

TO: Pat Wright
FROM: Ryan Alexander
RE: Legalization of Domestic Ferrets
DATE: 5/13/13

LEGAL MEMO:

QUESTION PRESENTED:

Under California law did the California Commission of Fish and Game and/or the California Department of Fish and Wildlife violate any duties or acts by failing to review or failure to provide the evidence that there was a review of the preliminary report put together by legalizeferrets.org?

What remedies are available to legalizeferrets.org if there are any violations by either of the two aforementioned entities?

Are there any other avenues legalizeferrets.org have in regards to getting domestic ferrets off the restricted species list?

Is there a way to force the Commission of Fish and Game and/or the California Department of Fish and Wildlife to work on an EIR with legalferrets.org?

SHORT ANSWER:

No. It is up to the "lead agency" whether to approve or disapprove a project. There is no law to back up the fact that they must consider, review or accept a private project that has been proposed. CDFW and the F+G Commission have stated that they are not interested in the project at this time. There is no source of law or duty that can force the Commission or CDFW to cooperate and do or direct an EIR. The agencies have wide discretion when deciding to take on a project and judges and other public officials will give deference to their positions. Therefore, this is a dead end avenue unless one of these groups agrees to work on the EIR with legalizeferrets.org.

FACTS:

The California Fish and Game Commission, at its April 6, 2000, meeting in Sacramento, listened to a request by Californians for Ferret Legalization that the Commission consider removing ferrets from the restricted species list. As explained at the meeting, a regulatory action by the Commission is considered a "project" under the California Environmental Quality Act (CEQA), which requires the preparation of an environmental document (EIR). Therefore, at the conclusion of public testimony, the Commission directed the Californians for Ferret Legalization, as project proponents, to fund the preparation of the environmental document to

assess the potential impact to the environment of this proposed action. The Commission would not be in a position to again consider this matter until such an environmental document were prepared (Meeting Summary, agenda item 7).

AUTHORITY:

According to the California Fish and Game Code section 2118(k) the Commission of Fish and Game has the authority by regulations in cooperation with the Department of Food and Agriculture to add to or delete species or classes from the restricted species list.

DISCUSSION:

Based on the past dealings Mr. Wright has had with this issue (including getting the bill passed only to have it vetoed by Governor Schwarzenegger at the behest of the CDFW) the cooperation of these agencies will be necessary to legalize ferrets. The only way the agencies will consider legalizing ferrets is if it makes it through the CEQA process. In order to make it through the CEQA process he will need the cooperation of the CDFW or the Commission of Fish and Wildlife. One of those two bodies would have to be the lead agency on the project or would have to help approve the project as a responsible agency.

The lead agency is in control of the Environmental Impact Report and they can have a meeting with Mr. Wright and his committee to work on a meeting for scoping. Scoping is when a project is being discussed what studies or types of research must be done for the EIR.

Also, the lead agency will have to submit many documents on the projects behalf with strict time lines. One of the main concerns is that no department wants to work on this issue and claims there are matters of higher importance. However under certain statutes a state agency may charge reasonable fees for this (Pub Res C section 21089(a); 14 Cal Code Regs section 15045(a)). If Mr. Wright can make contact and offer to pay for all expenses they may be willing to consult with him so that he can meet their requirements for an EIR.

CEQA is very hard process to go through and many opponents of projects use it to kill the projects. This is what seems to be happening with legalizeferrets.org. The Commission of Fish and Game says that they would need an EIR to make a vote on the project. However, it is a catch 22 because they are the ones who would be responsible for the EIR and must direct it, oversee it, and submit documents for it to certain agencies. However, they claim they do not have the time or resources to help with this project. They have you exactly where they want you no options without their cooperation or approval. Which is what we all know they have been trying to do.

COURSE OF ACTION:

1) Get on good side of one of the agencies and set up a scoping meeting and pay them for any and all expenses involved with the project. Either the Commission of Fish and Game, CDFW, or the Department of Food and Agriculture.

- With the Commission of Fish and Wildlife the way they are right now this does not look like a real avenue to pursue. Once some new people get on the Commission this could be a possibility.

2) Petition for a change in agency's regulations through Government Code Section 11340.6 and 11340.7.

- **Can I ask for a change in an agency's regulations? How?**
 - o Yes. You may ask an agency to repeal or amend an existing regulation, or to adopt a new regulation by petitioning the agency, using the method described in Government Code sections 11340.6 and 11340.7.
 - A petition is simply a letter that requests the change and contains certain information. Specifically, the petition must identify the nature of the regulation change, the reason for the request, and the agency's rulemaking power (a reference to the law giving the agency the power to adopt rules and regulations).
- **What happens after I have petitioned an agency, as outlined above?**
 - o By law, the agency must notify you in writing of the receipt and any denial of the petition within 30 calendar days. Any denial must be in writing and include the reasons the agency reached its decision. If the agency does not deny the petition it must schedule the matter for a public hearing.
 - o Any decision denying or granting a petition, in whole or in part, must be in writing and transmitted to OAL for publication in the Notice Register. The agency may also take any other action it may determine necessary by the petition, but is required to notify the petitioner in writing of any such action.
 - See Government Code sections 11340.6 and 11340.7, which describe the complete petition process.
- **They will just deny it and state that they cannot go forward without an EIR, and that they do not have the time or resources to work on it.**

3) Push for some form of litigation with a Writ of Mandamus under CCP 1085 or 1094, or seek declaratory or injunctive relief.

- In order for this to succeed we must point to a specific duty that is owed by the Agency. There is no law to back up a duty that the Commission of Fish and Game or the CDFW to have to comply with the request or to cooperate with putting together an EIR. Therefore, it is very unlikely that a judge would side with us on this issue and court costs could be substantial to defend this action.

4) Continue to try and write bills and get it passed by the legislature and the people.

- I know this is very expensive and time consuming to find a legislator who will write and present the bill and also to get the requisite signatures to place it on a ballot.

CONCLUSION:

Someone from CDFW, and/or the Commission of Fish and Game, and/or the Department of Food and Agriculture must agree to work on this project with legalizeferrets.org. Many times groups claim that something is a project under CEQA to kill a project. CEQA is a very complicated process and there are no set directions on an automatic form of an EIR. Therefore, unless it is signed off on or directed by CDFW it will never gain approval and ferrets will not be legalized. In my opinion someone in CDFW must be consulted with. They must find out how they would want the EIR done and that you would pay the agency for any people who work or direct it and fund the whole project. A lead agency may charge a project applicant a reasonable fee for the estimated cost of preparing an initial study. Pub Res C section 21089(a); 14 Cal Code Regs section 15045(a). This could be quite costly and still not get the data or support that legalizeferrets.org would need.

1. Litigation against parties participating in CEQA process
 - a. Collateral challenges to their adversaries actions
 - i. Misuse of legal process
 - ii. Defamation
 - iii. Claims for damages brought against the agency or its consultants
 - iv. Challenges to an opposing organization's tax-exempt status
 - b. These challenges are invariably unsuccessful.
 - c. SLAPP suits or Strategic Lawsuits against public participation
2. A project proponent may not sue a public agency for damages for failure to prepare a proper EIR
 - a. Lake Almanor Assocs. L.P. v. Huffman-Broadway Group, Inc. (2009) 178 CA4th 1194, 1201.
3. The Exclusive vehicle for attacking a CEQA document on the ground that it is inaccurate or inadequate legally is a mandamus proceeding
 - a. brought under Pub Res C 21168 or 21168.5
4. Under CEQA the lead agency has final responsibility for an EIR's contents and
 - a. the consultant's duty to provide an accurate EIR is owed solely to the lead agency,
 - i. not the developer or other third parties.
5. The petitioner must have a clear, present, and beneficial right to performance of the duty sought to be enforced.
 - a. People ex rel Younger v. County of El Dorado (1971) 5C3d 480, 491
 - b. The petitioner must show that it will obtain some benefit from issuance of the writ or suffer some detriment from its denial.
 - i. Waste Mgmt. v. County of Alameda (2000) 79 CA4th 1223, 1233.
6. In cases subject to Pub Res C 21168.5 judicial review is limited to determine whether there was a prejudicial abuse of discretion
 - a. Abuse of discretion is established either if the agency did not proceed in a manner required by law or if the agencies decision is not supported by substantial evidence. Pub Res C 21168.5
 - i. Whether there is substantial evidence to support the agency decision; and
 - ii. Whether the agency failed to proceed in the manner required by law
7. When the action that an agency takes on a project is quasi – legislative, such as adoption of an ordinance, rule, regulation, or policy,
 - a. Pub Res C 21168.5 Applies
 - b. CEQA determination is reviewed by CCP 1085
8. DECLARATORY RELIEF
 - a. An action challenging an agency's pattern and practice, rather than a specific decision or project approval, may be brought for declaratory relief.

- i. Californians for Native Salmon & Steelhead Ass'n v. Department of Forestry (1990) 221 CA3d 1419
 - 1. Declaratory relief is only for agency policy or practice
 - 2. Any challenges to a specific decision or project approval should be brought by administrative mandamus.
 - a. 43 CA4th 1113, 1121
- 9. Proceedings to Enforce Procedural Requirements
 - a. A court may issue a writ of mandate ordering a public agency to perform a mandatory duty imposed by law.
 - i. CCP 1085(a)
 - b. While mandamus is not available to compel an agency to exercise its discretion in a particular way, it is available to compel an agency to take action when it is legally required to do so.
 - i. 73 CA4th 215, 222
 - ii. 8 Witkin, CA Procedure, Extraordinary Writs section 94 (5th ed 2008)
 - c. If a lead agency fails to comply with maximum time limits mandated by CEQA, an aggrieved project applicant may, in appropriate circumstances, seek a writ of mandate compelling the lead agency to act.
 - i. 73 CA4th 215, 223
 - 1. On the unavailability of damages as a potential remedy.
- 10. When a challenge that should be brought as a mandamus proceeding is improperly labeled as an action for declaratory or injunctive relief, the court may treat it as a mandamus proceeding.
 - a. 6C3d 541, 546
- 11. EXCEPTIONS TO EXHAUSTION DOCTRINE
 - a. Futility 23.109
 - i. General rule is that an aggrieved party is not required to pursue an administrative remedy when it would be futile do so.
 - 1. 217 CA3d 71, 91
 - ii. Futility can be established only if it is certain what the agency's decision in the case would have been.
 - 1. 177 CA3d 62, 77
 - iii. Futility exception rarely applies in CEQA cases because the petitioner must be able to prove that the agency has clearly declared what its final ruling will be in a particular case before considering the facts
 - 1. 161 CA4TH 1464, 1490
 - iv. The futility exception cannot apply when the decision-making body has not been given an opportunity to address the petitioner's specific challenges to its CEQA determination.
 - b. RIPENESS
 - i. Under the ripeness doctrine, a CEQA challenge may not be maintained before the agency has made its decision on whether to approve or carry out the project.

1. 81 CA3d 923, 927

ii. An action challenging a quasi legislative policy may be ripe for review even if it does not seek to review final agency action on specific agency approvals.

1. 221 CA3d 1419, 1428

12. Finality of Administrative Decision 23.111

- a. A decision by a government agency may not be reviewed before the agency's decision in the matter is final;
- b. An agencies decision in a matter is not final if it may be reviewed by appealing the decision to a higher administrative body.
- c. Under CEQA, an agency decision is final for purposes of judicial review when the agency files a notice of determination or notice of exemption in connection with its decision to approve or carry out the project.
 - i. Pub Res. C. 21167(b) – (e)
- d. In the absence of a notice, the agency's decision is reviewable when it makes its final decision to approve or carry out the project.
 - i. Pub Res C. 21167(a), (d)

RELEVANT CODES

- Government Codes
 - 11340.6. Except where the right to petition for adoption of a regulation is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346). This petition shall state the following clearly and concisely: (a) The substance or nature of the regulation, amendment, or repeal requested. (b) The reason for the request. (c) Reference to the authority of the state agency to take the action requested.
 - 11340.7. (a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing in accordance with the notice and hearing requirements of that article. (b) A state agency may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition and shall notify the petitioner in writing of this action. (c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a). (d) Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346) shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision shall identify the agency, the party submitting the petition, the provisions of the California Code of Regulations requested to be affected, reference to authority to take the action requested, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain a copy of the petition from the agency.

CEQA CODES

15042. Authority to Disapprove Projects

A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed. A Lead Agency has broader authority to disapprove a project than does a Responsible Agency. A Responsible Agency may refuse to approve a project in order to avoid direct or indirect environmental effects of that part of the project which the Responsible Agency would be called on to carry out or approve. For example, an air quality management district acting as a Responsible Agency would not have authority to disapprove a project for water pollution effects that were unrelated to the air quality aspects of the project regulated by the district.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Sections 21002 and 21002.1, Public Resources Code; *Friends of Mammoth v. Mono County*, 8 Cal. App. 3d 247; *San Diego Trust and Savings Bank v. Friends of Gill*, 121 Cal. App. 3d 203.

Discussion: This section is necessary to codify the holdings of the cases cited in the note. These cases hold that a public agency has authority to disapprove a project due to environmental problems even though that authority might not be expressly stated in the enabling legislation for the agency.

15352. Approval

(a) "Approval" means 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.

(b) With private projects, approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Sections 21061 and 21065, Public Resources Code.

Discussion: The term "approval" needs definition because the term is critical to the CEQA process. A public agency must comply with CEQA when the agency proposes to approve some kind of project. The statute does not define the term, and it is often difficult to identify the time when the project is approved. This section spells out criteria for determining when the approval occurs.

15356. Decision-Making Body

"Decision-making body" means any person or group of people within a public agency permitted by law to approve or disapprove the project at issue.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21003(b), Public Resources Code; *Kleist v. City of Glendale*, (1976) 56 Cal. App. 3d 770.

Discussion: This definition is added because there is a need for a term to apply to the person or group which has authority to make the decision to approve or carry out a project. The individuals or groups which are granted this authority seem to have no one common name or common description among the many agencies subject to CEQA. Accordingly, the Guidelines must provide a term which could apply to these people in all situations.

15357. Discretionary Project

"Discretionary project" means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations. A timber harvesting plan submitted to the State Forester for approval under the requirements of the Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Res. Code Sections 4511 et seq.) constitutes a discretionary project within the meaning of the California Environmental Quality Act. Section 21065(c).

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21080(a), Public Resources Code; *Johnson v. State of California*, (1968) 69 Cal. 2d 782; *People v. Department of Housing and Community Development*, (1975) 45 Cal. App. 3d 185; *Day v. City of Glendale*, (1975) 51 Cal. App. 3d 817; *N.R.D.C. v. Arcata National Corp.*, (1976) 59 Cal. App. 3d 959.

Discussion: A definition of the term "discretionary project" is essential for defining the scope of activities subject to CEQA. The Act provides that it applies to discretionary projects, but the Act does not define the term. The definition offered here is taken from the State Supreme Court decision in *Johnson v. State of California*, a 1968 decision. The definition in this section has been approved in a number of court decisions since that time. Several of these decisions are cited in the note. See also discussion for Section 15268.

15367. Lead Agency

"Lead Agency" means the public agency which has the principal responsibility for carrying out or approving a project. The Lead Agency will decide whether an EIR or

Negative Declaration will be required for the project and will cause the document to be prepared. Criteria for determining which agency will be the Lead Agency for a project are contained in Section 15051.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21165, Public Resources Code.

Discussion: This section combines the statutory definition of the term "Lead Agency" with a more complete explanation in terms related to the CEQA process. The fundamental point is that CEQA gives the Lead Agency the tasks of determining whether an EIR or a Negative Declaration will be required for the project and preparing the document.

15377. Private Project

A "private project" means a project which will be carried out by a person other than a governmental agency, but the project will need a discretionary approval from one or more governmental agencies for:

- (a) A contract or financial assistance, or
- (b) A lease, permit, license, certificate, or other entitlement for use.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21065, Public Resources Code.

Discussion: This section defines a term to be used in the place of a much longer phrase several places in the statute. In a number of different contexts, the statute sets up special requirements that apply by way of a cross-reference to activities which involve the issuance of a lease, license, certificate, permit, or other entitlement for use. It is clearer in these situations to refer to private projects.

15378. Project

(a) "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

- (1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700.

(2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(b) Project does not include:

(1) Proposals for legislation to be enacted by the State Legislature;

(2) Continuing administrative or maintenance activities, such as purchases for supplies, personnel-related actions, general policy and procedure making (except as they are applied to specific instances covered above);

(3) The submittal of proposals to a vote of the people of the state or of a particular community that does not involve a public agency sponsored initiative. (*Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458; *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165);

(4) The creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment.

(5) Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment.

(c) The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval.

(d) Where the Lead Agency could describe the project as either the adoption of a particular regulation under subdivision (a)(1) or as a development proposal which will be subject to several governmental approvals under subdivisions (a)(2) or (a)(3), the Lead Agency shall describe the project as the development proposal for the purpose of environmental analysis. This approach will implement the Lead Agency principle as described in Article 4.

Authority cited: Section 21083, Public Resources Code. Reference: Section 21065, Public Resources Code; *Kaufman and Broad-South Bay, Inc. v. Morgan Hill Unified School District* (1992) 9 Cal.App.4th 464; *Fullerton Joint Union High School District v. State Board of Education* (1982) 32 Cal.3d 779; *Simi Valley Recreation and Park District v. Local Agency Formation Commission of Ventura County* (1975) 51 Cal.App.3d 648; and *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98.

15060.5. PREAPPLICATION CONSULTATION

(a) For a potential project involving the issuance of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies, the lead agency shall, upon the request of a potential applicant and prior to the filing of a formal application, provide for consultation with the potential applicant to consider the range of actions, potential alternatives, mitigation measures, and any potential significant effects on the environment of the potential project. **(b)** The lead agency may include in the consultation one or more responsible agencies, trustee agencies, and other public agencies who in the opinion of the lead agency may have an interest in the proposed project. The lead agency may consult the Office of Permit Assistance in the Trade and Commerce Agency for help in identifying interested agencies.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21080.1, Public Resources Code.

14 CA ADC § 770

§ 770. State, Federal and Public Review.
Cal. Admin. Code tit. 14, § 770


Barclays Official California Code of Regulations [Currentness](#)

Title 14. Natural Resources

Division 1. Fish and Game Commission-Department of Fish and Game

Subdivision 3. General Regulations

Chapter 4. Procedural Regulations for Implementation of the California Environmental Quality Act of 1970

 [Article 2. Fish and Game as Lead Agency \(Refs & Annos\)](#)

➔ **§ 770. State, Federal and Public Review.**

Filing the Draft EIR with the Secretary for Resources and State and local clearinghouses shall provide an opportunity for Federal, State and local agencies and members of the public to respond. EIRs shall be available for public inspection upon request during normal working hours at 1416 Ninth Street, Sacramento, or may be requested through Regional offices of the Department of Fish and Game. Copies shall be made available to the general public for the actual cost of reproducing such copies.

(a) In accordance with Section 15160 of the State Guidelines, Fish and Game shall provide a minimum of 45 calendar days between release of the Draft EIR and the final date for receipt of comments. ESB shall specify the length of the review period after considering the physical and environmental complexities of the proposed project. Unless there has been a request for a specific reasonable extension of time, only those comments received within the review period shall be considered.

(b) Whenever a public hearing is held on the project as a part of the review and approval process, hearings on the Draft EIR shall be included. In all other cases, the Director shall determine the need for public hearings on the Draft EIR in accordance with Section 15165 of the State Guidelines. Such public hearings shall not be held until at least 45 days after release of the Draft EIR for review and comment.

Note: Authority cited: Section 21080.5, Public Resources Code; Section 15050 of the State EIR Guidelines. Reference: Section 21080.5, Public Resources Code; Section 15050 of the State EIR Guidelines.

14 CCR § 770, 14 CA ADC § 770

**Governor's Office of Planning and Research
State Clearinghouse**

CEQA Technical Advisory

Submitting CEQA Documents to the State Clearinghouse

November 15, 2005

This technical advisory is intended to offer CEQA practitioners, particularly at the local level, information about the procedural requirements of the California Environmental Quality Act (CEQA). OPR's technical advisories are part of its public education and training program for planners, developers and others. This advice supplements, but does not amend or revise, the CEQA statute or state CEQA Guidelines.

I. Purpose

Public agencies are responsible for preparing CEQA environmental documents for proposed projects, and making those documents available for public review or posting as a matter of public record. These public agencies are called lead agencies. This advisory is intended to clarify the circumstances under which lead agencies must submit their environmental documents to the State Clearinghouse for state level review.

II. Background

The State Clearinghouse within the Governor's Office of Planning and Research (OPR) is responsible for managing the State's environmental review process under CEQA (Public Resources Code 21000 et seq.). CEQA and the state CEQA Guidelines (California Code of Regulations, Title 14, Chapter 3) require lead agencies to file or submit many types of environmental documents to OPR (the State Clearinghouse) under certain circumstances. These documents include:

- Notices of Exemption (NOE)
- Notices of Preparation (NOP)
- Notices of Completion (NOC)
- Notices of Determination (NOD)
- Draft Environmental Impact Reports (EIR)
- Proposed Negative Declarations and Mitigated Negative Declarations (Neg Dec)

Some lead agencies misunderstand or misinterpret the requirements for submitting CEQA documents to the State Clearinghouse. Procedural errors by lead agencies can needlessly delay a project's review and approval process and may even draw CEQA legal challenges. The following information is provided to minimize procedural errors by lead agencies and reduce the potential for delays or legal challenges.

III. What to Submit to the Clearinghouse

The following is a brief summary of the circumstances under which CEQA documents must be submitted to the State Clearinghouse. All code references are to the Public Resources Code (PRC) or to the California Code of Regulations (CCR).

Notice of Exemption

When a lead agency determines that a project is exempt from CEQA, the lead agency *may* file a NOE. Filing a NOE is voluntary. If a state agency files a NOE, it must be filed with OPR. If a local agency files a NOE, it must be filed with the County Clerk. (PRC 21108(b) and 21152(b))

Although filing of Notices of Exemption is generally voluntary, the statute requires lead agencies to file their NOEs with the State Clearinghouse for three specific types of housing projects. (PRC 21152.1) These three types of housing projects are identified in PRC 21159.22 for farm worker housing, 21159.23 for low-income housing, and 21159.24 for urban infill housing.

Notice of Preparation

Whenever a lead agency determines that an EIR is required for a project, the lead agency must send a copy of the NOP to all responsible agencies, trustee agencies, and OPR. Copies of *all* NOPS must be sent to OPR. (PRC 21080.4(a))

Notice of Completion

Whenever a lead agency completes a draft EIR, it must file a NOC with OPR which briefly describes the project and the fact that an EIR has been prepared. (PRC 21161)

Notice of Determination

When a lead agency approves a project for which an EIR or Neg Dec was prepared, the lead agency must file a NOD within 5 working days of the project approval. (CCR 15075(a); 15094(a)) When a state agency files a NOD, it must be filed with OPR. (PRC 21108(a)) When a local agency files a NOD, it must be filed with the County. (PRC 21152(a)) Filing of the NOD begins a 30 day statute of limitations on legal

challenges. If a NOD is *not* filed, the statute of limitations becomes 180 days, by operation of law. (CCR 15112)

Draft EIRs and Negative Declarations

Lead agencies must submit their Draft EIRs and Neg Decs to the State Clearinghouse when any of the following is true (PRC 21082.1; CCR 15205 and 15206):

- When the lead agency is a state agency.
- When there is a state responsible agency. The definition and role of a responsible agency is discussed in section IV.
- When there is a state trustee agency. The definition and role of a trustee agency is discussed in section IV.
- When the project meets the criteria for “statewide, regional or areawide significance.” A project qualifies as a project of “*statewide, regional, or areawide significance*” if it meets any of the criteria set forth in CCR 15206. These criteria are specific with respect to project size, location, type, and nature of impact. Examples include residential developments with over 500 dwelling units, projects within the Lake Tahoe Basin, and projects that would substantially affect sensitive wildlife habitats such as wetlands.
- When a state agency otherwise has jurisdiction by law with respect to the project.

This means state agencies must submit all of their EIRs and Neg Decs to the State Clearinghouse. Local agencies must submit an EIR or Neg Dec to the State Clearinghouse if (a) the project involves a state responsible or trustee agency, or (b) the project meets certain criteria based on project type, size, or location.

Where any of the above conditions exist (i.e., a state lead agency, a state responsible or trustee agency, or a project with statewide, regional or areawide significance) the EIR or Neg Dec must be submitted to the State Clearinghouse. Please refer to the *State Clearinghouse Handbook* for more information on how to submit your CEQA documents.

IV. Identifying and Working With Responsible and Trustee Agencies

Responsible agencies are those which have discretionary approval power over a project, such as the granting of a permit, lease or other approval, or approval of funding. Responsible agencies may also be involved in carrying out some aspect of the project (CCR 15381). The responsible agency’s power is more limited than that of the lead agency, but it may require changes in a project to lessen or avoid the environmental effects of that part of the project which the responsible agency will be called on to carry out or approve. (CCR 15041(b); 15042; 15096(g)) There are potentially dozens of state responsible agencies having regulatory or funding authority over private and local development projects.

Trustee agencies are state agencies that, while they do not have discretionary approval over a project, have jurisdiction by law over natural resources affected by

a project that are held in trust for the people of California. (CCR 15386) There are four trustee agencies defined in CEQA; the Department of Fish and Game, Department of Parks and Recreation, the State Lands Commission, and the University of California. (CCR 15386) A trustee agency has an important role in the CEQA process. A trustee agency may, for example, propose mitigation measures or project revisions for incorporation into a project and prepare and submit to the lead or responsible agency a draft monitoring or reporting program for those measures or revisions. (CCR 15097(f); 15204(f))

An agency is a trustee agency by virtue of its jurisdiction over natural resources affected by a project, not based on the extent of a project's effect on those natural resources. (CCR 15386). For example, an EIR or Neg Dec may conclude that a project has no significant impact on fish and wildlife of the state, yet the Department of Fish and Game would still be a trustee agency for that project if the project affects fish or wildlife. In this example, the Department of Fish and Game, as a trustee agency, would be consulted early in the process to assist in determining whether the project may have a significant impact on fish or wildlife resources and in developing appropriate changes in the project or mitigation measures for such impacts if they are significant.

Lead agencies are required to consult with state responsible and trustee agencies *before* deciding whether a project's impacts are significant. (PRC 21080.3; CCR 15063). This means that responsible and trustee agencies must be consulted *prior* to determining what type of CEQA document to prepare. Lead agencies should not confuse determining whether there is a state responsible or trustee agency with determining whether a project may have a significant impact. These are two separate and independent activities. A lead agency should not independently conclude whether impacts to natural resources are significant, without first consulting with appropriate trustee agencies.

Once an EIR or Neg Dec has been prepared, the lead agency must make the document available to the state responsible and trustee agencies, through the State Clearinghouse process. (CCR 15023(c); 15073(d); 15087(f); 15204(a),(e))

OPR can assist lead agencies to determine whether any state responsible or trustee agencies are involved in a project. (CCR 15023(d))

V. Contact For More Information

For more information on this subject or to review other OPR technical advisories, please contact:

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