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## THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The California Supreme Court held that corporations are not subject to heightened scrutiny when filing CEQA lawsuits (p. 379)

The city properly exercised its discretion in using compliance with AB 32 as the threshold for determining significance of greenhouse gas emissions from a development project (p. 403)

The EIR for a residential development was not defective for failure to describe the location and nature of Native American sites that would be unavoidably impacted by the construction (p. 423)

## HAZARDOUS WASTE AND TOXIC SUBSTANCE CONTROL

To satisfy the intent requirement for arranger liability under CERCLA, a company selling a product that uses and/or generates a hazardous substance may not be held liable as an arranger unless the plaintiff proves that the company entered into the relevant transaction with the specific purpose of disposing of a hazardous substance (p. 440)

## DEMYSTIFYING CEQA'S CUMULATIVE IMPACT ANALYSIS REQUIREMENTS: GUIDANCE FOR DEFENSIBLE EIR EVALUATION

By

*Nicole Hoeksma Gordon\* and Al Herson\*\**

### I. Introduction—Why Analyze Cumulative Impacts?

“One of the most important environmental lessons evident from past experience is that environmental damage occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact.” [*Los Angeles Unified School Dist. v. City of Los Angeles* [(1997) 58 Cal. App. 4th 1019, 1025, 68 Cal. Rptr. 2d 367]; *Kings County Farm Bureau v. City of Hanford* [(1990) 221 Cal. App. 3d 693, 720, 270 Cal. Rptr. 650]; Selmi, *Judicial Development of CEQA* (1984) 18 U.C. Davis L. Rev. 197, 244 fn. omitted.]

The purpose of analyzing cumulative environmental impacts is to assess adverse environmental change “as a whole greater than the sum of its parts.” [*Environmental Protection Information Center v. Johnson* [(1985) 170 Cal. App. 3d 604, 625, 216 Cal. Rptr. 502].] By evaluating the incremental impact of a proposed project, in connection with other projects causing related impacts, agencies may avoid the environmental harm that comes from considering projects “in a vacuum.” [*Whitman v. Board of Supervisors* [(1979) 88 Cal. App. 3d 397, 408, 151 Cal. Rptr. 866 (*Whitman*)].]

Although the policy basis for evaluating cumulative impacts is sound, preparing a legally defensible cumulative impact analysis is one of the trickiest tasks required by the California Environmental Quality Act (CEQA)

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[Pub. Res. Code § 21000 et seq.]. The statutory direction and the CEQA Guidelines (Guidelines) [14 Cal. Code Reg. § 15000 et seq.] are complicated and somewhat circular. Consequently, CEQA practitioners may be tempted to gloss over the cumulative impact analysis or include it as an afterthought to the assessment of project-specific impacts. The authors believe this is a mistake. Though complex, the analysis of cumulative impacts is "vitaly important" to the assessment of a project's impacts [*Citizens to Preserve the Ojai v. County of Ventura* [(1985) 176 Cal. App. 3d 421, 431, 222 Cal. Rptr. 247]], and many cases have rejected environmental impact reports (EIRs) due to inadequate cumulative impact analysis.

This article illuminates the complex issues agencies face when conducting a cumulative impact analysis in an EIR. In doing so, it identifies relevant statutory and Guidelines requirements, as well as examples from case law and strives to provide practical strategies for addressing cumulative impacts. It also identifies solutions for avoiding common pitfalls in the EIR's analysis of cumulative impacts.

## II. CEQA'S Requirements for Cumulative Impact Analysis—Making Sense of the Statute, Guidelines, and Case Law

### A. When Must an EIR Consider Cumulative Impacts?

An EIR must analyze cumulative impacts whenever a proposed project's individual impacts have the potential to combine with related impacts from other projects to compound environmental harm. The Guidelines define "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or ... compound or increase other environmental impacts" [Guidelines § 15355]. If the proposed project will not make any contribution to the cumulative impact, the EIR need not address it. [Guidelines § 15130(a)(1) ("An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR").] However, if even a tiny portion of the cumulative impact is caused by the proposed project, the EIR must analyze it. The ultimate goal of this analysis is to determine whether the proposed project's incremental contribution is "cumulatively considerable" and thus significant. [See Guidelines § 15130(a).] A project's incremental impact may be individually limited but cumulatively considerable when viewed together with the environmental impacts from past, present, and probable future projects. [Guidelines § 15130(a).]

The analysis of cumulative impacts is best accomplished in a two-step process:

- (1) The EIR should determine whether the combined effects from both the proposed project and other projects would be “cumulatively significant,” i.e., result in a significant cumulative impact.
- (2) If the answer is yes, the EIR should determine whether the proposed project’s incremental effect is “cumulatively considerable” and thus significant.

Critically, a proposed project’s incremental effects may be “cumulatively considerable” even when its individual effects are limited. [Guidelines §§ 15064(h)(1), 15065(a)(3), 15355(b).] In other words, CEQA does not excuse an EIR from evaluating cumulative impacts simply because the project-specific analysis determined its impacts would be “less than significant.” Similarly, a “less than significant” impact conclusion at the project-level does not guarantee the project’s contribution to a significant cumulative impact will be less than “cumulatively considerable.”

Consider, for example, a development project that will have traffic noise impacts below the lead agency’s quantitative threshold of significance. However, when the project’s noise impacts are combined with the anticipated noise impacts of other past, present and probable future projects in the area, they may cumulatively raise noise levels above the threshold. Whenever this potential exists, the EIR must analyze cumulative impacts. The EIR preparer should determine, first, whether the combined emissions result in a significant impact, i.e., breach the impact significance threshold, and, if they do, whether the project’s individual contribution to the cumulative impact is “cumulatively considerable” and thus significant.

If the analysis shows either that the cumulative impact is not significant, or that the project’s incremental effect is not cumulatively considerable, the EIR should briefly explain the basis for this conclusion. [Guidelines § 15130(a).] A conclusion that the cumulative impact is not significant must be accompanied by relevant facts and analysis. [Guidelines § 15130(a)(2).]

### ***B. How to Determine Cumulative Impact “Significance”***

EIR preparers frequently ask whether the “significance” of a cumulative impact should be determined using the same significance threshold as that used for project specific impacts. Neither the Guidelines nor the case law provide any guidance. In the authors’ view, unless there is a defensible reason to change the threshold,

it should remain constant from the project-specific analysis to the cumulative analysis. Thus, an EIR that used the lead agency’s thresholds of significance for measuring whether a project’s noise impacts are significant should use that same threshold for measuring whether the combined noise impacts of the project and other probable future projects is cumulatively significant.

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Another challenge arises in trying to summarize the environmental effects of other past, present and future projects. Unlike the impacts of the proposed project, which are readily available in the EIR's project-specific analysis, the impacts of other projects may be difficult to ascertain. CEQA requires "a summary of the expected environmental effects to be produced by those projects with specific reference to additional information stating where that information is available" [Guidelines § 15130(b)(4)], but there is no set standard for the requisite level of detail. The Guidelines provide that discussion should be "guided by the standards of practicality and reasonableness, and should focus on the cumulative impact to which the identified other projects contribute rather than the attributes of other projects which do not contribute to the cumulative impact" [Guidelines § 15130(b)]. However, the discussion of cumulative impacts "need not provide as great detail as is provided for the effects attributable to the project alone." [Guidelines § 15130(b).] The analysis should reflect "the severity of impacts and their likelihood of occurrence." [Guidelines § 15130(b).]

An EIR that quantifies cumulative impacts will be substantially more defensible than one "devoid of any reasoned analysis," specificity or detail. [See *Whitman*, 88 Cal. App. 3d at 411 (rejecting the cumulative analysis in EIR for a proposed oil and gas well which consisted of one sentence stating that the cumulative impact would be "increased traffic" and "a minor increase in air emissions").] The analysis will not withstand scrutiny if the lead agency has made no attempt to accurately describe cumulative conditions despite the existence of relevant data, particularly if it is not possible to determine the significance of an impact without actual data. For example, in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 729, 270 Cal. Rptr. 650 ("*Kings County*"), the court found the analysis of cumulative project impacts on water resources inadequate where it provided no information regarding the expected groundwater impacts of nearby energy projects except to say they "would impact regional water sources, but these impacts would be lessened by numerous programs and [conservation measures]." The court concluded that "[a]bsent some data indicating the volume of ground water used by all such projects, it is impossible to evaluate whether the impacts associated with their use of ground water are significant and whether such impacts will indeed be mitigated by the water conservation efforts upon which the EIR relies." [221 Cal. App. 3d at 729-730.]

Thus, lead agencies should quantify cumulative impacts whenever data are reasonably available or can be reasonably produced through further study. EIRs or other

environmental documents prepared for other projects may contain such data. Lead agencies may also obtain data and other relevant information about projects affecting the cumulative impact analysis by contacting the agencies responsible for carrying out or approving those projects. If data are not available and it would not be reasonable or practical to obtain such data, the EIR should explain the reasons why the impact is not quantified. It should then provide a well-reasoned qualitative analysis. The fact that a probable future project has not yet undergone CEQA review does not excuse lead agencies from at least qualitatively analyzing its reasonably foreseeable environmental impacts. [*San Franciscans for Reasonable Growth v. City and County of San Francisco* [(1984) 151 Cal. App. 3d 61, 74, 234 Cal. Rptr. 527 ("*San Franciscans for Reasonable Growth*")].]

The analysis of cumulative impacts should not assume that the impacts of other projects will be mitigated unless there is substantial evidence to support this assumption, e.g., if mitigation was adopted as a condition of project approval or is otherwise required by law. For example, a quantitative cumulative impact analysis for groundwater cannot be avoided by simply assuming that impacts of future projects would be mitigated through water conservation efforts. [*Kings County*, 221 Cal. App. 3d at 729.] Similarly, when combining the project's incremental impact with the impacts of other projects, the impact analysis should not assume that the project-specific mitigation measures have been adopted, i.e., it should consider the project's pre-mitigation impact. This reflects the fact that mitigation measures in an EIR are merely recommendations; they are not incorporated into the project until the project is approved subject to such mitigation and following the adoption of CEQA findings.

### C. When is an Incremental Contribution "Cumulatively Considerable"?

While it is not easy to determine the significance of the cumulative impact, it is often more difficult to judge whether a project's incremental contribution to a significant cumulative impact is "cumulatively considerable." Regrettably, there is no clear guidance on this subject. The closest answer comes from *Communities for a Better Environment v. California Resources Agency* [(2002) 103 Cal. App. 4th 98, 126 Cal. Rptr. 2d 441 ("*Communities for a Better Environment*")], which invalidated certain CEQA provisions and clarified the seminal appellate decision on cumulative impacts analysis, *Kings County Farm Bureau v. City of Hanford* [(1990) 221 Cal. App. 3d 692, 270 Cal. Rptr. 650]. In *Kings County*, the court rejected the cumulative analysis prepared for a proposed coal-fired cogeneration plant in which the lead

agency determined the project's impact on air quality was not cumulatively considerable because it would contribute less than one percent of area emissions for all criteria pollutants. [221 Cal. App. 3d at 718–719.] The court criticized the lead agency's focus on the ratio between the project's impacts and the overall environmental problem, rather than on the combined effect of the project in addition to already adverse conditions. Under this (impermissible) approach, which the court dubbed the "ratio theory", "the greater the overall problem, the less significance a project has in a cumulative impact analysis." [221 Cal. App. 3d at 721.] Instead of trivializing a project's impacts by comparing them to the impacts of other past, present, and probable future projects, CEQA requires the lead agency to first combine the impacts. When this is done properly, the EIR may find that the scope of the environmental problem is so severe that even a minuscule incremental change would be cumulatively considerable and thus significant.

The *Communities for a Better Environment* decision built upon and expanded the analysis in *Kings County*. In *Communities for a Better Environment*, the court invalidated an amendment to the CEQA Guidelines enacted in 1998 that permitted an EIR to find a project's contribution to a significant cumulative impact "de minimis" if the environmental conditions would be the same whether or not the proposed project is implemented. [*Communities for a Better Environment*, 103 Cal. App. 4th at 117–118.] The court found this approach counter to the *Kings County* decision, as well as other decisions rejecting the "ratio theory", e.g., *City of Long Beach v. Los Angeles Unified School Dist.* [(2009) 176 Cal. App. 4th 889, 98 Cal. Rptr. 3d 137 ("*Los Angeles Unified*") (EIR improperly relied on a ratio theory to conclude that a project's relatively small contribution to noise impacts were not significant)]. The relevant question, as set forth by the court, is whether any additional amount of effect is significant (i.e., cumulatively considerable) in the context of the existing cumulative effect. [103 Cal. App. 4th at 119.] In other words, "the greater the existing environmental problems are, the lower the threshold should be for treating a contribution to cumulative impacts as significant." [103 Cal. App. 4th at 119.] Although stating the " 'one additional molecule rule' is not the law," the court provided no further guidance on when a small incremental contribution to an existing environmental problem would be significant, i.e., cumulatively considerable. [103 Cal. App. 4th at 119.]

These two cases illustrate the importance of focusing on the actual effect a project's contribution will have on the environment at the cumulative level, rather than simply comparing the project's contribution to the magnitude of the impact as a whole. The more sensitive the resource, the greater potential for the project's incremental impact to be

significant, but it is not necessarily true that any level of contribution must be deemed cumulatively considerable. Thus, the answer to the question "what is cumulatively considerable?" ultimately falls to lead agencies and CEQA practitioners in consideration of the environmental setting, the sensitivity of the resource and the extent of the project's contribution.

The recent Supreme Court case, *Save the Plastic Bag Coalition v. City of Manhattan Beach* [(2011) 52 Cal.4th 155, 2011 Cal. LEXIS 6866], does provide one example of when a project's incremental contribution to an impact is so small it may be considered negligible and not significant. In dicta, the Court noted that the incremental impacts of a City of Manhattan Beach ordinance banning plastic bags were small enough that its cumulative effects, when combined with similar laws enacted or proposed in Los Angeles County and other jurisdictions, were "negligible" and not significant. The Court noted [52 Cal. 4th at 725, fn. 10] that although cumulative impacts should not be allowed to escape review when they arise from a series of small scale projects, it would be "ridiculous" to require a city of 40,000 to evaluate cumulative "life cycle" impacts of a possible Los Angeles County (population 10 million) ban on plastic bags. In this case, the life cycle impacts in question were indirect and uncertain. At least in this context, the Supreme Court appears to have recognized that minuscule contributions to cumulative impacts should not be considered cumulatively considerable.

#### ***D. Two Acceptable Approaches to Analysis: List Approach, Summary of Projections Approach***

An adequate discussion of cumulative impacts will use one of the following methods, known respectively as the "list" approach and the "summary of projections" (or "plan") approach:

- (1) A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or
- (2) A summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect. . . . [Guidelines § 15130(b)(1).]

These represent two distinct ways of identifying the "other projects" that add to the proposed project's incremental impacts. Each approach has advantages and disadvantages. In general, the "list approach" is often perceived as more straightforward, but it is vulnerable to a challenge as underinclusive. The "summary of projections

approach” may be more comprehensive, but can be problematic unless the projections in the plans are up-to-date.

### ***E. What Projects Belong on the List of “Probable Future Projects”? Is There a Cutoff?***

Developing the list of projects that contribute to an impact is sometimes difficult, particularly where such projects are outside the lead agency’s jurisdiction. Agencies should nevertheless use all reasonable means to “discover, disclose, and discuss related projects,” including those under the administrative jurisdictions of other local, state and federal agencies. [*San Franciscans for Reasonable Growth*, 151 Cal. App. 3d at 74.]

In developing the list of probable future projects, agencies should include:

- Projects under construction
- Projects that are approved but not yet constructed
- Projects undergoing environmental review
- Projects for which applications have been received
- Projects included in an adopted capital improvements program, or in an adopted general, regional, transportation or other plan
- Projects anticipated as future phases of previously approved projects
- Any future project where the applicant or public agency has devoted significant time and financial resources to prepare for any regulatory review.

[*San Franciscans for Reasonable Growth*, 151 Cal. App. 3d at 74; *Gray v. County of Madera* [(2008) 167 Cal. App. 4th 1099, 1127–1128, 85 Cal. Rptr. 3d 50 (“*Gray*”).] Developing an adequate list will involve a careful, case-by-case assessment of whether each project is one which might combine with the impacts of the proposed project to create cumulative impacts.

Issues often arise when new projects enter the pipeline and become “probable” after the draft EIR is published and before certification of the final EIR. This has long been problematic for lead agencies trying to avoid a never-ending re-opening of the cumulative impact analysis. Recent case law has confirmed that agencies have discretion to set a reasonable cutoff date to determine which projects should be included in the cumulative impact analysis. [*Gray*, 167 Cal. App. 4th at 1127–1128.] In the authors’ view, however, using a cutoff date creates a substantial risk that the EIR will ignore critical new information, especially if the newly “probable” project would significantly affect the analysis. Thus, lead agencies

should carefully balance the convenience of a cutoff date against the danger of ignoring significant new information, recognizing that the existence of such information might require recirculation of the EIR under Guidelines § 15088.5 regardless of whether a cutoff has been imposed. If opting to use a cutoff date, the lead agency should clearly identify the date and explain its rationale in the EIR.

Factors to consider when determining whether to include a project on the list include “the nature of each environmental resource being examined, the location of the project and its type.” [Guidelines § 15130(b)(2).] “Location may be important, for example, when water quality impacts are at issue since projects outside the watershed would probably not contribute to a cumulative effect. Project type may be important, for example, when the impact is specialized, such as a particular air pollutant or mode of traffic.” [Guidelines § 15130(b)(2); *Bakersfield Citizens for Local Control v. City of Bakersfield* [(2004) 124 Cal. App. 4th 1184, 1216–1219, 22 Cal. Rptr. 3d 203 (rejecting a cumulative impact analysis that failed to account for two, simultaneously proposed shopping centers with “overlapping market areas and shared roadways”).] The list should not, however, be limited to projects of the same type as the proposed project, e.g., if the proposed project involves construction of a bike path, the list of projects should not be limited to other bike paths in the region, or even other transportation projects; it must include all projects with impacts likely to combine with the project’s impacts. For example, if emissions from construction of a nearby housing development could combine with emissions from construction of the bike path, the housing development should be included on the list. Also, the list of projects will likely be different for different affected resources. For example, the list of projects affecting water supply may be very different than the list of projects affecting biological resources.

### ***F. Working with Plans in the Projections Approach: What if Adopted Plans Are Outdated or Plan EIRs do not Adequately Disclose Cumulative Impacts?***

The second means of identifying the “other projects” to which the proposed project’s incremental impacts must be added is the “summary of projections approach.” Under this approach, the EIR bases the cumulative impact analysis on a summary of projections contained in an adopted local, regional or statewide plan, or related planning document, or in an adopted or certified prior environmental document for such a plan. [Guidelines § 15130(b)(1)(B).] The types of plans upon which the lead agency may rely include general plans, regional transportation plans, plans for the reduction of greenhouse gas

emissions, specific plans, and local coastal plans. [Guidelines § 15130(b)(1)(B).] The projections approach does not directly rely on demographic (growth) projections contained in a plan or plan EIR. Rather, it relies on projections of cumulative impacts on one or more environmental resources, i.e., the cumulative impacts caused by projected growth, as set forth in the plan or plan EIR.

If up-to-date planning documents exist that describe or evaluate conditions contributing to cumulative impacts, the summary of projections approach can lighten the lead agency's burden in identifying projects with impacts related to those of the proposed project. In reality, however, projections contained in plans and the EIRs certified for such plans may be outdated or inaccurate. Such documents also may omit relevant possible sources of cumulative impacts. [See, e.g., *Citizens to Preserve the Ojai v. County of Ventura* [(1985) 176 Cal. App. 3d 421, 222 Cal. Rptr. 247 (county could not rely on air quality management plan that failed to include cumulative emissions from offshore oil operations to analyze cumulative impacts from an oil refinery project)].]

One solution to this is to supplement projections “with additional information such as a regional modeling program.” [Guidelines § 15130(b)(1)(B).] The other is to use a hybrid list-projections approach. This involves supplementing the projections included in adopted planning documents with a list of recent projects outside the scope of the plans' projections. Both of these solutions require a thoughtful review of adopted plans to find potential deficiencies, as well as an obligation to investigate recent projects and identify other necessary information.

When using the plan approach, EIR preparers should be sure to identify the documents upon which the analysis relies in the EIR and make them available to the public at a specified location. [Guidelines § 15130(b)(1)(B).] The Guidelines do not specify that the location of the documents must be included in the EIR, but at least one court has found an EIR inadequate for failing to identify the location of the planning documents in the EIR. [*Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099, 1127–1128, 85 Cal. Rptr. 3d 50.] Lead agencies should take this relatively easy precaution. If incorporating a document or a portion of a document by reference, the EIR should follow the procedures set forth in Guidelines § 15150.

### ***G. What About “Past Projects”? Are They Just Part of the Baseline?***

CEQA practitioners often question the value of specifically identifying past projects in the cumulative impact analysis, particularly where the EIR's description of

existing conditions accounts for the effects of such projects. The good news for those practitioners is that the CEQA courts have been relatively lenient when it comes to the level of detail required for assessing the impacts of past projects. The California Supreme Court has explained that the requirement to assess past projects “signifies an obligation to consider the present project in the context of a realistic historical account of relevant prior activities that have had significant environmental impacts.” [*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* [(2008) 44 Cal.4th 459, 524, 118 Cal. Rptr. 3d 352].] To do this effectively, an EIR “must reasonably include information about past projects to the extent such information is relevant to the understanding of the environmental impacts of the present project considered cumulatively with other pending and possible future projects.” [44 Cal. 4th at 525.] Identifying prior activities is particularly important when temporary construction impacts from past projects have the potential to compound with related impacts of the proposed project to create significant cumulative impacts. For example, a sensitive receptor may be exposed to “temporary” impacts from a construction project that are less than significant in the short term but become significant in the long term if numerous construction projects occur in the same place over time.

Thus, where the impacts of prior short-term construction past projects are not part of the baseline due to their temporary nature, past projects with the potential to cause cumulatively significant impacts should be specifically identified. In other cases, the discussion of existing conditions may adequately describe the effects of past projects. This can be done by acknowledging historical trends, e.g., population declines, degradation and loss of habitat, and the types of projects that have caused such trends. In such cases, so long as the analysis describes the impacts of past projects on existing and future conditions, it is not necessary to provide detailed information about the past projects themselves. For example, in *Los Angeles Unified*, 176 Cal. App. 4th at 910–912, the court upheld the lead agency's determination that existing refineries and diesel fuel stations were necessarily included in the analysis of cumulative air quality impacts because they comprised the baseline. By discussing the degradation of air quality in the air basin and the fact that it was a nonattainment area, and by describing all pollutant sources near the project, the lead agency adequately analyzed all relevant projects for purposes of the cumulative analysis. [176 Cal. App. 4th at 912.]

## H. Determining the Geographic Scope of Analysis

An EIR must “define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic area.” [Guidelines § 15130(b)(3).] The geographic scope should be determined based on the resource under review. Different environmental resources should have different geographic scopes for cumulative impact analysis. Even within a particular resource area, different sub-sets of the resource may require different geographic scopes, e.g., the analysis of cumulative impacts to biological resources would likely use one geographic scope to analyze impacts to fish and another to analyze impacts to migratory birds. [See, e.g., *Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* [(2008) 43 Cal.4th 936, 945–952, 77 Cal. Rptr. 3d 239 (upholding cumulative impact analysis that recognized varying biological assessment areas for the species being evaluated and its habitat)].]

Determining the appropriate geographic scope of analysis can be accomplished in two basic steps: (1) identify a geographic area that includes resources potentially affected by the proposed project; and (2) extend that area, as appropriate, to include all projects with the potential to affect those resources. For example, the analysis of cumulative biological impacts for a project affecting sensitive fish species should consider any up-stream or down-stream projects with the potential to affect those same species. A different geographic scope will be required to analyze the air quality impacts of that same project, e.g., air basin. Other relevant boundaries might be based on factors such as geology, hydrology, soil types, wildlife corridors, and historic districts.

In some cases, a geographic scope that is too extensive will result in an unwieldy or meaningless analysis. For example, in *Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Protection* (2004) 123 Cal. App. 4th 1331, 1352, 20 Cal. Rptr. 3d 808], petitioners contended the lead agency should have examining the entire range of the California spotted owl—the Sierra Nevada ecosystem—in assessing a logging project’s cumulative impacts to that species. However, the lead agency had expressly rejected that geographic scope because it could dilute any estimated impacts to insignificance. The court upheld the agency’s determination that using such a large assessment area could make it impossible to identify the project’s incremental effect.

Ultimately, courts will defer to the lead agency’s geographic scope of analysis if the EIR provides a rational explanation supported by substantial evidence. [Guidelines § 15130(b)(3); *Los Angeles Unified*, 176 Cal. App.

4th at 907.] Thus, it is essential to clearly identify the geographic scope of analysis in the EIR and explain why that scope is reasonable for each resource area.

## I. How Do You Mitigate Cumulative Impacts?

“An EIR shall examine reasonable, feasible options for mitigating or avoiding the project’s contribution to any significant cumulative effects.” [Guidelines § 15130(b)(5).] Project-specific mitigation identified in the EIR may be adequate to reduce the project’s contribution to less than cumulatively considerable. An EIR may also determine that a project’s contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. [Guidelines § 15130(a)(3).] For example, a lead agency may not be able to directly reduce the impact of a project that will adversely contribute to existing and anticipated traffic congestion at a particular intersection. In that case, the lead agency may require a fair share payment into a transportation fund that will eventually be used to reconfigure the intersection to reduce congestion. However, contribution of funds towards future programs, improvements or actions is only appropriate mitigation under CEQA if it is linked to a specific mitigation program. [See *Anderson First Coalition v. City of Anderson* [(2005) 130 Cal. App. 4th 1173, 30 Cal. Rptr. 3d 738]; *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* [(2001) 87 Cal. App. 4th 99, 141, 104 Cal. Rptr. 2d 326].] A commitment to pay fees is not considered mitigation under CEQA unless there is evidence that mitigation will actually result. [See *Kings County*, 221 Cal. App. 3d at 727 (requiring applicant to pay funds to purchase replacement groundwater not adequate where it was not known whether groundwater was available).] A lead agency should carefully document the facts and analysis supporting its conclusion that the fee payment will render a project’s incremental contribution less than cumulatively considerable. [Guidelines § 15130(a)(3).]

A lead agency may also determine that a project’s incremental contribution to a cumulative effect is not cumulatively considerable “if the project will comply with the requirements in a previously approved plan or mitigation program . . . that provides specific requirements that will avoid or substantially lessen the cumulative problem within the geographic area in which the project is located. Such plans or programs must be specified in law or adopted by the public agency with jurisdiction over the affected resources through a public review process to implement, interpret, or make specific the law enforced or administered by the public agency.” [Guidelines § 15064(h)(3).] The 2010 amendments to the Guidelines

expanded the list of examples of such programs to include water quality control plans, air quality attainment or maintenance plans, integrated waste management plans, habitat conservation plans, natural community conservation plans, and plans or regulations for the reduction of greenhouse gas emissions. [Guidelines § 15064(h)(3).] “When relying on a plan, regulation or program, the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project’s incremental contribution to the cumulative effect is not cumulatively considerable.” [Guidelines § 15064(h)(3).]

In addition to the requirement to mitigate a project’s incremental contribution to a cumulative impact, the Guidelines recognize that for some projects “the only feasible mitigation for cumulative impacts may involve the adoption of ordinances by regulations rather than the imposition of conditions on a project-by-project basis.” [Guidelines § 15130(c).] It is unclear whether the lead agency has an obligation to adopt such ordinances. A lead agency is only responsible for mitigating a project’s proportional contribution to a significant cumulative impact; it is not required to mitigate other projects’ contributions. However, agencies should, at a minimum, discuss whether a comprehensive ordinance would mitigate the cumulative impact and consider adopting such an ordinance. For example, a city could adopt a traffic mitigation ordinance that applies to all future projects and requires each project to pay its proportional fee towards future traffic improvements. Where adoption of such an ordinance is outside the scope of the lead agency’s jurisdiction, the EIR should nevertheless identify the ordinance as a mitigation option for the significant cumulative impact. The agency should then make an express finding that adoption of the ordinance is within the responsibility and jurisdiction of another agency, which has adopted it or can and should adopt it. [Pub. Res. Code § 21081(a)(2); Guidelines § 15091(a)(2).]

### ***J. Streamlining the Cumulative Impact Analysis***

Using the summary of projections approach, discussed above, is one way agencies can streamline the analysis of cumulative impacts. Under this approach agencies may rely on adopted plans and/or the environmental documents prepared for such plans if they include projections relevant to the EIR’s analysis of cumulative impacts. [Guidelines § 15130(b)(1)(B).] By incorporating these pre-existing discussions by reference, the lead agency may be excused from further analysis so long as the incorporated discussion is sufficiently comprehensive. [See, e.g., *Las Virgenes Homeowners Federation v. County of Los Angeles* [(1986) 177 Cal. App. 3d 300, 223 Cal. Rptr. 18].]

Additionally, if a project is consistent with a general plan, specific plan, master plan or “comparable programmatic plan,” and the lead agency determines that the regional or areawide cumulative impacts of the project have already been “adequately addressed” in a certified EIR for that plan, the EIR need not prepare further cumulative impact analysis. [Guidelines § 15130(d).] Note, however, that this Guidelines section specifically requires the lead agency to find the impacts have been “adequately addressed” as defined in section 15152(f) of the Guidelines, which deals with standards for tiering and program EIRs. Thus, to use this provision, the lead agency must determine: (a) the cumulative impacts have been mitigated or avoided as a result of the prior EIR and findings adopted in connection with that prior EIR; or (b) the impacts have been examined at a sufficient level of detail in the prior EIR to enable those effects to be mitigated or avoided by site-specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project. [Guidelines § 15152(f).]

The lead agency may also be excused entirely from further analysis of cumulative impacts under the little-used streamlining provisions of Pub. Res. Code § 21083.3 and Guidelines § 15183 (specific streamlining provisions for projects consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified). If the lead agency is relying on these streamlining provisions for analysis of a project, the EIR for that project should not further analyze a cumulative impact that was adequately addressed in the EIR for the community plan, zoning action, or general plan. [Guidelines § 15130(e).]

Lastly, SB 375 created two opportunities to streamline cumulative impact analysis. First, an EIR prepared for an eligible residential or mixed-use project consistent with a Sustainable Communities Strategy need not analyze cumulative impacts from cars and light-duty trucks on global warming or the regional transportation network. [Pub. Res. Code § 21159.28.] Second, environmental documents prepared for eligible Transit Priority Projects may conclude that the project’s incremental effect is not cumulatively considerable if the cumulative effect has been adequately addressed and mitigated in prior certified EIRs; typically, these would be EIRs for SB 375-compliant Regional Transportation Plans. [Pub. Res. Code § 21155.2.]

### ***K. Location and Format of Cumulative Impact Analysis***

Typically, an EIR’s cumulative impact analysis appears either as a subsection within the analysis of each environmental resource or in a separate chapter addressing

cumulative impacts from all resource areas. In the authors' view, including the cumulative analysis as a sub-component of each resource area chapter is the better approach for two reasons. First, it increases the likelihood that the analyst with the greatest expertise in a particular resource area and knowledge of the project's direct impacts will conduct the cumulative impact analysis for that resource area. It also insures against the temptation to leave cumulative impact analysis for the last minute, when deadlines may make it difficult to conduct an adequate analysis.

In the analysis of a project's direct impacts and applicable mitigation measures, EIR preparers often use a numbering system and captions for ease of reference to format. Cumulative impacts and mitigation measures for cumulative impacts should be formatted in the same way. This approach will help ensure cumulative impacts and mitigation measures are stated with specificity and will greatly facilitate the later preparation of CEQA findings for significant cumulative impacts.

### III. Ten Steps to Compliance

The following ten steps, based on the discussion above, will help make EIR cumulative impact analysis more efficient, meaningful, and legally defensible:

1. Use the project's direct impact analysis to identify cumulative impacts to which the project will contribute. Exclude any impacts to which the project will not contribute.
2. For the remaining cumulative impacts, define the geographic scope of the area affected by the cumulative impact and provide a reasonable explanation for the geographic limitation used. Consider the nature of each environmental resource and the type of project in making this determination.
3. Decide on the list approach, the summary of projections approach, or a hybrid of the two for identifying past, current and probable future projects with impacts related to the proposed project.
4. Review previously approved plans (e.g., general plans, specific plans, regional transportation plans, plans for the reduction of greenhouse gas emissions, local coastal plans) for pertinent discussions of cumulative impacts.
5. If the proposed project is consistent with a previously-approved programmatic plan, and the regional or areawide cumulative impacts of the proposed project have already been adequately addressed in a certified EIR for that plan, this can be explained and no further cumulative impact analysis is required. [Guidelines §§ 15130(d) and

15152(f).] Similarly, EIRs prepared for eligible residential and mixed use projects consistent with a Sustainable Communities Strategy need not consider cumulative global warming or regional transportation impacts caused by light duty vehicles.

6. If the proposed project is consistent with a community plan, zoning action or general plan for which a prior EIR was prepared which adequately addressed the cumulative impact, this should be explained in the EIR, and no further cumulative impact analysis is required. [Guidelines §§ 15130(e) and 15183.]
7. For the remaining cumulative impacts, using the plan, projection, or hybrid approach, summarize the environmental impacts of other, past, current and probable future projects, in combination with the proposed project, with specific reference to additional information and where it is available.
8. Determine (and state) whether the cumulative impacts of past, current and future projects, in combination with the proposed project, are significant. Use the same significance criteria for cumulative impacts as for project-specific impacts.
9. Determine (and state) whether the incremental impacts of the proposed project, before mitigation, are "cumulatively considerable." A project's incremental contribution to a cumulative impact can be cumulatively considerable even if the project's individual impact has been determined to be less than significant. The EIR may determine that a project's incremental effect is not cumulatively considerable if it: complies with the requirements of a previously approved plan or mitigation program identified in Guidelines § 15064(h)(3); is required to implement or fund its fair share of a mitigation measure designed to alleviate the significant cumulative impact; or is a Transit Priority Project eligible for SB 375 streamlining.
10. If the project's incremental impacts are cumulatively considerable, describe and evaluate feasible, project-specific mitigation measures to avoid or substantially reduce the project's incremental impact. Mitigation measures previously identified in the project's direct impact analysis can be used as a starting point. Determine (and state) whether mitigation measures would render the project's incremental impact less than cumulatively considerable.

### IV. Conclusion

An adequate analysis of cumulative impacts is essential to a legally defensible EIR. More importantly, a thorough analysis provides a more accurate and meaningful picture

of the local, regional, and even global environmental impacts that may result from project approval. Though questions remain, EIR preparers can overcome the complexities of the analysis. This article provides the foundation for a broad understanding of the legal requirements for cumulative impact analysis. By using the best practices and practical approaches outlined here, along with the recommended step-by-step approach, drafting a legally adequate cumulative impact analysis will be less intimidating, more efficient, and more useful to decision-makers and the public.

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## ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

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### Cases

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### Party May Be Awarded Attorneys' Fees Incurred in Administrative Proceeding

*Edna Valley Watch v. County of San Luis Obispo*  
No. B223653, 2d Dist., Div. 6  
2011 Cal. App. LEXIS 998  
August 2, 2011

**Parties may be awarded attorneys' fees under Code Civ. Proc. § 1021.5 that were incurred in administrative proceedings.**

**Facts and Procedure.** The Unitarian Universalist Fellowship planned to build an 11,000-square-foot church complex in the Edna Valley area of defendant county. Da Silva owned property adjacent to the planned church facility. The county planning commission granted the church a conditional use permit for its project. Da Silva appealed the decision to the board of supervisors, who denied the appeal.

Da Silva and Edna Valley Watch, a nonprofit organization, then filed a petition for writ of mandate to direct the county to rescind its approval of the project. The petition was based on the county's alleged failure to comply with

CEQA. Six days after the petition was filed, the church's counsel wrote to plaintiffs, stating that the church was abandoning the approval it received from the county and would return to the permitting process. The letter requested that plaintiffs take no further action on the writ petition. Plaintiffs were concerned that the approval was still valid, and refused to dismiss. The church's counsel wrote to assure them that the church would not reenter the approval process, and that the project was dead. Plaintiffs still refused to dismiss. By the time of the case management conference on November 13, 2008, the Board had adopted a resolution rescinding the project approval. Plaintiffs refused to dismiss until January 26, 2009.

On April 21, 2009, plaintiffs filed a motion for attorneys' fees pursuant to Code Civ. Proc. § 1021.5 ("upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any"). Plaintiffs sought fees for the administrative appeal to the board, for "litigation" and for the fee motion.

The trial court found that the writ petition was the "catalyst" for the ultimate withdrawal of the project application. However, it concluded that as a matter of law the parties were not entitled to an award of fees incurred in administrative proceedings, citing *Best v. California Apprentice Council* [(1987) 193 Cal. App. 3d 1448, 240 Cal. Rptr. 1]. The trial court denied an award of fees to Da Silva, concluding that his "personal stake in blocking the project was not so disproportionate to the cost of this litigation that an award of fees to him is necessary or appropriate." The trial court found that proposed 35-foot-high, 11,000-square-foot, multi-use facility was located immediately adjacent to Da Silva's residence. The residence was a 1903 Victorian purchased in 1997. From the date of purchase until the proposed project was terminated, Da Silva spent over \$350,000 in upgrades to the residence, in addition to his personal time and labor. The residence had a market value of more than \$1 million. The trial court cited letters from Da Silva to county supervisors stating that the proposed project would be devastating to his family's peace, safety and security, not to mention his plans to turn the Victorian into a bed-and-breakfast inn. The letters cited noise, light pollution, loss of privacy, and loss of the view he "paid for."