

Well, Who's on First?
The Lead Agency
Who?
The Responsible Agency
What?
Roles and Responsibilities

PRESENTED BY

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History of CEQA

- Adopted in 1970
- Modeled after the National Environmental Policy Act (NEPA)
- Pop Quiz....



Purposes of CEQA

- Disclosure of Environmental Effects
- Informed Decision-Making
- **Agency Coordination**
- Mitigate adverse environmental impacts of projects
- CEQA is **not** intended to **stop** projects but can justify disapproval

**PEDESTRIAN
WARNING!**

PROCEED AT YOUR OWN RISK

**TRESPASSING TREE-SITTERS
MAY BE IN TREES ABOVE
AT ANY TIME**

**IMPACT FROM FALLING OBJECTS
MAY RESULT IN SERIOUS INJURY**

How Does CEQA Affect LAFCOs?

- LAFCOs generally take one of two roles in the CEQA process:
 - Responsible agency (most frequent)
 - Lead agency

LAFCO as Responsible Agency

- Responsible Agencies (“RAs”) are agencies (other than the lead agency) that will issue a discretionary approval for a project. (State CEQA Guidelines § 15381.)
- Generally rely on lead agency’s CEQA document, but will utilize its own independent judgment to consider those aspects of a project that are within the responsible agency’s jurisdiction.
- General CEQA duties include:
 - Consultation w/ lead agency prior to preparation of EIR or Negative Declaration
 - Review of lead agency’s CEQA document and commenting on same
 - Consideration of lead agency’s final CEQA document
 - Adopt feasible alternatives/mitigation that are within LAFCO’s jurisdiction
 - CEQA findings
 - NOD following any approval

LAFCO as Responsible Agency (cont.)

Consultation Before CEQA Document is Prepared

- Lead agencies shall consult with responsible agencies before deciding what CEQA to prepare. (Pub. Res. Code § 21080.3.)
- RAs must respond in a timely fashion to lead agency requests for comments, information, and consultation. (State CEQA Guidelines § 15096(b).)
 - Must explain any recommendation for the preparation of a particular CEQA document.
 - Within 30 days after receiving a notice of preparation, the agency must identify the scope and content of environmental information that is germane to the agency's statutory responsibilities. (Pub. Res. Code, § 21080.4(a).)
 - Meetings: Must designate a representative to attend any meetings requested by the lead agency regarding the scope and content of an EIR. (State CEQA Guidelines, § 15096(c))

Discussion Problem

Part I

What if the lead agency does not properly notify or consult with LAFCO ?

The City of Pleasantville prepared an EIR in connection with a residential project proposed to be annexed to the city. The City staff claim they mailed the NOP to LAFCO but LAFCO has no record of receiving the NOP nor did LAFCO comment on it. What can you do about having not received notice?



Practice Tip re Noticing

- LAFCO may wish to submit written requests for all CEQA and/or Brown Act Notices to agencies in order to help assure that LAFCO receives notices going forward.

(Pub. Res. Code § 21092.2; Gov. Code § 54954.1)

LAFCO as Responsible Agency (cont.)

Commenting on Lead Agency's CEQA Document

- Once a draft CEQA document has been released for public comment, RAs review and comment on the documents. (State CEQA Guidelines, § 15096(d).)
 - RAs should make comments only as to activities that are within its scope of expertise or permitting power. (Pub. Res. Code § 21153.) Can be combined with other comments on traditional LAFCO issues.
 - Typically, LAFCO CEQA concerns are addressed in the land use, utilities, population & housing, and/or growth sections of an EIR or Negative Declaration. (Refer to State CEQA Guidelines Appendix G.) Consider template comment letters.
- Practice Tip:
 - If LAFCO may wish to file litigation challenging the adequacy of the lead agency's CEQA document, it must put its specific objections on record prior to approval. (Pub. Res. Code § 21177.) Even if LAFCO does not want to sue, it's comments can be used by other parties.

Pleasantville Problem, Part II

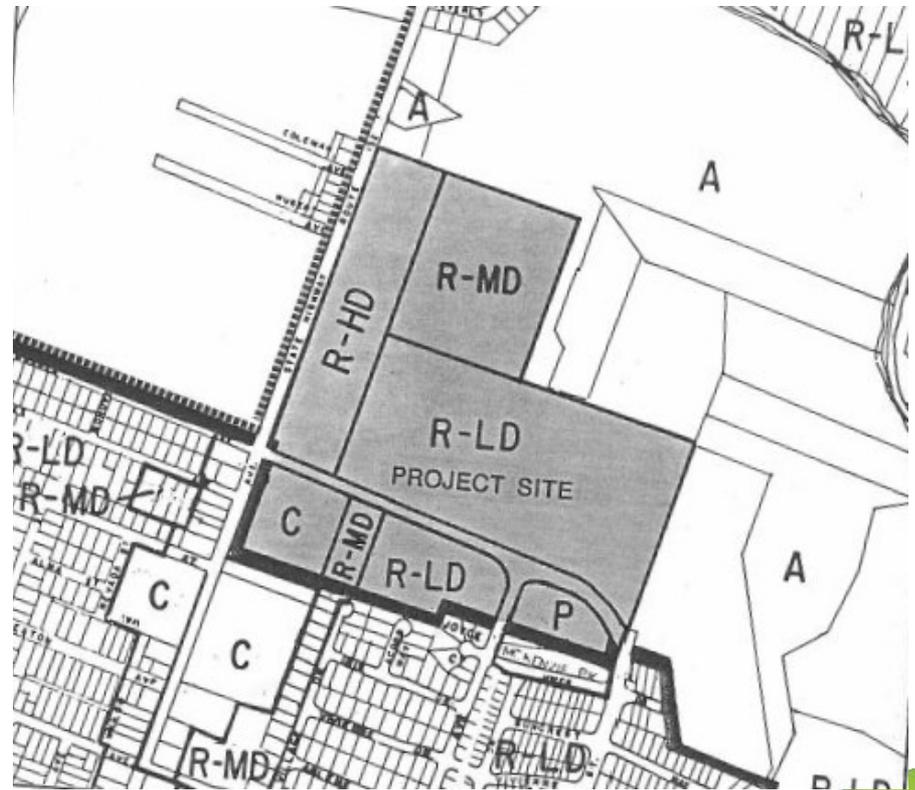
What if LAFCO's Concerns are Ignored or Cannot be Timely Lodged with the Lead Agency?

The City's EIR noted that the project land was a dying apple orchard. The site was prime agricultural land per Gov. Code 56064 and was bordered on 3 sides by prime lands.



Pleasantville Problem, Part II, con't

However, because the property was no longer under active agricultural production and the area was designated for urban development under the City General Plan, the EIR concluded that the land was not prime agricultural land and that conversion would not result in a significant environmental impact.



Pleasantville Problem, Part II, con't

The EIR noted that, while the regional groundwater aquifer was significantly overdrafted, there would not be a significant impact because the City has entered a JPA with the County and two water districts to prepare a groundwater management plan that would bring the basin back into a sustainable condition by 2040.



So, What's Next?

- Assuming that you had received sufficient notice of the MND prior to its approval, what comments would you have raised?
- How would you have conveyed your comments?
- Let's take a look at some sample letters.

Sample Letters

- Letter re: NOP

- LAFCO's relation to the project
- LAFCO's authority and policies
- Changes to the project description
- List of probable effects
- Policy related impacts
- LAFCO Commission consideration
- Contact person

- Letter re: Draft EIR

- LAFCO's relation to the project
- LAFCO's policies applicable to the project
- Comments re environmental impacts (agree or disagree? Why? Be specific.)
- Next steps (ok to certify or not? Why? Be specific.)
- Contact person

LAFCO as Responsible Agency

Consideration of Final CEQA Document/Findings

- RAs “consider” the lead agency’s CEQA document, but do not re-certify or re-adopt it. (State CEQA Guidelines § 15096 (f)-(g))
- Similar to lead agencies, responsible agencies must adopt findings:
 - For MNDs, must find that no substantial evidence supports a fair argument that the project may result in significant impacts.
 - For EIRs, must find that no feasible alternatives or mitigation measures are available to reduce or avoid significant unavoidable impacts within the RAs jurisdiction. For EIRs, these findings must be made in writing. (State CEQA Guidelines § § 15096(h), 15091; *RiverWatch, supra*, 170 Cal.App.4th at 1202.) If there are significant unavoidable impacts, then RA must also adopt a statement of overriding considerations, showing that benefits outweigh impacts, prior to any approval. (State CEQA Guidelines § 15093)

LAFCO as Responsible Agency (cont.)

Consideration of Final CEQA Document/Findings

Practice Tip: RA *may* be able to utilize lead agency's written CEQA findings if RA agrees with them. But *use caution* here, because RA findings must reflect the RA's own independent judgment and be supported by substantial evidence.



LAFCO as Responsible Agency (cont.)

Consideration of Final CEQA Document/Findings

- For all projects with mitigation measures (EIRs and MNDs), RAs must adopt a Mitigation Monitoring and Reporting Program. (Pub. Res. Code § 21081.6.)
- RA can issue its project approvals ONLY AFTER lead agency takes action: (*RiverWatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186, 1201.)
- RAs to file Notice of Determination with County Clerk and Office of Planning and Research/State Clearinghouse within five working days

Practice Tip: RA may be able to use lead agency's MMRP, so consider asking lead agency for final copy of the adopted MMRP.

Practice Tip

- Fish & Game filing fees for NODs are substantial (several thousand dollars). Those fees only need to be paid once per project. Ask lead agency for copy of its NOD and filing fee receipt, and take with you to County Clerk's Office to avoid being charged.

Options When LAFCO's CEQA Concerns Are Not Addressed by Lead Agency

- State CEQA Guidelines § 15096(e): If RA concludes that lead agency's document is inadequate, RA must:
 - Take the issue to court within 30 days after the lead agency files a notice of determination (or otherwise sue within applicable statute of limitations);
 - Again, this is why submitting comments is important during the process.
 - Litigation is expensive, though a successful petitioner may be able to recover its attorney's fees. (Code Civ. Proc. § 1021.5.)
 - Be deemed to have waived any objections regarding adequacy;
 - Prepare a subsequent EIR (or other CEQA document) as required by State CEQA Guidelines § 15162; or
 - Assume the lead agency role.

Assuming the Lead Agency Role Under State CEQA Guidelines § 15052

- Where an RA is called on to grant an approval for a project for which another agency was the lead agency, the RA shall assume the role of the lead agency when any of the following occur:
 - The lead agency did not prepare a CEQA document for the project, and the statute of limitations has expired for challenging the lead agency's action.
 - The lead agency prepared a CEQA document, but the following conditions occur:
 - A subsequent EIR is required pursuant to Section 15162,
 - The lead agency has granted a final approval for the project, and
 - The statute of limitations for challenging the lead agency's action under CEQA has expired.
 - The lead agency prepared an inadequate CEQA document without consulting with the responsible agency, and the statute of limitations has expired for challenging the lead agency's action.

Practice Tip: Proceed with caution. Assuming the lead agency role also involves substantial responsibilities and costs. For that reason, diligently pursuing consultation with lead agency as part of the lead agency's CEQA process is important.

Responsible Agency Duties – Why Do We Care?

- Public agency stewardship and compliance with law.
- Litigation risk: Although more rare than lead agency challenges, RAs can be sued under CEQA. (Consider *Riverwatch* case, in which court found that lead agency was not a necessary party to CEQA proceeding.)
 - Cost implications (successful defendants cannot recover attorney's fees)
 - Timing implications
 - Public perception and political implications

- Short Statute of Limitations

- Practice Tip: Include an indemnification condition to protect against financial risk of litigation for any project approvals.

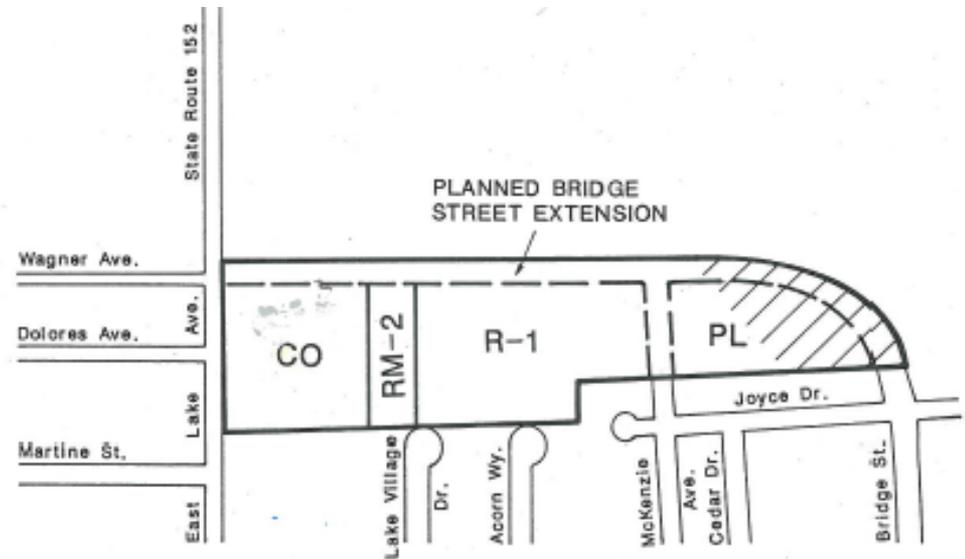
Pleasantville Problem, Part III

The FEIR has been challenged in court by a local environmental group “Friends of the Farms and Forests”, who are opposed to any development. The litigation is pending at the time the City has brought the annexation forward to LAFCO.



Pleasantville Problem, Part III, con't

Shortly after the annexation application was filed with LAFCO, the LAFCO staff identified a compromise annexation that would reduce the amount of ag. land urbanized, keep all urban development out of the flood plain, and utilize a planned arterial road to buffer the remaining ag. land from the new residential development.



Pleasantville Problem, Part III, con't

- LAFCO proceeds to public hearing on the project.
- At the hearing the farm bureau and the farmer to the north of the site complain that the city does not adequately buffer urban and ag lands, and they ask that the project be denied unless an adequate buffer can be assured.
- At the hearing, Friends of the Farms speaks and says that there are other non-prime sites within and outside of the city limits that are suitable for residential development.



Pleasantville Problem, Part III, con't

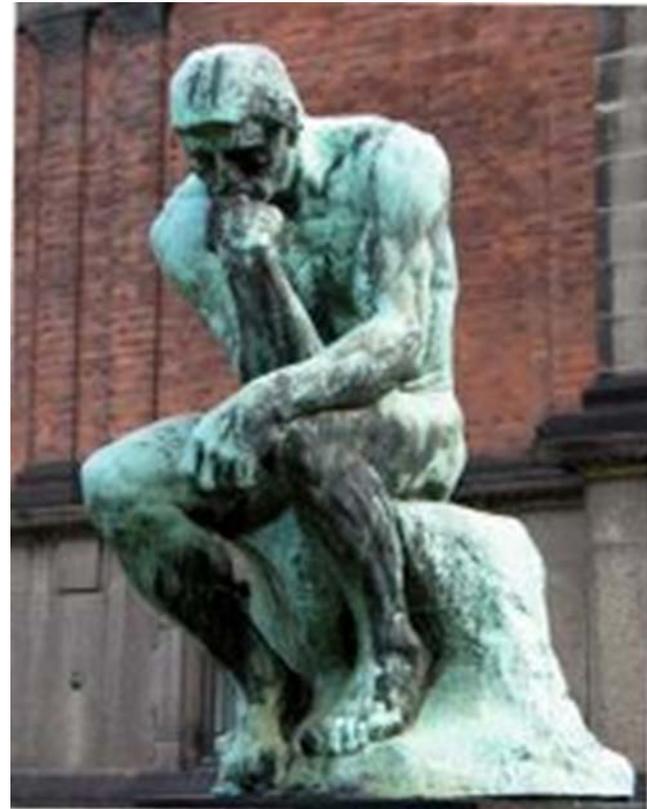
- The Pleasantville Labor Council has recently had their housing program turned down by the City Council. They testify against the project at LAFCO saying that it will take away farmworker and farm support jobs, while only providing housing for rich people.



WWYD?

(What Would You Do?)

- You are the Executive Officer of the affected LAFCO. What would you recommend to your Commission do regarding C-K-H?
- What would you propose that the Commission do to comply with CEQA?



LAFCO as Lead Agency

- Lead agency is public agency with “principal responsibility” for carrying out or approving a project. (State CEQA Guidelines § 15367)
- Less frequent than LAFCO as “responsible agency,” but might include some service extensions and reorganizations not prompted by application.
- If LAFCO has a “project” that is not “exempt,” it must determine which CEQA document to prepare. Typically, an initial study is prepared to assist with this determination. (State CEQA Guidelines, Appendix G.)

Where to Begin?

CEQA Preliminary Review

- Three Questions to Consider:
 1. Is it a “project”?
 2. Is it exempt?
 3. What document to prepare?

Step One: Is it a Project? (State CEQA Guidelines § 15378)

- Four Prongs:
 1. Discretionary
 2. Approval
 3. By a public agency
 4. With the potential to result in a direct physical change, or reasonably foreseeable indirect physical change, in the environment.

Step Two: If it is a Project, is it Exempt?

- Statutory Exemptions: The Legislature exempts many types of projects from CEQA by statute based on public policy reasons. Statutory exemptions are not subject to CEQA even if they will result in environmental impacts.
- Categorical Exemptions: Developed by the Natural Resources Agency as classes of projects that will not have a significant effect on the environment.

Practice Tip: These exemptions are not absolute, and will not apply in “unusual circumstances” under State CEQA Guidelines § 15300.2. It is recommended that you provide a written explanation in your staff report setting out why the exemption applies, and why none of the exceptions apply.

- Catchall/Commonsense Exemption: CEQA exempts certain discretionary actions where “there is no possibility that the activity in question may have a significant effect on the environment.” (State CEQA Guidelines § 15061(b)(3).)

Step Two: If it is a Project, is it Exempt? (Cont.)



- Statutory Exemption Examples:
 - Ministerial actions (Pub. Res. Code § 21080(b)(1); State CEQA Guidelines § 15268)
 - Feasibility and Planning Studies (State CEQA Guidelines § 15262)
 - Emergency Projects (Pub. Res. Code § 21080(b)(2)-(b)(4); State CEQA Guidelines § 15269)
- Categorical Exemption Examples:
 - Operation, Repair, Maintenance, or Minor Alteration of Existing Structures or Facilities (Class 1 – State CEQA Guidelines § 15301)
 - Minor Alterations to Land Use Limitations (Class 5 – State CEQA Guidelines § 15305)
 - Information Collection (Class 6 – State CEQA Guidelines § 15306) eg MSR's
 - Annexation of Existing Facilities and Lots for Exempt Facilities (Class 19 – State CEQA Guidelines § 15319)
 - Minor Changes in Organization of Local Agencies (Class 20 – State CEQA Guidelines § 15320)

Step Three: If it is a Project, and It's Not Exempt, What is Required?

- Initial Study
 - Negative Declaration
 - Mitigated Negative Declaration
 - EIR

LAFCO As Lead Agency

Use of Other EIR's

- LAFCO can incorporate other EIR's that address similar issues such as the EIR for the County General Plan.
- Must still prepare a supplemental environmental document as a basis for such reliance
- If the EIR being relied upon finds significant, unavoidable impacts, then the LAFCO document must be a supplemental EIR in order to allow adoption of required 15091 findings for those impacts
- Must be careful to tailor LAFCO CEQA document to the specific sphere being considered

LAFCO and CEQA

Issues to Consider:

- Compliance with CEQA poses the highest risk to LAFCO of being successfully sued
- IF LAFCO loses must go back and rewrite the environmental document, usually as an EIR
- The successful challenger is typically entitled to their legal fees
- If LAFCO is the lead agency, the cost of redoing the environmental document and the legal fees come out of LAFCO's budget
- Staff will therefore tend to be conservative and recommend more rather than less environmental documentation





Thank you for attending.

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