

ENVIRONMENTAL LAW

CALIFORNIA
LAWYERS
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CYLA

Intro to Environmental Law Series

- Air Quality Law 101 – August 17, 2021
- Water Law 101 – September 2, 2021
- CEQA 101 – October 4, 2021
- Navigating the Yosemite Conference – October 5, 2021
- 30th Annual Environmental Law Conference at Yosemite – October 14-17, 2021

Intro to Environmental Law Series

CEQA 101



Moderator:

Paige Samblanet, Associate, The Sohagi Law Group, PLC



Speakers:

Mindy Jian, Fellow, Shute, Mihaly & Weinberger



Nathan O. George, Associate, Remy Moose Manley, LLP



Nicole Hoeksma Gordon, Partner, The Sohagi Law Group, PLC



AGENDA

- **BACKGROUND**
- **PROCEDURAL & SUBSTANTIVE BASICS**
- **LITIGATION**
- **WAYS TO GET INVOLVED**
- **QUESTIONS & DISCUSSION**

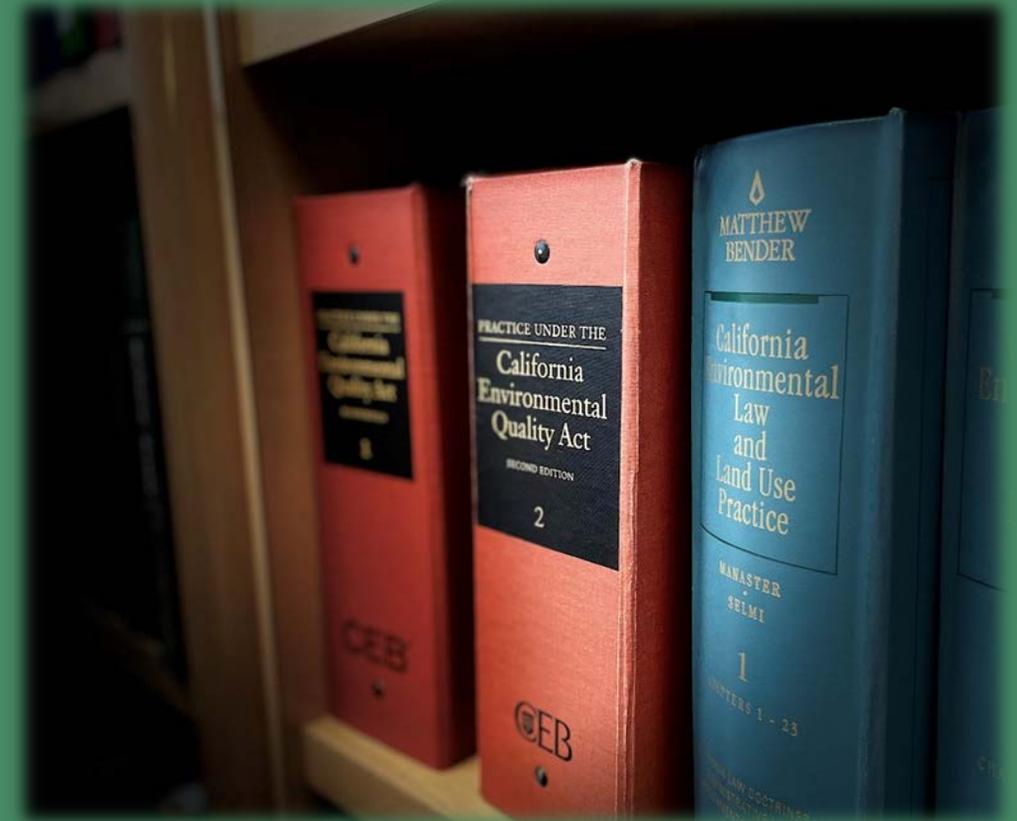
Nicole Hoeksma Gordon

- Practicing for: 16 years
- Been at current firm for: 15 years
- How did you get into environmental law: interest began in college, pursued environmental law at USC Law School, interned at NRDC, hired by Land Use Law adjunct professor
- Skills that helped you succeed in environmental law career: Law school/ early career classes/skills



What is CEQA?

- California Environmental Quality Act (CEQA) was the first state law modeled after NEPA
- Enacted in 1970
- Introduced the concept of environmental impact assessment to state and local planning in California
- Backbone of environmental policy in California



What does CEQA do?

CEQA helps ensure...

- A project's environmental factors are considered
- Public notification and engagement regarding projects
- Comments from public are reviewed and addressed
- Interagency coordination
- No decisions made “behind closed doors” with no explanations
- Opportunity for judicial enforcement

What does CEQA do?

CEQA differs from other environmental and planning laws because...

- Multidisciplinary
- Emphasis on disclosure of information
- Does not mandate a specific result – requires you to go through the environmental review process
- Integrates with other laws
- It is not a permit – it is a process

Legal Authorities and Resources

- CEQA Statute (Public Resources Code, Division 13, Sections 21000–21189.70.10)
- CEQA Guidelines (California Code of Regulations, Title 14, Sections 15000-15387 and Appendices A-N)
- https://www.califaep.org/statute_and_guidelines.php
- Agency CEQA Guidelines
- CEQA court decisions
- OPR technical advice series
- OPR resources website (<https://opr.ca.gov/ceqa/>)
- CEQAnet Web Portal (<https://ceqanet.opr.ca.gov/>)
- California Natural Resources website (<https://files.resources.ca.gov/ceqa/>)



CEQA: The California Environmental Quality Act

Key resources for understanding and implementing the California Environmental Quality Act (CEQA).

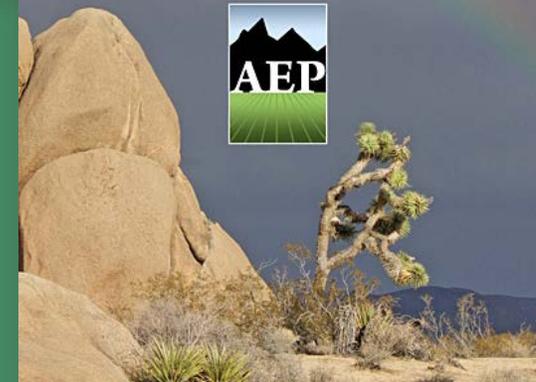
ON THIS PAGE:

New to CEQA? ↓

Guidelines & Updates ↓

2021 CEQA

California Environmental Quality Act
Statute & Guidelines



CEQA Directives

CEQA authorizes agencies to:

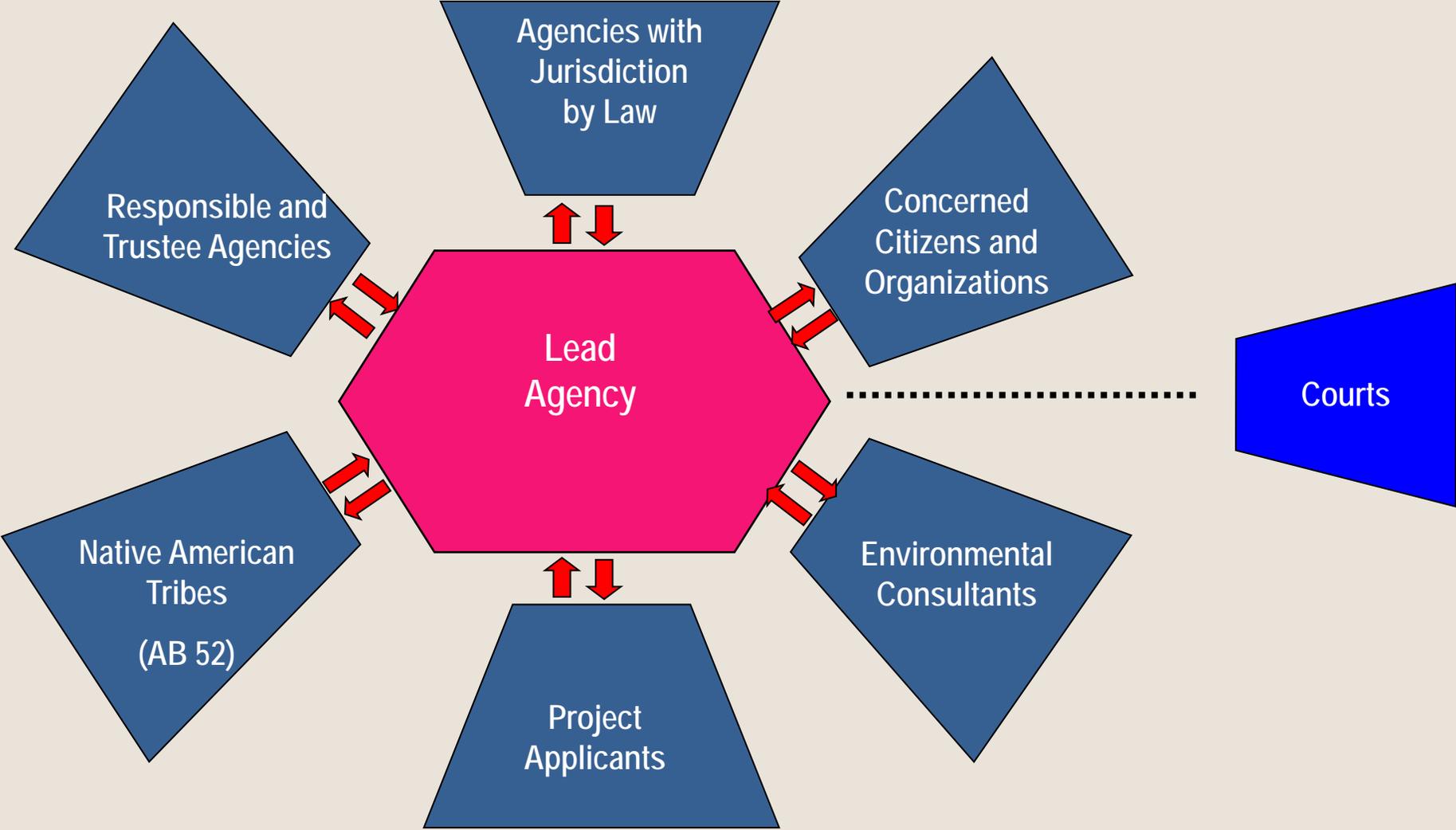
- Require changes in a project to lessen or avoid significant effects
- Disapprove a project to avoid significant effects
- Approve a project with unavoidable significant effects if project's benefits outweigh those effect
- Comment on CEQA documents prepared by other agencies
- Impose fees from project applicants for CEQA implementation
- CEQA does not alter an agency's powers

CEQA Objectives

- Foster informed government decision-making by disclosing significant environmental impacts
- Foster interagency coordination in reviewing projects
- Identify feasible alternatives and mitigation measures that avoid or reduce environmental impacts
- Encourage public participation throughout the process
- Publicly disclose reasons for agency approval of projects with significant environmental impacts

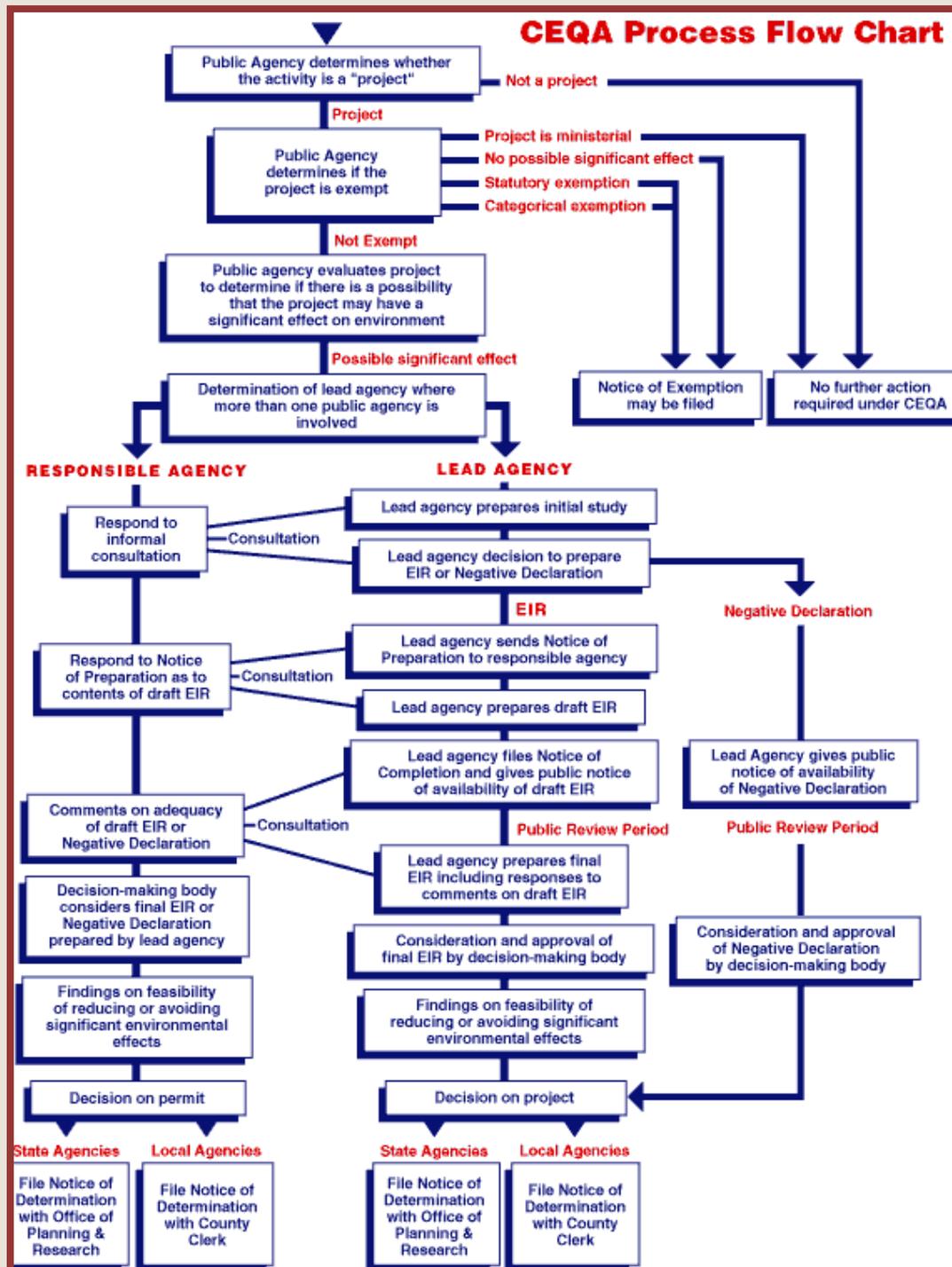
See Pub. Resources Code §§ 21000-21006; CEQA Guidelines §§ 15002-15003

Key Participants in the CEQA Process



CEQA Process Flowchart

Appendix A to CEQA Guidelines



Mindy Jian

- Practicing for: one year
- Been at current firm for: one year
- How did you get into environmental law: I took an environmental politics class in college and luckily have wanted to stick with it since
- Skill(s) that helped you succeed in environmental law career:
 - Being comfortable with discomfort, spending time outside
 - Real-world experience, administrative law, taking classes in other disciplines



Does CEQA Apply?

1. Is it a “project”?
 - a) Undertaken, supported, or approved by a public agency?
 - b) May cause a physical change in the environment?
2. Is the project discretionary?
3. Is the project exempt?
 - a) Statutory exemptions
 - b) Categorical exemptions
 - Exceptions
 - c) Common Sense exemption

Is it a “Project”? – Public Agency Action

- **“Public Agency”**: “any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision” (Pub. Resources Code § 21063)
- Includes activities...
 - ...directly undertaken by a public agency
 - ...undertaken by a person supported by public agencies
 - ...involving public agency approval
- Pretty expansive definition – often have **Real Parties in Interest (RPIs)**
- Notable exceptions:
 - Governor
 - State Legislature

Is it a “Project”? – Physical Change on the Environment

- “may cause either a **direct** physical change in the environment or a **reasonably foreseeable indirect** physical change **in the environment**” (Pub. Resources Code § 21065)
 - Doesn’t include purely socio-economic changes
- Other considerations
 - Is the public agency committed to a definite course of action?
 - Is the scope of the action properly defined? Improper piecemealing?



***Bozung v. LAFCO* (1975) 13 Cal.3d 263**

Does CEQA apply to LAFCO's approval of a City's annexation?

“One final overwhelming consideration...is the mandate of CEQA that environmental considerations do not become submerged by chopping a large project into many little ones...which cumulative may have disastrous consequences.”

Discretionary or Ministerial?

- Discretionary projects are subject to CEQA; ministerial projects are not
- “[W]hether the public agency can use its subjective judgment to decide whether or how to carry out or approve a project” (Guidelines § 15357)

Functional test: does the agency have the power to shape the project in ways that are responsive to environmental concerns?

Is it Exempt?– Statutory Exemptions

- Absolute; no exceptions
- Can be found in any statute, not just CEQA or CEQA Guidelines
- Examples
 - SB 10
 - Napa Wine Train
 - Olympics
 - Sports venues

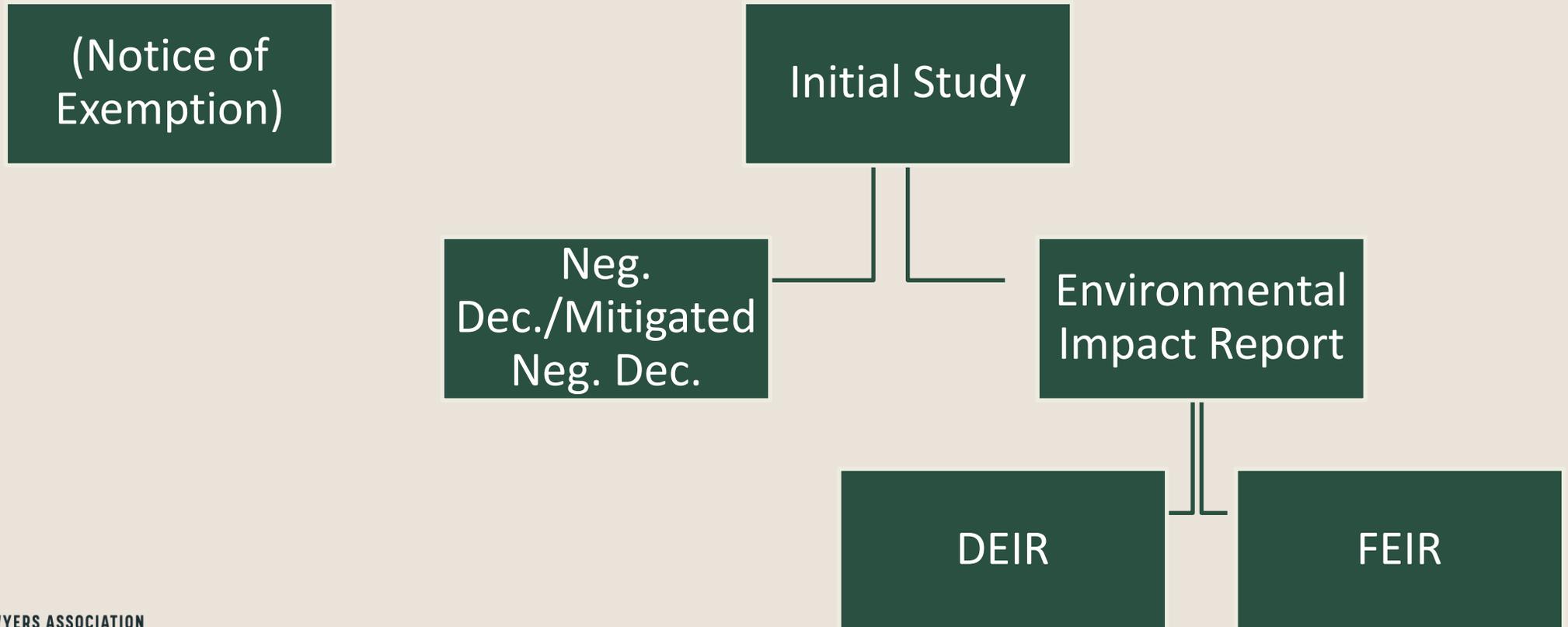
Is it Exempt?– Categorical Exemptions

- Categories of projects which don't usually have significant impacts
 - Ex. Existing facilities exemption (Class 1)
 - Ex. Protection/enhancement of natural resources and/or the environment (Class 7 and Class 8)
- Subject to **exceptions**
 - Specific: project located in and around scenic resources, historic resources, hazardous waste sites
 - General: cumulative impacts, unusual circumstances (most common), uniquely sensitive environment
- *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086

Is it Exempt?– Common Sense Exemption

- Project is exempt if “it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment” (Guidelines § 15061(b)(3))
 - Higher standard
 - Ex. modifications to the interior of a house
- Question is whether there is **any** effect – projects with beneficial impacts don’t qualify for this exemption (but would likely be exempt under Class 7 or 8 categorical exemption)

What Does CEQA Require?



What Does CEQA Require?

- **Initial Study (IS):** used to determine whether a project will have significant environmental impacts
- **Negative Declaration (ND):** prepare if project will not result in any significant impacts
- **Mitigated Negative Declaration (MND):** prepare if project will not result in significant effects because effects can be reduced through feasible mitigation measures

What Does CEQA Require?

- **Environmental Impact Report (EIR):** Prepare if determine that project will have significant environmental impacts
 - **Fair Argument standard:** “where it can be fairly argued on the basis of substantial evidence, in light of the whole record, that the project may have a significant effect on the environment”
 - “Significant environmental impact”: “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.” (Guidelines § 15382)
 - A lot of debate over whether the agency erred in not preparing an EIR
- EIR = Draft EIR + Final EIR

Nathan O. George

- Practicing for: 6 years
- Been at current firm for: 5 years
- How did you get into environmental law: law school environmental law club, internships at the California Air Resources Board and Attorney General's Office, Yosemite Conference
- Skills that helped you succeed in environmental law career: legal writing, administrative law, pre-trial procedure, environmental law work experience at externships, California Environmental Law and Policy class



CEQA Litigation

- Exhaustion of Administrative Remedies
- Statutes of Limitations
- Standard of Review
- Remedies

Public Resources Code, section 21177: Two components of exhaustion under CEQA

- First Component: Administrative Participation
 - Before filing a CEQA lawsuit, you must participate in the lead agency's administrative approval process by commenting on or objecting to the project.
 - However, organizations that are formed after project approval can rely on administrative participation by members.
 - Must pursue the administrative remedy to completion.
 - If you send in a comment letter, but don't pursue available administrative remedies, such as an appeal to the City Council/Board of Supervisors, you're out.

Public Resources Code, section 21177: Two components of exhaustion under CEQA

- Second Component: Issue Exhaustion
 - Whatever issues you plan to raise in court must have been raised with the lead agency before it approved the project.
 - E.g., if the only objections to the agency were related to air quality, the lawsuit cannot raise issues related to cultural resources
 - Issues can be raised by anyone during the administrative process.
 - The issues raised by commenters/project opponents and the agency's responses are part of what makes up the agency's record, which is what a court "reviews" in CEQA litigation.

Public Resources Code, section 21167: CEQA's unusually short limitations period

- No CEQA = 180 days from approval or commencement of project.
- Exemption = 35 days from the filing of the NOE by the lead agency, or, if no NOE is filed, 180 days from approval or commencement of the project.
- Neg Dec or MND = 30 days from the filing of the NOD by the lead agency, or, if no NOD is filed, 180 days from approval or commencement of project.
 - CEQA requires the lead agency to file an NOD (but may file an NOE) with the County Clerk and that the Clerk publicly post the notice for 30 days.
- EIR = 30 days from the filing of the NOD by the lead agency, or, if no NOD is filed, 180 days from approval or commencement of project.

Public Resources Code, section 21167: CEQA's unusually short limitations period

- Extending the Statute of Limitations
 - Posting issues: (changes limitations period from 30 days to 180 days)
 - Notice not posted for full 30 days
 - Notice does not identify project
 - Project changes:
 - NOD/NOE fails to provide notice of the project actually built

Public Resources Code, section 21168 & 21168.5: The “abuse of discretion” Standard of Review

- First Prong: Failure to comply with CEQA’s procedural mandates
 - Legal/procedural issues are reviewed “de novo” with no deference to the agency’s decision/conclusion.
 - I.e., the court gets to make its own decision on whether the agency’s decision/conclusion was correct.
 - Courts don’t require technical perfection, but look for adequacy, completeness, and a good faith effort at full disclosure.

Public Resources Code, section 21168 & 21168.5: The “abuse of discretion” Standard of Review

- Second Prong: Failure to support factual conclusions with substantial evidence
 - Factual/policy issues are reviewed under the deferential substantial evidence test.
 - I.e., the court reviews the agency’s record and decides whether there is substantial evidence to support the agency’s decision/conclusion. If so, the decision stands.
 - The court does not independently decide whether the decision/conclusion was correct/good policy. That is left up to the agency.

Public Resources Code, section 21168.9: Remedies under CEQA

- Writ of Mandate
 - Order commanding the agency to void, vacate, or rescind all or part of its decision (resolutions, ordinances, permits, etc.).
 - Order commanding the agency to take actions to comply with CEQA
- Injunction or Stay
 - Order commanding the agency and project proponent to refrain from acting on the project that could impact the environment, pending compliance with the writ and CEQA
- Limits
 - Order can only require what is necessary to comply with CEQA and cannot limit or command the agency's discretion

WAYS TO GET INVOLVED

- Join CLA, CYLA, or one of the Sections once you graduate and are admitted to the Bar
- Attend webinars and in-person events (e.g., Yosemite Conference, Diversity Conference, 101 Series, Annual Meeting)
- Earn MCLE credit through online videos or self-study materials
- Submit an article for our eNews or other Section publications
- Watch CYLA's 10 Minute Mentor videos on YouTube
- Participate in Student Negotiation and Writing Competitions
- Attend our Book Club
- Apply for Summer Fellowships

INTRO TO ENVIRONMENTAL LAW SERIES – NAVIGATING THE YOSEMITE CONFERENCE

Tomorrow, Oct 5 @ 12:00 PM – 1:00 PM

<https://calawyers.org/event/webinar-intro-to-environmental-law-series-navigating-the-yosemite-conference/>

Diversity & Inclusion Fellowship for Law Students

For more information about the *Environmental Law Diversity & Inclusion Fellowship* and to apply please visit: <https://calawyers.org/section/environmental-law/fellowships/>

Deadline is October 25, 2021



QUESTIONS & DISCUSSION



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