Agencies Subject to CEQA

Jim Moose
(January 2006)

A. CEQA Applies to California “Public Agencies.”

All California “public agencies” must comply with CEQA, including all “state agencies, boards, and commissions,” and local and regional agencies. (Pub. Resources Code, §§ 21080, subd. (a), 21062, 21063; CEQA Guidelines, §§ 15020-15022, 15379.) The term “public agency” is defined as “any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment, or other political subdivision.” (Pub. Resources Code, § 21063.)

The term “public agency” is sufficiently broad to include the Tahoe Regional Planning Agency, a bi-state agency created by interstate compact. (People, etc. v. City of South Lake Tahoe (E.D.Cal. 1978) 466 F.Supp. 527, 536-537.) The term does not, however, include:

- the State Legislature (Pub. Resources Code, § 21063 (definition of “public agency” does not specify Legislature); ¹
- “the courts of the state” (CEQA Guidelines, § 15379);
- the electorate (Stein v. City of Santa Monica (2nd Dist. 1980) 110 Cal.App.3d 458, 460 [168 Cal.Rptr. 39]); or
- federal agencies (Gentry v. City of Murrieta (4th Dist. 1995) 36 Cal.App.4th 1359, 1389 [43 Cal.Rptr.2d 170]). ²

¹See also CEQA Guidelines, § 15378, subd. (b)(1) (CEQA does not apply to “[p]roposals for legislation to be enacted by the State Legislature”).

²In 1998, the Legislature amended the definition of “person” in Public Resources Code section 21066 to include, “to the extent permitted by federal law, the United States, or any of its agencies or political subdivisions.” The Legislature also created a new statute, section 21006, which provides that CEQA “is an integral part of any public agency’s decisionmaking process, including, but not limited to, the issuance of permits, licenses, certificates, or other entitlements required for activities undertaken pursuant to federal statutes containing specific waivers of sovereign immunity.” The apparent intent behind (continued...)
1. State Agencies

The CEQA Guidelines define "[s]tate agency" as "a governmental agency in the executive branch of the State Government or an entity which operates under the direction and control of an agency in the executive branch of the State Government and is funded primarily by the State Treasury." (CEQA Guidelines, § 15383.)

2. Local Agencies

"Local agency" is defined as "any public agency other than a state agency, board, or commission," including, but 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." (CEQA Guidelines, § 15368; Pub. Resources Code, § 21062.)

An agency may be considered a "local agency" under CEQA although it is considered a "[s]tate agency" for many other purposes. Thus, an agricultural district operating solely within a single county was a "local agency" for purposes of CEQA, although the district received state funding and was described in the Food and Agriculture Code as a "state agency." (Lewis v. Seventeenth District Agricultural Association (3rd Dist. 1985) 165 Cal.App.3d 823, 832-834 [211 Cal.Rptr. 884].) 3

3(...continued)

these changes was to subject the federal government to CEQA obligations otherwise applicable to "persons," to the extent that Congress had subjected particular federal agencies, under particular federal statutes, to California law specifically or state law generally. (See, e.g., Pub. Resources Code, §§ 21065, subd. (c) (defines "project" to include "the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies"), 21089, subd. (a) ("[a] lead agency may 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 in preparing a negative declaration or [EIR] for the project and for procedures necessary to comply with [CEQA] on the project").)

3Both state and local agencies are subject to CEQA. Nevertheless, the distinction can be important because the two types of agencies are subject to differing requirements for filing various kinds of notice documents. (See Lewis v. Seventeenth District Agricultural Association (3rd Dist. 1985) 165 Cal.App.3d 823, 832-834 [211 Cal.Rptr. 884].) Moreover, with one exception (the South Coast Air Quality Management District), only state agencies (continued...)
B. Interagency Division of Labor

Public agencies carry out their CEQA obligations in three distinct capacities: as "lead agencies," as "responsible agencies," and as "trustee agencies." ⁴

1. The Lead Agency's Duties

The lead agency is "the public agency which has the principal responsibility for carrying out or approving a project. The Lead Agency will decide whether an EIR or Negative Declaration will be required for the project and will cause the document to be..."

³(...continued)

may seek certification of their regulatory programs under Public Resources Code section 21080.5.

⁴The CEQA statute and Guidelines also identify at least seven other non-mutually-exclusive categories of agencies, to be notified in circumstances discussed later in this section of this book: (1) a "public agency with jurisdiction by law over resources affected by the project" (CEQA Guidelines, § 15073, subd. (c)); (2) a "public agency which has jurisdiction by law with respect to the project" (Pub. Resources Code, §§ 21104, subd. (a), 21153, subd. (a)); (3) "[a]ny 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, including water agencies that may be consulted pursuant to [CEQA Guidelines] section 15083.5" (CEQA Guidelines, § 15086, subd. (a)(3)); (4) a "city or county which borders a city or county within which the project is located" (Pub. Resources Code, §§ 21083.9, subd. (b)(1), 21104, subd. (a), 21153, subd. (a); CEQA Guidelines, § 15086, subd. (a)(4)); (5) "transportation planning agencies" (Pub. Resources Code, § 21092.4; CEQA Guidelines, § 15086, subd. (a)(5)); (6) "public agencies which have transportation facilities within their jurisdiction which could be affected by...project[s]" of "statewide, regional, or areawide significance") (Pub. Resources Code, § 21092.4; CEQA Guidelines, § 15086, subd. (a)(5)); and (7) "local air quality management district[s]" (CEQA Guidelines, § 15086, subd. (a)(6)). There are also special consultation requirements involving the California Air Resources Board (Pub. Resources Code, § 21104, subd. (b); CEQA Guidelines, § 15086, subd. (a)(6)), certain water supply agencies in some instances (CEQA Guidelines, § 15086, subd. (a)(3); see also Chapter XV (Water Supply Planning and CEQA), section (A)(4), infra), the California Department of Transportation (Pub. Resources Code, § 21083.9, subd. (a)(1)), and the United States Department of Defense (Pub. Resources Code, § 21098) (for projects in a "low-level flight path," "military impact zone," or "special use airspace").
prepared.” (CEQA Guidelines, § 15367.) The lead agency's decision whether to prepare a negative declaration or an EIR is binding on the responsible and trustee agencies, except in unusual circumstances. (CEQA Guidelines, §§ 15050, subd. (c), 15052, subd. (b), 15096, subds. (e), (f); Pub. Resources Code, § 21080.1 ("[t]he lead agency shall be responsible for determining whether an [EIR], a negative declaration, or a mitigated negative declaration shall be required for any project which is subject to [CEQA]"); [t]hat determination shall be final and conclusive on all persons, including responsible agencies, unless challenged as provided in Section 21167").

a. Consultation with Responsible Agencies

Lead agencies have a duty to produce “comprehensive” environmental documents that will be of use to responsible agencies. (Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission (1st Dist. 1992) 10 Cal.App.4th 908, 922 [13 Cal.Rptr.2d 117].) To ensure that negative declarations and EIRs will be adequate for the responsible agencies’ purposes, lead agencies must consult with such agencies throughout the CEQA process. For example, statutory language provides that “the lead agency shall consult” with such agencies “prior to determining whether a negative declaration or environmental impact report is required.” (Pub. Resources Code, § 21080.3, subd. (a).)

The CEQA Guidelines are more specific, stating that such consultation must occur “[a]s soon as a Lead Agency has determined that an Initial Study will be required.” (CEQA Guidelines, § 15063, subd. (g).) Prior to the point at which such consultation becomes mandatory, it is nevertheless permitted. (Pub. Resources Code, § 21080.3, subd. (b).) A lead agency's consultation includes solicitation of comments from responsible agencies and trustee agencies regarding the choice and content of environmental documents. (Pub.

See also Pub. Resources Code, § 21067 ("Lead Agency' means the public agency which has the principal responsibility for carrying out or approving a project"); CEQA Guidelines, § 15051 (setting forth criteria for determining which agency will be the lead agency); Planning & Conservation League v. Department of Water Resources (3rd Dist. 2000) 83 Cal.App.4th 892, 904-907 [100 Cal.Rptr.2d 173] (agency with principal responsibility for implementing a project is the “logical choice for lead agency”); Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park District (4th Dist. 1994) 28 Cal.App.4th 419, 426-428 [33 Cal.Rptr.2d 635] (applying criteria for determining “lead agency” status); City of Sacramento v. State Water Resources Control Board (3rd Dist. 1992) 2 Cal.App.4th 960, 970-973 [3 Cal.Rptr.2d 643] (discussing the relative roles and responsibilities of the “lead agency” and “responsible agencies” and applying criteria for identifying the “lead agency”).)
Resources Code, §§ 21080.3, 21080.4, 21104, 21153; CEQA Guidelines, §§ 15073, 15082, 15086, 15096.)

If a lead agency determines that an EIR is required, the lead agency must “immediately” send a “notice of preparation” (NOP) to each responsible agency (as well as each trustee agency). (CEQA Guidelines, § 15082, subd. (a).) To ensure that all responsible and trustee agencies receive the NOP, the lead agency must also provide the document to the Office of Planning and Research (OPR). (Pub. Resources Code, § 21080.4, subds. (a) and (b).) If a lead agency determines instead that a negative declaration or mitigated negative declaration is appropriate, there is no analog to the NOP; that is, there is no prescribed formal document for initiating further consultation. The first formal written notice required in the case of a proposed negative declaration or mitigated negative declaration is a “notice of intent to adopt.” (CEQA Guidelines, § 15073, subd. (c). But see CEQA Guidelines, § 15063, subd. (g) (consultation must occur “[a]s soon as a Lead Agency has determined that an Initial Study will be required”).

For projects requiring EIRs, the lead agency consults responsible agencies and trustee agencies both as regards the proper “scope” of the EIR and as to the substance of a draft EIR. (CEQA Guidelines, §§ 15082 (determination of scope of EIR), 15086, subd. (a)(1) (consultation concerning draft EIR).) Both responsible agencies and trustee agencies play a major role in this regard. In particular, lead agencies must include in their EIRs information related to the environmental impacts that are anticipated by responsible agencies and trustee agencies as to matters within their expertise or jurisdiction. This obligation is evident from several provisions of CEQA and the CEQA Guidelines. For example, Public Resources Code section 21080.4, subdivision (a), provides:

[E]ach responsible agency . . . and [trustee agency] shall specify to the lead agency the scope and content of the environmental information that is germane to the statutory responsibilities of that responsible agency . . . or [trustee agency] in connection with the proposed project and which . . . shall be included in the environmental impact report.

(Italics added.)

Key CEQA Guidelines sections also recognize the lead agencies’ duty to include in EIRs the information and analysis specified by responsible agencies and trustee agencies. Section 15082 generally addresses the process by which the “scope” of an EIR is determined. The section requires lead agencies to send NOPs to responsible and trustee agencies, which then have 30 days in which to respond in writing. (CEQA Guidelines, § 15082, subds. (a), (b).) Although a lead agency may begin work on a draft EIR before receiving these
statutory authority of that agency. If mitigation measures are submitted, the responsible or trustee agency shall either submit to the lead agency complete and detailed performance objectives for the mitigation measures, or shall refer the lead agency to appropriate, readily available guidelines or reference documents which meet the same purpose.” (CEQA Guidelines, § 15204, subd. (f); see also § 15086, subd. (d); Pub. Resources Code, § 21081.6, subd. (c).) The authority of the lead, responsible, or trustee agencies over aspects of a project is unaffected by the fact that a responsible or trustee agency provided or failed to provide the lead agency with information about potential mitigation measures. (Pub. Resources Code, § 21081.6, subd. (c).)

d. Other General Consultation Requirements

When acting as a lead agency for a project requiring an EIR, a state or local agency must consult with and seek comments on a draft EIR from not only every responsible agency and trustee agency with resources affected by the project, but also from:

- every “public agency which has jurisdiction by law with respect to the project,”
- every “city or county which borders on a city or county within which the project is located,” and
- “[a]ny 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[.]”

(Pub. Resources Code, §§ 21104, subd. (a), 21153, subd. (a); CEQA Guidelines, § 15086, subd. (a).)

With respect to the requirement to consult with adjacent cities and counties, state and local lead agencies have the option to negotiate annual agreements with such neighboring entities by which the latter waive their right to be consulted. (Pub. Resources Code, §§ 9

9Note that although the CEQA Guidelines expressly require lead agencies, in preparing an EIR, to consult with federal agencies “which exercise authority over resources which may be affected by the project,” there is no similar requirement when lead agencies prepare negative declarations. (Compare CEQA Guidelines, § 15073 with § 15086; see also § 15082, subd. (a) (“Notice of Preparation” must be sent to “every federal agency involved in approving or funding the project”).)
e. Special Consultation Requirements

- For a draft EIR on a highway or freeway project, a state lead agency must consult with and obtain comments from the State Air Resources Board "as to the air pollution impact of the potential vehicular use of the highway or freeway and if a non-attainment area, the local air quality management district for a determination of conformity with the air quality management plan." (CEQA Guidelines, § 15086, subd. (a)(6); Pub. Resources Code, § 21104, subd. (b).)

- "For a subdivision project located within one mile of a facility of the State Water Resources Development System," the lead agency, in preparing an EIR, must consult with the California Department of Water Resources. (CEQA Guidelines, § 15086, subd. (a)(7).)

- For all projects of "statewide, regional, or areawide significance" (as defined in section 15206 of the CEQA Guidelines), lead agencies must conduct at least one scoping meeting and must provide notice of the meeting to any county or city that borders on a county or city within which the project is located, all responsible agencies, all public agencies with jurisdiction by law over resources that could be affected by the project, and any organization or individual who has made a written request for notice. (Pub. Resources Code, §§ 21083.9, 21092.2; CEQA Guidelines, § 15082, subd. (c)(1).) 11

10 For projects proposed within counties with numerous bordering counties, the obligation to consult with such neighboring counties can be very burdensome absent an inter-county agreement dispensing with the need for such consultation. For example, Sacramento County, in reviewing a project proposed in its unincorporated area, would be required to consult with Sutter, Yolo, Placer, El Dorado, Amador, Solano, San Joaquin, and Contra Costa Counties, even though the project might be dozens of miles from the border of any one of these counties.

11 The statutory language creating the requirement for such scoping meetings does not specify whether it applies only where an EIR is being prepared, or whether it also applies where a negative declaration or mitigated negative declaration is proposed. The authors of this book believe that, because the term "scoping," as used in the CEQA Guidelines, is a term of art applicable only to the preparation of EIRs (see, e.g., CEQA Guidelines, § 15083 (refers to "scoping")), the requirement should not be understood to apply to situations involving (continued...
For all projects of “statewide, regional, or areawide significance,” lead agencies must consult with “transportation planning agencies” and “public agencies which have transportation facilities within their jurisdictions which could be affected by the project.” (Pub. Resources Code, § 21092.4, subd. (a); CEQA Guidelines, § 15086, subd. (a)(5).) Such “transportation facilities” include “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.” (Pub. Resources Code, § 21092.4, subd. (b); CEQA Guidelines, § 15086, subd. (a)(5).) Lead agencies must provide these agencies with all “environmental documents pertaining to the project.” (Pub. Resources Code, § 21092.4, subd. (a).) “Consultation shall be conducted in the same manner as for responsible agencies” and “shall be for the purpose of the lead agency obtaining information concerning the project’s effect on major arterials, public transit, freeways, highways, and rail transit service” within the consulted agency’s jurisdiction. (Pub. Resources Code, § 21092.4, subd. (a).) After project approval, negative declarations or mitigated declarations. This view is also supported by cross-references found at the beginning of Public Resources Code section 21083.9, subdivision (a), all of which are to statutes involving EIR preparation (Pub. Resources Code, §§ 21080.4, 21104, and 21153).

The statutory language makes clear that a lead agency’s obligations to consult pursuant to section 21092.4 are not contingent on a finding of significant impacts on particular transportation facilities; rather, a lead agency must consult with those entities whose facilities “could be affected by the project.” (Pub. Resources Code, § 21092.4, subd. (a) (italics added).) Interpreting a similar CEQA requirement, the Court of Appeal in Gentry v. City of Murrieta (4th Dist. 1995) 36 Cal.App.4th 1359 [43 Cal.Rptr.2d 170] (Gentry) was required to determine the interagency consultation obligations created by the command found in CEQA Guidelines section 15073 directing a lead agency, before adopting a negative declaration, to consult with every “public agency with jurisdiction by law over resources affected by the project.” The court held that the required level of “effect” could be quite minimal. Such an interpretation, the court concluded, “serves the statutory purpose of fostering interagency consultation.” (Gentry, supra, 36 Cal.App.4th at pp. 1387-1388 (lead agency violated CEQA by failing to consult with the Department of Fish and Game, even though the lead agency believed that its project would not have any significant effect on wildlife).)

Section 21092.4 instructs lead agencies, as noted above, to consult with (continued...)
lead agencies must provide the consulted agencies with transportation information generated from the "reporting or monitoring program" that the lead agency adopted at the time of project approval. (Pub. Resources Code, § 21081.7.) In order to keep the state Department of Transportation (Caltrans) abreast of the latest developments in transportation-related mitigation, Caltrans must also receive this transportation information. (Pub. Resources Code, § 21081.7.)

- For any proposed project that would be located within the "a low-level flight path, military impact zone, or special use airspace" and that either (i) is a project of statewide, regional, or areawide significance, (ii) requires a general plan amendment, or (iii) must be referred to the airport land use commission or appropriately designated body pursuant to Article 3.5 of Chapter 4 of Part 1 of the Public Utilities Code, the lead agency must submit the notices required by Public Resources Code sections 21080.4 and 21092 to any "military service" (i.e., branch of the United States Armed

13(...continued) transportation planning agencies" and other agencies whose facilities could be adversely affected by a project "in the same manner as for responsible agencies[.]") For reasons explained throughout this chapter, "responsible agency" is a term of art with a known meaning under CEQA. (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381.) Although section 21092.4 does not have the effect of giving the agencies specified in its text any actual approval authority over proposed projects, the statute does give such agencies the heightened right to address scoping issues normally reserved for responsible agencies. Thus, in giving transportation planning agencies the consultation rights normally reserved for responsible agencies, the Legislature may have intended to require lead agencies to give scoping comments from transportation planning agencies and other consulted entities the same weight due to scoping comments from true responsible agencies.

14See also Pub. Resources Code, § 21081.6, subd. (a)(1) (requirements for adoption of reporting or monitoring program for the changes made to the project or conditions of project approval adopted in order to mitigate or avoid significant effects on the environment); CEQA Guidelines, §§ 15074, subd. (d) (a mitigation reporting or monitoring program is required when the agency adopts a mitigated negative declaration), 15091, subd. (d) (agency must adopt a mitigation monitoring and reporting program when making its findings as to the significance of project impacts).

15Public Resources Code section 21083.9 has been amended to provide that a scoping meeting held pursuant to the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA) fulfills the requirement for a scoping meeting under CEQA, provided that the lead agency satisfies statutory notice requirements. (Pub. Resources Code, § 21083.9, subd. (d).)
Forces) that has previously notified the lead agency "of the contact office and address for the military service and the specific boundaries" of the affected area. (Pub. Resources Code, § 21098.)

For projects "involving the purchase of a schoolsite or the construction of a new elementary or secondary school by a school district," the lead agency (e.g., the school district) preparing a negative declaration or EIR must consult with both "the administering agency [16] in which the proposed schoolsite is located" and "any air pollution control district or air quality management district having jurisdiction in the area." (Pub. Resources Code, § 21151.8, subd. (a)(2); see also Ed. Code, § 17213, subd. (b).) The purpose of such consultation is to identify "permitted and unpermitted facilities" within one-fourth of a mile of the proposed schoolsite which might be reasonably anticipated to emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste. Such facilities include, but are not limited to, freeways and busy traffic corridors, large agricultural operations, and railyards. The lead agency's notification "shall include a list of the locations for which information is sought." (Pub. Resources Code, § 21151.8, subd. (a)(2); see also CEQA Guidelines, § 15186, subd. (c).) "Each agency or district receiving notice shall provide the requested information and provide a written response to the lead agency within 30 days of receiving the notification. If any such agency or district fails to respond within that time, the negative declaration or EIR shall be conclusively presumed to comply" with the requirement that the lead agency seek the above-described information for its environmental document. (CEQA Guidelines, § 15186, subd. (c)(2); see also Pub. Resources Code, § 21151.8, subd. (a)(4).)

Before any such project can be approved, the governing board of the relevant school district must issue a written finding reaching one of the following conclusions:

- The consultation identified no such facilities or pollution sources;

- Consultation resulted in identification of such facilities or other pollution sources, but one of the following conditions applies:
  
  (i) "The health risks from the facilities or other pollution sources do not and will not constitute an actual or potential endangerment of public

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[16] An "administering agency" is the local agency responsible for administering and enforcing Chapter 6.95 of the Health and Safety Code, which governs "hazardous materials release response plans and inventory." (Ed. Code, § 17213, subd. (d)(6); Health & Saf. Code, §§ 25501, subd. (a), 25502; CEQA Guidelines, § 15186, subd. (e)(2).)
health to persons who would attend or be employed at the school.”

(ii) An existing order issued by an agency with jurisdiction over the facilities requires corrective measures that, before the school is occupied, will “result in the mitigation of all chronic or accidental hazardous air emissions to levels that do not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school.” If the governing board makes this finding, it must also make a subsequent finding, prior to occupancy, that the emissions have in fact been mitigated to those levels.

(iii) Where a school site is located within 500 feet from the edge of the closest traffic lane of a freeway or other busy traffic corridor, the school district determines that the air quality at the proposed site is such that neither short-term nor long-term exposure poses significant health risks to pupils. This determination must be supported by a health risk assessment prepared in accordance with guidelines prepared by the Office of Environmental Health Hazard Assessment. (See Health & Safety Code, § 44360, subd. (b)(2).) The analysis must be based upon “appropriate air dispersion modeling.” The determination may be made only after the school district considers any potential mitigation measures. (Pub. Resources Code, § 21151.8, subd. (a)(3)(B); Ed. Code, § 17213, subd. (c)(2); see also CEQA Guidelines, § 15186, subd. (c)(3).)

• Such facilities or other pollution sources exist, but the conditions in paragraphs (i), (ii) and (iii), above, cannot be met, and the school district is unable to locate an alternative site that is suitable due to a severe shortage of sites that avoid the hazards listed in Education Code section 17213, subdivision (a). If the governing board of the school district makes this finding, it must adopt a statement of overriding conditions pursuant to CEQA Guidelines section 15093. (Pub. Resources Code, § 21151.8, subd. (a)(3)(C); Ed. Code, § 17213, subd. (c)(2)(D).)

Prior to the passage of Senate Bill 352 (Escutia) in 2003, the preexisting consultation requirement in Public Resources Code section 21151.8, subdivision (a)(2), did not specifically list freeways, busy traffic corridors, large agricultural operations and railyards as facilities that needed to be identified due to hazards concerns. Nor was there a specific requirement that school districts perform air quality analysis for sites
located within 500 feet of a freeway or busy traffic corridor. While the amendments to Public Resources Code section 21151.8 and Education Code section 17213 ostensibly address concerns relating to exposure of sensitive receptors to diesel fuel particulates, they also introduced into the statute the override option, which was not included in the prior versions of sections 21151.8 and 17213. (See also Pub. Resources Code, § 21151.2 (requires governing board of school district to inform the

duties under CESA. Notably, all state agencies remain subject to the command that they “should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy.” (Fish & G. Code, § 2053.) As under former section 2092, however, “in the event specific economic, social, or other conditions make infeasible such alternatives, individual projects may be approved if appropriate mitigation and enhancement measures are provided.” (Fish & G. Code, § 2054.)

State agencies are also subject to a general duty to “conserve” endangered and threatened species. Thus, “all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter [1.5, regarding Endangered Species].” (Fish & G. Code, § 2055.)

Presumably, this duty to conserve, though framed in vague terms, sets some outer limit on state agencies’ ability to “take” or otherwise cause harm to endangered and threatened species, and may disallow actions that would foreseeably result in the extinction of a protected species. This duty, however, presumably does not prohibit state agencies from causing “jeopardy,” since Fish and Game Code sections 2053 and 2054, read together, appear to authorize actions that cause jeopardy provided that the agencies make appropriate findings and adopt “appropriate mitigation and enhancement measures[.]”

To ensure compliance with these remaining duties under CESA, prudent state agencies should continue to consult with DFG regarding the possibility that their proposed projects might cause jeopardy and therefore give rise to the need for reasonable and prudent alternatives to minimize impacts on listed species. Because such agencies, in any event, will be required under standard CEQA procedures to consult with DFG as a trustee agency, little extra effort would be required to pose to the latter agency the question of whether proposed state agency projects might cause jeopardy.

Furthermore, 1997 amendments to CESA will ensure that DFG consults, as a

candidate species if . . . the take is incidental to an otherwise lawful activity” and if
certain other requirements are met. (Fish & G. Code, § 2081, subd. (b).) 19

- Finally, lead agencies may consult directly with “[a]ny person who has special
expertise with respect to any environmental impact involved”; “[a]ny member of the
public who has filed a written request for notice with the lead agency or the clerk of
the governing body”; or “[a]ny person identified by the applicant whom the applicant
believes will be concerned with the environmental effects of the project.” (CEQA
Guidelines, § 15086, subd. (b).) 20

f. Agency Interaction in the Review and Approval of Timber
   Harvesting Plans

The California Department of Forestry and Fire Protection (CDF) is the lead agency
under CEQA responsible for analyzing the potential adverse environmental impacts of timber
harvesting plans (THPs). Nothing in Senate Bill 810, effective January 1, 2004, appears to
alter that process. Rather, Senate Bill 810 gives authority to the Regional Water Quality
Control Boards to determine, during their own review of THPs, whether the plans adequately
protect water quality.

The new law authorizes the regional boards to disapprove THPs if they would result
in discharges to water bodies designated as “impaired” due to excessive sediment (as
determined by the State Water Resources Control Board pursuant to the Clean Water Act as
administered by the federal Environmental Protection Agency), or cause or contribute to a
violation of the regional water quality control plan. THPs already are required to satisfy
water quality standards. Prior to the statutory changes made through Senate Bill 810,
however, regional boards could only “non-concur” with plans approved by CDF as the lead

19See also Fish & G. Code, § 2080 (“[n]o person shall . . . take . . . any species . . . that
the [Fish and Game C]ommission determines to be an endangered species or a threatened
species, . . . except as otherwise provided in this chapter”).

20See also Pub. Resources Code, §§ 21104, subd. (a) (“lead agency may consult with
persons identified by the applicant which the applicant believes will be concerned with the
environmental effects of the project and may consult with members of the public who have
made a written request to be consulted on the project”), 21153, subd. (a) (same). But
compare Pub. Resources Code, § 21092.2 (“t]he notices required pursuant to Sections
21080.4, 21092, 21108, and 21152 shall be mailed to any person who has filed a written
request for notices with either the clerk of the governing body or, if there is no governing
body, the director of the agency”) (italics added).
agency, and issue recommendations to bolster whatever water quality provisions CDF included in the THP. According to proponents of the new law, CDF sometimes ignored the regional boards' water quality recommendations. Now, if proposed THPs fail to satisfy water quality standards, the Legislature has authorized regional boards to override CDF's approval of those plans. The regional boards already actively participate in the process to review and approve THPs, but this enactment gives them overall veto power.

Notably, the new statutory language does not appear to establish any process for appealing a regional board decision to reject a THP. Rather, the regional board may dictate that CDF "shall deny the timber harvesting plan and return the plan to the person that submitted it. The director [of CDF] shall advise the person that submitted the timber harvesting plan of the reasons why the plan is being returned." (Sen. Bill No. 810 (2003 - 2004 Reg. Sess.) § 3 (adding Public Resources Code section 4582.71, subdivision (c).)

2. Duties of Responsible Agencies

A responsible agency typically has permitting authority or approval power over some aspect of the overall project for which a lead agency is conducting CEQA review. (Pub. Resources Code, § 21069; CEQA Guidelines, §§ 15096, 15381; Citizens Association for Sensible Development of Bishop Area v. County of Inyo (4th Dist. 1985) 172 Cal.App.3d 151, 173-175 [217 Cal.Rptr. 893].) Accordingly, lead agencies must consult with responsible agencies regarding the proper "scope" and substance of the draft EIR. (CEQA Guidelines, §§ 15082, 15086, subd. (a)(1).) A responsible agency's comments must address only "those activities involved in a project that are within an area of expertise of the agency or that are required to be carried out or approved by the agency." Such comments must be "supported by specific documentation." (Pub. Resources Code, §§ 21104, subd. (c) (state lead agency), 21153, subd. (c) (local lead agency).)

Responsible agencies have limited ability to conduct their own environmental review outside the processes initiated and managed by the lead agency. (Pub. Resources Code, § 21167.3; CEQA Guidelines, §§ 15233, 15050, subd. (c), 15052, 15096; City of Redding v. Shasta County Local Agency Formation Commission (3rd Dist. 1989) 209 Cal.App.3d 1169 [257 Cal.Rptr. 793].) The responsible agency relies on the lead agency's environmental document in acting on whatever aspect of the project requires its approval. The responsible

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21 See also Lexington Hills Association v. State of California (6th Dist. 1988) 200 Cal.App.3d 415, 429-438 [246 Cal.Rptr. 97] (discussing scope of responsible agency authority to conduct environmental review). For a detailed discussion of cases applying these limitations on responsible agencies' ability to quarrel with the content of environmental documents, see section D of this essay.
agency must, however, issue its own findings regarding the feasibility of relevant mitigation measures or project alternatives that can substantially lessen or avoid significant environmental effects. Furthermore, where necessary, a responsible agency must issue its own statement of overriding considerations. (CEQA Guidelines, § 15096, subds. (f), (g), (h); Resource Defense Fund v. Local Agency Formation Commission of Santa Cruz County (1st Dist. 1987) 191 Cal.App.3d 886, 895 [236 Cal.Rptr. 794].)

3. Trustee Agencies

"Trustee agency" is defined as "a state agency having jurisdiction by law over natural resources affected by a project which are held in trust for the people of the State of California." (CEQA Guidelines, § 15386.) The Guidelines recognize the following four agencies as trustee agencies:

(a) the California Department of Fish and Game (DFG), which has jurisdiction over fish and wildlife, exercises some regulatory control over rare or endangered species of plants and animals, and administers game refuges, ecological reserves, and other areas (see Fish & G. Code, § 1913, subd. (c));

See also Fish & G. Code, § 1802 (DFG, "as trustee for fish and wildlife resources, shall consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities"). The Department of Fish and Game, though most often a trustee agency when participating in the CEQA process, will function in many instances as a "responsible agency" under 1997 amendments to the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), which created the "incidental take" permitting process now found in Fish and Game Code section 2081, subdivision (b). That section allows the Department to approve the "take" of an endangered or threatened species if the take "is incidental to an otherwise lawful activity" subject to the following requirements:

[t]he impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.

(continued...)
(b) the State Lands Commission, which has jurisdiction over state-owned “sovereign” lands such as the beds of navigable waters and state school lands;

(c) the State Department of Parks and Recreation, which administers units of the State Park System; and

(d) the University of California, which has authority over the Natural Land and Water Reserves System.

(CEQA Guidelines, § 15386 and following Discussion.)

C. Identifying the Lead Agency

If two or more agencies are involved in implementing or approving a proposed project, only one agency can be the lead agency. (CEQA Guidelines, § 15050, subd. (a).) The CEQA Guidelines establish criteria for selecting a single lead agency amongst two or more contenders.

1. Typical Situations

“If the project will be carried out by a public agency, [then] that agency shall be the Lead Agency,” even though the project may be located in another agency’s jurisdiction. (CEQA Guidelines, § 15051, subd. (a).)

If a private party is carrying out a project, then the lead agency will be the agency with the greatest responsibility for supervising or approving the project as a whole. (CEQA Guidelines, § 15051, subd. (b).) The lead agency “will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project.” (CEQA Guidelines, § 15051, subd. (b)(1).)

If more than one agency meets the lead agency criteria, then the agency that will act

22(...continued)
(Fish & G. Code, § 2081, subd. (b)(2).)

Incidental take permits cannot be approved absent assurance from the applicant of “adequate funding to implement” the required mitigation measures. (Id., subd. (b)(4).) Nor can any incidental take permit be issued where it “would jeopardize the continued existence of the species.” (Id., subd. (c).)

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first will be the lead agency. *(Citizens Task Force on Sohio v. Board of Harbor Commissioners* (1979) 23 Cal.3d 812, 814 [153 Cal.Rptr. 584] (Board of Harbor Commissioners held to be lead agency; Public Utilities Commission was responsible agency); *City of Sacramento v. State Water Resources Control Board* (3rd Dist. 1992) 2 Cal.App.4th 960, 970-973 [3 Cal.Rptr.2d 643] (California Department of Food and Agriculture [now the Department of Pesticide Regulation] is the lead agency for the formulation, approval, and implementation of “rice pesticide plans” allowing rice farmers to discharge herbicide-laden irrigation return water into the Sacramento River; the Regional Water Quality Control Board, which must approve the plans, is a responsible agency); CEQA Guidelines, § 15051, subd. (c). But see *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist.* (4th Dist. 1994) 28 Cal.App.4th 419, 427-428 [33 Cal.Rptr.2d 635] (doctrine that “the agency which acted first on the project in question is considered the lead agency . . . has no application” where the agency that acts first does not meet the lead agency criteria because it is not the agency with “principal responsibility for the activity”).) 23

23 In *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park District* (4th Dist. 1994) 28 Cal.App.4th 419 [33 Cal.Rptr.2d 635], the Court of Appeal rejected the claim that the respondent recreation and park district had violated CEQA by failing to prepare environmental review in connection with a duck hunting season that occurred, in part, within and around a lake managed by the district. The court held that, as a mere “responsible agency” with respect to the season, the district had no obligation to prepare any environmental document. That duty lay with the lead agency, the California Department of Fish and Game.

The district had previously entered into a “cooperative agreement” with DFG by which the district would operate and manage state-owned land and facilities as “a public fish and waterfowl hunting area,” subject to applicable state laws and regulations governing hunting. *(Id. at p. 423.) Under this arrangement, DFG retained “‘principal responsibility for . . . approving [the] project.’” *(Id. at p. 427.) “[I]t is the Department, not the District, that is the agency that decides whether there will be a duck hunting season on Lake Cuyamaca in any given year[.]” *(Ibid.) Although, pursuant to the cooperative agreement, the district submitted a proposed waterfowl hunting plan to DFG for its consideration, DFG had to approve the plan before it could become effective. Thus, the mere fact that the district “acted first” on the project did not per se render the district the lead agency for purposes of CEQA. *(Id. at p. 428.) The court noted that the Department and the Fish and Game Commission annually conducted environmental review of statewide bird hunting. Moreover, the state’s ownership interest in the lake confirmed its status as lead agency—a status that was not undermined by its contractual delegation of administrative oversight to the park district. *(Id. at pp. 427-428.)

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2. Cooperative Designation

If two or more public agencies have a substantial claim to be the lead agency, then the public agencies may by agreement designate one agency as the lead agency for a project. Such an agreement may provide for cooperative efforts by means of a joint exercise of powers. (CEQA Guidelines, § 15051, subd. (d).) 24

In Planning & Conservation League v. Department of Water Resources (3rd Dist. 2000) 83 Cal.App.4th 892, 904-907 [100 Cal.Rptr.2d 173](Planning & Conservation League), however, the Court of Appeal invalidated several public agencies’ cooperative designation of the lead agency for environmental review of the so-called “Monterey Agreement,” which related to long-term water supply contracts between the California Department of Water Resources (DWR) and local water contractors. DWR and six local water contractors had negotiated the Monterey Agreement in order to settle disputes arising under a particular standard provision found in existing long-term contracts between DWR and its customer agencies. The agreement revised the method of allocating water among contractors under shortage conditions, and also involved changes in the operation of certain facilities of the State Water Project (SWP). The contractors and DWR agreed that the Central Coast Water Authority (CCWA) would act as the CEQA lead agency for evaluating the environmental consequences of the proposed agreement. Accordingly, CCWA prepared and certified a program EIR evaluating the environmental impacts of the agreement. DWR, acting as a responsible agency, relied on CCWA’s document in making findings and approving the proposal. (Planning & Conservation League, supra, 83 Cal.App.4th at p. 902.)

A water agency and several citizens groups challenged the adequacy of the EIR, arguing that DWR must serve as the lead agency. (Id. at p. 903.) The trial court ruled that although DWR should have been the lead agency for the project, CCWA’s environmental review was adequate and the CEQA violation therefore was not prejudicial. The Court of Appeal agreed that CCWA had improperly served as the lead agency, but concluded that the

24In cases in which a single group of decisionmakers acts in differing legal capacities (e.g., as both a city council and a redevelopment agency), the courts generally will not elevate form over substance in determining whether a particular entity acted as a lead agency or a responsible agency. Thus, if two ostensibly distinct agencies are substantively identical, then the courts may treat them as one and the same agency. (See Oceanside Marina Towers Association v. Oceanside Community Development Commission (4th Dist. 1986) 187 Cal.App.3d 735, 741 [231 Cal.Rptr. 910] (notice of determination filed by city was effective, even though redevelopment agency was actual “lead agency,” because the city council comprised the agency board and the redevelopment commission served as city’s alter ego).)
EIR failed to comply with CEQA and ordered preparation of a new EIR under DWR’s direction. (Id. at p. 907.)

In concluding that DWR had impermissibly delegated its role as lead agency to CCWA, the appellate court reasoned that:

It is DWR that “manage[s]” the SWP, “the largest state-built, multipurpose water project in the country. Approximately 20 million of California’s 32 million residents receive at least part of their water from SWP, and SWP water is used to irrigate approximately 600,000 acres of farmland.” [Citation omitted.] It is incongruous to assert that any of the regional contractors simply by virtue of a private settlement agreement can assume DWR’s principal responsibility for managing the SWP. Under these circumstances, those at the negotiating table were not at liberty to anoint a local agency to act in place of DWR.

(Planning & Conservation League, supra, 83 Cal.App.4th at p. 906.) 25 The court emphasized the significance of the role of lead agency, and found that DWR’s statewide perspective and expertise, its familiarity with potential problems and impacts associated with the proposed agreement, and its principal responsibility for implementing the agreement made it “the ‘logical choice for lead agency.’” (Id. at p. 907.)

3. OPR Determination

If the agencies cannot agree as to which is the lead agency for a project, then any of the agencies, or a private project applicant, may submit the dispute to the Governor’s Office of Planning and Research (OPR) for resolution. (Pub. Resources Code, § 21165; CEQA Guidelines, § 15053, subd. (a).) OPR has adopted procedures governing the manner in which

25See also Kleist v. City of Glendale (2nd Dist. 1976) 56 Cal.App.3d 770, 779 [128 Cal.Rptr. 781] (CEQA prohibits the lead agency from delegating its review and consideration function to another body; delegation is inconsistent with the purposes of environmental review because it would insulate decisionmakers “from public awareness and possible reaction to the individual members’ environmental and economic values”). But see ElMorro Community Assn. v. California Department of Parks and Recreation (4th Dist. 2004) 122 Cal.App.4th 1341, 1349-1352 [19 Cal. Rptr. 3d 445] (where state law makes a single state agency official, rather than an elected or appointed body, the decisionmaker for particular activities or proposals, such an official may delegate his or her decisionmaking authority to a staff designee, who may also be responsible for certifying an EIR required for a particular decision).
it resolves the disputes. (Cal. Code Regs., tit. 14, § 16000 et seq.) Under these procedures, OPR must "find which of the disputing agencies is most appropriate to carry out the obligations of a lead agency. In making this finding, [OPR] shall consider the capacity of each such agency to fulfill the requirements of CEQA. In addition, [OPR] shall consider the lead agency criteria set forth in the state Guidelines Section 15065 [\textsuperscript{26}]. . . ." (Cal. Code Regs., tit. 14, § 16021.) OPR must reach its decision within 21 days of receiving a completed request to resolve the dispute. (CEQA Guidelines, § 15053, subd. (b).) \textsuperscript{27}

4. Cities and LAFCOs

When a city "prezones" an unincorporated area proposed for annexation, the city functions as the lead agency, and the local agency formation commission (LAFCO), which must approve the annexation proposal, functions as the responsible agency. (CEQA Guidelines, § 15051, subd. (b)(2); City of Redding v. Shasta County Local Agency Formation Commission (3\textsuperscript{rd} Dist. 1989) 209 Cal.App.3d 1169, 1174-1177 [257 Cal.Rptr. 793].) If the application for a boundary change is initiated by a private entity, however, the LAFCO may serve as the lead agency. (See, e.g., People ex. rel. Younger v. Local Agency Formation Commission (4\textsuperscript{th} Dist. 1978) 81 Cal.App.3d 464, 481 [146 Cal.Rptr. 400].)

D. Cases Involving the Relationship Between Lead Agencies, Responsible Agencies, and Trustee Agencies

The leading cases addressing the relationship between lead agencies, responsible agencies, and trustee agencies include the following:

1. \textit{Fall River Wild Trout Foundation v. County of Shasta} (3\textsuperscript{rd} Dist. 1999) 70 Cal.App.4th 482, 490-491 [82 Cal.Rptr.2d 705]

In \textit{Fall River Wild Trout Foundation v. County of Shasta} (3\textsuperscript{rd} Dist. 1999) 70 Cal.App.4th 482, 490-491 [82 Cal.Rptr.2d 705] (\textit{Fall River}), a local lead agency's failure to send a copy of its mitigated negative declaration to a trustee agency was a prejudicial abuse of discretion. Acting as the lead agency under CEQA, the County of Shasta rezoned a site along the Fall River based on a plan to develop it as 14 residential sites. The project proponent subsequently acquired additional acreage adjoining the project site and sought

\textsuperscript{26}Guidelines section 15065 has since been renumbered. The correct cross-reference is to current Guidelines section 15051.

\textsuperscript{27}For an extended discussion of the general duties of OPR, see Longtin's California Land Use (2d ed. 1987), §§ 1.11-1.11[4].

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amendment of the zoning ordinance to add more units to the project. The County prepared a mitigated negative declaration, which the County circulated to "interested/affected agencies"; the County also published notice of its hearing on the project. The County did not send a copy of the mitigated negative declaration to the Department of Fish and Game. *(Fall River, *supra*, 70 Cal.App.4th at p. 486.)*

Petitioner argued that the County had failed to proceed in the manner required by law because the County had not sent notice of its intent to adopt the mitigated negative declaration to the Department of Fish and Game, a trustee agency, and to the State Clearinghouse. The Court of Appeal agreed. Because the Department of Fish and Game was a "trustee agency" under CEQA, the express language of the Guidelines provided for the Department's participation in the lead agency's environmental review process:

The Guidelines specifically state that a lead agency such as the County "shall provide a notice of intent to adopt a . . . mitigated negative declaration to the public, responsible agencies, trustee agencies, and the county clerk of each county within which the proposed project is located, sufficiently prior to adoption by the lead agency of the . . . mitigated negative declaration to allow the public and agencies the review period provided under Section 15105."

*(Id. at p. 490, quoting CEQA Guidelines, § 15072, subd. (a) (italics in original)*.)

The *Fall River* opinion also pointed to the language of Public Resources Code section 21177, subdivision (e) (excusing noncompliance with requirements for exhaustion of administrative remedies where an agency "failed to give the notice required by law"), and gave a broad reading of the statutory language to encourage "public action to ensure relevant information is considered by local agencies at all stages in the CEQA review process." *(Fall River, *supra*, 70 Cal.App.4th at p. 491.)* According to the court, the County's failure to comply with CEQA Guidelines section 15072 "deprived the County of information necessary to informed decisionmaking and informed public participation." *(Id. at p. 493, citing *Kings County Farm Bureau v. City of Hanford* (5th Dist. 1990) 221 Cal.App.3d 692, 712 [270 Cal.Rptr. 650].)*


*Gentry v. City of Murrieta* (4th Dist. 1995) 36 Cal.App.4th 1359 [43 Cal.Rptr.2d 170] (*Gentry*) explained the lead agency's duty to consult with and send proposed negative declarations to trustee agencies. The respondent city approved a residential subdivision based on a mitigated negative declaration. Because there was no evidence in the record that
the city had sent the proposed negative declaration to other public agencies prior to adoption, the Court of Appeal began its analysis by considering whether there were any “trustee agencies” to which the proposed document should have been sent. The court determined that because the initial study concluded that the project would affect wildlife under the jurisdiction of the California Department of Fish and Game, the city, as the lead agency, was required to engage in informal consultation with the Department as a potential trustee agency during the initial study phase and to send the resulting environmental documents to the state and regional clearinghouse. (Gentry, supra, 36 Cal.App.4th at p. 1388.)

In contrast to its holding with respect to the California Department of Fish and Game, however, the court held that the city did not need to send the proposed negative declaration to the United States Fish and Wildlife Service (USFWS) or the Regional Water Quality Control Board (Regional Board). (Gentry, supra, 36 Cal.App.4th at p. 1389.) As regards USFWS, the court concluded, first, that only state or local agencies can be “public agencies” within the meaning of CEQA (see Pub. Resources Code, § 21063; CEQA Guidelines, § 15379), and, second, that “only a ‘state agency’ can be a trustee agency.”

As for the Regional Board, the court concluded that there was insufficient evidence in the record to indicate that the project would affect resources subject to the jurisdiction of that agency. (Gentry, supra, 36 Cal.App.4th at p. 1389.) Although the court ruled that the city abused its discretion by failing to send a copy of the proposed negative declaration to the Department of Fish and Game, the court declined to determine “whether this abuse of discretion was so prejudicial that we would be required to reverse the judgment below on this ground alone,” because the court had already concluded that the negative declaration had to be struck down on other grounds. (Ibid., citing Pub. Resources Code, § 21005.)


Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park District (4th Dist. 1994) 28 Cal.App.4th 419 [33 Cal.Rptr.2d 635] (Friends of Cuyamaca Valley) held that the California Department of Fish and Game, not a local park district, is the proper “lead agency” for purposes of approving duck hunting season, even though the local park district approved an implementation plan for an area subject to its jurisdiction. In Friends of the Cuyamaca Valley, a citizens group asserted that the recreation and parks district responsible for the operation and management of Lake Cuyamaca violated CEQA by approving the 1992-1993 duck hunting season without conducting environmental review. At issue was whether the district or the state Department of Fish and Game was the “lead agency” under CEQA and therefore responsible for preparing an environmental analysis.
The court held that because the Department decided in any given year whether there even would be a duck hunting season on the lake, it was the “lead agency” with the “principal responsibility for . . . approving a project which may have a significant effect on the environment,” pursuant to Public Resources Code section 21067. The district was merely the “responsible agency” as defined in section 21069. Furthermore, the state’s ownership interest in the lake mandated its status as lead agency.


*Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission* (1st Dist. 1992) 10 Cal.App.4th 908 [13 Cal.Rptr.2d 117] (*Save San Francisco Bay*) addressed the adequacy of an EIR for purposes of a responsible agency’s approval of a permit within its jurisdiction. *Save San Francisco Bay* involved a challenge to issuance by the San Francisco Bay Conservation and Development Commission (BCDC), as a responsible agency, of a permit authorizing the addition of “fill” to San Francisco Bay to accommodate a proposed aquarium at “Pier 39” in the Fisherman’s Wharf area of San Francisco. The project had received previous approvals by the City and County of San Francisco (City).

The court rejected petitioners’ argument that the EIR failed to examine another, non-fill alternative and that as a result, BCDC, as a responsible agency, could not rely on the EIR in carrying out its particular mandate to protect the Bay from additional fill. (*Id.* at p. 921.) After noting that, as the lead agency, “the City had a duty to produce a comprehensive [document] that could be relied upon by BCDC,” the court concluded that the City had met this responsibility because the objectives severely limited the number of feasible alternatives. (*Id.* at p. 922.) The court found that the EIR considered a full range of alternatives that could feasibly attain the basic objectives of the project. The court also determined that BCDC’s findings revealed it had examined a wide range of alternatives and did not merely “rubber-stamp” the City’s analysis.

The petitioners also argued that BCDC’s findings on the project’s impacts on views were inconsistent. The court disagreed. When a lead agency completes an EIR that identifies one or more significant effects, a responsible agency must make findings concerning the avoidance or mitigation of these effects. (CEQA Guidelines, § 15096, subd. (h).) With this principle in mind, the court found that the seemingly contradictory BCDC findings could in fact be squared with one another. The first finding — that the project would have a significant impact on views — essentially parroted the City's EIR, whereas the second finding — that all major view corridors would be preserved — reflected the fact that,
by the time BCDC granted its approval, the project had been substantially redesigned to preserve view corridors, among other things. (Save San Francisco Bay, supra, 10 Cal.App.4th at pp. 931-932.)

The petitioners further argued that because the project underwent substantial changes while under review at BCDC, a subsequent or supplemental EIR should have been prepared. The City had prepared a memorandum analyzing the environmental effects of the modified project, concluding that the effects of the project would not change and no further review was required. In its review of the project, BCDC made a similar finding. The court upheld these conclusions, noting that because the subsequent plans were formulated after the City certified the EIR, it would have been unreasonable to expect the EIR itself to analyze the impact of the new plans. Second, a supplemental or subsequent EIR is required only where the new information involves “new significant environmental impacts not considered in a previous EIR.” (CEQA Guidelines, §§ 15162, subd. (a)(1), 15163, subd. (a).) An addendum will suffice where only “minor technical changes or additions are necessary” and the changes “do not raise important new issues about the significant effects on the environment.” (CEQA Guidelines, § 15164, subds. (a)(2), (a)(3).) 28

The Court of Appeal held that the City’s memorandum analyzing the impacts of the project changes qualified as an “addendum” to the EIR, constituting substantial evidence supporting BCDC’s conclusions. Furthermore, the petitioners’ efforts to raise new concerns before the court regarding project changes were thwarted by their failure to have first raised these concerns with BCDC. (Save San Francisco Bay, supra, 10 Cal.App.4th at pp. 933-935.) 29


*City of Sacramento v. State Water Resources Control Board (3rd Dist. 1992) 2 Cal.App.4th 960 [3 Cal.Rptr.2d 643] (City of Sacramento)* addressed the criteria that distinguish a lead agency from a responsible agency. In *City of Sacramento*, the court

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29See also Pub. Resources Code, § 21177, subds. (a), (b) (only persons who object to agency’s proposed action orally or in writing during public comment period or at public hearing may later sue and then only on issues previously raised).
considered which of two agencies—the Department of Food and Agriculture (DFA) or the Regional Water Quality Control Board for the Central Valley Region (Regional Board)—was the lead agency with respect to the annual formulation, approval, and implementation of “rice pesticide plans.” These plans allowed Sacramento Valley rice farmers to discharge herbicide-laden irrigation return water into the Sacramento River. (City of Sacramento, supra, 2 Cal.App.4th at pp. 966-967.)

The trial court concluded that the Regional Board, which “approved” the plans since they affected the waters of the state, was the lead agency; but the Court of Appeal disagreed. The appellate court reasoned that DFA, as author of each plan, would be the first in time to consider the plan’s environmental impacts. The Regional Board, in contrast, “approved” the plans, but did not formulate them or carry them out. (Id. at pp. 972-973.)

In assigning the lead agency role to DFA, the court rejected arguments that the agency’s statutory responsibilities were too narrow to allow it to adequately perform the lead agency role. The court emphasized that CEQA

establishes concomitant responsibility in DFA and the Regional Board for protecting state waters from pesticide pollution. The Regional Board’s responsibility is to protect state waters from all forms of pollution, while DFA’s responsibility is limited to pesticide pollution. However, DFA’s responsibility extends beyond water pollution to include the total environment. Thus, because the underlying purpose of an EIR is to analyze and inform regarding adverse effects to the environment as a whole (Pub. Resources Code, § 21061), DFA is in the best position to make such an assessment.

(2 Cal.App.4th at p. 973 (italics in original).) 30


City of Redding v. Shasta County Local Agency Formation Commission (3rd Dist. 1989) 209 Cal.App.3d 1169 [257 Cal.Rptr. 793] (City of Redding) analyzed the extent of a responsible agency's duty and ability to prepare environmental analysis beyond that produced

30After this case was tried in the superior court, former Governor Pete Wilson, by executive order, shifted responsibility for the regulation of pesticide use from DFA to the then newly-formed Department of Pesticide Regulation within the California Environmental Protection Agency.
by the lead agency. In City of Redding, the Court of Appeal enforced the statutory mandate requiring responsible agencies to treat lead agencies’ environmental documents as legally adequate even when such documents are the subject of pending litigation against the lead agencies. (See also CEQA Guidelines, § 15233.) The case also described the circumstances under which responsible agencies may or must prepare their own environmental analysis.

The City of Redding sued both the City of Anderson and the Shasta County Local Agency Formation Commission (LAFCO) over Anderson’s proposals to prezone and annex certain property. Anderson had prepared a negative declaration before prezoning the land and submitting its proposal to LAFCO. The latter agency then relied on the document in granting its approval. Redding argued that LAFCO had a duty to prepare its own EIR because LAFCO, not Anderson, was the lead agency. Alternatively, Redding asserted that even though LAFCO may initially have been poised to act as a responsible agency, Anderson’s submission of an inadequate negative declaration required LAFCO to prepare its own adequate EIR.

The Court of Appeal rejected both arguments, concluding that Anderson was the lead agency because it had prezoned the land to be annexed, and that LAFCO had no choice but to treat the negative declaration as legally adequate. The court noted that CEQA Guidelines section 15051, subdivision (b)(2), states that, with respect to proposed annexations, cities become lead agencies when they engage in prezoning. (City of Redding, supra, 209 Cal.App.3d at pp. 1174-1177.)

Redding’s lawsuit challenging Anderson’s reliance on the negative declaration did not prevent LAFCO from relying on the document. In fact, the court noted, Public Resources Code section 21167.3 creates a presumption that even challenged documents are adequate, and prohibits responsible agencies from taking steps to prepare additional analysis. Thus,

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31 Section 15233 of the CEQA Guidelines provides that “[i]f a lawsuit is filed challenging an EIR or negative declaration for noncompliance with CEQA, responsible agencies shall act as if the EIR or negative declaration complies with CEQA[.]” Subdivision (b) of section 15233 cautions, however, that “[a]n approval granted by a responsible agency in this situation provides only permission to proceed with the project at the applicant’s risk prior to a final decision in the lawsuit.” (See also Pub. Resources Code, § 21167.3, subd. (b).)

32 Public Resources Code section 21167.3 actually requires that, despite a pending lawsuit against a lead agency, a responsible agency must treat the challenged environmental (continued...)
the court concluded, LAFCO had neither the ability nor the duty to reject Anderson's negative declaration and to prepare its own EIR. (City of Redding, supra, 209 Cal.App.3d at pp. 1178-1182; see also Pub. Resources Code, § 21167.6.5, subd. (c) (responsible agencies must be notified of litigation filed against lead agency).)

Furthermore, the court explained, where a responsible agency believes that a lead agency has improperly relied on a negative declaration or has prepared a deficient EIR, the responsible agency is limited to the three options set forth in CEQA Guidelines section 15096, subdivision (e): (1) take the matter to court within the applicable statute of limitations period; (2) prepare its own "subsequent EIR" if permissible under CEQA Guidelines section 15162; or (3) assume the role of lead agency if permissible under section 15052. None of these circumstances was present in this case. (209 Cal.App.3d at pp. 1179-1181.)

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document as legally valid unless and until the court reaches a final determination that the document is inadequate. (See also CEQA guidelines, §§ 15231, 15233.) Under such circumstances, the responsible agency’s approval is conditional, and “provides only permission to proceed with the project at the applicant’s risk prior to a final decision in the lawsuit.” (CEQA Guidelines, § 15233, subd. (b).)

See also Pub. Resources Code, §§ 21080.1, subd. (a) (the lead agency is responsible for determining whether to prepare a negative declaration or an EIR, and its determination is "final and conclusive on all persons, including responsible agencies, unless challenged" in a lawsuit against the lead agency), 21167.2 (EIR presumed to be valid if no lawsuit is filed within applicable statute of limitations, unless subsequent or supplemental EIR is required); Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California (1993) 6 Cal.4th 1112, 1130 [26 Cal.Rptr.2d 231] (Laurel Heights II) (“section 21167.2 mandates that the EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR”); Committee for a Progressive Gilroy v. State Water Resources Control Board (3rd Dist. 1987) 192 Cal.App.3d 847, 853-854 [237 Cal.Rptr. 723] (“an EIR or negative declaration prepared by a lead agency . . . is conclusively presumed to comply with CEQA for purposes of use by responsible agencies, such as the Regional Board. (Cal. Admin. Code, tit. 14, § 15231.) The only exceptions to this rule are where the environmental document is determined to be invalid in court proceedings (§ 15231(a)) and where a subsequent EIR is necessary (§ 15231(b))”).

Notwithstanding the decision in City of Redding v. Shasta County Local Agency Formation Commission (3rd Dist. 1989) 209 Cal.App.3d 1169 [257 Cal.Rptr. 793], a

(continued...)

*Lexington Hills Association v. State of California* (6th Dist. 1988) 200 Cal.App.3d 415 [246 Cal.Rptr. 97] (*Lexington Hills*) discussed the criteria by which a permitting agency, other than a lead agency, does or does not qualify as a responsible agency. *Lexington Hills* involved three lawsuits relating to approvals by the California Department of Forestry (CDF) of a timber harvesting plan (THP) for a forested parcel in Santa Cruz County adjacent to a busy highway leading to the coast. The Department of Transportation (Caltrans) was an agency from which the logging enterprise must obtain encroachment permits. Despite the permitting requirement, the Court of Appeal held that Caltrans was not a responsible agency for purposes of CEQA.

The appellate court reasoned that the agency’s actions on the encroachment permits did not constitute “approvals” of a project for purposes of CEQA, and did not trigger the requirement to prepare an initial study and a negative declaration or EIR. The petitioners had presented numerous arguments in challenging the permits, the primary thrust of which was that, because CDF had not prepared an adequate environmental document, that duty necessarily fell on Caltrans.

In rejecting the arguments for Caltrans’ “default” duty, the court noted that the encroachment permits in question normally would be exempt from CEQA review, and could not be made subject to the Act by the mere fact that the permits were related to a project for which another agency had prepared an environmental document. Caltrans was merely implementing mitigation measures identified in CDF’s document, and had no real authority...

34(...continued)

...responsible agency may be able to require further conditions of approval, over and above the mitigation measures identified by the lead agency, if the responsible agency’s organic statutory authority (as opposed to CEQA) provides the responsible agency with such authority. (See, e.g., *La Canada Flintridge Development Corp. v. Department of Transportation* (2nd Dist. 1985) 166 Cal.App.3d 206, 214-216 [212 Cal.Rptr. 334] (the Streets and Highways Code provides Caltrans with the authority to require a developer to pay for cost of widening a highway as a condition of granting an encroachment permit, even though the subdivision map previously approved by the affected city had included conditions requiring intersection improvements requested by Caltrans during the CEQA process that did not call for the widening of the highway).)

35The full name of the former Department of Forestry is now the Department of Forestry and Fire Protection.
to deny the logging trucks access to the highway. Rather, the agency’s statutory authority relates to the physical aspects of highways and rights of way. An “approval” for CEQA purposes can exist only where an agency has real discretion to deny the requested permit or entitlement. (*Lexington Hills, supra*, 200 Cal.App.3d at pp. 429-433.)

The court also rejected the petitioners’ argument that, because of its greater expertise over highway safety matters, the task of determining what was necessary to ensure such safety for CEQA purposes had been effectively delegated to Caltrans. The court emphasized that CEQA does not allow such delegation, but instead requires the lead agency to use its authority to analyze the entire project in question and to devise feasible mitigation measures, if possible, for all identified significant impacts, although in some instances additional measures will be required by agencies with jurisdiction over specific resources. The court found, moreover, that CDF had adequately considered safety issues, as evidenced by the requirement that the project proponents obtain the necessary Caltrans permits (although these were not subject to CEQA). (*Lexington Hills, supra*, 200 Cal.App.3d at p. 433-435.)


*Citizens for Quality Growth v. City of Mount Shasta* (3rd Dist. 1988) 198 Cal.App.3d 433 [243 Cal.Rptr. 727] (*Citizens for Quality Growth*) held that a lead agency may not refuse to exercise its police power to mitigate significant environmental effects of a project simply because another agency also may have the power to do so. *Citizens for Quality Growth* emphasized that, in determining what kinds of mitigation measures are feasible and appropriate, a lead agency cannot refrain from considering means of exercising its own regulatory power simply because another agency has general authority over the impacted natural resource. In that case, the Court of Appeal held that the respondent city, in approving a development project on a sensitive wetlands site, had violated CEQA by failing to consider the feasibility of proposals to require the restoration, creation, or enhancement of wetlands in another location. The city had urged that it had no duty even to consider such a measure because the United States Army Corps of Engineers had ultimate regulatory authority over the on-site wetlands.

The court disagreed, concluding that, because the city’s proposed project (a general plan amendment and rezone) would significantly impact the wetlands, the city was required

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36But compare *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (4th Dist. 1985) 172 Cal.App.3d 151, 173-175 [217 Cal.Rptr. 893] (because Caltrans had discretionary approval power over encroachment permit for project, lead agency was required to file its negative declaration with State Clearinghouse).
to consider whatever potentially feasible mitigation measures lay within its authority and power. "Each public agency is required to comply with CEQA and meet its responsibilities, including evaluating mitigation measures and project alternatives." (Citizens for Quality Growth, supra, 198 Cal.App.3d at p. 443, fn. 8 (italics in original) (citing CEQA Guidelines, § 15020); accord, Sundstrom v. County of Mendocino (1st Dist. 1988) 202 Cal.App.3d 296, 308-309 [248 Cal.Rptr. 352] (court set aside a county's negative declaration for a proposed sewage treatment system because, among other things, one proposed "mitigation measure" simply required the applicant to obtain an approved sludge disposal plan from the regional water quality control board, a responsible agency).)


Bakman v. Department of Transportation (3rd Dist. 1979) 99 Cal.App.3d 665, 678-681 [160 Cal.Rptr. 583] (Bakman) rejected a claim that the Division of Aeronautics of the California Department of Transportation, as a responsible agency, was required to prepare its own EIR before approving an airport permit submitted by the City of Fresno, which, in approving an airport master plan, had acted as lead agency and had properly prepared and certified an EIR. In Bakman, homeowners near the City of Fresno's airport asserted that the decision of the California Department of Transportation (Caltrans) to approve the City's airport permit application was invalid because it had not prepared or approved an EIR for the permit application. They contended that because the permit application qualified under CEQA as a "project," Caltrans was obligated to prepare or approve an EIR before it could grant the permit.

The court held that the City's department of transportation, not the state agency, was the "lead agency" under Public Resources Code section 21067. Caltrans was merely a "responsible agency," and therefore was not required to prepare an EIR for its approval of the application. The court further determined that even though Caltrans had not formally approved an EIR for the project, it had actually reviewed and considered the City's EIR and the environmental effects of the project, so that its approval did not violate CEQA.

37It is true that, as a federal agency, the Army Corps of Engineers is not a "responsible agency," since the California Legislature has no legal authority over the Corps, for which only Congress can legislate. Still, the reasoning of Citizens for Quality Growth v. City of Mount Shasta (3rd Dist. 1988) 198 Cal.App.3d 433 [243 Cal.Rptr. 727] strongly suggests that, if the respondent city had intended to rely on a state or other local agency (i.e., a true "responsible agency") to mitigate the impacts in question, the Court of Appeal would have been similarly troubled.
E. Payment of Fees to the Department of Fish and Game

The Department of Fish and Game (DFG) may charge state and local agencies fees for reviewing CEQA documents. Local agencies can first collect such fees from project applicants; agencies must then pay the fees to the county clerks in the counties in which the projects are located; and the clerks will pass the money on to DFG. (Pub. Resources Code, § 21089, subd. (b); Fish & G. Code, §§ 711.4, subd. (d)(3), 711.7.) State agencies pay their fees to the Office of Planning and Research (OPR), unless their programs have been certified pursuant to Public Resources Code section 21080.5, in which case the fee goes to the Secretary of Resources. (Fish & G. Code, § 711.4, subds. (d)(3), (d)(5).) In 1991, DFG promulgated a regulation to implement the statutory scheme. (Cal. Code Regs., tit. 14, § 753.5.)

Under regulations adopted by DFG, if a project is approved based on a negative declaration, the fee is $1,250.00, to be paid with the filing of a notice of determination (NOD). (Fish & G. Code, § 711.4, subd. (d)(3); Cal. Code Regs., tit. 14, § 753.5, subd. (d)(1).) State agencies with certified regulatory programs (see Chapter VI (Certified Regulatory Programs)) pay only $850. (Fish & G. Code, § 711.4, subd. (d)(5).) Because of the detailed accounting procedures required by DFG, counties may add a documentary handling fee of $25.00 to any project generating a fee or any project that is exempt from the fee requirement. (Fish & G. Code, § 711.4, subd. (e); Cal. Code Regs., tit. 14, § 753.5, subd. (d)(6).)

No project can be "operative, vested, or final until the filing fees required pursuant to Section 711.4 of the Fish and Game Code are paid." (Pub. Resources Code, § 21089, subd. (b); Fish & G. Code, § 711.4, subd. (c).) The payment of these fees does not change DFG’s duty under CEQA. DFG must still "recommend, require, permit, or engage in mitigation activities." (Fish & G. Code, § 711.4, subd. (h).)

When local land use authorities grant a license, permit, or entitlement to project applicants, the private or special district project proponent must "remit the fee." (Cal. Code Regs., tit. 14, § 753.5, subd. (b)(2).) When a local or non-state public entity acts in its own statutory or proprietary capacity in undertaking a project, such an agency must originate the fee itself. (Id., § 753.5, subd. (b)(1).) All checks are made payable to the county where the NOD will be filed, and must be paid at the time of filing. Without the appropriate fee, the NOD "shall not be accepted by the county clerk and shall be returned to the lead agency with notification of fee requirement and a statement that ... 'the project is not operative, vested, or final until the filing fees are paid.'" (Id., § 753.5, subd. (e)(1), quoting Pub. Resources Code, § 21089, subd. (b).)
Only one filing fee is required for each project, unless the project is tiered or phased, and thus requires separate environmental documents or separate rounds of review by DFG. (Fish & G. Code, § 711.4, subd. (g).)

As noted above, state agencies are also subject to these fees and must submit payment to OPR at the time of filing the NOD. (Id., § 711.4, subds. (d)(2), (d)(3).) The fee for a project subject to a certified regulatory program is paid to the Secretary of Resources upon filing of the NOD. (Id., § 711.4, subd. (d)(4).)

Federal agencies, licensees, contractees, and permittees engaged in activities on federal lands that contain, or are adjacent to lands containing, “state wildlife trust resources” are also subject to the fee requirement “unless the payment of state filing and permit fees is explicitly preempted by the authority of the federal agency permitting the use or modification of state trust resources.” (Id., § 711.7, subds. (a)(1), (a)(2).)

DFG must assess a ten percent penalty for failure to pay the fees. (Id., § 711.4, subd. (e)(3).) Failure to pay the fee is not a misdemeanor, but is rather a “statutory assessment” subject to collection under the Revenue and Taxation Code. (Fish & G. Code, § 711.4, subd. (f).)

1. “De minimis” Exemption from Fee Payment

No fee is required where a project is found to be “de minimis in its effect on fish and wildlife,” regardless of whether a negative declaration or EIR has been prepared. (Fish & G. Code, § 711.4, subd. (d)(1); Cal. Code Regs., tit. 14, § 753.5, subd. (a)(3).) The term “de minimis,” as used in this context, does not appear in CEQA, the Guidelines, or CEQA case law. Rather, the Legislature used the term for the first time in enacting the fee legislation. The determination of whether a project’s impacts are “de minimis” is based on information in the initial study. According to the Fish and Game regulations, “[i]f the lead agency finds that, as a result of its initial study, a project involves no potential for adverse effect, either individually or cumulatively on wildlife . . . , no fee is required.” (Cal. Code Regs., tit. 14, § 753.5, subd. (c) (italics added).) “Wildlife” is defined as “all wild animals, birds, plants, fish, amphibians, and related ecological communities, including the habitat upon which the wildlife depends for its continued viability . . . .” (Fish & G. Code, § 711.2, subd. (a).)

In order to claim the “de minimis” exemption, a lead agency must: (1) provide a brief description of the project and its location, including the county; (2) state that “an initial study has been conducted by the lead agency so as to evaluate the potential for adverse environmental impact”; and (3) make a finding declaring that “there is no evidence before the agency that the proposed project will have potential for adverse effect on wildlife.
resources.” (Cal. Code Regs., tit. 14, § 753.5, subd. (c)(1).)

To obtain this fee waiver, a lead agency must file a “Certificate of Fee Exemption” with its Notice of Determination (NOD). (Cal. Code Regs., tit. 14, § 753.5, subds. (c)(2), (c)(3).) DFG supplies the form, which contains spaces to fill in the required findings. The lead agency’s “chief planning official” must sign the document, keeping the original with the agency and filing two copies with the county clerk. (Id., subd. (c)(3).) If the lead agency is a state agency, copies must be filed with OPR. (Ibid.)

2. Other Fee Waivers

In addition, fees also are not required for projects meeting the following criteria: DFG itself is undertaking the project; the project costs are payable from either (i) the Public Resources Account in the Cigarette and Tobacco Products Surtax Fund, (ii) the California Wildlife, Coastal, and Park Land Conservation Fund of 1988, (iii) the Habitat Conservation Fund, (iv) the Fisheries Restoration Account in the Fish and Game Preservation Fund, or (v) Striped bass stamp funds collected pursuant to Fish and Game Code section 7360; and “[t]he project is implemented through a contract with either a nonprofit entity or a local government agency.” (Fish & G. Code, § 711.4, subd. (c)(3).)

3. Fee Requirement Does Not Violate Proposition 13

Through much of the 1990s, some question had existed regarding whether the fees imposed by Fish and Game Code section 711.4 violate the two-thirds vote requirement imposed by Proposition 13. In litigation raising this issue, DFG entered into a settlement agreement suspending the fee. (Mills v. State Department of Fish and Game, et al., Sacramento County Superior Court No. 529928.) Subsequent litigation questioned DFG’s authority to enter into such a settlement agreement under Article II, section 3.5, of the California Constitution, which provides: “An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power . . . [t]o refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional . . . .” (Cal. Const., art. III, § 3.5, subd. (a).) (California Association of Professional Scientists v. Department of Fish and Game (3rd Dist. 2000) 79 Cal.App.4th 935 [94 Cal.Rptr.2d 535] (CAPS).) Following consolidation of these cases, the Sacramento County Superior Court ruled that the enactment of Fish and Game Code section 711.4 had violated Proposition 13, but that the Mills settlement violated article III, section 3.5 of the Constitution. Multiple appeals followed.

DFG’s authority to collect fees was validated by the Court of Appeal in the Mills and CAPS litigation. (CAPS, supra, 79 Cal.App.4th 935 [94 Cal.Rptr.2d 535].) The court
acknowledged that "the Legislature created a flat fee system to finance Fish and Game's environmental review" and that such a system, by statute, "must be proportional to the overall cost of environmental review." (Id. at p. 943.) The question for the court was "whether the Legislature violated the constitution by establishing such a fee system with less than two-thirds vote." (Ibid.) The court was satisfied that DFG had met its burden of showing that "the amount of fees generated by section 711.4 was far less than the cost of the environmental reviews provided. ... Thus, the fees were not revenue raising in that they did not generate income which surpassed the cost of the services provided." (Id. at p. 946.)

The court rejected the contention that, because DFG does not operate a regulatory program, the fee could not be regulatory in nature. (Id. at p. 942.) "Fish and Game is only one small part of a huge regulatory system in place in this state to protect and sustain the environment, but it plays a vital regulatory role under ... CEQA." (Ibid.) The court recognized that "a regulatory fee does not violate California Constitution, article XIII A when the fees collected do not surpass the costs of the regulatory programs they support and the cost allocations to individual payors have a reasonable basis in the record." (Id. at p. 950.)

The court differentiated between a user fee and a regulatory fee, with only the former requiring a correlation between cost and benefit. (Id. at p. 952.) This state-imposed fee does not have an accompanying statutory provision demanding that "the amount of a fee be commensurate with the value of a service provided or the cost of a burden imposed." (Ibid.) Although the court recognized that a "flat fee will seldom represent the exact cost of providing a service" (id. at p. 951), it also found that the record disclosed several justifiable reasons for imposing a flat fee. (Id. at p. 953.)

Furthermore, the court rejected the plaintiff's challenge regarding the higher fee for filing a negative declaration than for other environmental documents. (Id. at p. 955.) At trial, a DFG senior environmental specialist supervisor explained that the standard for a negative declaration requires that the project have "no adverse impact on the environment." 38 Because proposed mitigation measures are often inadequate, according to the supervisor, Fish and Game works with the lead agency and the project applicant to develop adequate and acceptable mitigation measures. Thus, "due to project information collection cost and the time spent negotiating mitigation measures, Fish and Game's costs are generally higher for negative declarations" than for "an equivalent-sized project with EIR ... documentation." (Ibid.) The court concluded that there existed "a sufficient reasonable basis for the

38A precise statement of the law would have been that a negative declaration is proper where a project has no significant adverse effect on the environment. (See Pub. Resources Code, § 21064.)
legislative decision to charge more for the review of a negative declaration than for the review of an environmental impact report.” (Ibid.)

In its final conclusion, the court held that “the Legislature did not violate California Constitution, article XIII A by enacting the section 711.4 fees by a simple majority vote [and] ... further challenge to the equity of a flat fee structure must be presented to the Legislature for the issue is political, not constitutional.” (Id. at p. 956)

Thus, the statutory provisions in CEQA and the Fish and Game Code that authorize DFG to collect fees to review EIRs and negative declarations remain in effect. Project applicants should note that, as discussed above, no finding or project approval under CEQA is “operative, vested, or final until the filing fees required pursuant to Section 711.4 of the Fish and Game Code are paid.” (Pub. Resources Code, § 21089, subd. (b).)

F. Recovering Costs from Applicant

A lead agency is authorized to charge and collect a reasonable fee from any applicant to cover the agency’s estimated costs in preparing CEQA documents and for procedures necessary to comply with CEQA generally. (Pub. Resources Code, § 21089, subd. (a); CEQA Guidelines, § 15045, subd. (a); see also Meridian Ocean Systems, Inc. v. California State Lands Commission (2nd Dist. 1990) 222 Cal.App.3d 153, 173 [271 Cal.Rptr. 445] (“conditioning issuance of the interim permits upon execution by petitioners of an agreement to reimburse the [State Lands] Commission for the costs incurred in preparing the EIR was lawful as CEQA specifically provides for the charge and collection of a reasonable fee to pay those expenses”); Wat. Code, § 13274, subd. (c) (State Water Resources Control Board or Regional Water Quality Control Board may charge reasonable fee to cover cost of administering application for waste discharge requirements, including cost of related CEQA review); 39 cf. Mission Oaks Ranch, Ltd. v. County of Santa Barbara (2nd Dist. 1998) 65 Cal.App.4th 713, 723-724 [77 Cal.Rptr.2d 1] (upholding “statutorily authorized” fee agreement between agency and developer, under which developer agreed to pay consultant’s fees for preparing EIR, but agency retained exclusive authority over adequacy of document).)

Section 21089 does not, however, provide independent authority for the lead agency to require the applicant to bear the agency’s litigation expenses, costs, and fees. (Pub. Resources Code, § 21089, subd. (a); CEQA Guidelines, § 15045, subd. (a).)

39In 1997, the Legislature enacted a different version of Water Code section 13274. (See Stats. 1997, ch. 814, § 13, p. 4404.) The Legislature did not repeal the former version of section 13274, however. Both versions are found in the Water Code, and both appear to be in effect.