BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Section 17025 added by Statutes 1996, Chapter 1562

Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455

Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21102, 21150, 21151, 21151.2, 21151.8, 21152, 21153, 21154, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1970, Chapter 1433; Statutes 1972, Chapter 1154; Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes 1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121

California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18;

Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44

California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15022, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062,

Case No.: 03-TC-17

California Environmental Quality Act

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(*Adopted September 30, 2010*)

15063, 15064 15064.5, 15064.5, 15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29; Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30

California State Clearinghouse Handbook

Governor's Office of Planning and Research (January 2000)Filed on September 26, 2003 by

Clovis Unified School District, Claimant

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 30, 2010. Mr. Art Palkowitz represented the claimant, Clovis Unified School District and Ms. Donna Ferebee represented the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 *et seq*., and related case law.

Summary of Findings

For the reasons discussed below, the Commission finds that the test claim statutes, regulations and alleged executive orders do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution because:

1. The California State Clearinghouse Handbook is not an executive order subject to Article XIII B, Section 6.
2. The Commission does not have jurisdiction over statutes adopted prior to January 1, 1975.
3. The statutes and regulations listed below, which generally require compliance with the CEQA process, do not mandate school districts or community college districts to perform any activities because:

A. The plain language of Public Resources Code section 21083 imposes requirements on the Office of Planning and Research and the Secretary of the Resources Agency, not school districts or community college districts.

B. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.

C. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project:

Education Code Section 17025 added by Statutes 1996, Chapter 1562; Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455; Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21151, 21151.2, 21151.8, 21152, 21153, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes 1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121; California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18; Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44 and California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062, 15063, 15064 15064.5, 15064.5, 15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29; Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30.

4. Public Resources Code section 21082, as amended by Statutes 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 do not impose a new program or higher level of service on school districts and community college districts because:

    A. The Public Resources Code section 21082 requirement for school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation, added in 1976, was a clarification of existing law regarding "evaluation of projects," and therefore does not impose a new program or higher level of service.

    B. The requirement to adopt objectives, criteria, and procedures, for the evaluation of projects and the preparation of environmental documents pursuant to CEQA was required by the law as it existed immediately prior to the date that California Code of Regulations, title 14, section 15022 was adopted and has been continuously required by the Public Resources Code Section 21082 since January 1, 1973, and therefore does not impose a new program or higher level of service.

BACKGROUND

This test claim addresses the activities required of school districts, county offices of education and community college districts pursuant to the California Environmental Quality Act (CEQA) and related statutes and regulations. To assist the reader, there is a glossary of frequently used CEQA related terms and acronyms on page 60.

CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions, as well as categorical exemptions that can be found in CEQA and the CEQA regulations. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (EIR). If the EIR includes findings of significant environmental impacts, CEQA imposes a substantive requirement to adopt feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the project.[1] The EIR requirement, which effectively accomplishes the above purposes, is "the heart of CEQA."[2]

The project proponent is generally responsible for the costs of CEQA compliance, including the costs of preparing the EIR, if required. Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received environmental review, a lead agency must make certain findings. If mitigation measures are required or incorporated into a project, the lead agency must adopt a reporting or monitoring program to ensure compliance with those measures. If a mitigation

[1] Public Resources Code section 21002

[2] *County of Inyo v. Yorty* (1973) 32 Cal. App. 3d 795.

measure would cause one or more significant effects in addition to those that would be caused by the proposed project, the effects of the mitigation measure must be discussed, but in less detail than the significant effects of the proposed project.

In the final analysis for this test claim, prepared for the January 29, 2010 hearing, staff found that there was no evidence in the record to support a finding that school districts and community college districts are legally or practically compelled to acquire new school sites or build new school facilities or additions to existing schools of greater than 25%. At the January 29, 2010 hearing, claimant requested, and the Commission granted, permission to submit evidence that school districts are practically compelled to comply with some or all of the statutes and regulations pled in this test claim.

On March 23, 2010[3] and April 8, 2010[4], claimant submitted supplemental filings to support its claim that school districts are practically compelled to construct new facilities. Specifically, claimant reiterated its arguments that districts are practically compelled to comply with CEQA as a matter of law, and submitted a portion of the San Diego Unified 52nd Street Area Elementary School Final EIR for factual support. In the revised draft staff analysis, staff found that the evidence submitted by claimant in its supplemental filing on practical compulsion did not support a finding of practical compulsion. Rather, the evidence in the record supports staff's conclusion that the test claim statutes, regulations and alleged executive orders do not impose a state-mandated local program. Specifically, the evidence submitted shows that the district had many non-construction options which could have accommodated its students, but it chose not to pursue those options because they did not meet the district's own policy objectives. Therefore, the Commission finds that this test claim should be denied.

CEQA OVERVIEW

CEQA was enacted in 1970 and is currently contained in Public Resources Code sections 21000-21177. There are also numerous statutory provisions relating to CEQA that are contained in other codes. Those pled in this test claim include Education Code section 17025 as added by Statutes 1996, chapter 1562 and Government Code sections 66031 and 66034 as amended by Statutes 1994, chapter 300, and Statutes 1990, chapter 1455. In addition to these code sections, interpretive regulations for implementing CEQA, officially known as "the CEQA Guidelines," were first adopted in 1973 and have been amended numerous times since then. The CEQA Guidelines are located in California Code of Regulations, title 14, sections 15000-15387. This analysis will refer to the Public Resources Code sections 21000-21177 collectively as "CEQA" and the CEQA Guidelines (i.e. California Code of Regulations, title 14, sections 15000-15387) collectively as "the CEQA regulations."

The purposes of CEQA are:

- to inform decisionmakers and the public about project impacts;
- identify ways to avoid or significantly reduce environmental damage;
- prevent environmental damage by requiring feasible alternatives or mitigation measures;

[3] Claimant's supplemental filing dated March 15, 2010 (received March 23, 2010).

[4] Claimant's supplemental filing dated April 8, 2010.

- disclose to the public reasons why an agency approved a project if significant environmental effects are involved, involve public agencies in the process; and,
- increase public participation in the environmental review and the planning processes.[5]

CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions, as well as categorical exemptions that can be found in CEQA and the CEQA regulations. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (EIR). If the EIR includes findings of significant environmental impacts, CEQA imposes a substantive requirement to adopt feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the project.[6] The EIR requirement, which effectively accomplishes the above purposes, is "the heart of CEQA."[7]

The project proponent is generally responsible for the costs of CEQA compliance, including the costs of preparing the EIR, if required. Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received environmental review, a lead agency must make certain findings. If mitigation measures are required or incorporated into a project, the lead agency must adopt a reporting or monitoring program to ensure compliance with those measures. If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the proposed project, the effects of the mitigation measure must be discussed but in less detail than the significant effects of the proposed project.

PUBLIC AGENCY ROLES IN THE CEQA PROCESS

Lead Agencies

Existing law, pursuant to CEQA, requires public and private projects to be subject to the same level of environmental review.[8] In keeping with the recognition of the diverse conditions throughout the state and out of deference to local control over local land use decisions,[9] CEQA

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[5] Public Resources Code section 21002, California Code of Regulations, title 14, section 15002.

[6] Public Resources Code section 21002.

[7] *County of Inyo v. Yorty* (1973) 32 Cal. App. 3d 795.

[8] Public Resources Code section 21001.1; California Code of Regulations, title 14, 15002.

[9] Note that most of California's environmental laws (see e.g. the California Clean Air Act and the Planning and Zoning Law) specifically recognize local agency control over land use decisions and impose mainly procedural requirements on local agency decision making. See also *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 879 [""Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7." (We have recognized that a city's or county's

generally provides for a local agency to take responsibility for CEQA compliance for projects within its jurisdiction. Specifically, CEQA requires a local agency, such as a school district or a community college district,[10] to conduct an analysis of the environmental impacts associated with projects within its jurisdiction. A district acting in this capacity is referred to as the "lead agency." A lead agency for a private project is the agency with the greatest responsibility for supervising or approving the project; usually the city or county.[11] However, in the case of public projects, such as a school project, the lead agency is the project proponent,[12] in this case, the school district or community college district. This is true even when the project is in another agency's jurisdiction.[13]

Responsible Agencies

A public agency, other than the lead agency, that has some discretionary power to approve or carry out a project (usually the authority to grant a needed permit) for which the lead agency is preparing an EIR or ND is known as a "responsible agency."[14] With few exceptions, responsible agencies are bound by the lead agency's determination of whether to prepare an EIR or ND and by the document prepared by the lead agency.[15] In certain instances, responsible agencies can challenge lead agency determinations, assume the lead agency role, or participate in other ways in the CEQA process. Generally, responsible agencies have two sets of responsibilities:

(1) responding to the lead agency's request for information or comments as the lead agency determines whether to prepare an EIR or ND and commenting on any CEQA documents that are prepared; and,

(2) responsibilities related to approving or acting on the project.[16]

Specifically, in its role as consultant to the lead agency, the responsible agency:

(1) Makes a recommendation on whether to prepare an EIR or ND.[17]

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power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state. [Citations]".]

[10] The CEQA regulations define "local agency" to mean "any public agency other than a state agency, board, or commission. Local agency includes but is not limited to cities, counties, charter cities and counties, *districts*, *school districts*, special districts, redevelopment agencies, local agency formation commissions, and any board, commission, or organizational subdivision of a local agency when so designated by order or resolution of the governing legislative body of the local agency." (Tit. 14, Cal. Code of Regs., § 15368, emphasis added.)

[11] California Code of Regulations, title 14, section 15051(b).

[12] California Code of Regulations, title 14, section 15051(a).

[13] *Id*.

[14] California Code of Regulations, title 14, section 15381.

[15] See Public Resources Code section 21080.1(a); California Code of Regulations, title 14, section 15050(c).

[16] See generally Public Resources Code section 21080.3; California Code of Regulations, title 14, section 15096.

(2) Sends a written reply within 30 days after receiving a notice of preparation (NOP) of an EIR specifying the scope and content of information, germane to the responsible agency's statutory responsibilities, which should be included in the EIR.[18]

(3) Designates a representative to attend meetings requested by the lead agency regarding scope and content of the EIR.[19]

(4) Provides comments, limited to the project activities within the responsible agency's area of expertise, on the draft EIR (DEIR) or ND focusing on any shortcomings in the document or any additional alternatives or mitigation measures that should be considered.[20] The comments must be specific as possible and supported by specific oral or written documentation.[21]

(5) Provides the lead agency with performance standards for mitigation measures proposed by the responsible agency. The responsible agency may also request project changes or specific mitigation measures but then must also prepare the mitigation monitoring or reporting program for those changes if requested to do so by the lead agency.[22]

With regard to its responsibilities related to approving or acting on its own project, the responsible agency must:

(1) Consider environmental effects of the project as shown in the EIR or ND and feasible mitigation measures within the responsible agency's powers.[23]

(2) Decide whether the EIR or ND is adequate for its use and, if not:

a. take the issue to court within 30-days after the lead agency has filed the notice of determination (NOD);

b. prepare a subsequent EIR if permissible under California Code of Regulations, title 14, section 15162; or,

c. assume the lead agency role if permissible under California Code of Regulations, title 14, section 15052, subdivision (a)(3).[24]

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[17] California Code of Regulations, title 14, section 15096, subdivision (b)(1).

[18] Public Resources Code section 21080.4, subdivision (a); California Code of Regulations, title 14, section 15096, subdivision (b)(1).

[19] California Code of Regulations, title 14, section 15096, subdivision (c).

[20] Public Resources Code section 21153(c); California Code of Regulations, title 14, sections 15086, subdivision (c) and 15096, subdivision (d).

[21] *Id*.

[22] Public Resources Code section 21081.6, subdivision (c); California Code of Regulations, title 14, 15086, subdivision (d).

[23] California Code of Regulations, title 14, 15096; see also California Code of Regulations, title 14, section 15050, subdivision (b) regarding certification.

[24] California Code of Regulations, title 14, section 15096, subdivision (e).

(3) Make findings, adopt a reporting or monitoring program (if required) and file a NOD with the Office of Planning and Research (OPR) if a state agency, or the county clerk if a local agency.[25]

Trustee Agencies

A "trustee agency" is a state agency that has jurisdiction by law over natural resources affected by a project that are held in trust for the people of the State of California. Trustee agencies include:

(1) The California Department of Fish and Game with regard to the fish and wildlife of the state, to designated rare or endangered native plants, and to game refuges, ecological reserves, and other areas administered by the department.

(2) The State Lands Commission with regard to state owned "sovereign" lands such as the beds of navigable waters and state school lands.

(3) The State Department of Parks and Recreation with regard to units of the State Park System.

All of the lead agency consultation requirements that apply with regard to responsible agencies also apply to trustee agencies and trustee agencies may only make substantive comments regarding project activities within their area of expertise.[26] For any project where a ND is proposed and a state agency is a trustee agency, the draft ND must be sent to OPR for state agency review.[27]

Other Agencies That Must be Consulted

(1) The University of California with regard to sites within the Natural Land and Water Reserves System.[28]

(2) Transportation planning agencies, for projects of statewide, regional or areawide significance.[29]

(3) Planning commissions, for school site acquisition projects.[30]

(4) Air quality agencies, for school construction projects.[31]

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[25] Public Resources Code sections 21108, 21152 and 21081.6; California Code of Regulations, title 14, sections 15096 and 15097.

[26] Public Resources Code sections 21080.3, 21080.4, 21104, and 21153; California Code of Regulations, title 14, sections 15082, 15086, 15104.

[27] Public Resources Code section 21091; California Code of Regulations, title 14, sections 15073, subdivision (c) and 15205, subdivision (b).

[28] California Code of Regulations, title 14, section 15386.

[29] Public Resources Code section 21092.4.

[30] Public Resources Code section 21151.2.

[31] Public Resources Code section 21151.8.

The Office of Planning and Research

The CEQA regulations are unique in that they are prepared by OPR and then adopted by the Resources Agency pursuant to Public Resources Code section 21083. Therefore, the regulations are actually regulations of the Resources Agency. However, OPR is responsible for carrying out various state level environmental review activities pursuant to CEQA, including:

(1) Preparing and developing proposed CEQA Guidelines and reviewing the adopted CEQA Guidelines, at least once every two years, and recommending proposed changes or amendments to the Secretary of Resources.[32]

(2) Receiving, evaluating and making recommendations to the Secretary of the Resources Agency for changes to the list of categorically exempt projects.[33]

(3) Upon request from a lead agency, assisting the lead agency in determining which agencies are responsible agencies.[34]

(4) Upon request from a lead agency, assisting the lead agency in determining which public agencies have responsibility for carrying out or approving a proposed project and notifying responsible agencies regarding meetings requested by the lead agency.[35]

(5) Resolving disputes over which agency is the lead agency.[36]

(6) Receiving for filing the following notices and CEQA documents:

a. A state agency notice of exemption (NOE).[37]

b. DEIRs, NDs and other environmental documents to be reviewed by state agencies.[38]

c. Notices of Completion (NOCs) for state or local agency DEIRs and final EIRs (FEIRs).[39]

d. NODs if:

i. a state agency is the lead agency and the project was approved using an ND or an EIR; [40] or,

[32] Public Resources Code sections 21083 and 21087.

[33] Public Resources Code section 21086.

[34] Public Resources Code section 21080.3.

[35] Public Resources Code section 21080.4.

[36] Public Resources Code section 21165.

[37] Public Resources Code section 21080.4 subdivision (d); California Code of Regulations, title 14, section 15023 subdivision (e).

[38] California Code of Regulations, title 14, section 15025 subdivision (b).

[39] Public Resources Code section 21108 subdivision (b): California Code of Regulations, title 14, section 15062 subdivisions (b) and (c).

ii. a local agency is the lead agency but the project requires a discretionary approval from a state agency.[41]

(7) Coordinating state-level review of CEQA documents including:

a. Receiving for filing the following notices and CEQA documents:

i. A state agency NOE.[42]

ii. NOPs for projects where a state agency is a responsible or trustee agency.[43]

iii. DEIRs, NDs and other environmental documents to be reviewed by state agencies or for projects of statewide, regional or areawide significance.[44]

iv. NOCs for state or local agency DEIRs and FEIRs.[45]

v. NODs if:

- A state agency is the lead agency and the project was approved using an ND or an EIR; [46] or,
- A local agency is the lead agency but the project requires a discretionary approval from a state agency.[47]

b. Receiving certain CEQA documents and notices from state and local agencies and distributing them to appropriate state agencies (i.e. responsible and trustee agencies) for review and comment.[48]

c. Ensuring that responsible and trustee agencies provide necessary information in response to NOPs.[49]

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[40] Public Resources Code section 21108, subdivision (a); California Code of Regulations, title 14, section 15075 and 15094.

[41] California Code of Regulations, title 14, sections 15075 and 15094.

[42] Public Resources Code section 21080.4 subdivision (d); California Code of Regulations, title 14, section 15023 subdivision (e).

[43] California Code of Regulations, title 14, section 15082 subdivision (d).

[44]California Code of Regulations, title 14, sections 15205, subdivision (b) and 15206, subdivision (a).

[45] Public Resources Code section 21108, subdivision (b); California Code of Regulations, title 14, section 15062, subdivisions (b) and (c).

[46] Public Resources Code section 21108, subdivision (a); California Code of Regulations, title 14, section 15075, and 15094.

[47] California Code of Regulations, title 14, sections 15075 and 15094.

[48] Public Resources Code section 21091; California Code of Regulations, title 14, section 15023, subdivision (c).

(8) Establishing, maintaining, and making available through the Internet, a central repository for NOEs, NOPs, NOCs, and NODs.[50]

(9) Providing the California State Library with copies of any CEQA documents submitted in electronic format to OPR. The California State Library serves as the repository for such electronic documents and must make them available for viewing to the general public, upon request.[51]

The Resources Agency

The Secretary of the Resources Agency is responsible for fulfilling the following duties:

(1) Adopting and amending the CEQA Guidelines.[52]

(2) Adopting categorical exemptions from CEQA.[53]

(3) Certifying state environmental programs that qualify as certified regulatory programs and receiving and filing notices filed by certified regulatory programs.[54]

ADOPTION OF AGENCY PROCEDURES TO IMPLEMENT CEQA

Both CEQA and the CEQA regulations require public agencies to adopt their own objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for implementing CEQA by ordinance, resolution, rule or regulation.[55] In adopting its procedures, the public agency has a choice of the following approaches:

(1) Adopting the CEQA regulations by reference.

(2) Adopting the CEQA regulations by reference and adopting some of its own provisions, specifically tailored to the agency's criteria that are consistent with CEQA and the CEQA regulations.

(3) Adopting a detailed set of its own objectives, criteria and procedures that are consistent with CEQA and the CEQA regulations.[56]

If the agency adopts its own procedures without incorporating the CEQA regulations by reference, the agency's objectives, criteria and procedures must incorporate all of the necessary

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[49] Public Resources Code sections 21080.4 subdivision (d); California Code of Regulations, title 14, section 15023.

[50] Public Resources Code section 21159.9, subdivision (c); California Code of Regulations, title 14, section 15023, subdivision (h). These notices may be found at www.ceqanet.ca.gov.

[51] Public Resources Code section 21159.9, subdivision (d).

[52] Public Resources Code section 21083; California Code of Regulations, title 14, section 15024.

[53] Public Resources Code section 21084; California Code of Regulations, title 14, section 15024.

[54] Public Resources Code section 21080.5; California Code of Regulations, title 14, section 15024.

[55] Public Resources Code section 21082, California Code of Regulations, title 14, section 15022, subdivision (a).

[56] California Code of Regulations, title 14, section 15022, subdivision (d).

requirements.[57] A school district, community college district, or any other district, whose boundaries are coterminous with a city, county, or city and county, may utilize the objectives, criteria, and procedures of the city, county, or city and county, as may be applicable, in which case, the school district or other district need not adopt objectives, criteria, and procedures of its own. [58]

THE CEQA PROCESS[59]

Types of Projects Subject to CEQA

Under CEQA, "project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, *and* which is any of the following:

(1) An activity directly undertaken by any public agency.

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

(3) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.[60]

A CEQA analysis is required only for discretionary projects, that is, projects that may or may not be approved at the district's discretion. Ministerial projects, meaning projects that must be approved if all applicable legal criteria are met, do not require CEQA analysis.[61] Under CEQA, a project is "ministerial" if it "involv[es] little or no personal judgment by the public official as to the wisdom or manner of carrying out the project."[62]

Additionally, a project is not subject to CEQA if it can be seen with certainty that there is no possibility of a significant effect on the environment.[63] "Significant effect on the environment" means 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.[64]

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[57] *Id*.

[58] Public Resources Code section 21082.

[59] Note that this background on the CEQA process is based upon the current requirements of CEQA and the CEQA regulations/CEQA Guidelines and is meant only to provide the reader with an overview of the CEQA process. It in no way distinguishes the test claim statutes and regulations from the requirements of pre-1975 law or from any changes that have been made to those statutes and regulations since the filing of the test claim.

[60] Public Resources Code section 21065.

[61] See Public Resources Code section 21080, subdivisions (a) and (b)(1): California Code of Regulations, title 14, sections 15357 and 15369.)

[62] California Code of Regulations, title 14, section 15369.

[63] California Code of Regulations, title 14, section 15060.

[64] Public Resources Code section 21068; California Code of Regulations, title 14, section 15382.

Preliminary Review

The lead agency must complete a preliminary review of a proposed activity to determine:

(1) Whether the application (for a private project) is complete.

(2) Whether the activity is subject to CEQA.

(3) Whether the activity is exempt from CEQA, and if so, whether to prepare and file an optional notice of exemption (NOE).[65] The filing of an NOE has no significance except that it triggers a 35-day statute of limitations.[66] Note that K-12 school districts are required, as a condition of receipt of state funding, to self-certify that they have filed the appropriate CEQA document.

Initial Study

If the lead agency determines that no exemptions apply to a project subject to CEQA and decides not to proceed directly to the preparation of an EIR, it must conduct an initial study which considers all phases of project planning, implementation, and operation to determine whether the project may have a significant effect on the environment.[67] Before making this determination, the lead agency must consult with responsible agencies and trustee agencies.[68] The purposes of an initial study are to provide the lead agency with information to use as the basis for deciding whether to prepare an EIR or negative declaration; enable an applicant or lead agency to modify

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[65] Public Resources Code Sections 21108 and 21152; California Code of Regulations, title 14, sections 15060, 15061 and 15062. See also *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1385. (A school district need not prepare a detailed written evaluation to determine whether project is exempt, provide any notice or opportunity to review or comment on the exemption to any other agency or to the public, and, it need not hold a hearing on its exemption determination.)

[66] *Id*.

[67] California Code of Regulations, title 14, section 15063.

[68] Public Resources Code section 21080.3, subdivision (a). Note also that under CEQA and related statutes, school districts have additional special consultation requirements which include: Public Resources Code section 21151.2, (requirement to give the planning commission with jurisdiction over the site written notice of the district's intent to acquire title to property for a new or expanded school site); Public Resources Code section 21151.8, and Education Code section 17213 (requirement to include in any ND or EIR an analysis of hazardous substances on the site and requirement to consult with administering agency for hazardous material [generally the county health department]); Public Resources Code section 21151.8, subdivision (a)(2) and California Code of Regulations, title 14, section 15186, subdivision (c) (requirement to consult with local air pollution control district to ascertain whether any facilities within a quarter mile of the proposed site might emit hazardous materials, substances or waste; Education Code section 17213.1 (as a condition of receiving state funds, the requirement to consult with an environmental assessor to conduct a Phase I environmental assessment (and potentially a Phase II to determine whether hazardous materials are present, the extent of their release or threat of release) before acquiring an school site or before beginning construction of a project.

a project, mitigating adverse impacts before an EIR is prepared, thereby enabling the project to qualify for a mitigated negative declaration (MND); assist in the preparation of an EIR, if one is required, by focusing the EIR on the effects determined to be significant, identifying the effects determined not to be significant, explaining the reasons for determining that potentially significant effects would not be significant, and identifying whether a program EIR, tiering, or another appropriate process can be used for analysis of the project's environmental effects; facilitate environmental assessment early in the design of a project; provide documentation of the factual basis for the finding in a negative declaration (ND) that a project will not have a significant effect on the environment; eliminate unnecessary EIRs; and, determine whether a previously prepared EIR could be used with the project.[69]

Negative Declaration

If the lead agency proposes to adopt an ND or an MND, it must:

(1) Prepare and distribute a notice of intent (NOI) to adopt an ND or MND.[70]

(2) Prepare the proposed ND and distribute it, together with the initial study for public and agency review.[71]

(3) Consider the proposed ND and comments and approve or disapprove the ND.[72]

(4) File and post a NOD, if the ND is adopted.[73] The filing and posting of the NOD triggers a 30-day statute of limitations, if it is not properly filed and posted, the statute of limitations is 180-days.

A lead agency may hold public hearings regarding the proposed ND at its option, but such hearings must be properly noticed.[74]

Prepare Draft Environmental Impact Report (DEIR)

A lead agency that determines that an EIR is required must complete the following steps:

(1) Draft and distribute a NOP stating that an EIR will be prepared.[75]

(2) Receive information and comments on the NOP and consider incorporating them into the DEIR.[76]

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[69] California Code of Regulations, title 14, section 15063.

[70] Public Resources Code section 21092(a); California Code of Regulations, title 14, section 15072, subdivision (a).

[71] California Code of Regulations, title 14, section 15073.

[72] California Code of Regulations, title 14, section 15074.

[73] See generally Public Resources Code section 21080, subdivision (c); California Code of Regulations, title 14, section 15075.

[74] Public Resources Code section 21092.5, subdivision (b).

[75] Public Resources Code section 21080.4, subdivision (a); California Code of Regulations, title 14, section 15082, subdivision (a).

[76] California Code of Regulations, title 14, section 15084, subdivision (c).

(3) Consult with other agencies and hold scoping meetings (scoping meetings can be voluntary or mandatory depending on the situation) with responsible and trustee agencies, other interested state and local agencies, and, with members of the public.[77]

(4) Consult with and request comments on the DEIR from:

a. Responsible agencies.

b. Trustee agencies with resources affected by the project.

c. Any other state, federal, and local agencies which have jurisdiction by law with respect to the project or which exercise authority over resources which may be affected by the project.

d. Any city or county which borders on a city or county within which the project is located.

e. For a project of statewide, regional, or areawide significance, the transportation planning agencies and public agencies which have transportation facilities within their jurisdictions which could be affected by the project. "Transportation facilities" includes: major local arterials and public transit within five miles of the project site, and freeways, highways and rail transit service within 10 miles of the project site.[78]

(5) Prepare or hire a consultant to prepare the DEIR.[79]

(6) Prepare a NOC when the DEIR is complete, file it with OPR, provide public notice in a newspaper of general circulation that the DEIR is available for review and comment, and, distribute the DEIR.[80]

<u>Prepare Final Environmental Impact Report (FEIR)</u>

(1) Receive and review comments on the DEIR, prepare written responses to each public agency that commented and to all comments on significant environmental issues for inclusion in the FEIR.[81]

(2) Determine whether any new "significant" information (including any new findings of significant impact) have been added to the FEIR after the DEIR was circulated and, if so, re-circulate the EIR for public review and comment.[82]

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[77] Public Resources Code section 21080.4, subdivision (b).

[78] Public Resources Code section 21081.7; California Code of Regulations, title 14, section 15086.

[79] Public Resources Code section 21082.1, subdivision (a). 21151, subdivision (a); California Code of Regulations, title 14, sections 15085 and 15087.

[80] Public Resources Code section 21161; California Code of Regulations, title 14, section 15084, subdivision (a).

[81] Public Resources Code section 21092.5; California Code of Regulations, title 14, section 15088.

[82] Public Resources Code section 21092.1.

(3) Certify that the FEIR:

a. Has been completed in compliance with CEQA.

b. Was presented to the decision-making body of the lead agency, and that the decision-making body reviewed and considered the information contained in the final EIR prior to approving the project.

c. Reflects the lead agency's independent judgment and analysis.[83]

Project Approval Decision-making Process

(1) Once the FEIR has been certified the lead agency must consider the FEIR and decide whether or how to approve or carry out the project.[84]

(2) CEQA prohibits the approval of a project for which the EIR has identified one or more significant effects[85] on the environment unless it makes one of the following findings supported by substantial evidence in the record:

a. Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR. (Note: If this finding is made, a mitigation monitoring reporting program must also be adopted.)

b. Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and should be adopted by such other agency.

c. Specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR.[86]

(3) If there are unavoidable significant impacts, and the lead agency wants to approve the project anyway, it must adopt a statement of overriding considerations supported by substantial evidence in the record.[87]

Post Project Approval Requirements

(1) After approving the project the lead agency must:

a. File a copy of the FEIR with the appropriate planning agency of any cities or counties where significant effects on the environment may occur.

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[83] California Code of Regulations, title 14, section 15090.

[84] California Code of Regulations, title 14, section 15092, subdivision (a).

[85] Note that CEQA and the CEQA regulations use the words "effects" and "impacts" interchangeably.

[86] Public Resources Code section 21002; California Code of Regulations, title 14, section 15091

[87] California Code of Regulations, title 14, section 15093.

b. Retain one or more copies of the FEIR as public records for a reasonable period of time.

c. Require the applicant to provide a copy of the certified, FEIR to each responsible agency.[88]

(2) If mitigation measures were adopted for the project, the lead agency is responsible for implementing the mitigation monitoring or reporting program.[89]

(3) If there are substantial changes in the project or certain types of new information become available, a supplemental or subsequent EIR may be required.[90]

Special Rules Related to CEQA Litigation

(1) Any action brought in the superior court relating to any act or decision of a public agency made pursuant to CEQA may be subject to a mediation proceeding.[91]

(2) If the mediation does not resolve the action, the court may, in its discretion, schedule a settlement conference before a judge of the superior court. If the action is later heard on its merits, the judge hearing the action shall not be the same judge who conducted the settlement conference, except in counties with only one judge of the superior court.[92]

Costs of CEQA Compliance

In general, the project proponent (also known as the applicant) bears 100 percent of the lead agency's costs for CEQA compliance, which often includes the cost of hiring a consultant to prepare the CEQA document. A lead agency is authorized to "charge and collect a reasonable fee from any person proposing a project subject to [CEQA] in order to recover the estimated costs incurred by the lead agency" for preparing a ND or an EIR for the project and for procedures necessary to comply with CEQA on the project.[93] Additionally, the lead agency may require an applicant to provide data and information for CEQA compliance purposes.[94] These costs are generally considered a part of the cost of the project. For public projects, the cost is born by the public project proponent unless the project proponent has fee authority or qualifies for one of the many state or federal construction grants which authorize CEQA expenses as part of the cost of the project.

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[88] California Code of Regulations, title 14, section 15095.

[89] Public Resources Code section 21081.6, subdivision (a); California Code of Regulations, title 14, section 15097.

[90] Public Resources Code section 21166; California Code of Regulations, title 14, sections 15162-15164.

[91] Government Code section 66031.

[92] Government Code section 66034.

[93] Public Resources Code section 21089, subdivision (a); California Code of Regulations, title 14, section 15045.

[94] Public Resources Code section 21082.1, subdivision (b); California Code of Regulations, title 14, section 15084, subdivision (b).

Claimant's Position

Claimant alleges reimbursable state-mandated costs to school districts and community college districts for "developing, adopting and implementing policies and procedures, and periodically revising those policies and procedures, to comply with the requirements of [CEQA], and related statutes and regulations."[95] Claimant additionally asserts that the test claim statutes and regulations impose a list, approximately 100 pages long, of reimbursable state-mandated activities relating to CEQA compliance. The specific activities claimed can be found in the test claim filing and the declarations of William C. McGuire, Clovis Unified School District and Thomas J. Donner, Santa Monica Community College District.[96]

In claimant's response to DOF's comments, claimant asserts that "DOF is mistaken" in its interpretation that CEQA is entirely a law of general application. Specifically, claimant cites to Education Code section 17025, subdivision (b) which provides that the applicant district is the lead agency for purposes of CEQA with regard to projects funded under the State School Building Lease-Purchase Law of 1976.[97] Thus, the claimant asserts, a school district, "when constructing any new school or reconstructing or altering any existing building, is not only required to comply with CEQA, it is also required to fulfill the governmental duties of a lead agency. Other persons and entities are not required to do so."[98]

Claimant also disputes DOF's argument that school districts are not compelled to construct additional school facilities or acquire any site for the purposes of constructing a school building. Claimant cites to the following:

(1) *Butt v. State of California*, which discusses the duty of the Legislature to "provide for a system of common schools, by which a school be kept up and supported in each district."[99]

(2) A report of the California Research Bureau which states in part that one challenge public schools face ". . . .is the anticipated growth of nearly 2 million K-12 students during the next decade that will require many districts to build new schools to meet burgeoning

[95] Declarations of William C. McGuire, Clovis Unified School District and Thomas J. Donner, Santa Monica Community College District, p. 2.

[96] Test Claim filing, pp. 4-185 and Declarations of William C. McGuire, Clovis Unified School District and Thomas J. Donner, Santa Monica Community College District, pp. 2-101.

[97] Claimant, Response to DOF Comments, March 31, 2004, p.2. Note also that claimant asserts on page 1 that "[t]he comments of DOF are incompetent and should be excluded." However, DOF's comments on the test claim do not make any factual assertion and, in any event, are supported by the declaration of Walt Schaff. (See DOF, Comments on the Test Claim, dated March 8, 2004, p. 4.

[98] Claimant, Response to DOF Comments, *supra*, p.2.

[99] Claimant, Response to DOF Comments, *supra*, p.2, citing *Butt v. State of California* (1992) 4 Cal. 4th 668, p. 680.

student demand."[100] That report also discusses the shortfall of available funds to meet the need for public school construction and rehabilitation.

(3) The March 2004 Proposition 55 ballot information pamphlet which discusses the "need to construct new schools to house nearly 1 million pupils and modernize schools for an additional 1.1 million pupils.[101]

Claimant states that "a finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate"[102] and discusses the case law regarding practical compulsion. Claimant concludes that "[i]n light of the finding that there is a need to construct new schools to house 1.1 million pupils and the need to modernize schools for an additional 1.1 million pupils, it is beyond the realm of practical reason to opportunistically argue that there is no state law or regulation which requires a school district to construct additional school facilities or acquire any site for the purpose of constructing a school building."[103]

Claimant also disputes DOF's argument that the costs incurred under CEQA are allowable costs for the use of new construction grants provided by the State Allocation Board under the School Facilities Program (SFP). Specifically, claimant argues:

> The district's necessary costs of CEQA are not funded out of the [State's share of] 50 percent given to school districts to construct or modernize schools. CEQA is a separate statutory program. In fact, Education Code section 17025, subdivision (a) provides that the State Allocation Board shall not authorize a contract for the construction of any new school, or for the addition to, or reconstruction or alteration of, any existing building, for lease-purchase to any school district unless the applicant district has submitted plans therefor [sic] to the Department of General Services and obtained the written approval of the department pursuant to Article 3 (commencing with Section 17280) of Chapter 3 of part 10.5.
>
> DOF's argument in this regard is bereft of logic or legal foundation.[104]

Claimant disagrees with DOF's position that Education Code Part 1, Chapter 6, Title 1, Division, 1 provides schools with authority to impose development fees and, therefore Government Code section 17556, subdivision (d) prohibits reimbursement for any state-mandated activities. Claimant argues: "Government Code section 17556(d) refers to 'service charges, fees or assessments.' Education Code 17620 refers to a 'fee, charge, dedication or other requirement.' They are not the same."[105] Claimant includes a discussion of the limitations on the purposes for which a "fee, charge or dedication" may be used (i.e. to fund the construction or reconstruction

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[100] *Id*, p.3, citing *School Facility Financing – A History of the Role of the State allocation Board and Options for the Distribution of Proposition 1A Funds* (Cohen, Joel, February 1999).

[101] *Id*.

[102] *Id*, p. 4.

[103] *Id*, p. 7.

[104] Claimant, Response to DOF Comments, *supra*, pp. 7-8.

[105] *Id*, p. 9.

of school facilities but not for maintenance) pursuant to Government Code section 17620, subdivision (a) (1).

In its comments on the draft staff analysis issued on October 23, 2009, claimant re-asserted its arguments that school districts are legally compelled and practically compelled to construct new school facilities.[106]

In the final analysis for this test claim, prepared for the January 29, 2010 hearing, staff found that there was no evidence in the record to support a finding that school districts and community college districts are legally or practically compelled to acquire new school sites or build new school facilities or additions to existing schools of greater than 25%. At the January 29, 2010 hearing, claimant requested, and the Commission granted, permission to submit evidence that school districts are practically compelled to comply with some or all of the statutes and regulations pled in this test claim. On March 23, 2010[107] and April 8, 2010[108] claimant submitted supplemental filings to support its claim that school districts are practically compelled to construct new facilities. Specifically, claimant reiterated its arguments that districts are practically compelled to comply with CEQA as a matter of law and submitted a portion of the San Diego Unified 52nd Street Area Elementary School Final EIR, for factual support.

Claimant submitted comments on the revised draft staff analysis on August 16, 2010. Claimant reasserts its practical compulsion arguments. Additionally, claimant states that the test claim should be approved because the portions of the San Diego Unified 52nd Street Area Elementary School Final EIR submitted by claimant provide "evidence that supports a finding of practical compulsion."[109] Specifically, claimant states that the district considered eight alternatives in the EIR, which, it says "meets the standard of the POBRA [] Court."[110] Claimant states that "the failure to build new facilities will result in 'certain and severe consequences' such as violating safety regulations due to over population, placing an unlawful amount of temporary facilities on the school premises or the inability to educate children."[111] Claimant further contends that it is inappropriate to deny this test claim solely based on the facts in the record regarding practical compulsion because "it is forseeable that there will be facts a court will conclude as a practical compelling action taken by a school district."[112]

Claimant also asserts that since CEQA must be complied with before a final decision is made approving a project; the activities required by CEQA` are triggered by the test claim statutes rather than the district's decision to build.[113]

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[106] Claimant, comments on the draft staff analysis dated November 12, 2009.

[107] Claimant's supplemental filing dated March 15, 2010 (received March 23, 2010).

[108] Claimant's supplemental filing dated April 8, 2010.

[109] Claimant, comments on the revised draft staff analysis dated August, 16, 2010, page 4.

[110] *Id*, p.p. 2-3.

[111] *Id*, p. 2.

[112] *Id*.

[113] Claimant, comments on the revised draft staff analysis, *supra*, p. 4.

Department of Finance's Position

DOF, in its comments on the test claim, states that "[CEQA] requirements are not unique to local government.[114] In support of this argument DOF cites to Public Resources Code section 21001.1 and California Code of Regulations, title 14, section 15002. Public Resources Code section 21001.1 provides:

> The Legislature further finds and declares that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies.

Moreover, DOF argues, CEQA applies to discretionary, school district proposed, projects and school facilities construction projects.[115] In support of this assertion DOF writes:

> Nothing in State law or regulation requires a school district to construct additional school facilities or to acquire any site for the purpose of constructing a school building. Instead, the law provides school districts with flexibility, discretion, and choice over the manner in which districts elect to house their student populations. For example, school districts have the discretion to operate year round multi-track schools or two kindergarten sessions per day, use portable classrooms or transport students to underused schools. It is the district's voluntary decision to construct a school facility rather than using the aforementioned alternative that forced the district to carry out the activities required under CEQA.[116]

DOF also cites to the *Kern*[117] case for the proposition that "where a local government entity voluntarily participates in a statutory program, the State may require the entity to comply with reasonable conditions without providing additional funds to reimburse the entity for [the] increased level of activity."[118]

Next, DOF argues that the costs incurred under CEQA are allowable costs for the use of new construction grants provided by the State Allocation Board.[119] Specifically, DOF states "[t]he State Allocation Board provides new construction grants through the State School Facilities Program (SFP) to cover the State's share of all necessary project costs, which include costs incurred under CEQA. According to DOF, the State's share "is typically 50 percent, but may be up to 100 percent if a district receives hardship funding. Therefore, any necessary costs of CEQA are, in fact, funded through voluntary participation in the SFP."[120]

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[114] DOF, Comments on the Test Claim, March 8, 2004, p.1.

[115] DOF, Comments on the Test Claim, *supra,* p. 2.

[116] *Id.*

[117] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal. 4th 727.

[118] DOF, Comments on the Test Claim, *supra,* p. 2.

[119] DOF, Comments on the Test Claim, *supra,* p. 2.

[120] *Id.*

Finally, DOF argues that "school districts have the authority to charge development fees to finance construction projects."[121] Specifically, DOF asserts that Education Code sections 17620-17626 "authorize school districts to levy fees against any construction within its district boundaries for the purpose of funding school construction."[122] DOF concludes with a discussion of the prohibition against finding a reimbursable mandate in a statute or executive order ". . . .if the affected local agencies have authority to levy service charges, fees, or assessments sufficient to pay for the mandated program in the statute or executive order."[123] DOF concurs with the draft staff analysis.[124]

Department of Natural Resources Position

Department of Natural Resources (DNR), in its comments on the claimant's supplemental briefing on practical compulsion, states that the claimant "has failed to establish that it is entitled to reimbursement under California Constitution article XIII B, section 6 for costs associated with environmental review required by [CEQA]."[125] DNR indicated that it concurs with the final staff analysis prepared for the for the January 29, 2010 hearing. Further, DNR argues that:

- claimant has not established that CEQA or the CEQA regulations impose a unique requirement on local entities; and
- claimant has failed to establish that it is "practically compelled" to engage in build-out.

Specifically, with regard to whether CEQA imposes unique requirements on local entities, DNR states, that "[CEQA] does not impose any unique requirements on local entities that it does not also impose on state entities in identical fashion."[126] DNR cites to cases and statutes to demonstrate that CEQA applies equally to state and local governmental entities.[127] DNR concludes that "the state is not unfairly burdening or shifting governmental work or responsibilities to local entities via CEQA's requirements for environmental review."[128]

Regarding claimant's supplementary filing on the issue of practical compulsion, DNR states that the claimant "has presented nothing new in this supplemental briefing or evidentiary production that establishes by a preponderance of the evidence that school development is in any way legally or practically compelled."[129] DNR states further:

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[121] DOF, Comments on the Test Claim, supra, p. 2.

[122] *Id.*

[123] *Id*.

[124] DOF, comments on the draft staff analysis dated November 12, 2009.

[125] DNR, comments on claimant's supplemental briefing on practical compulsion dated May 17, 2010, p. 1.

[126] *Id*, p. 2.

[127] See DNR, comments on claimant's supplemental briefing on practical compulsion, *supra*, p. 2.

[128] DNR, comments on claimant's supplemental briefing on practical compulsion, *supra*, p. 2.

[129] DNR, comments on claimant's supplemental briefing on practical compulsion, *supra*, p. 3.

> Ironically, the portion of the EIR submitted suggests [claimant] has ample discretion relative to build-out, and in fact analyzed less onerous and less expensive short-term alternative solutions including: double session kindergarten, boundary adjustments, portable classrooms, grade level reconfiguration, conversion of leased land, multi-track year round scheduling, relocation with transportation, reopening closed schools, and additional on-site construction. . . . This analysis suggests that [claimant] had full discretion to build or not to build, and that the mandated education of its students is independent from any requirement that it build-out or upgrade facilities for this purpose.[130]

Discussion

The courts have found that article XIII B, section 6, of the California Constitution recognizes the state constitutional restrictions on the powers of local government to tax and spend. "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[131] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[132] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[133]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[134] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[135] A "higher level of service" occurs when the new "requirements were intended to

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[130] *Id*.

[131] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[132] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[133] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3rd 830, 835 *(Lucia Mar)*.

[134] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,*

[135] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

provide an enhanced service to the public."[136] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[137]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[138] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[139]

This analysis addresses the following issues:

(1) **I**s the California State Clearinghouse Handbook an executive order subject to Article XIII B, section 6 of the California Constitution?

(2) Is reimbursement required for statutes adopted prior to January 1, 1975?

(3) Do the remaining test claim statutes and executive orders impose state-mandated duties on school districts and community college districts within the meaning of Article XIII B, section 6 of the California Constitution?

(4) Do the activities mandated by the test claim statutes and executive orders impose a new program or higher level of service on school districts and community college districts?

Issue 1: The California State Clearinghouse Handbook is Not an Executive Order Subject to Article XIII B, Section 6.

At the outset, the Commission finds that the California State Clearinghouse Handbook (Handbook) is not an executive order. An executive order is "any order, plan, requirement, rule or regulation" issued by the Governor or any official serving at the pleasure of the Governor.[140] Although the Handbook is issued by the Governor's Office of Planning and Research (OPR) and the director of OPR serves at the pleasure of the Governor, the Handbook does not impose an "order, plan, requirement, rule or regulation." Because the Handbook does not require districts to do anything and is not a plan, it is not an executive order. The Handbook merely explains the functions of the State Clearinghouse under CEQA and provides an overview of the environmental review process, summarizing requirements that have been established pursuant to statutory and regulatory provisions, including the test claim statutes and test claim regulations. The Handbook does not add any additional requirements above what is required by the relevant statutes and regulations, but rather, provides a tool to make compliance easier. Specifically, the Handbook is designed to make CEQA compliance easier for local agencies and school districts

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[136] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[137] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[138] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[139] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[140] Government Code section 17516.

by laying things out in a simple step-by-step process. However, local agencies and school districts are free to refer solely to CEQA, the CEQA regulations and related statutes and regulations and to consult with their attorneys to determine how to navigate the CEQA process if that is their preference. Nonetheless, given the fact that courts have cited to the Handbook as a guide to how the CEQA process works in practice,[141] it has value as a guide to the process.

Issue 2: Reimbursement is Not Required for Statutes Enacted Prior to January 1, 1975.

California Constitution Article XIII B, section 6, subdivision (a) requires the state to reimburse local governments for any state-mandated new program or higher level of service imposed on any local government with few exceptions. One of the exceptions to the reimbursement requirement provided in article XIII B, section 6 of the California Constitution is for "[l]egislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to 1975."[142]

The Commission finds that reimbursement is not required for any activities imposed by Public Resources Code sections 21082, 21083, 21100, 21102, 21150, 21151, 21152, 21153, 21154, 21165, 21166, or 21167 as added or amended by Statutes 1970, chapter 1433; and, Statutes 1972, chapter 1154 since these statutes were enacted prior to January 1, 1975. The Commission also finds that Public Resources Code sections 21102, 21150 and 21154 have not been amended since 1972. Therefore, no constitutional or statutory provision mandates reimbursement to local governments for costs incurred in complying with these statutes.

Issue 3: Do the Remaining Test Claim Statutes and Regulations Impose State-Mandated Duties on School Districts and Community College Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution?

For the test claim statutes or regulations to impose a state-mandated program, the language must order or command a school district or community college district to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[143] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur the costs of the new program.[144]

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[141] *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151. (Cited to show how the CEQA process works in practice.)

[142] California Constitution Article XIII B, section 6, subdivision (a)(3); see also Government Code Section 17514.

[143] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[144] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

The Commission finds that the statutes and regulations listed below, which generally require compliance with the CEQA process discussed at length in the background above on pages 5-19 do not mandate school districts or community college districts to perform any activities because:

A. The plain language of Public Resources Code section 21083 imposes requirements on OPR and the Secretary of the Resources Agency, not school districts or community college districts.

B. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.

C. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project:

Education Code Section 17025 added by Statutes 1996, Chapter 1562; Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455; Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21151, 21151.2, 21151.8, 21152, 21153, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes 1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121; California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18; Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44 and California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062, 15063, 15064 15064.5, 15064.5, 15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29;

Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30.

However, the Commission finds that Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312 and California Code of Regulations, title 14 section 15022 as amended by Register 83, No. 29 mandate school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs, by ordinance, resolution, rule or regulation, no later than 60 days after the Secretary of the Resources Agency adopts the CEQA regulations or amendments thereto. This requirement to adopt objectives, criteria, and procedures for NDs is not triggered by an underlying voluntary decision of a school district or community college district.

A. The plain language of Public Resources Code section 21083 imposes requirements on OPR and the Secretary of the Resources Agency, but does not impose mandated duties on school districts or community college districts.

Public Resources Code section 21083 provides:

(a) The Office of Planning and Research shall prepare and develop proposed guidelines for the implementation of this division by public agencies. The guidelines shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with this division.

(b) The guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a "significant effect on the environment." The criteria shall require a finding that a project may have a "significant effect on the environment" if one or more of the following conditions exist:

(1) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.

(2) The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

(c) The guidelines shall include procedures for determining the lead agency pursuant to Section 21165.

(d) The guidelines shall include criteria for public agencies to use in determining when a proposed project is of sufficient statewide, regional, or areawide environmental significance that a draft environmental impact report, a proposed negative declaration, or a proposed mitigated negative declaration shall be submitted to appropriate state agencies, through the State

Clearinghouse, for review and comment prior to completion of the environmental impact report, negative declaration, or mitigated negative declaration.

(e) The Office of Planning and Research shall develop and prepare the proposed guidelines as soon as possible and shall transmit them immediately to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt the guidelines pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, which shall become effective upon the filing thereof. However, the guidelines shall not be adopted without compliance with Sections 11346.4, 11346.5, and 11346.8 of the Government Code.

(f) The Office of Planning and Research shall, at least once every two years, review the guidelines adopted pursuant to this section and shall recommend proposed changes or amendments to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt guidelines, and any amendments thereto, at least once every two years, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, which shall become effective upon the filing thereof. However, guidelines may not be adopted or amended without compliance with Sections 11346.4, 11346.5, and 11346.8 of the Government Code.

Based on the plain language of this statute, Public Resources Code section 21083 requires OPR and the Secretary of Resources to perform activities but it does not mandate school districts or community college districts to perform any activities.

B. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.

Maintenance projects, including emergency repair projects, are the only projects over which districts do not have discretion. However, maintenance projects and emergency projects are among the many exemptions from CEQA that have been provided for school projects. School districts enjoy many exemptions from CEQA not only for maintenance and emergencies, but also for major reconstruction projects and additions to schools that include up to ten new class rooms.[145] Although school districts and community college districts are required to keep schools and colleges in good repair, the Commission finds that school and community college projects to

[145] There are also several exceptions for discretionary school projects including: Statutory exceptions for: feasibility and planning studies (Pub. Resources Code §§ 21102 and 21150; Cal.Code Regs., tit. 14, § 15262); and, school facilities needs analyses (Gov. Code § 65995.6); Categorical exceptions for: normal operations of existing facilities for public gatherings (Cal. Code Regs, tit. 14, § 15323); educational or training programs involving no physical changes (Cal. Code Regs, tit. 14, § 15322); sales of surplus government property (Cal. Code Regs., tit. 14, § 15312); leasing of new facilities (Cal. Code Regs., title 14, § 15327); and, disapproved projects (Cal. Code Regs., tit. 14, § 21080, subd. (b)(5); Cal. Code Regs., tit. 14, § 15270).

maintain facilities in good repair, including emergency repair projects, are statutorily or categorically exempt from CEQA.

1. *School Districts and Community College Districts are Required to Keep Schools in Good Repair Which Includes Making Emergency Repairs.*

Education Code section 17593 requires school districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Moreover, Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Prior to 2006, "good repair" was not defined in statute. Education Code section 17002 was amended by Statutes 2006, chapter 704 to define "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction and approved by the board or a local evaluation instrument that meets the same criteria. . . .In order to provide that school facilities are reviewed to be clean, safe, and functional, the school facility inspection and evaluation instrument and local evaluation instruments shall include at least the following criteria:
>
> (A) Gas systems and pipes appear and smell safe, functional, and free of leaks.
>
> (B) (i) Mechanical systems, including heating, ventilation, and air-conditioning systems, are functional and unobstructed.
>
> (ii) Appear to supply adequate amount of air to all classrooms, work spaces, and facilities.
>
> (iii) Maintain interior temperatures within normally acceptable ranges.
>
> (C) Doors and windows are intact, functional and open, close, and lock as designed, unless there is a valid reason they should not function as designed.
>
> (D) Fences and gates are intact, functional, and free of holes and other conditions that could present a safety hazard to pupils, staff, or others. Locks and other security hardware function as designed.
>
> (E) Interior surfaces, including walls, floors, and ceilings, are free of safety hazards from tears, holes, missing floor and ceiling tiles, torn carpet, water damage, or other cause. Ceiling tiles are intact. Surfaces display no evidence of mold or mildew.
>
> (F) Hazardous and flammable materials are stored properly. No evidence of peeling, chipping, or cracking paint is apparent. No indicators of mold, mildew, or asbestos exposure are evident. There is no apparent evidence of

hazardous materials that may pose a threat to the health and safety of pupils or staff.

(G) Structures, including posts, beams, supports for portable classrooms and ramps, and other structural building members appear intact, secure, and functional as designed. Ceilings and floors are not sloping or sagging beyond their intended design. There is no visible evidence of severe cracks, dry rot, mold, or damage that undermines structural components.

(H) Fire sprinklers, fire extinguishers, emergency alarm systems, and all emergency equipment and systems appear to be functioning properly. Fire alarm pull stations are clearly visible. Fire extinguishers are current and placed in all required areas, including every classroom and assembly area. Emergency exits are clearly marked and unobstructed.

(I) Electrical systems, components, and equipment, including switches, junction boxes, panels, wiring, outlets, and light fixtures, are securely enclosed, properly covered and guarded from pupil access, and appear to be working properly.

(J) Lighting appears to be adequate and working properly. Lights do not flicker, dim, or malfunction, and there is no unusual hum or noise from light fixtures. Exterior lights onsite appear to be working properly.

(K) No visible or odorous indicators of pest or vermin infestation are evident.

(L) Interior and exterior drinking fountains are functional, accessible, and free of leaks. Drinking fountain water pressure is adequate. Fountain water is clear and without unusual taste or odor, and moss, mold, or excessive staining is not evident.

(M) (i) Restrooms and restroom fixtures are functional.

(ii) Appear to be maintained and stocked with supplies regularly.

(iii) Appear to be accessible to pupils during the school day.

(iv) Appear to be in compliance with Education Code Section 35292.5.

(N) The sanitary sewer system controls odor as designed, displays no signs of stoppage, backup, or flooding, in the facilities or on school grounds, and appears to be functioning properly.

(O) Roofs, gutters, roof drains, and downspouts appear to be functioning properly and are free of visible damage and evidence of disrepair when observed from the ground inside and outside of the building.

(P) The school grounds do not exhibit signs of drainage problems, such as visible evidence of flooded areas, eroded soil, water damage to asphalt playgrounds or parking areas, or clogged storm drain inlets.

(Q) Playground equipment and exterior fixtures, seating, tables, and equipment are functional and free of significant cracks, trip hazards, holes, deterioration that affects functionality or safety, and other health and safety hazards.

(R) School grounds, fields, walkways, and parking lot surfaces are free of significant cracks, trip hazards, holes, deterioration that affects functionality or safety, and other health and safety hazards.

(S) Overall cleanliness of the school grounds, buildings, common areas, and individual rooms demonstrates that all areas appear to have been cleaned regularly, and are free of accumulated refuse and unabated graffiti. Restrooms, drinking fountains, and food preparation or serving areas appear to have been cleaned each day that the school is in session.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. …

Education Code section 81601 does not define "good repair" nor is it defined elsewhere under Title 3 of the Education Code, which contains the provisions regarding community college districts. However, since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[146] the requirement to repair includes real property as well as facilities owned by the district. Moreover, because the term "repair" is defined as "to restore to sound condition after damage or injury" and "to renew or refresh,"[147] the Commission finds that "repair" includes "maintenance" for purposes of these provisions. Thus, both school districts and community college districts are required by statute to maintain their property.[148] The requirement to keep school facilities in good repair necessarily includes making necessary emergency repairs, such as those caused by, among other things, earthquakes, floods, and fires.

Moreover, school and community college maintenance projects, including emergency repair projects, are projects subject to CEQA. Note also that, as will be discussed in greater detail below, though emergency repairs are part of "maintenance" for the purposes of Education Code sections 17002, 17565, 17593 and 81601, "maintenance" and "emergency" projects are treated differently from one another, for purposes of CEQA.

2. *But Emergency Projects and Other Projects Related to Maintenance are Statutorily Exempt From CEQA.*

There are two kinds of exemptions from CEQA: statutory and categorical. Statutory exemptions describe types of projects which the Legislature has decided are not subject to CEQA procedures and policies and these exemptions are absolute. Statutory exemptions are found in various places in the California Code and are comprehensively listed in Article 18 of the CEQA Guidelines. Categorical exemptions, on the other hand, are descriptions of types of projects which the Secretary of the Resources Agency has determined do not usually have a significant effect on the environment. These exemptions are not absolute; there are exceptions to categorical exemptions.

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[146] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

[147] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

[148] Note that this analysis uses the words "maintenance" and "repair" interchangeably.

Under CEQA the filing of a NOE is discretionary; however, it triggers a 35-day, statute of limitations for a legal challenge to the lead agency's decision that the project is exempt.[149]

Statutory exemptions take several forms. Most statutory exemptions are complete exemptions from CEQA. Other exemptions apply to only part of the requirements of CEQA, and still other exemptions apply only to the timing of CEQA compliance. Examples of some of the statutory exemptions potentially applicable to school projects include:

- THE CLOSING OF OR THE TRANSFER OF STUDENTS FROM ANY PUBLIC SCHOOL. This includes the transfer of K-12 grade students to another school as set forth in section 21080.18 of the Public Resources Code so long as the resulting physical changes are categorically exempt from CEQA.[150]
- ESTABLISHING OR MODIFYING FEES.[151]
- ISSUING OR REFUNDING BONDS UNDER THE CALIFORNIA EDUCATIONAL FACILITIES AUTHORITY ACT. Note though that development projects funded by these bonds are still subject to CEQA unless they fall under an exemption.
- EMERGENCY PROJECTS.
    - Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor pursuant to the California Emergency Services Act, commencing with Section 8550 of the Government Code. This includes projects that will remove, destroy, or significantly alter an historical resource when that resource represents an imminent threat to the public of bodily harm or of damage to adjacent property or when the project has received a determination by the State Office of Historic Preservation pursuant to Public Resources Code section 5028, subdivision (b).
    - Emergency repairs to publicly or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare.
    - Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term.[152]

3. *Maintenance Projects Are Categorically Exempt from CEQA.*

The following are some of the categorical exemptions that can be utilized by school districts and community college districts for maintenance projects:

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[149] California Code of Regulations, title 14, section 15062.

[150] California Code of Regulations, title 14, section 15282.

[151] Public Resources Code section 21080, subdivision (b)(8).

[152] Public Resources Code sections 21080(b)(2), (3), and (4), 21080.33 and 21172; California Code of Regulations, title 14, section 15269; See also *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257; and *Western Municipal Water District of Riverside County v. Superior Court of San Bernardino County* (1987) 187 Cal.App.3d 1104.

- OPERATION, REPAIR, MAINTENANCE, AND RECONSTRUCTION. This exemption covers the operation, repair, permitting, leasing, licensing, or minor alteration of existing structures or facilities, mechanical equipment, or topographical features. This exemption is limited to negligible or no expansion of previous use and may includes among other things:
    - Interior or exterior repairs and alterations
    - Facilities used to provide public utilities services
    - Small additions
    - Addition of safety or health protection devices
    - Maintenance of certain facilities to protect fish and wildlife resources.[153]
- REPLACEMENT OR RECONSTRUCTION OF EXISTING FACILITIES OR STRUCTURES. This exemption is limited to structures on the same site with substantially the same purpose and capacity as the existing structure. One example given is the replacement or reconstruction of schools with earthquake resistant structures that do not increase the structural capacity by more that 50 percent.[154]
- CONSTRUCTION OR PLACEMENT OF ACCESSORY STRUCTURES. Examples are on-premises signs, small parking lots, and seasonal or temporary use structures in facilities designed for public use such as lifeguard towers, mobile food units and portable restrooms.[155]
- MINOR ALTERATIONS TO LAND, WATER, OR VEGETATION. The alterations may not involve removal of mature, scenic trees. Examples include grading on land with less than 10 percent slope that does not involve an environmentally sensitive area or severe geological hazards; new landscaping or gardening; minor trenching or backfilling of previously excavated earth with compatible material; minor temporary uses of land having negligible effects on the environment (e.g. carnivals and Christmas tree sales).[156]
- MINOR ADDITIONS TO SCHOOLS. Limited to additions (including permanent or temporary classrooms) within current school grounds and must not increase student capacity by more than 25 percent or ten classrooms, whichever is less.[157]
- COMMON SENSE EXCEPTION. This exemption is based on the general rule that CEQA only applies to projects which have a potential for causing a significant effect on the environment. Under this exemption a lead agency may

[153] California Code of Regulations, title 14, section 15301.

[154] California Code of Regulations, title 14, section 15302.

[155] California Code of Regulations, title 14, section 15311.

[156] California Code of Regulations, title 14, section 15304.

[157] California Code of Regulations, title 14, section 15314.

find a project 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."[158] This exemption acts as a "catchall" exception in that projects that do not fit under any of the statutory or categorical exemptions may nonetheless be exempt under this provision.

There is no evidence in the record to dispute the conclusion that school district and community college district maintenance projects and emergency repair projects are exempt from CEQA. Moreover, staff searched the CEQAnet database maintained by OPR at www.ceqanet.ca.gov, for school district and community college district environmental documents filed between 1982 to the present and did not find an instance in which a school has prepared an ND or EIR for an emergency or maintenance project.

Based upon the forgoing discussion of the applicable exemptions, the Commission finds that for school district and community college district maintenance and emergency projects, CEQA does not impose a state-mandated program.

C. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project.

As discussed in the background, under CEQA a "project" is an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is, in the context of school district and community college district projects:

- an activity directly undertaken by the district, or,
- an activity undertaken by a district which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

The decision to undertake such projects could arise in a myriad of ways, from a district-level decision to an initiative enacted by the voters. Likewise, there are a number of funding sources that a school district or community college district might utilize to fund discretionary school construction projects. When a state funding source is used, proof of compliance with CEQA is a condition of funding.

1. *All non-maintenance, non-emergency school projects are at the discretion of the school districts or community college districts and thus, compliance with CEQA for these projects is not legally compelled by the state.*

Aside from the statutory requirement to maintain school and college facilities in good repair, the state has not required districts to undertake other construction projects that *do not* involve repair or maintenance. In comments filed March 31, 2004, and November 12, 2009 however, claimant argues that "constructing new school facilities is not optional."[159] In support of this contention, claimant cites to *Butt v. State of California*[160] for the propositions that the state has a

[158] California Code of Regulations, title 14, section 15061, subdivision (b)(3).

[159] Claimant's Response to DOF Comments, March 31, 2004, p. 2.

[160] *Butt v. State of California* (1992) 4 Cal. 4th 688.

responsibility to "provide for a system of common schools, by which a school shall be kept up and supported in each district" and that those schools are required to be "free."

The Commission disagrees with the claimant's argument that "constructing new school facilities is not optional." With regard to new construction of school buildings, the Second District Court of Appeal has stated: "[w]here, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[161]

It is true, as claimant states, that courts have consistently held public education to be a matter of statewide rather than a local or municipal concern, and that the Legislature's power over the public school system is plenary.[162] These conclusions are true for every Education Code statute that comes before the Commission on the question of reimbursement under article XIII B, section 6 of the California Constitution. It is also true that the state is the beneficial owner of all school properties and that local school districts hold title as trustee for the state.[163]

Nevertheless, article IX, section 14 of the California Constitution allows the Legislature to authorize the governing boards of all school districts to initiate and carry on any program or activity, or to act in any manner that is not in conflict with state law. In this respect, it has been and continues to be the legislative policy of the state to strengthen and encourage local responsibility for control of public education through local school districts.[164] The governing boards of K-12 school districts may hold and convey property for the use and benefit of the school district.[165] Governing boards of K-12 school districts have also been given broad authority by the Legislature to decide when to build and maintain a schoolhouse and, "when desirable, may establish additional schools in the district."[166] Governing boards of community college districts are required to manage and control all school property within their districts, and have the power to acquire and improve property for school purposes.[167] Thus, under state law, the decision to construct a school facility lies with the governing boards of school districts and community college districts, and is not legally compelled by the state.

Additionally, there are no statutes or regulations requiring the governing boards of school districts to construct new buildings or reconstruct unsafe buildings. The decision to reconstruct, or even abandon an unsafe building, is a decision left to the discretion of a school district. In *Santa Barbara School District v. Superior Court*, the California Supreme Court addressed a school district's decision to abandon two of its schools that were determined unsafe, instead of

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[161] *People v. Oken* (1958)159 Cal.App.2d 456, 460.

[162] See *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1579, fn. 5; *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 (formerly known as *California Teachers Assn. v. Huff*); *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179.

[163] *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, 1579, fn. 5.

[164] *California Teachers Assn., supra*, 5 Cal.App.4th 1513, 1523; Education Code section 14000.

[165] Education Code section 35162.

[166] Education Code sections 17340 and 17342.

[167] Education Code sections 81600, 81606, 81670 *et seq*. and 81702 *et seq*.

reconstructing a new building, as part of its desegregation plan.[168] The court held that absent proof that there were no school facilities to absorb the students, the school district, "in the reasonable exercise of its discretion, could lawfully take this action."[169] The court describes the facts and the district's decision as follows:

> On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503 [a former statute with language similar to Education Code sections 17367 and 81162]. The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion.[170]

Thus, school districts are not legally compelled to construct new school facilities in these circumstances. Based on the above analysis, the Commission finds that CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project subject to CEQA and thus, school districts and community college districts are not legally compelled to comply with CEQA.

2. *Although CEQA compliance is a downstream activity required as a condition of receipt of state funding, school districts and community college districts are not required or legally compelled by the state to request or accept state funding or to comply with CEQA under these circumstances.*

Since 1972, Public Resources Code section 21102 has specifically prohibited a state agency, board or commission from authorizing expenditure of funds for any project, except feasibility or planning studies, which may have a significant effect on the environment unless such request or

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[168] *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315, 337-338. As a side note, the decision to abandon or reconstruct a school is exempt from CEQA. See Public Resources Code section 21080.17, California Code of Regulations, title 14, sections 15282, subdivision (i) and 15302. See also *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356 (decision to close school and transfer students exempt from CEQA).

[169] *Id*, p. 338.

[170] *Id*, p. 337.

authorization is accompanied by an EIR. Public Resources Code section 21102, which has not been amended since 1972 specifies:

> No state agency, board, or commission shall request funds, nor shall any state agency, board, or commission which authorizes expenditures of funds, other than funds appropriated in the Budget Act, authorize funds for expenditure for any project, other than a project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted or funded, which may have a significant effect on the environment unless such request or authorization is accompanied by an environmental impact report.
>
> Feasibility and planning studies exempted by this section from the preparation of an environmental impact report shall nevertheless include consideration of environmental factors.

Additionally, and also since 1972, Public Resources Code section 21150 has specified that:

> State agencies, boards, and commissions, responsible for allocating state or federal funds on a project-by-project basis to local agencies for any project which may have a significant effect on the environment, shall require from the responsible local governmental agency a detailed statement setting forth the matters specified in Section 21100 prior to the allocation of any funds other than funds solely for projects involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded.

Thus, if a school district or community college district wishes to receive state or federal funding through the state for a project, compliance with CEQA is a prerequisite.

Consistent with the Public Resource Code 21102 and 21150 requirements, Education Code section 17025, subdivision (b) requires certification of CEQA compliance as a condition of bond funding for K-12 school districts. Similarly, Education Code section 17268, subdivision (b) requires school districts to comply with CEQA as a condition of receiving state funds for the construction of new school buildings.

Public Resources Code sections 21102 and 21150 make clear that state agencies must require compliance with CEQA and the CEQA regulations (i.e. the requirements of the test claim statutes and regulations) as a condition of providing state funding for any school district or community college district project that is subject to CEQA. However, there is no requirement that a school district or community college district seek funding from the state.

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The school district claimants in *Kern* participated in various funded programs each of which required the use of school site councils and other advisory committees. The claimants sought reimbursement for the costs from subsequent statutes which required that such councils and committees provide public notice of meetings, and post agendas for those meetings.[171]

[171] *Kern High School Dist., supra*, 30 Cal.4th 727.

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[172] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[173] The court also reviewed and affirmed the holding of *City of Merced*,[174] determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[175] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[176] (Emphasis in the original.)

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][177]

Based on the plain language of the statutes creating the underlying education programs in *Kern*, the court determined that school districts were not legally compelled by the state to establish school site councils and advisory bodies, or to participate in eight of the nine underlying state and federal programs and, hence, not legally compelled to incur the notice and agenda costs required under the open meeting laws. Rather, the districts elected to participate in the school site council programs to receive funding associated with the programs.[178]

Similarly here, school districts and community college districts are not legally compelled to request and accept state funds for discretionary construction projects. However, if districts choose to receive state funds then, based upon the plain language of Public Resources Code

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[172] *Kern High School Dist., supra,* at p. 737.

[173] *Ibid.*

[174] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[175] *Kern High School Dist., supra,* 30 Cal.4th 727, 743.

[176] *Ibid.*

[177] *Id.* at p. 731.

[178] *Id.* at pp. 744-745.

section 21150, the state must require compliance with CEQA and the CEQA regulations as a condition of receiving state funding for school district and community college district projects. Public Resources Code section 21150 states: "State agencies. . . .responsible for allocating state or federal funds . . . . to local agencies for any project which may have a significant effect on the environment, *shall require from the responsible local governmental agency a detailed statement setting forth the matters specified in Section 21100 prior to the allocation of any funds* other than funds solely for projects involving only feasibility or planning studies for possible future actions." (Emphasis added.)

The financing of school facilities has traditionally been the responsibility of local government, with *assistance* provided by the state. In 1985, the California Supreme Court decided *Candid Enterprises, Inc. v. Grossmont Union High School District*, which provides a good historical summary of school facility funding up until that time.[179]

> In California the financing of public school facilities has traditionally been the responsibility of local government. "Before the *Serrano v. Priest* decision in 1971, school districts supported their activities mainly by levying ad valorem taxes on real property within their districts." [Citation omitted.] Specifically, although school districts had received some state assistance since 1947, and especially since 1952 with the enactment of the State School Building Aid Law of 1952 (Ed. Code, § 16000 et seq.), they financed the construction and maintenance of school facilities through the issuance of local bonds repaid from real property taxes.
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> After the *Serrano* decision [citation omitted] and to the present day, local government remained primarily responsible for school facility financing, but has often been thrust into circumstances in which it has been able to discharge its responsibility, if at all, only with the greatest difficulty. In these years, the burden on different localities has been different: extremely heavy on those that have experienced growth in enrollment, light on those that have experienced decline, and somewhere in between on those that have remained stable.
>
> In the early 1970's, because of resistance to increasing real property taxes, localities throughout the state began to experience greater difficulty in obtaining voter approval of bond issues to finance school facility construction and maintenance. As a result, a number of communities chose to impose on developers school-impact fees … in order to make new development cover the costs of school facilities attributable to it. [Citation omitted.]
>
> With the passage of Proposition 13 in 1978 the burden of school financing became even heavier. "Proposition 13 prohibits ad valorem property taxes in excess of 1% except to finance previously authorized indebtedness. Since most localities have reached this 1% limit, school districts cannot raise property taxes even if two-thirds of a district's voters wanted to finance school construction." [Citation omitted.] Moreover, although Proposition 13 authorizes the imposition of "special taxes" by a vote of two-thirds of the electorate, such special taxes have rarely been imposed, remain novel, and as consequence are evidently not perceived as a practical method

[179] *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878.

> of school facility financing – especially in view of the need for a two-thirds vote of the electorate to approve them. [Citation omitted.]
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> In the face of such difficulties besetting local governments, the state has not taken over any substantial part of the responsibility of financing school facilities, less still full responsibility. To be sure, in order to implement the *Serrano* decision the Legislature has significantly increased assistance to education. But it has channeled by far the greater part of such assistance into educational programs and the lesser part into school facilities; in fiscal year 1981-1982, for example, only 3.6 percent went for such facilities. [Citation omitted.][180]

State assistance for construction of school facilities comes almost exclusively from statewide general obligation bonds, and is implemented through the State Allocation Board.[181] Before Proposition 13, the state bond funds provided to school districts were provided through loan programs in which districts were required to repay their assistance with property tax revenues or local bond funds. After Proposition 13, the State Allocation Board shifted its policy of providing bond fund assistance from a loan-based program to a grant-based program.[182] Today, the grant funds are provided through the School Facility Program (SFP), under the provisions of the Leroy F. Greene School Facilities Act of 1998.[183] Under the SFP, state bond funding is provided in the form of per pupil grants, with supplemental grants for site development, site acquisition, and other project specific costs when warranted.[184] New construction grants provide funding on a 50/50 state and local match basis. Modernization grants provide funding on a 60/40 basis. Districts that are unable to provide local matching funds and are able to meet the financial hardship provisions may be eligible for state funding of up to 100 percent.[185]

Though there is substantial funding made available to school districts through state grants, not all school districts elect to receive assistance from state funds for construction of school buildings. The "School Facility Financing" handbook prepared in February 1999 states, that:

> If a school district wants state funding for construction or repair of a school, it must apply to the State Allocation Board for the money. *There are school districts that repair and construct school buildings without the assistance from the State Allocation Board* (i.e., San Diego Unified School District, San Luis Unified School District). (Emphasis added.)[186]

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[180] *Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra*. See also "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," *supra*.

[181] See also "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," *supra*.

[182] "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," *supra*, pp. 12, 13, 20.

[183] Education Code, section 17170.10 *et seq*.

[184] School Facility Program Handbook, *supra*, p. 23.

[185] *Id*, p. 61.

[186] *Id*, endnote 2, p. 39.

Therefore, the Commission finds that school districts are not legally compelled to request or accept state funding or to comply with CEQA requirements under these circumstances.

3. The evidence in the record does not support a finding that school districts or community college districts are practically compelled to undertake non-maintenance or non-emergency projects or receive state funding.

In comments filed March 31, 2004, claimant notes that "a finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate" and cites to *Sacramento II* as controlling case law. [187] Claimant relies on a study and Proposition 55 ballot language, both of which state a need to build more schools in California, to demonstrate that school districts are practically compelled to construct new school facilities when existing facilities become inadequate.[188] However, the question before the Commission is not whether additional school facilities are needed, but whether school districts are legally compelled by a state statute or regulation or practically compelled to build them and thus mandated by the state to comply with CEQA. As discussed above, the Commission finds that school districts and community college districts are not legally compelled to acquire new school sites or build new school facilities or additions to existing schools of greater than 25%, or to receive state funding for such facilities.

Claimant argues that school districts and community college districts are practically compelled to construct new facilities. In the final analysis for this test claim prepared for the January 29, 2010 hearing, staff found that there was no evidence in the record to support a finding that school districts and community college districts are legally or practically compelled to acquire new school sites or build new school facilities or additions to existing schools of greater than 25%. At the January 29, 2010 hearing, claimant requested, and the Commission granted, permission to submit evidence that school districts are practically compelled to comply with some or all of the statutes and regulations pled in this test claim. On March 23, 2010 and April 8, 2010 claimant submitted supplemental filings to support its claim that school districts are practically compelled to construct new facilities. On May 19, 2010, DNR submitted comments on claimant's supplemental filings. For the reasons discussed below, considering all of the evidence in the record, the Commission finds that the evidence does not support a finding that school districts are practically compelled to acquire new school sites, or build new school facilities or additions to existing schools of greater than 25% which would trigger a requirement to comply with CEQA. Rather, the evidence submitted by claimant in its supplemental filing supports the opposite conclusion. Therefore, the Commission finds that school districts are not practically compelled to comply with CEQA.

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[187] Claimant's Response to DOF Comments, *supra*, p. 4, citing C*ity of Sacramento v. State of California* (1990) 50 Cal.3rd. 51 (*Sacramento II*).

[188] Claimant's Response to DOF Comments, *supra*, pp. 3-4, citing "School Facility Financing-A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds" (Cohen, Joel, February 1999.) and Proposition 55 Ballot Pamphlet from 2004, which identified a need to construct schools to house one million pupils and modernize schools for an additional 1.1 million students.

The proper standard for determining whether school districts and community college districts are practically compelled to undertake school construction projects is the *Kern*[189] standard as followed, and expanded upon to provide specific evidentiary requirements, in the recent decision *Department of Finance v. Commission on State Mandates* (*POBRA*).[190] Absent legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[191] Rather, local entities that have discretion will make the choices that are ultimately the most beneficial for the entity and its community:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[192]

Likewise, the state School Facilities Program (SFP) provides new construction grant funding on a 50/50 state and local match basis. Districts that are unable to provide local matching funds and are able to meet the financial hardship provisions may be eligible for state funding of up to 100 percent.[193] If a district decides not to build a new school or a major addition to an existing school, and hence not to comply with all the corresponding requirements including CEQA compliance, there are no "draconian" consequences. Rather, the district will simply forgo the

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[189] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, hereinafter "*Kern."*

[190] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355**,** pp. 1365-1366, hereinafter "*POBRA*". Note that POBRA is the test claim statute that was formerly identified as "POBAR" by the Commission and Commission staff. However, as the POBRA Court pointed out at footnote 2, the statute's commonly used name is "Peace Officers Bill of Rights Act" and the acronym "POBRA" was used by the Supreme Court in *Mays v. City of Los Angeles* (2008) 43 Cal. 4th 313, 317. Therefore, this analysis will use the acronym POBRA.

[191] *Kern, supra,* 30 Cal.4th 727, 754.

[192] *Id,* p. 753.

[193] School Facility Program Handbook, *supra,* p. 61.

state matching funds for new construction and will need to figure out another way to house its students.

In *POBRA,* the court addressed the issue of the evidence needed to support a finding of practical compulsion. In that case, it was argued that districts "employ peace officers when necessary to carry out the essential obligations and functions established by law." [194] The Commission found that the POBRA statutes constituted a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.[195] In 2006, the Commission in reconsidered the claim, as required by Government Code section 3313 and found that *San Diego Unified* supported the Commission's 1999 Statement of Decision. In other words, under the rule in *San Diego Unified*, the Commission's decision would have been the same. Specifically, with regard to schools, the Commission found that districts were practically compelled to employ peace officers based upon the district's "obligation to protect pupils from other children, and also to protect teachers themselves from the violence by the few students whose conduct in recent years has prompted national concern."[196] The Commission's Statement of Decision on reconsideration pointed out that, like the decision on mandatory expulsions in the *San Diego Unified* case, its decision was supported by the fact that the California Supreme court found that the state "fulfills its obligations under the safe schools provision of the Constitution (Cal. Const., art. I,5 28, subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline."[197] In other words, the Commission relied on a general requirement in the law (i.e. to provide safe schools) to support a finding of practical compulsion to perform specific activities (i.e. to hire police officers and comply with the down-stream requirements of hiring those officers). This is precisely the line of reasoning that claimant urges the Commission to follow in this test claim.

However, the court in *POBRA* found that the superior court erred in concluding as a matter of law that, "'[a]s a practical matter,' the employment of peace officers by the local agencies is 'not an optional program' and 'they do not have a genuine choice of alternative measures that meet their agency-specific needs for security and law enforcement." Moreover, the *POBRA* court did not find any evidence in the record to support a finding of legal or practical compulsion and the court provided some guidance regarding what kind of evidentiary showing is required to make such a finding. Specifically, the court stated:

> The 'necessity' that is required is facing 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences.' That cannot be established in this case without a concrete showing that reliance upon the general law

[194] *POBRA*, *supra*, 170 Cal.App.4th 1355**,** 1368.

[195] See CSM-4499.

[196] CSM 05-RL-4499-01, p. 26, citing *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

[197] *Id.*

enforcement resources of cities and counties will result in such severe adverse consequences. [198]

Thus, practical compulsion must be demonstrated by specific facts in the record showing that unless the alleged activity is performed, here the activity of acquiring new school sites or building new school facilities or additions to existing schools of greater than 25%, which would in turn trigger the requirement to comply with CEQA, the district faces "certain and severe ... penalties' such as "double ... taxation" or other "draconian' consequences." Only a showing that relying on alternative arrangements to house students would result in such severe consequences will meet the practical compulsion standard. Some alternatives that school districts can employ without triggering the requirement to comply with CEQA include but are not limited to:

- Transferring students to other schools.[199]
- Reconstructing an existing school without increasing structural capacity by more than 50%.[200]
- Adding 25% capacity or up to ten classrooms to each existing school.[201]

On March 23, 2010 claimant submitted the Alternatives section of the 52nd Street Area Elementary School Final EIR, which was certified by the San Diego Unified School District on June 10, 2003.[202] Funding for this school was specifically included in San Diego's Proposition MM, which was placed on the November 1998 ballot by the San Diego Board of Education and which authorized the sale of up to $1.51 billion in general obligation bonds to repair, renovate, upgrade, and expand existing schools; and to acquire property and construct 13 new elementary schools.[203] [204] The 52nd Street Area Elementary School was re-named the "Mary Layon Fay

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[198] *POBRA, supra,* 170 Cal.App.4th 1355, 1368, (POBRA) citing *Kern High School Dist.*, ,30 Cal.4th at p. 754, quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.)

[199] See California Code of Regulations, title 14, section 15301.

[200] See California Code of Regulations, title 14, section 15302.

[201] See California Code of Regulations, title 14, section 15314.

[202] Claimant's supplemental filing dated March 15, 2010 (received March 23, 2010), p. 9 and following (or pages 7-1 to 7-7 of the 52nd Street Area Elementary School Final EIR).

[203] San Diego City Schools, Office of Superintendant, Certification of Environmental Impact Report and Selection of a Site for the Acquisition and Construction of the Proposed 52nd Street (aka Jackson/Marshall) Area Elementary School, p. 1.

[204] Note that this school was fully funded between the $18,508,106 in SFP funds that have been released for it (See Office of Public School Construction, School Facilities Program: Fund Release by Project, project number 50-68338-03-004, claim schedule number 2006224, Office of Public School Construction processing date 5/23/2007, warrant issued release date 6/4/2007.) and the local bond funds specifically designated for this purpose in Proposition MM. Therefore, it would not be eligible for reimbursement even if staff found the district was legally or practically compelled to build it since the cost was 50% off-set by local bond funds and 50% funded with SFP funds.

Elementary School" (Fay Elementary) and opened its doors to students September 2, 2008.[205] According to the district, Fay Elementary was built to "ease overcrowding at Jackson and Marshal Elementary schools"[206] However, due to a decrease in enrollment, Jackson Elementary was closed immediately prior to the opening of Fay Elementary and the students from Jackson were transferred to Fay.[207] The Alternatives section for the Fay Elementary School EIR included consideration of a number of non-construction and minor addition alternatives which would have been exempt from CEQA but were rejected by the district because they did not meet the district's objectives. Specifically:

- Double session kindergarten programs were rejected because "the District has initiated a policy . . . to operate single session, full-day kindergarten programs system wide." [208] Single session kindergarten programs are a local district policy decision, not a state-mandated program.
- Boundary changes were rejected, in part, because the district adopted a standard school size of 700 students and also because they would "shift students to those schools with remaining operating capacity" but would not meet the districts goal of small (700 students or less) neighborhood schools.[209] Small neighborhood schools may be good public policy and are certainly within the district's discretion to require, but they are not a state-mandated local program.
- Adding "portable classrooms and/or the modification and modernization of permanent space" was rejected out of hand because it would result in enrollment levels above the district's self-imposed standard school size of 700 students.[210] There is no analysis in the EIR of what number of students could potentially be accommodated by adding additional portable and/or permanent classrooms, much less how many students could be accommodated using an array of non-building alternatives. Small neighborhood schools may be good public policy and are certainly within the district's discretion to require, but they are not a state-mandated local program.
- Conversion of leased district properties or administrative space into classrooms was rejected because such properties were not in the project vicinity (so would require busing) and they "would not serve the project's objective of providing additional neighborhood schools in the Jackson and Marshall elementary school attendance

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[205] San Diego Unified School District Web Site, About: Fay Elementary (April 14, 2010) http://new.sandi.net/schools/fay/About/Pages/default.aspx.

[206] *Id*.

[207] *Id*. See also Magee, *Jackson Elementary Closing its Doors*, S.D. Union-Tribune (July 19, 2008).

[208] 52nd Street Area Elementary School Final EIR, p. 7-2.

[209] 52nd Street Area Elementary School Final EIR, p. 7-2.

[210] 52nd Street Area Elementary School Final EIR, p. 7-3.

areas."[211] However, the project's objective is fulfillment of a district policy, not a state-mandated local program.

- Multi-track year round scheduling was rejected because the district "adopted a policy of not implementing multi-track year round scheduling any longer, unless requested by a school and its community and approved by the Board of Education."[212] It is within the discretion of the district to eliminate multi-tracking, but this is not a state-mandated program.
- Busing was rejected because though "it [would] reduce overcrowding," it would not "provide additional capacity for elementary school students within the resident neighborhood" and so it would not meet the district's objective of small neighborhood schools.[213] However, meeting the district's objectives is not a state mandate.
- Reopening closed school sites was rejected because "many of these sites are now leased and provide revenue to the District through the [District's] Property Management Program." Also "reopening closed school sites outside of the City Heights Community [would] not meet the objectives of the project" (i.e. meeting the district objective of small neighborhood schools).[214] However, meeting the district's objectives is not a state mandate.
- Additional construction at operating schools was rejected because "it would hinder the District's ability to meet its planning standards."[215] Meeting the district's planning standards is a district requirement; not state mandate.

Thus, the Commission finds that there has been no concrete showing, as required by the *POBRA* court, that reliance upon non-construction and minor addition alternatives to house students would result in severe adverse consequences.

Here, the evidence in the record does not support a conclusion that school districts or community college districts that elect not to construct new facilities or use state funds, which would trigger the requirement to comply with CEQA, face certain and severe penalties such as double taxation or other draconian consequences. Instead, school and college facilities projects that are undertaken for purposes other than repair and maintenance are discretionary decisions of the district, analogous to the situation in *City of Merced*. There, the issue before the court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[216] The court stated:

> Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The

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[211] 52nd Street Area Elementary School Final EIR, p. 7-2, 7-3.

[212] 52nd Street Area Elementary School Final EIR, p. 7-3.

[213] 52nd Street Area Elementary School Final EIR, p.p. 7-3, 7-4.

[214] 52nd Street Area Elementary School Final EIR, p. 7-4.

[215] 52nd Street Area Elementary School Final EIR, p. 7-4.

[216] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

> fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[217]

The Supreme Court in *Kern* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[218]

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[219]

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. …[220]

The holding in *City of Merced* applies in this instance. Districts have many options for housing students, but as is demonstrated by the 52nd Street Area Elementary School Final EIR Alternatives section, they may, in their discretion, choose not to exercise them. The policy of a district to have small neighborhood schools at a walkable distance from students' homes, even if it is good public policy, is not a state-mandated local program. Any costs incurred under CEQA or the CEQA regulations sections pled (excepting Public Resources Code section 21082, as

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[217] *Id*, p. 783.

[218] *Kern, supra,* 30 Cal.4th 727, 743.

[219] Code of Civil Procedure section 1230.030.

[220] California Law Revision Commission comment on Code of Civil Procedure section 1230.030, 2009 Thomson Reuters.

amended by Statutes 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29) result from the school district's or community college district's decision to undertake a project to construct new school facilities or additions to existing schools of greater than 25%, rather than from a requirement imposed by the state. Under such circumstances, reimbursement is not required.[221] Therefore, based on the above discussion, the Commission finds that school districts and community college districts are not practically compelled to undertake discretionary projects subject to CEQA.

D. The Plain Language of Public Resources Code Section 21082, as Amended by Statutes of 1976, chapter 1312 and California Code of Regulations, Title 14 Section 15022, Subdivision (a), as Amended by Register 83, No. 29, Imposes a State-Mandated Activity.

The Commission finds that Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, and California Code of Regulations, title 14 section 15022, subdivision (a), as amended by Register 83, No. 29, mandate school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs, by ordinance, resolution, rule or regulation, no later than 60 days after the Secretary of the Resources Agency adopts regulations (i.e. the CEQA Guidelines) pursuant to Public Resources Code section 21083.

As stated under Issue 2, above, reimbursement is not required for Public Resources Code section 21082, as added by Statutes of 1972, chapter 1154, which provided:

> All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports pursuant to this division. The objectives, criteria, and procedures shall be consistent with the provisions of this division and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083. Such objectives, criteria, and procedures shall be adopted by each public agency no later than 60 days after the Secretary of the Resources Agency has adopted guidelines pursuant to Section 21083.

Current law, Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, provides:

> All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports *and negative declarations* pursuant to this division. A school district, or any other district, whose boundaries are coterminous with a city, county, or city and county, may utilize the objectives, criteria, and procedures of the city, county, or city and county, as may be applicable, in which case, the school district or other district need not adopt objectives, criteria, and procedures of its own. The objectives, criteria, and procedures shall be consistent with the provisions of this division and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083. Such objectives, criteria, and procedures shall be adopted by each public

[221] *San Diego Unified School Dist.*, supra, 33 Cal.4th 859, 880.

> agency no later than 60 days after the Secretary of the Resources Agency has adopted guidelines pursuant to Section 21083. (Italics added to indicate amended language.)

Public Resources Code section 21082 has been amended twice since its enactment in 1972: in 1975 and 1976. Statutes 1975, chapter 242, which was not pled in this test claim, amended Public Resources Code section 21082, adding the second full sentence which allows districts (including school districts and community college districts) whose boundaries are coterminous with a city, county, or city and county, to utilize the objectives, criteria, and procedures of the city, county, or city and county, in lieu of adopting its own. The 1975 amendment merely provides an optional alternate means of compliance, and does not mandate any new activities. However, Public Resources Code section 21082 was amended by Statutes 1976, chapter 1312, which has been pled in this test claim, to add the words "and negative declarations" to what must be included in a public agency's objectives, criteria and procedures.

Similarly current California Code of Regulations, title 14 section 15022, subdivision (a), as amended by Register 83, No. 29, states:

> Each public agency shall adopt objectives, criteria, and specific procedures consistent with CEQA and these Guidelines for administering its responsibilities under CEQA, including the orderly evaluation of projects and preparation of environmental documents. The implementing procedures *should* contain at least provisions for: . . . .

(List of subjects recommended for inclusion omitted; emphasis added.)

CEQA has required OPR to review the CEQA regulations and prepare amendments to CEQA regulations and has required the Secretary of the Resources Agency to adopt the regulations since 1972.[222] Public Resources Code section 21083 requires OPR to review the CEQA regulations at least every two years and to prepare amendments to the regulations. It also requires the Secretary of Resources to adopt the regulations which triggers the requirement of Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312, for school districts and community college districts to adopt objectives, criteria, and procedures for NDs. This continuing requirement is not triggered by any action of a school district or community college and is not dependant on the existence of any development project.[223]

However, the California Code of Regulations, title 14, section 15022, subdivision (a) list of what the implementing procedures "should" include is advisory and thus does not impose any

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[222] See the requirements of Public Resources Code section 21087, as adopted by Statutes of 1972, chapter 1154 which were amended into Public Resources Code section 21083 by Statutes 2004, chapter 945; note that the amendment to Public Resources Code section 21087 requiring review at least every two years (rather than periodic review) was adopted by Statutes of 1993, chapter 1130.

[223] Note however, that the Public Resources Code section 21083 requirement for OPR to review and propose amendments to the CEQA regulations at least every two years was supported by local agencies because of concerns that the regulations were not being revised often enough to keep up with the statutory changes and case law developments that local agencies are required to comply with. (See Senate Floor Analysis, Assembly Bill No. 1888 (Sher), September 9, 1993.)

mandated activities. California Code of Regulations, title 14, section 15005 defines words as "mandatory, advisory or permissive." Specifically, it defines "must" or "shall" as mandatory, "should" as advisory and "may" as permissive for purposes of the CEQA regulations. With regard to the word "should" California Code of Regulations, title 14, section 15005, subdivision (b) provides:

> "Should" identifies *guidance* provided by the Secretary of Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are *advised* to follow this guidance in the absence of compelling, countervailing considerations.

"Advisory" means "counseling, suggesting, or advising, but not imperative or conclusive."[224] Therefore, because the list provided by 15022, subdivision (a) of what the implementing procedures "should" include is advisory, it does not impose any mandated activities.

The Commission finds that the plain language of Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, subdivision (a) as amended by Register 83, No. 29, imposes the following state-mandated activity on school districts and community college districts:

> Adopting objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs, by ordinance, resolution, rule or regulation, no later than 60 days after the Secretary of the Resources Agency adopts the CEQA regulations pursuant to Public Resources Code section 21083.

Issue 4: Do Public Resources Code Section 21082, as Amended by Statutes of 1976, Chapter 1312, or California Code of Regulations, Title 14, Section 15022 as Amended by Register 83, No. 29 Impose a New Program or Higher Level of Service on School Districts or Community College Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution?

It is unnecessary for this analysis to address the argument raised by DOF and DNR that CEQA is not unique to government. The Commission finds that with the exception of Public Resources Code Section 21082, as Amended by Statutes of 1976, Chapter 1312, and California Code of Regulations, Title 14, Section 15022 as Amended by Register 83, No. 29, the activities required by CEQA are triggered by a district's discretionary decision to build. Therefore, a new program or higher level of service analysis is not necessary for the test claim statutes and regulations with the exception of Public Resources Code Section 21082, as Amended by Statutes of 1976, Chapter 1312, and California Code of Regulations, Title 14, Section 15022 as Amended by Register 83, No. 29.

The Commission finds that the plain language of Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, subdivision (a), as amended by Register 83, No. 29 mandate school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA Guidelines, for the preparation NDs, by ordinance, resolution, rule or regulation,

[224] Black's Law Dictionary, Sixth edition.

no later than 60 days after the Secretary of the Resources Agency adopts the CEQA regulations (i.e. the CEQA Guidelines) pursuant to Public Resources Code section 21083. However, the Commission finds that Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 do not impose a new program or higher level of service on school districts and community college districts because:

- The Public Resources Code Section 21082 requirement for school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation, added in 1976, was a clarification of existing law regarding "evaluation of projects" and therefore does not impose a new program or higher level of service.
- The requirement of California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29, for school districts and community college districts to adopt objectives, criteria, and procedures, for the evaluation of projects and the preparation of environmental documents pursuant to CEQA was required by CEQA before January 1, 1975, and therefore does not impose a new program or higher level of service.

In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at *state-mandated increases in the services* provided by local agencies.[225] In 1990, the Second District Court of Appeal decided the *Long Beach Unified School District* case, which challenged a test claim filed with the Board of Control on executive orders issued by the Department of Education to alleviate racial and ethnic segregation in schools.[226] The court determined that the executive orders did not constitute a "new program" since schools had an existing constitutional obligation to alleviate racial segregation.[227] However, the court found that the executive orders constituted a "higher level of service" because the requirements imposed by the state went beyond constitutional and case law requirements. The court stated in relevant part the following:

> The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. [Citation omitted.] A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because the requirements go beyond constitutional and case law requirements. . . .While these steps fit within the "reasonably feasible" description of [case law], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are *required acts*. *These requirements constitute a higher level of service*. We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is

[225] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[226] *Long Beach Unified School District, supra*, 225 Cal.App.3rd 155.

[227] *Id*, p. 173.

reimbursable: "Only those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."[228] [229]

Thus, in order for Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312, or California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29, to impose a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts and community college districts to adopt objectives, criteria and procedures for NDs beyond those already required by law.

A. The Statutes of 1976, Chapter 1312 Amendment of Public Resources Code Section 21082, Adding "Negative Declarations," Was A Clarification of Existing Law Regarding "Evaluation of Projects" and Therefore Does Not Impose a New Program or Higher Level of Service.

Current law, Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, provides:

> All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports *and negative declarations* pursuant to this division. A school district, or any other district, whose boundaries are coterminous with a city, county, or city and county, may utilize the objectives, criteria, and procedures of the city, county, or city and county, as may be applicable, in which case, the school district or other district need not adopt objectives, criteria, and procedures of its own. The objectives, criteria, and procedures shall be consistent with the provisions of this division and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083. Such objectives, criteria, and procedures shall be adopted by each public agency no later than 60 days after the Secretary of the Resources Agency has adopted guidelines pursuant to Section 21083. (Italics added to indicate amended language.)

This amendment added the words "and negative declarations" which requires school districts and community college districts to address NDs in the objectives, criteria and procedures that they must adopt by ordinance, resolution, rule, or regulation.

In order for the Statutes of 1976, chapter 1312 amendment, which requires school districts and community college districts to address NDs in the objectives, criteria and procedures that they must adopt by ordinance, resolution, rule, or regulation to impose a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts and community college districts beyond those already required by law. For the reasons described below, the Commission finds that school districts and community college

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[228] *Ibid*, emphasis added.

[229] See also, *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1193-1194, where the Second District Court of Appeal followed the earlier rulings and held that in the case of an existing program, reimbursement is required only when the state is divesting itself of its responsibility to provide fiscal support for a program, or is forcing a new program on a locality for which it is ill-equipped to allocate funding.

districts have been required to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation under CEQA since 1972, before the enactment of the Statutes of 1976, chapter 1312.

The intent to change the law may not always be presumed by an amendment. The courts have recognized that changes in statutory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][230]

Under the rules of statutory construction, the first step is to look at the statute's words and give them their plain and ordinary meaning. Where the words of the statute are not ambiguous, they must be applied as written and may not be altered in any way. Moreover, the intent must be gathered with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.[231]

Public Resources Code section 21082, as added by Statutes of 1972, imposed the requirement to "adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports pursuant to [CEQA]."[232] Section 21082 does not specify exactly what is meant by "the evaluation of projects." However, when read in context with the whole system of law, of which this statute is a part, it becomes clear that under prior law, preparation of NDs was a required activity when a lead agency evaluated a project which was not exempt from CEQA, but which the lead agency determined would not have a significant effect on the environment.

To "evaluate" means "to determine the value of."[233] In the context of CEQA, the possible values assigned to activities or approvals of the lead agency are:[234]

- Project or not.[235]
- If a project, exempt or not.[236]

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[230] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[231] *People v. Thomas* (1992) 4 Cal.4th 206, 210.

[232] See Public Resources Code Section 21082, as enacted in Statutes 1972, chapter 1154.

[233] Webster's II New Riverside Dictionary.

[234] For a good overview of the CEQA project evaluation process see the California Resources Agency, CEQA Process Flowchart. http://ceres.ca.gov/ceqa/flowchart/index.html.

[235] Public Resources Code section 21065; California Code of Regulations, title 14, section 15378.

[236] Public Resources Code sections 21080-21080.33, 21084; California Code of Regulations, title 14, sections 15300-15329.

- If not exempt, whether it may have a significant effect on the environment or will not have a significant effect on the environment.[237]
- ND or EIR.[238]

Thus, the determination regarding whether to prepare an EIR or an ND is a part of project evaluation. In *No Oil*, the California Supreme Court, in a decision regarding a 1972 project approval by the Los Angeles City Council, held that:

- an agency must determine whether a project may have a significant environmental impact, and thus whether an EIR is required, before it approves the project; and,
- a determination that a project does not require an EIR, when that project is not exempt from CEQA, must take the form of a written ND. [239]

In reaching these holdings, the *No Oil* court considered federal court opinions construing the National Environmental Policy Act (NEPA) on which CEQA was modeled, the federal NEPA guidelines, and California Code of Regulations, title 14, section 15083, regarding NDs, which did not take effect until 1973. The *No Oil* court stated that these holdings were consistent with "the unanimous view of the federal courts construing [NEPA], and the explicit requirement of both federal and state guidelines."[240] With regard to consideration of the CEQA regulations, the court stated "we do not apply these [regulations] retroactively to the decisions of the court or the city council rendered before the [regulations] went into effect. We make use of the [regulations], however, as a suggested interpretation of the statute, and as an illustration of the procedures which the resources agency finds necessary to the enforcement of the statute."[241] Moreover, the court stated, "the requirement that a finding of no significant impact take the form of an express written determination, however, is implicit in the act itself, and could have been deduced in October of 1972 from examination of the act, from our decision in *Friends of Mammoth* [citations] and from the federal cases cited in that decision."[242]

Additionally, California Code of Regulations, title 14, Article 7 (entitled Evaluating Projects), section 15083 (Register 73, No. 50) was adopted in 1973. Section 15083 addressed the requirement to prepare a negative declaration and the procedures that must be followed for projects that are not exempt from CEQA which the lead agency finds will not have a significant effect on the environment.[243] Thus, the requirement to address NDs is not new. In fact, if a

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[237] Public Resources Code sections 21080, 21080.1; California Code of Regulations, title 14, sections 15060 subdivision (c), 15063, 15064, 15064.7, 15065, 15365.

[238] Public Resources Code section 21080; California Code of Regulations, title 14, section 15070.

[239] *No Oil Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, pp. 79-80. (Hereinafter, *No Oil*).

[240] *Id*, p. 80.

[241] *Id*, p. 80.

[242] *Id*, p. 81.

[243] Title 14 California Code of Regulations, Article 7 (Evaluating Projects), section 15083 (Register 73, No. 50.)

school district or community college district prior to the 1976 amendment of Public Resources Code section 21083, had prepared objectives, criteria, and procedures, for the evaluation of projects preparation of EIRs by ordinance, resolution, rule or regulation, without addressing NDs, its objectives, criteria, and procedures would not have been consistent with CEQA and the CEQA regulations. Therefore, because the requirement for school districts and community college districts to address NDs in their objectives, criteria, and procedures, for the evaluation of projects preparation of EIRs by ordinance, resolution, rule or regulation clarifies existing law that pre-dates January 1, 1975, Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312 does not impose a new program or higher level of service.

B. California Code of Regulations, Title 14, Section 15022 Does Not Impose a New Program or Higher Level of Service.

The current regulation interpreting Public Resources Code section 21082, California Code of Regulations, title 14, section 15022, subdivision (a), as adopted by Register 83, No. 29, provides:

> Each public agency shall adopt objectives, criteria, and specific procedures consistent with CEQA and these Guidelines for administering its responsibilities under CEQA, including the orderly evaluation of projects and preparation of environmental documents. The implementing procedures *should* contain at least provisions for: . . . . [List of what the procedures should contain omitted.]

To determine whether California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 imposes a new program or higher level of service, we must first look at the law as it existed immediately prior to July 16, 1983, the effective date of that amendment, to determine whether the amendment mandates new activities.[244] Utilizing the same principles of statutory construction and analysis as applied under "A." above, the Commission finds that school districts and community college districts have been continuously required to adopt objectives, criteria, and procedures that are consistent with CEQA and the CEQA regulations, by ordinance, resolution, rule, or regulation, for the evaluation of projects and the preparation of EIRs pursuant to CEQA since January 1, 1972.

The requirements of California Code of Regulations, title 14, section 15022, were originally adopted in Register 73, No. 50 in California Code of Regulations, title 14, section 15050. California Code of Regulations, title 14, section 15050, as originally adopted said:

> All public agencies are responsible for complying with the CEQA according to these Guidelines. They must develop their own procedures consistent with these Guidelines. Where a public agency is a lead agency and prepares an EIR itself or contracts for the preparation, that public agency is responsible entirely for the adequacy and objectivity of the EIR.

California Code of Regulations, title 14, section 15050 was subsequently amended several times, each time adding more specificity. (See Registers 75, No.1; 76, No. 41; and, 80, No. 19.) The

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[244] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

following language, which, with minor, non-substantive modifications appears in the current California Code of Regulations, title 14, section 15022, was amended into section 15050 by Register 76, No. 41:[245]

> Public agenc[ies] shall adopt objectives, criteria, and specific procedures consistent with CEQA and these Guidelines for . . .the orderly evaluation of projects and preparation of environmental documents. The[se] implementing procedures *should* contain at least [the following] provisions. . . . [List of what the procedures should contain omitted.]

As discussed in "A." above, the CEQA statutory provisions in place prior to January 1, 1975, required a school district or community college district to adopt objectives, criteria, and procedures consistent with CEQA and the CEQA regulations for administering its responsibilities under CEQA, including the orderly evaluation of projects and preparation of environmental documents. Therefore the requirement to adopt objectives, criteria, and procedures consistent to address the evaluation of projects and preparation of environmental documents (i.e. NDs and EIRs) is not new. The addition of the language "objectives, criteria, and specific procedures" and "evaluation of projects and preparation of environmental documents" though adding greater specificity to the regulation, simply reflects the language of the pre-existing statutory requirement under 21082 and thus does not impose a new program or higher level of service.

CONCLUSION

The Commission concludes that the test claim statutes, regulations and alleged executive orders do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution because:

1. The California State Clearinghouse Handbook is not an executive order subject to Article XIII B, Section 6.
2. Reimbursement is not required for any activities imposed by Public Resources Code sections 21082, 21083, 21100, 21102, 21150, 21151, 21152, 21153, 21154, 21165, 21166, or 21167 as added or amended by Statutes 1970, chapter 1433; and, Statutes 1972, chapter 1154 since these statutes were enacted prior to January 1, 1975.
3. The statutes and regulations listed below, which generally require compliance with the CEQA process, do not mandate school districts or community college districts to perform any activities because:
    a. The plain language of Public Resources Code section 21083 imposes requirements on the Office of Planning and Research and the Secretary of the Resources Agency, not school districts or community college districts.
    b. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.

[245] Note that the prior iterations of California Code of Regulations, title 14, section 15050 as amended by Registers 75, No.1; 76, No. 41; and, 80, No. 19 were also pled in this test claim.

c. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project:

Education Code Section 17025 added by Statutes 1996, Chapter 1562; Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455; Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21151, 21151.2, 21151.8, 21152, 21153, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes 1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121; California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18; Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44 and California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062, 15063, 15064 15064.5, 15064.5, 15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29; Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30.

4. Public Resources Code Section 21082, as amended by Statutes 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 Do Not Impose a New Program or Higher Level of Service on School Districts and Community College Districts because:

A. The Public Resources Code Section 21082 requirement for school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation, added in 1976, was a clarification of

existing law regarding “evaluation of projects,” and therefore does not impose a new program or higher level of service.

B. The requirement to adopt objectives, criteria, and procedures, for the evaluation of projects and the preparation of environmental documents pursuant to CEQA was required by the law as it existed immediately prior to the date that California Code of Regulations, title 14, section 15022 was adopted and has been continuously required by the Public Resources Code Section 21082 since January 1, 1973, and therefore does not impose a new program or higher level of service.

Glossary of Frequently Used CEQA Related Terms and Acronyms:

CEQA: California Environmental Quality Act	An Act with the purposes of informing decisionmakers and the public about project impacts, identifying ways to avoid or significantly reduce environmental damage, preventing environmental damage by requiring feasible alternatives or mitigation measures, disclosing to the public reasons why an agency approved a project if significant environmental effects are involved, involving public agencies in the process, and increasing public participation in the environmental review and the planning processes.
Categorical Exemption	An exemption from the requirement to prepare an EIR or negative declaration for classes of projects based on a finding that the listed classes of projects do not have a significant effect on the environment. See also statutory exemption below. (Pub. Resources Code §§ 21080(b)(10) and 21084; Cal. Code Regs., tit. 14, § 15354.)
Certification	The lead agency's determination that an EIR has been completed in compliance with CEQA, was reviewed and considered by the lead agency's decision-making body before action on the project, and reflects the agency's independent judgment and analysis.
Cumulative Impacts	Two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. The individual effects may be changes resulting from a single project or a number of separate projects. The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. (Pub. Resources Code § 21083(b); Cal. Code Regs., tit. 14, § 15355.)
EIR: Environmental Impact Report	A detailed statement prepared in accordance with CEQA whenever it is established that a project may have a potentially significant effect on the environment. The EIR describes a proposed project, analyzes potentially significant environmental effects of the proposed project, identifies a reasonable range of alternatives, and discusses possible ways to mitigate or avoid the significant environmental effects. EIR can refer to the draft EIR (DEIR) or the final EIR (FEIR) depending on context.

	(Pub. Resources Code §§ 21061, 21100 and 21151; Cal. Code Regs., tit. 14, § 15362.)
Initial Study	A lead agency's preliminary analysis of a project to determine whether it may have a significant effect on the environment. If it may have a significant effect, an EIR is required. If not, the project may be approved based on a negative declaration. (Pub. Resources Code §§ 21080.1, 21080.2, 21080.3 and 21100; Cal. Code Regs., tit. 14, § 15365.)
Lead Agency	The agency with primary responsibility for approving or carrying out a project. (Pub. Resources Code § Section 21165; Cal. Code Regs., tit. 14, § 15367.)
Local Agency	Any public agency other than a state agency, board, or commission. Local agency includes but is not limited to cities, counties, charter cities and counties, districts, *school districts*, special districts, redevelopment agencies, local agency formation commissions, and any board, commission, or organizational subdivision of a local agency when so designated by order or resolution of the governing legislative body of the local agency. (Pub. Resources Code § 21062 and 21151; Cal. Code Regs., tit. 14, § 15368.)
MND: Mitigated Negative Declaration	A negative declaration prepared when a project will not have a significant effect on the environment because the project's adverse effects have been mitigated by measures incorporated into the project. (Pub. Resources Code § 21064.5; Cal. Code Regs., tit. 14, § 15369.5.)
ND: Negative Declaration	A written statement by the lead agency that briefly states why a project subject to CEQA will not have a significant effect on the environment. A ND precludes the need for an EIR. (Pub. Resources Code § 21064; Cal. Code Regs., tit. 14, § 15371.)
NOC: Notice of Completion	A brief notice filed with the Office of Planning and Research (OPR) by a lead agency when it completes preparation of the DEIR and is prepared to make it available for public review. The filing of the NOC begins the public review period for the DEIR. (Pub. Resources Code § 21161; Cal. Code Regs., tit. 14, § 15372.)

NOD: Notice of Determination	A brief notice (usually 1 page) filed by the lead agency with the clerk of the county in which the project will be located and OPR. The notice is posted in the County Clerk's office for 30-days after an agency approves or determines to carry out a project subject to CEQA. The NOD is perhaps the most important notice under CEQA since it triggers the short statute of limitations for challenging a project for failure to comply with CEQA. (Pub. Resources Code §§ 21108(a) and 21152; Cal. Code Regs., tit. 14, § 15373.)
NOE: Notice of Exemption	A notice filed after the lead agency has determined that a project is exempt from CEQA and has approved that project. The filing of the NOE is not required, however, it triggers a short statute of limitations for a challenge to the decision that the project is exempt. Otherwise, the statute does not begin to run until the project has commenced (i.e. ground is broken). (Pub. Resources Code §§ 21108(b) and 21152(b); Cal. Code Regs., tit. 14, § 15374.)
NOP: Notice of Preparation	A notice by a lead agency that it plans to prepare an EIR for a project. This notice is sent to various state and federal agencies to seek guidance from those agencies on the scope and content of the EIR. (Pub. Resources Code § 21080.4; Cal. Code Regs., tit. 14, §§ 15082(a) and 15375.)
Project	The whole of an action that may result in either a direct physical change in the environment, or a reasonable foreseeable indirect physical chance in the environment. (Public Resources Code Guideline § 15378(a).) Projects include activities directly undertaken by public agencies as well as private projects that have any public funding or are permitted or approved by public agencies. (Pub. Resources Code § 21065; Cal. Code Regs., tit. 14, § 15378.)
Public Agency	All executive branch agencies and all local government agencies in California. The state legislature, courts and federal agencies are not public agencies for the purposes of CEQA. (Pub. Resources Code § 21063; Cal. Code Regs., tit. 14, § 15379.)
Responsible Agency	A public agency, other than the lead agency, that has some discretionary power to approve or carry out a project (usually has authority to grant a needed permit) for which the lead agency is preparing an EIR or ND. With few exceptions, responsible agencies are bound by the lead

	agency's determination of whether to prepare an EIR or ND and by the document prepared by the lead agency. (See Pub. Resources Code §§ 21002.1, 21069, 21080.1, 21080.3, 21080.4, 21167.2 and 21167.3; Cal. Code Regs., tit. 14, § 15381.)
Significant Effect on the Environment	A substantial or potentially substantial adverse change in the physical conditions of the area affected by the project. (Public Resources Code § 21068.) 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. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant. (Pub. Resources Code §§ 21068, 21083, 21100 and 21151; Cal. Code Regs., tit. 14, § 15382.)