

I. CEQA – substance and process

A. Major substantive requirement: agency may not approve project with significant impacts unless it finds

1. Impacts rendered less than significant through mitigation or project alternative, or
2. another agency will ensure this, or
3. mitigation or alternatives are infeasible and there are overriding considerations
4. see Guidelines 15091-15093
 - a) note: [The CEQA Guidelines are codified at Title 14 California Code of Regulations section 15000 et seq.](#)
 - b) available at <https://govt.westlaw.com/calregs/Index?transitionType=Default&contextData=%28sc.Default%29>

B. Many procedural requirements, e.g.

1. Public participation required through comment and response process
2. Specific informational disclosures must be provided in environmental review documents
3. Agency must make certain findings

II. EIR = deference to agency on facts, but more procedural requirements

A. CEQA Process – see Flow Chart

B. Key decision: to prepare EIR instead of lesser review document

1. EIR is required if initial study leads to substantial evidence that project may have significant effect

C. consequences of decision to prepare EIR

1. more substantive review of issues
2. more process – e.g., NOP, draft and final EIR, comment and response, more robust alternatives analysis
3. more deference to agency on factual determinations

D. “substantial evidence” is required for factual determinations

1. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion support by facts. Guidelines 15064, 15384
2. Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence. Guidelines 15064
3. An EIR must present facts and analysis, not mere conclusion
4. Agency determinations and findings must be based on substantial evidence (e.g., significance of impacts, effectiveness and feasibility of mitigation)

E. Deference on facts, not procedural requirements

1. If agency prepares an EIR, court will defer to agency factual determinations if supported by substantial evidence –
 - a) Regardless whether other substantial evidence does not support agency
 - b) So opponents do not win in a battle of experts
2. Court will not defer to agency in determining whether agency failed to proceed as required by CEQA
 - a) Process errors count because failure to disclose information required by CEQA and to respond to comments may be fatal

III. What must be in EIR

- A. Project description – CEQA Guidelines §15124
- B. Environmental setting (“baseline”) - §15125
- C. Significant impacts – §15126.2
- D. Cumulative impacts - § 15130
- E. Mitigation proposals – §15126.4
- F. Alternatives – §15126.6
- G. Comment responses – §15132

IV. Project Description - § 15124

A. Elements of project description

1. location
2. objectives
3. description of the project's technical, economic, and environmental characteristics – sufficient for impact analysis
4. uses of EIR, i.e, list of permits and approvals for lead agency and responsible agencies

B. adequacy requirements

1. description must be complete enough to support analysis
2. description must be provided at outset – in draft EIR
3. description must be stable, not shifting
4. description must include the whole of the project – no piecemealing
5. objectives may not be so narrow as to preclude reasonable range of alternatives

V. Environmental setting – § 15125

A. Environmental setting is baseline for analysis because project-caused changes from baseline are its impacts

B. Baseline is given for each resource area, e.g., biological resources, traffic, air quality

C. Requirements

1. Baseline is physical environmental conditions in project vicinity
2. Baseline conditions are typically determined as of the date of NOP or commencement of review – but some exceptions allowed
3. Baseline must be complete enough to support analysis
4. Baseline must be provided early in the process – in the draft EIR – not later
5. Baseline discussion requires identification of inconsistencies between the project and applicable general plans and regional plans
6. baseline should reflect all sources of resource impacts – particularly important to cumulative analysis

VI. environmental impacts – § 15126.2

A. determination of significance

1. question of judgment
2. but must be based on facts and analysis, not mere conclusion

B. thresholds of significance

1. determination may be based on identified threshold of significance
2. CEQA Guidelines Appendix G checklist contains non-quantitative, largely standardless generic thresholds (e.g., significant if “substantial”)
3. EIR may set out quantitative thresholds for impacts subject to quantification (noise, traffic, air pollutants)
4. Other impacts may be qualitatively assessed (aesthetics, biological resources)
5. Agency enjoys great deference in selection of thresholds of significance

C. Significance determination is critical because it triggers requirement to mitigate or to consider a project alternative

D. Likely deference to agency except where there is

1. lack of clarity
2. inconsistency
3. failure to provide facts and analysis
4. clearly erroneous study

VII. Cumulative impacts § 15130

- A. Cumulative impact is effect of project together with past, present, and foreseeable future projects
- B. Requirement to analyze is based on recognition of death by 1,000 cuts
- C. Formal requirements
 - 1. Identify geographic scope of analysis and justify any limitations
 - 2. Identify universe of cumulative projects either by list or by reference to a plan (e.g., General Plan projections)
 - 3. Two-step determination
 - a) Is there a significant cumulative impact from project plus past, present, and foreseeable future projects?
 - b) If so, does project make a “considerable contribution” to that impact?
 - 4. Individually minor impact may nonetheless be a considerable contribution
 - 5. The worse the cumulative conditions, the lower the threshold for “considerable” contribution
- D. EIR’s frequently fail to provide formally adequate cumulative analysis –
- E. typical EIR errors
 - 1. no facts or analysis – e.g., one paragraph cumulative discussion
 - 2. assume no considerable contribution simply because project-level impact is less than significant
 - 3. omit relevant cumulative projects affecting the resource at issue
 - 4. fail to identify geographic scope or apply irrelevant scope (e.g., traffic analysis list of projects and /or geographic scope used for biological impacts)

VIII. Mitigation – §15126.4

- A. Measures to avoid or minimize significant impacts
- B. EIR proposes mitigation; findings state efficacy of mitigation; project approval imposes mitigation
- C. Not required or enforceable for less than significant impacts
- D. Mitigation requires nexus and proportionality
- E. Must propose all feasible mitigation if impact remains unavoidably significant – e.g., impacts for which no quantitative threshold is identified
- F. FEIR must respond to each public proposal of facially feasible mitigation
- G. Mitigation includes both project features and conditions of approval
 - 1. In practice, project features are taken as a given and impacts are determined assuming that the project contains such features
 - 2. Where this matters, commenters may want to insist on enforceable commitment to relevant project features
- H. Mitigation must be enforceable and feasible
- I. Formulation of mitigation may only be deferred if
 - 1. EIR identifies a good reason for deferral
 - 2. Mitigation is known to be feasible
 - 3. Performance specifications are provided – not sufficient to promise mere compliance with recommendations from post-approval study
- J. Impact fees
 - 1. Fee program may provide mitigation for multiple projects with similar impacts with each project paying fair share, e.g., traffic or habitat bank
 - 2. May find effective only if program is funded and committed
 - 3. Program must itself have been subjected to CEQA to determine its efficacy (e.g., habitat mitigation program)

IX. Alternatives - §15126.6

- A. EIR must describe and discuss reasonable range of alternatives that
 - 1. feasibly attain most of the basic objectives of the project – may impede some objectives and may be more costly
 - 2. would avoid or substantially lessen any of the significant effects of the project
- B. alternatives are to project or its location
- C. project objectives frame choice of alternatives
- D. substantial deference given to agency in choice of range of alternatives as long as “reasonable”
- E. EIR must evaluate the comparative merits of the alternatives and identify the environmentally superior alternative – typically done in matrix
- F. EIR must also consider no-project alternative
- G. Infeasibility of alternatives may be determined elsewhere in the record, outside of EIR – an exception to general rule that facts and analysis must be in EIR

X. Comments and final EIR - §15132

- A. Agency must make draft EIR available for public comments for minimum period
- B. Agency must respond to public comments received before close of comment period in final EIR
- C. Must respond to each facially feasible mitigation proposal
- D. Final EIR must contain facts and analysis and provide good-faith reasoned responses
- E. Need not undertake every requested analysis, but must address contested issues, especially where there is expert disagreement
- F. FEIR may revise text of DEIR in response to comments

XI. Water supply

A. EIR must evaluate whether there is a water supply

B. EIR must also evaluate

1. effect of providing a water supply on other uses including environmental uses
2. impacts of constructing necessary infrastructure
3. uncertainty of future supply

C. more detailed analysis is required for project-level approval than for approval of general or specific plan

D. law is highly evolved here and courts tend to give less deference to agency factual determinations

1. courts will look carefully at water balance accounting
2. courts may reject paper water claims
3. courts will not permit deferral of analysis, even if development is phased based on water availability

E. SB 610 formal water supply assessment is required for large projects (e.g., +500 units residential projects)

1. WSA is to evaluate whether supplies will meet projected demand, including cumulative demand, over 20 year period
2. WSA must provide certain information about groundwater, water rights, overdrafting, and sufficiency and reliability of supplies
3. water supplier is to prepare and certify, then WSA is included in EIR
4. but agency may draw its own conclusions about water supply and reject water supplier conclusions

F. uncertain water supply not fatal to CEQA document, but can be fatal to residential subdivision over 500 units

1. CEQA permits approval with uncertain water supply with adequate disclosure and, if impacts are unavoidably significant, a finding of overriding considerations
2. But SB 221 mandates written verification of an adequate water supply before recording final map