H.

Each draft EIR must contain a brief summary of the proposed project and its consequences.

a. Brief Summary. Each draft EIR must contain a brief summary of the proposed project and its consequences. The language used should be as clear and simple as is reasonably practical; and the length of the section normally should not exceed fifteen pages. The summary must identify the following: each significant effect with proposed mitigation measures and alternatives that would reduce or avoid that effect; areas of controversy known to the lead agency, including issues

raised by other agencies and the public; and issues to be resolved, including the choice among alternatives and whether or how to mitigate the significant effects. CEQA Guidelines, § 15123.

Because the content requirements are mandatory, while the 15-page limit on page length is only recommended, agencies should not feel constrained to limit their summaries to 15 pages at the cost of omitting mandatory contents.

The authors of this book note that, in practice, lead agencies often find it difficult, if not impossible, to include within the "brief summary" all of the required contents within a 15-page format. Because the content requirements are *mandatory*, while the 15-page limit on page length is only *recommended*, agencies should not feel constrained to limit their summaries to 15 pages at the cost of omitting mandatory contents.

b. Project Description

i. General Principles–Contents. The project description should include the following:

- A map, preferably topographical, depicting the project's precise location and boundaries. CEQA Guidelines, § 15124, subd. (a)
- A statement of the objectives sought by the proposed project; and a general description of the proposed project's technical, economic, and environmental characteristics. CEQA Guidelines § 15124, subd. (b), (c). "A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decisionmakers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project." *Id.* at subd. (b)[7]
- A statement describing the intended uses of the EIR. CEQA Guidelines, § 15124, subd. (d)
- A list of related environmental review and consultation requirements mandated by federal, state, or local laws, regulations, or policies. CEQA Guidelines, § 15124, subd. (d) (1) (c). The statement describing the uses of the EIR must include, to the extent the lead agency knows such information, a list of the agencies expected to use the EIR in their decisionmaking and a list of approvals for which the document will be used. *Id.* at subds. (d)(1)(A), (d)(1)(B). This list, along with the list of other federal, state, and local environmental review and consultation requirements, is important because "[t]o the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements." *Id.* at subd. (d)(1)(C)

If a public agency must make more than one decision on a project, the project description should include a list of all such decisions subject to CEQA, preferably in the order in which they will occur.

If a public agency must make more than one decision on a project, the project description should include a list of all such decisions subject to CEQA, preferably in the order in which they will occur. On request, the Governor's Office of Planning and Research (OPR) will assist agencies to identify state permits needed for a project. CEQA Guidelines, § 15124 subd. (d)(2).

OPR = Governor's Office of Planning and Research

ii. General Principles–Consistency, Accuracy, and Completeness. The project description must be accurate and consistent throughout an EIR. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal. App. 3d 185, 193 [139 Cal. Rptr. 396] (*County of Inyo*) (italics in original); *Kings County Farm Bureau*

v. City of Hanford (5th Dist. 1990) 221 Cal. App. 3d 692, 738 [270 Cal. Rptr. 650] (*Kings County*); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (5th Dist. 1994) 27 Cal. App. 4th 713, 730 [32 Cal. Rptr. 2d 704] (*San Joaquin Raptor I*); *Santiago Water District v. County of Orange* (4th Dist. 1981) 118 Cal. App. 3d 818, 830 [173 Cal. Rptr. 602] (*Santiago Water District*); *Christward Ministry v. County of San Diego* (4th Dist. 1993) 13 Cal. App. 4th 31, 45 [16 Cal. Rptr. 2d 435] (*Christward II*); *Dusek v. Anaheim Redevelopment Agency* (4th Dist. 1986) 173 Cal. App. 3d 1029, 1040 [219 Cal. Rptr. 346] (*Dusek*).[8]

> A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the "no project" alternative) and weigh other alternatives in the balance.

County of Inyo, supra, 71 Cal. App. 3d at pp. 192–193[9]

The CEQA process, if working properly, will often result in project changes reducing the severity of environmental effects.

At the same time, however, the CEQA process, if working properly, will often result in project changes reducing the severity of environmental effects. "'The CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal.'" *Kings County, supra*, 221 Cal. App. 3d at pp. 736–737 (quoting *County of Inyo, supra*, 71 Cal. App. 3d at p. 199); *see also River Valley Preservation Project v. Metropolitan Transit Development Board* (4th Dist. 1995) 37 Cal. App. 4th 154, 168, fn. 11 [43 Cal. Rptr. 2d 501]. "'CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process.' [Citation.] In short, a project must be open for public discussion and subject to agency modification during the CEQA process." *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal. 3d 929, 936 [231 Cal. Rptr. 748].

If an agency, after completing an EIR, ultimately chooses to approve only a portion of the larger project analyzed in the EIR, such action does not retroactively invalidate the project description.

Furthermore, if an agency, after completing an EIR, ultimately chooses to approve only a portion of the larger "project" analyzed in the EIR, such action does not retroactively invalidate the project description. *Dusek, supra*, 173 Cal. App. 3d at p. 1041 ("CEQA does not handcuff decisionmakers in the manner proposed by the" petitioners).

(A) *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal. App. 3d 185 [139 Cal. Rptr. 396]. In *County of Inyo v. City of Los Angeles* (3rd Dist. 1977) 71 Cal. App. 3d 185 [139 Cal. Rptr. 396] (*County of Inyo I*) an EIR drafted by the City of Los Angeles referred to the project in question differently in different parts of the document. The project that the city was supposed to be analyzing, pursuant to a court order (*see County of Inyo v. Yorty* (3d Dist. 1973) 32 Cal. App. 3d 795 [108 Cal. Rptr. 377]), was a proposal to increase the city's extraction of groundwater from the Owens Valley for export to Los Angeles. The document that resulted, however, did not focus its analysis on that proposal. The EIR first incorrectly defined the project

If such information is not found in the EIR, it must be added to the record in some manner in order to be cited in findings. CEQA Guidelines, § 15131, subd. (c).[94]

C. Contents of a Final EIR

The final EIR consists of the contents of the draft EIR, with some revisions if necessary, and the addition of the following: (1) comments and recommendations received, either verbatim or in summary; (2) a list of persons, organizations, and public agencies commenting on the draft EIR; and (3) the lead agency's responses to significant environmental points raised in the review and consultation process. CEQA Guidelines, § 15132.

As is explained at length in chapter X (The EIR Process), section H, if the lead agency adds "significant new information" or makes substantial changes to the project after receiving comments on the draft EIR, the documents must be recirculated for additional public review. Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5.[95]

D. What Constitutes an Adequate EIR—A Summary

"[T]he determination of EIR adequacy is essentially pragmatic. Whether an EIR will be found in compliance with CEQA involves an evaluation of whether the discussion of environmental impacts reasonably sets forth sufficient information to foster informed public participation and to enable the decision makers to consider the environmental factors necessary to make a reasoned decision. Preparing an EIR requires the exercise of judgment, and the court in its review may not substitute its judgment, but instead is limited to ensuring that the decision makers have considered the environmental consequences of their action." *Berkeley Keep Jets Over the Bay Com. v. Board of Port Commissioners* (1st Dist. 2001) 91 Cal. App. 4th 1344, 1355 [111 Cal. Rptr. 2d 598].

In general, a reviewing court will not expect perfection, but will focus instead on adequacy, completeness, and a good faith effort at full disclosure.

In general, a reviewing court will not expect perfection, but will focus instead on adequacy, completeness, and a good faith effort at full disclosure. Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible. The document should provide a sufficient degree of analysis to allow decisionmakers to make intelligent judgments. CEQA Guidelines, § 15151. "[T]he adequacy of an EIR is determined in terms of what is reasonably feasible, in light of factors such as the magnitude of the project at issue, the severity of its likely environmental impacts, and the geographic scope of the project." CEQA Guidelines, § 15204, subd. (a).[96]

1. Sufficiently Detailed Analysis

Although the analysis in an EIR "need not be exhaustive" (CEQA Guidelines, § 15151), nevertheless, "the courts have favored specificity and use of detail in EIRs." *Whitman v. Board of Supervisors* (2d Dist. 1979) 88 Cal. App. 3d 397, 411 [151 Cal. Rptr. 866].[97] "A conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystallize issues [citation] but 'affords no basis for a comparison of the problems involved with

the proposed project and the difficulties involved in the alternatives.'" *People v. County of Kern* (5th Dist. 1974) 39 Cal. App. 3d 830, 841–842 [115 Cal. Rptr. 67], quoting *Silva v. Lynn* (1st Cir. 1973) 482 F. 2d 1282, 1285.

"A legally adequate EIR…'must contain sufficient detail to help ensure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug.'" *Kings County Farm Bureau v. City of Hanford* (5th Dist. 1990) 221 Cal. App. 3d 692, 733 [270 Cal. Rptr. 650]. The EIR "must reflect the analytic route the agency traveled from evidence to action." *Ibid.* "The EIR must contain facts and analysis, not just the bare conclusions of a public agency. An agency's opinion concerning matters within its expertise is of obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment." *Santiago Water District v. County of Orange* (4th Dist. 1981) 118 Cal. App. 3d 818, 831 [173 Cal. Rptr. 602].

In *City of Coronado v. California Coastal Zone Conservation Commission* (4th Dist. 1977) 69 Cal. App. 3d 570, 583 [138 Cal. Rptr. 241], the court rejected a two-page environmental document, stating that "[t]his document resembles an EIR as mist resembles a Colorado cloudburst."[98] Some courts, however, have been less demanding of specificity than others. In *Karlson v. City of Camarillo* (2d Dist. 1980) 100 Cal. App. 3d 789, 805–806 [161 Cal. Rptr. 260] (*Karlson*), for example, the court held adequate an EIR that failed to conduct a "point by point analysis" of the degree to which proposed general plan amendments conformed with the goals of the existing general plan. Said the court: "[t]here is nothing in the law or the Guidelines which requires such a specific consideration." *Id.* at p. 806.

The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in an EIR.

Readers should not take *Karlson* as authority to prepare analyses less specific than is possible with available or obtainable data. "The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in an EIR." CEQA Guidelines, § 15146. Thus, "[a]n EIR on a construction project will necessarily be more detailed in the specific effects of the project than will be an EIR on the adoption of a local general plan or comprehensive zoning ordinance because the effects of the construction can be predicted with greater accuracy." CEQA Guidelines, § 15146, subd. (a). Conversely, EIRs for general legislative actions such as the adoption or amendment of general plans or comprehensive zoning ordinances should focus on the secondary effects caused thereby. CEQA Guidelines, § 15146, subd. (b); *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (2d Dist. 1993) 18 Cal. App. 4th 729, 745–746 [22 Cal. Rptr. 2d 618]; *Rio Vista Farm Bureau Center v. County of Solano* (1st Dist. 1992) 5 Cal. App. 4th 351, 371–374 [7 Cal. Rptr. 2d 307]. Still, every EIR will "be reviewed in light of what is reasonably feasible." CEQA Guidelines, § 15151; *Kings County Farm Bureau, supra*, 221 Cal. App. 3d at pp. 723, 733–734.

a. *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376 [253 Cal. Rptr. 426]. The leading California Supreme Court case on EIR adequacy is *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376 [253 Cal. Rptr. 426] (*Laurel Heights I*), which involved a proposal to relocate ongoing biomedical research activities into an unoccupied building near a residential area. In its decision, the court held (i) that the respondent

agency prejudicially failed to assess the impacts of a foreseeable future phase of the challenged project, (ii) that the alternatives analysis within the EIR was defective, and (iii) that substantial evidence supported the respondent's conclusions regarding the effectiveness of adopted mitigation measures.

An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.

In reaching its holdings, the Supreme Court emphasized that "[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." 47 Cal. 3d at pp. 404–405. At the same time, however, the court also stressed that "a court's proper role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence and whether the EIR is sufficient as an informational document." *Id.* at p. 407. Furthermore, although "[t]he often technical nature of challenges to EIR's... requires particular attention to detail[,]" the "proper judicial goal... is not to review each item of evidence in the record with such exactitude that the court loses sight of the rule that the evidence must be considered as a whole." *Id.* at p. 408.

b. *Kings County Farm Bureau v. City of Hanford* (5th Dist. 1990) 221 Cal. App. 3d 692 [270 Cal. Rptr. 650]. Another important decision addressing the standards governing EIRs is *Kings County Farm Bureau v. City of Hanford* (5th Dist. 1990) 221 Cal. App. 3d 692] [270 Cal. Rptr. 650], in which the Court of Appeal held inadequate an EIR prepared for a proposed coal-fired cogeneration power plant. The substance and tenor of the decision indicate that reviewing courts may closely scrutinize EIRs to assess their legal adequacy. The opinion addresses the following important issues:

- The need, in some instances, to support with rigorous analysis and concrete substantial evidence the conclusion that impacts will be insignificant; the requirement to analyze both "on-site" and "secondary" air pollution emissions in assessing the overall significance of air quality impacts;
- The proper method by which to assess cumulative impacts in the context of an already degraded environment; the proper geographic scope of cumulative impact analysis;
- The requirement, at least under some circumstances, to provide comparative, quantitative analysis in assessing the environmental merits of project alternatives; and
- The fact that analysis of alternatives should not be unduly narrowed by investments made by applicants prior to the commencement of environmental review.

c. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (5th Dist. 1994) 27 Cal. App. 4th 713 [32 Cal. Rptr. 2d 704]. The Court of Appeal also set high standards for an EIR in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (5th Dist. 1994) 27 Cal. App. 4th 713 [32 Cal. Rptr. 2d 704], in which the court invalidated an EIR for a 154-acre mixed use development. Stating that "[t]he record demonstrates what only can be characterized as grudging and pro forma compliance with CEQA[,]" the court described the EIR as "a mass of flaws." *Id.* at p. 741, 742. The opinion addresses the following issues: the need to include within the

"environmental setting" portion of an EIR a full and fair description of adjacent properties that would be affected by a project, as well as sensitive resources within the project site (*id.* at pp. 722–729); the need to include, within the "project description," a discussion of any infrastructure improvements necessitated by a project (*id.* at pp. 729–735); the need to address project alternatives in detail, and to include "alternative sites" within the alternatives analysis, in some circumstances(*id.* at p. 722–729); and the need to adequately address cumulative impacts (*id.* at pp. 739–741).

d. *Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District* (2d Dist. 1994) 24 Cal. App. 4th 826 [29 Cal. Rptr. 2d 492]. In *Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District* (2d Dist. 1994) 24 Cal. App. 4th 826 [29 Cal. Rptr. 2d 492], which involved the approval of a new elementary school, the Court of Appeal repeatedly emphasized the limitations on an agency's obligations in preparing an EIR. The court stated, for example, that "[a]n EIR need not contain discussion of specific future action that is merely contemplated nor a gleam in a planner's eye." *Id.* at p. 838. Similarly, the court noted that "'CEQA does not require analysis of every *imaginable* alternative or mitigation measure; its concern is with *feasible* means of reducing environmental effects.'" *Id.* at p. 841 (italics in original). Finally, the court added that "[a]n EIR does not have to contain the results of unfruitful investigations or pursuits down blind alleys, but only 'an analysis of those alternatives necessary to permit a reasoned choice.'" *Id.* at p. 845.

CEQA does not require analysis of every imaginable alternative or mitigation measure; its concern is with feasible means of reducing environmental effects.

e. *Stanislaus Natural Heritage Project v. County of Stanislaus* (5th Dist. 1996) 48 Cal. App. 4th 182 [55 Cal. Rptr. 2d 625]. In *Stanislaus Natural Heritage Project v. County of Stanislaus* (5th Dist 1996) 48 Cal. App. 4th 182 [55 Cal. Rptr. 2d 625] (*Stanislaus*), the Court of Appeal invalidated an EIR for a specific plan because it had not adequately dealt with the environmental consequences associated with acquiring a long-term water supply for the proposed development. *Id.* at p. 187.[99] The specific plan would allow 5,000 residential units on 29,500 acres, to be built in four phases over 25 years. *Id.* at p. 186. The EIR evaluated the effects related to providing water during the first five years of the 15-year first phase, but did not address impacts that would occur beyond that initial period. *Id.* at pp. 194–195. Instead, the document treated the potential long-term water supply shortfall as a significant and unavoidable impact, but identified as "mitigation" a commitment that further construction, beyond the first increment, could not occur unless adequate water supplies could be found. *Id.* at p. 195. The EIR also stated that additional environmental review would be required in connection with future water acquisition projects serving the development. *Ibid.*

In finding the EIR deficient, the court rejected the respondent's argument that, because the EIR was only a "first tier" document, to be augmented in the future with additional negative declarations or EIRs, the county was not required to analyze long-term water supply impacts to the degree advocated by the petitioners. The court explained that:

> [A] decision to "tier" environmental review does not excuse a governmental entity from complying with CEQA's mandate to prepare, or cause to be prepared, an environmental impact report on any project that may have a

CHAPTER XVI

Judicial Review

A. Statutes of Limitations

"CEQA provides unusually short statutes of limitations on filing court challenges to the approval of projects under the act."[1] CEQA Guidelines, § 15112, subd. (a). "The statute of limitations periods are not public review periods or waiting periods for the person whose project has been approved. The project sponsor may proceed to carry out the project as soon as the necessary permits have been granted. The statute of limitations cuts off the right of another person to file a court action challenging approval of the project after the specified time period has expired." CEQA Guidelines, § 15112, subd. (b).

As is explained in chapter V (Exempt Activities), section C.1.b.ii and chapter X (The EIR Process), section P, the filing and posting of "notices of determination" (NODs) or "notices of exemption" (NOEs) commence the limitations periods for filing lawsuits invoking CEQA. Pub. Resources Code, §§ 21108, 21152, 21167; CEQA Guidelines, §§ 15062, 15075, 15094; *Citizens of Lake Murray Association v. San Diego City Council* (4th Dist. 1982) 129 Cal. App. 3d 436, 440–441 [181 Cal. Rptr. 123].

Sample forms for NODs and NOEs are included as appendices D and E to the CEQA Guidelines.

1. Notices of Determination Trigger a 30-Day Limitations Period

The limitations period, triggered by the filing and posting of a Notice of Determination, is 30 days for the following agency actions:

- Approval of a project for which an environmental impact report (EIR) or a negative declaration was prepared. Pub. Resources Code, §§ 21167, subds. (b), and (c), 21152, subds. (a), (c); CEQA Guidelines, § 15112, subd. (c)(1)
- Approval of a project based on a form of CEQA compliance other than adoption of negative declaration or certification of an EIR. Pub. Resources Code, §§ 21108, subd. (a), 21152, subd. (a), 21167, subd. (e), 21152, subd. (c)[2]

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