

THE FOLLOWING MATERIAL IS DIRECTED SOLELY TO THE ENVIRONMENTAL REVIEW PROCESS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA). IT IS HOPED THAT THIS MATERIAL WILL PROVE HELPFUL TO GROUPS IN THE MOTHER LODGE CHAPTER THAT ARE FACED WITH SITUATIONS WHERE CEQA GOVERNS.

## THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

CEQA is patterned after the National Environmental Policy Act (NEPA) but has some useful provisions not found in NEPA (one of these is a requirement for a Mitigation Monitoring Plan). In essence, it is a full-disclosure measure, intended to be enforced by citizen action. It does *not* require that a development proposal be foregone or altered, as will be seen in what follows. What it does require is that the environmental effects of the project be identified and analyzed, i.e., fully disclosed.

CEQA is found in the California Public Resources Code, Division 13, Sections 21000 et seq. The CEQA Guidelines are found in the California Code of Regulations, Title 14, Chapter 3, Sections 15000 et seq. Text of both may be downloaded from the Internet. For general plans in particular, the Governor's Office of Planning and Research publishes *General Plan Guidelines*. Although advisory in nature, these *Guidelines* are "the state's only official document interpreting and expalining California's legal requirements for general plans." A useful web site is <http://www.ceres.ca.gov/> and links to CEQA. Useful references are given at the end of this guide.

Throughout the process of consideration and approval of the project in which you are interested, there will be occasional hearings before the lead agency. Your Group should participate in these to establish "standing", as well as to try, through your testimony, to influence the outcome positively and avoid subsequent litigation. Often, time limits are imposed by the agency, longer for a group's spokesperson and shorter for individuals. If you have a lot of issues to discuss, you may have to organize speakers from your group, each to address a specific topic.

## ENVIRONMENTAL DOCUMENTATION OVERVIEW

Unless the lead agency decides upon an Exemption (from CEQA) or a Negative Declaration (see what follows), the CEQA process begins with Scoping, continues with preparation of a Draft Environmental Impact Report (DEIR), and goes on to a Final Environmental Impact Report (FEIR). The "lead agency" prepares the DEIR and FEIR (but the project proponent, which may differ from the lead agency, may pay, creating a possibly corrupted process), and takes some sort of action based upon the FEIR. A "responsible agency" may also be in the picture, one that uses the EIRs in some way also to take an action. For example, a water-rights project may be sponsored by the lead agency, such as a county water agency or a water purveyor, but the water rights themselves are under the purview of the State Water Resources Control Board, which, as a responsible agency, would utilize the environmental documentation produced by the lead agency.

### EXEMPTIONS, NEGATIVE DECLARATIONS, MITIGATED NEGATIVE DECLARATIONS

The lead agency may claim that the proposed project is exempt from the requirements of CEQA. (Eligibility for an exemption is governed by law. Exemptions are either "categorical" or "statutory"; the governing statute must be specified if an exemption is claimed.)

The first documentation in the CEQA process is an **Initial Study** by the lead agency. This will include a checklist of environmental effects that identifies those the lead agency regards as being significant or possibly significant, with a reasoned statement as to why it reached its conclusions. For a "Neg Dec" or "Mitigated Neg Dec", if the lead agency expects proposed mitigation to reduce these to levels of insignificance, it must set forth the mitigation measures and why they are expected to have the desired result.

You may want to challenge a claimed exemption. You may also want to challenge a Negative Declaration or Mitigated Negative Declaration in order to compel a full Environmental Impact Report. The more detailed environmental analysis found in a DEIR begins with Scoping.

### SCOPING:

Scoping starts with a Notice of Preparation of an Environmental Impact Report (NOP). NOPs must go to public agencies and to the public, if you've requested to be notified. If you are concerned about a particular project, ask that you be on the mailing list to receive information relative to it. Otherwise, watch the legal notices, where NOPs must also be published.<sup>(1)</sup>

Scoping is a process whereby potentially significant issues are identified, data are collected re them, and the resulting quantification of the issue is compared to some "**threshold of significance**". If this threshold is exceeded, the lead agency *must* look at alternatives and ways of mitigating these impacts. It must adopt such mitigation *or* set forth during the adoption process "Overriding Considerations" to justify ignoring the impacts or failing to reduce them to "insignificant" levels. Often it does this latter.

The lead agency often tries to choose the threshold of significance *after* the data are collected. Under the Wilson administration there were attempts to declare thresholds of significance derived from regulatory standards. But regulations generally are years behind scientific knowledge. A threshold of significance is a subjective matter, so prepare your arguments well.<sup>(2)</sup>

For the lead agency, scoping serves to defuse controversy early and narrow the potentially significant impacts. (See Sec. 15083 of the *Guidelines*.) For those commenting, scoping serves to try to see that all critical issues are properly analyzed. Data needs and methodology of collection and analysis can be suggested. Alternatives and mitigation measures can be suggested. You are laying a foundation for a subsequent lawsuit if the agency ignores your comments. Your comments should be sent by certified mail with a return receipt requested, or hand-carried with a duplicate, date-stamped first page retained by you. The agency is required to respond to your comments *in the same detail as you commented*.

**Identifying the issues:** A starting point is those matters checked on the Environmental Checklist form in the Initial Study. (See attached sample.) Watch to see whether the lead agency has organized its checklist so as to lump or split possible impacts to affect the number of issues it checks as significant or possibly significant. Consult the list of reviewing state agencies (see attachment) and the list of authorities (see attachment). You might try calling them for information. If the person you talk to didn't get a copy of the NOP (or, later, the DEIR) upon which to comment, get their name and make a written note of who, when, and what they said. You can also look at other DEIRs for ideas--what thresholds were used and why, what mitigation was suggested, etc.. (Public libraries, including that of the City of Sacramento, may have copies of DEIRs on other projects.) Err on the side of too *low* a threshold if it is unclear and subjective. Do research and *get documentation*. The Internet can be very helpful.

Because it can be burdensome to attempt to develop expertise on many different issues, it may be helpful to identify persons in your group who will agree to accept responsibility for researching and commenting on a particular issue or issues. If so, allow time to assemble all the contributions before the date for submitting comments!

**Remember to couch as questions all the matters upon which you want a response! If they aren't questions, they run a strong risk of being ignored.**

#### **ANALYSIS:**

How do you identify an adequate analysis or methodology? Try to get experts to help you. Talk to staff of reviewing agencies. Check the Planning Department's files to see what might already be there from reviewing agencies when it's DEIR time. Research your issue. Look at other EIRs.

#### **THRESHOLD OF SIGNIFICANCE:**

Assess whether regulatory requirements have replaced subjective ones. If *you* deem something as exceeding *your* threshold of significance, vigorously argue your own opinion while marshaling as much supporting documentation as you can.

#### **MITIGATION MEASURES:**

Look at other EIRs. Be creative. Suggest several measures, erring on the side of too much rather than too little.<sup>(3)</sup>

#### **DEIRS:**

The foregoing remarks largely apply also to preparing comments upon DEIRs *except* that here you have a document to analyze and critique. Remember that it's harder to detect something that isn't there at all than to critique something that *is* there. Do both!

Why do we comment on DEIRs?

- To improve the analysis of issues. The better the analysis, the more informed you can make the public and the decisionmaker.
- To make it more expensive or time consuming to complete the EIR. You may disapprove of this "harassment" approach.
- To make certain policy arguments against the project for the benefit of the decisionmakers.
- To make sure that the lead agency responds to your comments with good-faith reasoned analysis. If it rejects your request, it must explain why with a level of detail commensurate with that of your request/comment. This puts the decisionmaker in the hot seat. Rarely do politicians ever have to give you a reasoned written explanation for their actions. This standard is difficult for agencies to live up to and often spawns a successful cause of action in court.
- To add to the administrative record the information that is needed to allow the decisionmakers to reach the conclusion you want.
- To establish exhaustion of administrative remedies should you be forced into litigation.

#### **DOCUMENTATION:**

You should get all the documentation you have accumulated to support your case into the record. One way of doing so is as a list of references at the end of the treatment of each topic. This is perhaps the most convenient for the reader. Another is by means of an overall appendix to your comments organized issue-by-issue.

It is helpful to spend the time to organize your documentation by numbered references to specific documents supporting your arguments/comments as you write them. This takes time and care, but is more effective than merely a disorganized "mess" with paragraphs highlighted in some way, leaving the reader to guess what points you were trying to make with a particular document.

#### **FEIRs:**

In the FEIR the agency responds to all the comments it received on the DEIR. You need both the DEIR and the FEIR for complete documentation. You will want to look at how it treated your comments. Comments from other agencies and the responses thereto may be especially interesting. There is no statutory period for public comment following issuance of the FEIR, though public agencies do get at least ten days. Sometimes a lead agency will fast-track a project with little to no review time prior to the public hearing on its adoption. This makes comment on the FEIR difficult to impossible.

If you haven't previously provided documentation for the points you've been hoping to make, you *can still get things into the record at the public hearing to certify the FEIR* (and maybe they'll even have read your material and will reject the project or approve it in modified form based on the comments you and others have been making). Try, however, to get your comments in written form delivered prior to the final public hearing.

Unfortunately, public comments are often just "blown off". CEQA doesn't allow this, but you can enforce this provision only by suing. ("[T]he major environmental issues raised when the Lead Agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice.")

#### **PRESENTATION OF SCOPING AND/OR DEIR COMMENTS**

One way for both scoping and DEIR comments is a format that includes six sections for each topic: **Background, Analysis, Evaluation of Impacts, Proposed Alternatives, and Proposed Mitigation Measures.** An appropriate quotation at the beginning of each topic can serve to focus the reader's attention on your general argument. Quotes can be funny, philosophical, or poignant. They can be from some authoritative person or body who agrees with you. A shocking quote from the DEIR, regulation, or law can be very powerful. Be sure to identify the author and work quoted. You may even find a cartoon that appropriately summarizes your concerns. (An alternative approach is discussed at the end of this guide.)<sup>(4)</sup>

If you or your Group comment fairly frequently on DEIRs, it may be helpful to begin to assemble notable quotations and other materials on

various topics for future use. (If you have accepted responsibility for a particular topic, certainly you should begin to assemble useful material on your topic.)

### **A. Background**

Here you should explain the significance of the issue in the broad context of the County and region. Some of the information may be found in the DEIR itself (or, for a general plan, a "Background" volume that sets forth the baseline conditions). Sometimes the information set forth may even be incomplete or incorrect. If so, point this out.<sup>(5)</sup>

Remember that the audience for your comments may be the decisionmakers, or members of the press, and they may not be completely up to speed on the issue. More importantly, the judge and appellate court justices may know nothing about local conditions. When completed, this section should be a sufficient briefing to allow somebody who knows nothing about the project area to understand, appreciate, and sympathize with your concerns.

### **B. Analysis**

Identify any analytical flaws, technical errors, or issues that were not discussed. Ask that these errors be corrected in the FEIR. Point it out if an issue is insufficiently analyzed. Your goal is to ensure that there is a sound factual basis in the EIR to support the conclusions *you* want the decisionmakers to reach.

If possible, the estimated impact should be quantified at various stages over the life of the project for each proposed alternative, and cumulatively with respect to similar impacts from other sources. If this has not been done, ask that it be done. You should try to point out 1) issues not discussed; 2) issues insufficiently analyzed; and 3) errors in analysis.

### **C. Evaluation of Significance**

Even if all the estimates of impacts are correct, the DEIR may incorrectly determine that an impact is insignificant by applying a wrong threshold of significance. The *Guidelines* provide a list of impacts considered significant under CEQA. Quantitative thresholds (e.g., pollutant concentrations) are the most clear cut. Recall, also, the previous discussion about substituting regulatory standards for thresholds of significance.

A common mistake in DEIRs is to suggest that a project contributed only a small impact relative to the significant countywide cumulative impacts of a whole host of projects and, as a result, the particular project's impacts are insignificant. In fact, law says that *any* contribution to a cumulatively significant impact is itself significant. Generally, such impacts are required not only to be mitigated, but to be mitigated enough to begin to *offset* the impacts of the current substandard condition. For example, for every pound of project-generated air pollution, the project may be required to reduce air pollution by 1.5 pounds of pollutant.

Sometimes cumulative impacts are addressed in a special section of the EIR that discusses the cumulative impacts associated with the project. You may need to hunt to find the cumulative impact analysis for your particular issue.

Where there is an existing local, state, or federal standard in law or regulation (e.g., air quality), advocate the application of the strictest standard as the threshold of significance. (California's air-quality standards are more stringent than those of the federal government.) Your goal is to make sure that all significant impacts are identified as such so that they must be mitigated to the extent feasible.

Significance is in the eye, ear, nose, and taste of the beholder. Significance is a function of the context and intensity of an impact. A noise level that is acceptable at an urban intersection may not be acceptable at a rural bird sanctuary. A visual blight on the landscape that may be acceptable in a downtown business district may not be acceptable along a scenic highway. This is the section where you need to make your case to the decisionmakers to uphold high standards for environmental protection.

This does not mean that you expect decisionmakers to be radicals. When a project proponent comes to the lead agency for project approval, the party is really asking the lead agency for a loan (or gift!) of its environmental and social-service resources, be they water supply, air quality, road safety, school capacity, or whatever. The lead agency has to determine if the party is a good environmental credit risk. Does the project have good environmental collateral (good design and mitigations)? Has the developer complied with mitigation measures in other projects? Have the mitigation measures been effective in the past? In essence, you are asking the lead agency to be a very conservative banker with our environmental and social-service resources.

### **D. Mitigation of Impacts**

CEQA requires that the EIR "describe measures which could minimize significant adverse impacts...." [*Guidelines*, Sec. 15126 (c).] If you know of mitigation measures that have not been considered, ask that they be considered. Good sources of mitigation measures are conversations with planners from responsible or trustee agencies, other EIRs, books on various issues, the Internet, etc. If a particular mitigation measure hasn't worked in the past, it may be because it wasn't followed through on.

Generally, the level of impact reduction associated with a mitigation measure should be quantified when possible. If the impact reduction is not quantified, ask that this be done.

The track record of the developer and the mitigation measures are relevant concerns. Has the developer complied with mitigation measures on other projects? Have the mitigation measures been effective in the past? If not, why not? (It might be that they weren't carried out, or that the lead agency didn't enforce them.) If the DEIR doesn't discuss these issues, ask that it do so.

To approve a project with potentially significant impacts, a lead agency must mitigate to a level of insignificance, ask another agency with sole jurisdiction to do this, or adopt "overriding considerations" to approve the project in the face of the adverse impacts. The "*findings*" by which this is done must be supported by *substantial evidence*. If mitigation does not reduce the level of impact below the threshold of significance, then note that the impact is a significant unmitigable project impact. Also explain why denying the project is better than adopting a statement of overriding considerations. Explain why the public benefits of the project are small relative to the magnitude of the adverse impacts.

Specifically ask the decisionmaker to adopt the proposed mitigation measures you like. Explain why they are socially and economically feasible.

CEQA also requires that at the time of completion of the FEIR, the lead agency must adopt a **mitigation monitoring and reporting plan** that indicates how the implementation of mitigation measures will be monitored for completion and effectiveness, and what reports will be done and by whom to document this. If the monitoring and reporting plan does not appear in the DEIR, express your dismay and request that this plan be made available for public comment *prior* to the decision on approval of the project.

If you have any suggestions for requirements for mitigation-measure reporting and monitoring, make them here. Good things to ask for are: 1) continuous field monitoring of continuing impacts, 2) independent third-party and public review of monitoring plans and monitoring results, 3) contingency plans for when initially required mitigation measures prove ineffective, 4) clear thresholds for evaluating the effectiveness of mitigation, 5) clear authority to the party that needs to implement the contingency plan, 6) clear provisions that allow citizens to take legal action if mitigation is not effectively implemented.

#### **E. Analysis of Alternatives**

CEQA requires that the EIR identify and evaluate a reasonable range of alternatives capable of eliminating one or more of the significant impacts of the project. If the range of alternatives is too narrow, suggest that another alternative be analyzed. If the analysis of impacts failed to provide a quantitative comparison of the impacts of the alternatives, request such an analysis. If you like a proposed alternative, make your case for it here.

#### **F. Conclusions**

Summarize your conclusions and make your moving policy arguments. If you have not gotten your good rhetoric into the comment yet, this is your last chance!

### **AN ALTERNATIVE FORMAT**

A simpler overall approach won't present your arguments so completely but still has the virtue of making it difficult for a lead agency merely to skip over some of your comments. This is to *number* each question you pose. You still can provide a context for your question by text interspersed between your questions. (You are remembering to couch all your comments you want answered in the form of *questions*, of course! They have to *answer* questions.).

### **STRATEGIES: RISKS AND BENEFITS**

Concentrate on the things you expect them to do wrong. Participate in the process in good faith but try to avoid being a "victim". If you become one, be a *good* one. Ask tough questions. (Where is the water coming from? What are your chances of getting it?) Demand state-of-the-art analyses up-front. Aim to put into the record information to enable the decisionmakers to make the right decision and to look bad if they make the wrong one. Stuff an appendix to your comments with documentation--reports, articles, clippings, etc. *Take the time to reference these by footnotes to your text to help with clarity.*

Economic effects are not subject to CEQA, which concerns itself with physical effects on the environment. But with careful wording, you may nevertheless be able to include them. For example, if a project fails to generate revenue adequate to fund its share of public services, will the level of such services available for existing residents decline? Will roads fall into disrepair? Will the availability of parks decline as existing ones are used by more people? Will illegal dumping increase? These would all be physical effects on the environment stemming from project economics.

CEQA grants the plaintiff the option of **preparing the administrative record** yourself. Take advantage of this! Lead agencies may "stuff" the record with duplicates of the same documents or with trivial documents to discourage you by running up the costs. Moreover, they will charge you the going rate for providing copies to the public--10 to 15 cents per page, maybe more, is not uncommon. You can get copies made much more cheaply.<sup>(6)</sup>

A lead agency may also try to prevent your preparing the record by refusing to let you remove documents from their possession for copying. This isn't unreasonable, but they usually have an arrangement with some local copy service for large-scale copying tasks. You can make a separate arrangement with such a service to pick up the record and duplicate it for you and deliver it back to the lead agency without your being involved. For smaller records, you might consider renting a small copier, taking it to the agency's office, and making copies there. This is slower than a high-speed copier at a copy shop, but is also an opportunity to examine documents carefully, as well as to prepare an index, all at once at minimal cost beyond the time spent by you and your helpers. (See the second following paragraph.)

When the record is assembled and copied, its **pages will have to be numbered** consecutively (a full-service copy shop probably can do this for you; if the record isn't too big, there are hand numbering machines that also may be used). Once the pages are numbered, you will need a second copy for the court. The lead agency will want a third copy, but you don't have to pay for that one; it has to.)

An *index* will also have to be prepared for the court. (It will also help you and your attorney.) If the lead agency does it, it may charge you for the task. Look upon this also as an opportunity and do it yourself. As you and your helpers index, you can detect duplicates, look for interesting tidbits in the documents you examine, and keep track of the record number on the pages. Keep track! This will also be very useful when your attorney is preparing briefs in your case. Laptop computers are handy for such work.

The record will probably also need to be bound for the convenience of the court and your attorney. This may mean hole-punching of the pages (there are vendors that can do this), or you can have the copies made on pre-hole punched paper. Check the costs of the two alternatives.

### **RESOURCES:**

The California Environmental Quality Act (CEQA) is part of the California Public Resources Code (Division 13, Section 21000 et seq.). It may be downloaded from the Internet at a link to [www.ceres.ca.gov](http://www.ceres.ca.gov).

CEQA Guidelines are part of the California Code of Regulations (14 CCR Section 15000 et seq.). They may also be downloaded from the Internet at a link from [www.ceres.ca.gov](http://www.ceres.ca.gov). Copies also should be obtainable from the Governor's Office of Planning and Research.

OPR also publishes *Planning, Zoning and Development Laws*, a frequently updated compendium of laws involved in planning and zoning.

*Guide to the California Environmental Quality Act (CEQA)* is a frequently updated and thorough treatment written by members of the law firm Remy, Thomas, and Moose and others and published by Solano Press. It includes case law on various of the issues. It is priced at \$70.

The Planning and Conservation League occasionally offers classes in the EIR process aimed especially at education of citizen groups.

**TIPS  
KEEP TRACK OF THE TIME YOUR VOLUNTEERS SPEND:**

If you try to reduce your overall costs by having volunteers do some of the work, have them keep track of their time spent on doing what sort of work. If you eventually win your case, it may be possible to charge for time spent in doing work that would otherwise have been done by paralegals. Also keep track of out-of-pocket costs, such as copying charges, and keep receipts.

1. Lead agencies may publish in the cheapest newspaper of "general circulation". In El Dorado County, for example, that is the Mountain Democrat, not the Sacramento Bee. That few people in the county read the Mountain Democrat is of no consequence to the agencies. Learn to read the legal notices regularly!

2. For example, would the same noise standard acceptable in an urban setting be appropriate also for a rural setting? El Dorado County chose 65 decibels as a standard not to be exceeded, the same as the standard in many metropolitan areas. However, the World Health Organization in 1995 recommended a limit of 50 decibels for constant daytime noise exposure and 45 decibels at night, saying that "most people begin to become annoyed and many suffer ill effects" at greater level. The EPA reached a similar conclusion in 1974. And the OPR takes 60 decibels as an *upper* limit of "Normally Acceptable" for a single-family residence. See <http://www.nonoise.org/> for information.

3. Example: One mitigation for impacts on air quality might be to require the developer to remove a certain number of "clunker" cars from the road through a buy-back program. Placer County may have tried this--call its air-quality officer to ask and to get sample wording.

4. Example: In El Dorado County, a judge hearing a suit on a particular development proposal had his attention caught by this quotation concerning light pollution and the Northridge earthquake. After hearing the defendant's argument trivializing the issue, the judge said, "What about this quotation from *Modern Maturity*?" He ruled in favor of the plaintiff on this issue (and several others).

"Having climbed through fallen furniture, broken glass, and chunks of plaster, she and her husband sat on a curb in the predawn darkness as sirens wailed. Betty's husband of 50 years put his arm around her and held her close. 'Look at the sky. There are a million stars,' he whispered. 'It was true,' Betty writes. 'With all the lights of the city extinguished in those terrible moments, the sight was breathtaking.'"

---*Modern Maturity*, Jul-Aug 1995

5. Example: In El Dorado County, the EPA in 1986 paved some gravel roads surfaced with crushed serpentine rock out of concern for air-borne asbestos. No mention was made of this in the background volume of the general plan and the county was evasive in responding to a question about the presence of asbestos. Yet in 1998, naturally-occurring asbestos became a major consideration when it was found that schools, with unpaved playing fields, had been built on such deposits.)

6. For the El Dorado County general plan lawsuit, in order to compile the record, the county asked for all files from Planning, Planning Commission, Dept. of Transportation, Counsel's Office, and Board of Supervisors. Many had copies of the same documents. The complete record was over 210,000 pages long and probably less than 15 to 20 percent was really pertinent and not present in duplicate copies.