RESPONSES TO STAFF REPORT # 19-11 :

Page 1 ; "Summary", 2nd Paragraph

The report fails to mention that an " **ACTION** " item ("Environmental Clearance") was not approved (or certified) at the October 3, 2018 Planning Commission hearing, and tonight's hearing, contrary to October 3, 2018 hearing, totally ignores any CEQA determination despite the fact that this VTSM extension request is clearly "discretionary" and as the City admits on page 3, paragraph "B". [Public Resources Code, 21080, subdivisions (a), (b)(1) and CEQA Guidelines Sections 15268, 15357, 15369)].

According to the Staff Report, the Planning Commission "**ACTION**" is to "Approve/Disapprove/Modify" VTSM # 1291 and the Conditions of Approval, similar to the 2nd **ACTION** item on the Planning Commission agenda for

the October 3, 2018 hearing. I am now timely reasserting all issues raised in my January 30, 2019 letter ("**ATTACHMENT K**"). The Planning Commission has the authority and duty to consider all of those issues just as if they were raised at the October 3, 2018 hearing.

On the bottom of page 2 and top of page 3, the Staff Report states the City Attorney concluded that the time within which I may raise those issues had expired and, therefore, may not be considered. While that opinion may have been accurate with regard to planning and zoning issues (according to the California Government Code), that opinion from the City Attorney is wrong with regard to CEQA [according to California Public Resources Code Section 21167 (a)]. Specifically, the modified Conditions of Approval must analyze the environmental impact(s) associated with the

changing project description and the changed background setting. The background setting is substantially different than it was in 2006 [Note: the current Staff Report declares that "Environmental Review #06-26 – CEQA Section 15162 Findings remains sufficient for this project"]. The City's Staff Report # 19-11 describes how the applicant will **again** modify the subdivision by relocating the drainage basin. This planned and privately conceived modification *denies* the public and adjoining property owners (like myself) the rightful opportunity to review a "stable, finite, and accurate" project description and make comments regarding the latest changes to the project.

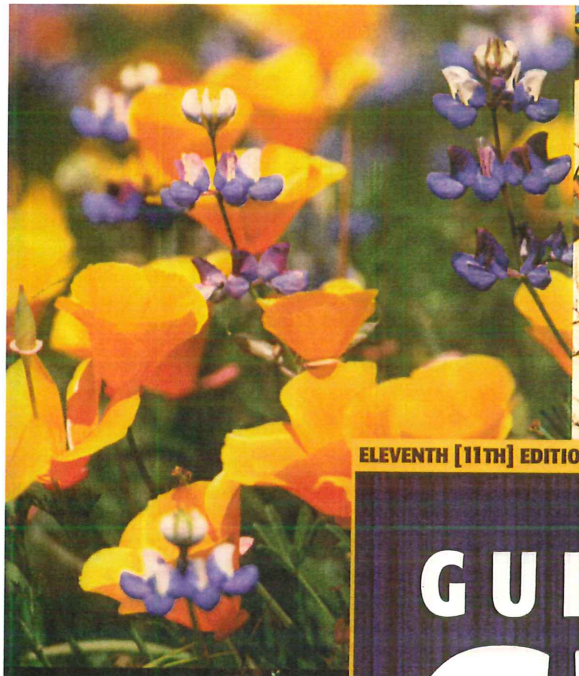
The most significant modification to this ever- changing subdivision map is the proposed Emergency Vehicle Access (EVA). According to Staff

Report # 19-11, the City is now relying on Environmental Review # 06-26, prepared in 2006, in contrast to "Environmental Review # 18-56 (CEQA Section 15162 Findings)" presented to the Planning Commission on October 3, 2018. In 2006 the project was not designed to include an EVA and therefore, the environmental analysis could not possibly have considered the environmental impacts of allowing *any* direct access on to "G" Street. Further, at that time, the *MERCED VISION 2015 GENERAL PLAN* was the supreme planning document by which all Conditions of Approval would need to be evaluated. Since the 2015 General Plan strictly prohibits access to and from "Major Arterials" ("G" Street) and to or from adjoining properties, the EVA modification cannot be approved, and the outdated environmental review documents must be revised and updated, based on the current environmental baseline. [See, *Woodward Park Homeowners Ass'n v.*

City of Fresno (2007) 150 Cal.App. 4th 683.] Also, because the current Conditions of Approval for VTSM # 1291 (as modified by the Planning Commission at the October 3, 2018 hearing : see "**ATTACHMENT J**") referenced the *MERCED VISION 2030 GENERAL PLAN,* the City must revise those Conditions of Approval that reference the EVA and the *MERCED VISION 2030 GENERAL PLAN.*

[Please see attached references and legal citations, including highlighted provisions from the Remy, Thomas, Moose & Manley treatise, especially the authors' comments concerning the citations supporting the lead agency's duty to disclose and consider current baseline background conditions when reviewing prior environmental review documents supporting discretionary approvals.]

RICK TELEGAN, March 19, 2019
Manager, BP INVESTORS, LLC



ELEVENTH [11TH] EDITION

GUIDE TO CEQA

California Environmental Quality Act

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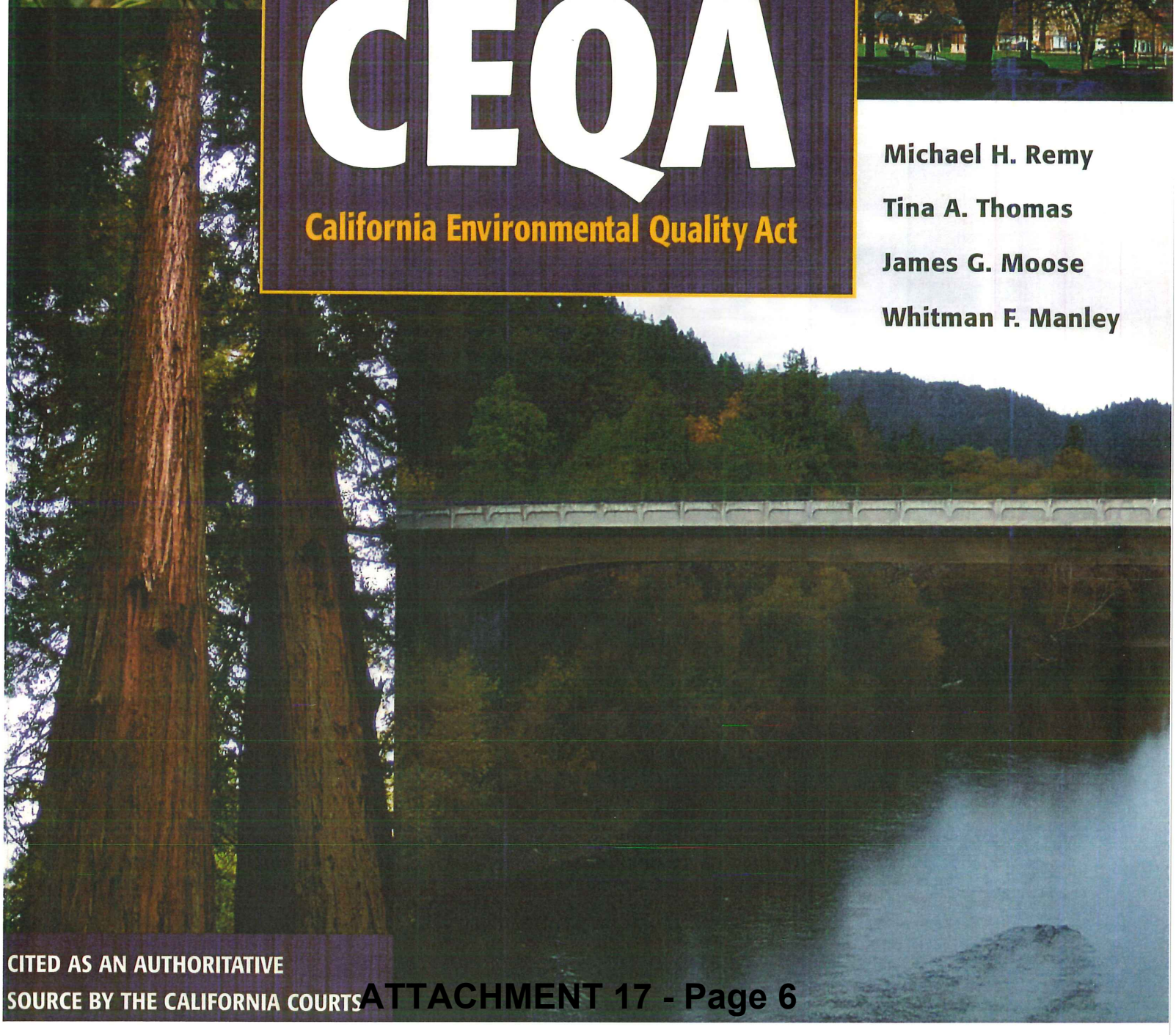

CITED AS AN AUTHORITATIVE SOURCE BY THE CALIFORNIA COURTS

not proceed to perform further environmental review (unless some abbreviated level of further review is required by the terms of the applicable exemption itself). *See* chapter V (Exempt Activities), section C.2 (statutory exemptions).

If the project falls within a categorical exemption, then the agency must inquire whether the categorical exemption is negated because the project is subject to an exception to the categorical exemptions.

If the project falls within a categorical exemption, then the agency must make a fourth inquiry: whether the categorical exemption is negated because the project is subject to an *exception* to the categorical exemptions. CEQA Guidelines, § 15300.2; Pub. Resources Code, § 21084. If the project's ostensible categorical *exemption* is subject to one of these *exceptions*, then the agency cannot rely on a categorical exemption, but must prepare an initial study and eventually a negative declaration or EIR. *See* chapter V (Exempt Activities), section C.3.d (exceptions to categorical exemptions).

The fifth potential inquiry occurs where the agency has determined that its action involves approval of a project, but the project does not fall within a statutory or categorical exemption. That inquiry is whether, as a matter of common sense, "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." CEQA Guidelines, § 15061, subd. (b)(3); Discussion following CEQA Guidelines, § 15061; *Davidon Homes v. City of San Jose* (6th Dist. 1997) 54 Cal. App. 4th 106, 112–120 [62 Cal. Rptr. 2d 612]. If the answer to the fifth inquiry is in the affirmative, no further review is required, though the agency should justify its conclusion in writing. *See* chapter V (Exempt Activities), section C.8 (the common sense exemptions).

1. Is the Agency Considering "Approval" of a Proposed Action?

CEQA generally applies to discretionary projects proposed to be carried out or approved by public agencies.

CEQA generally applies to "discretionary *projects* proposed to be carried out or *approved* by public agencies...." Pub. Resources Code, § 21080, subd. (a) (italics added). The CEQA Guidelines and case law have interpreted this quoted language to require a threshold, two-part analysis to determine the applicability of CEQA. The relevant inquiry is whether an agency proposes (1) to "approve," (2) a "project." *Lexington Hills Association v. State of California* (6th Dist. 1988) 200 Cal. App. 3d 415, 430–433 [246 Cal. Rptr. 97].

a. "Approval" Occurs When the Agency Commits to a Definite Course of Action. CEQA does not define the term "approve." The CEQA Guidelines, however, define "approval" as:

> [T]he decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by a person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval.

CEQA Guidelines, § 15352, subd. (a)

For private projects, "approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." CEQA Guidelines, § 15352, subd. (b).

no need to comply with CEQA in approving the agreement, and could instead limit its CEQA obligations to its *future* consideration of a specific plan and tentative map for the site. What is clear is that the opinion neither explicitly holds that CEQA does not apply to the legislative action of approving a development agreement (*see* Gov. Code, § 65867.5) nor discusses any possible legal authority for such a proposition. To the extent that readers might glean from the case any suggestion that CEQA generally does not apply to development agreements that unambiguously vest applicants' rights to develop property, the authors of this book believe that such a conclusion is contrary to long-settled principles of CEQA case law, for reasons discussed in chapter II (The Public Policies Explicit and Implicit in CEQA), section B.

In City of Chula Vista, *the Court of Appeal considered what constitutes an approval for purposes of triggering the 180-day statute of limitations for challenging an action treated as exempt from CEQA.*

b. "Approval" for Purposes of Triggering the 180-Day Statute of Limitations. In *City of Chula Vista v. County of San Diego* (4th Dist. 1994) 23 Cal. App. 4th 1713 [29 Cal. Rptr. 2d 89] (*City of Chula Vista*), the Court of Appeal considered what constitutes an "approval" for purposes of triggering the 180-day statute of limitations for challenging an action treated as exempt from CEQA. The action at issue was a five-year agreement pursuant to which the respondent county had authorized the continuing operation of a hazardous waste treatment and transfer facility. The petitioner city had filed its lawsuit within 180 days of the formal *execution* of the agreement, but had not filed within 180 days of the board of supervisors' decision authorizing its staff to *negotiate* the agreement. The county had filed a "notice of exemption" (NOE) after authorizing these negotiations, as though its decision constituted final project approval for CEQA purposes. In rejecting the city's lawsuit, the court agreed with the county's characterization of its action, reasoning that "the facts alleged in the city's petition... clearly show that the 'project' (*i.e.*, the agreement) was approved by the county on November 28, 1989, and the actual agreement executed on January 29, 1992, was not substantially different from the original 'project.'"[4] *Id.* at p. 1720.[5]

NOE = Notice of exemption

The *City of Chula Vista* decision does not cite to *Miller v. City of Hermosa Beach*, (2d Dist. 1993) 13 Cal. App. 4th 1118 [17 Cal. Rptr. 2d 408] (*Miller*) (discussed in footnote 3, *supra*), even though these decisions are arguably in tension. *Miller* had held that a statute of limitations for a challenge to a hotel project ran from the formal issuance of a building permit rather than the prior approval of an "Approval in Concept." *Miller*, *supra*, 13 Cal. App. 4th at pp. 1142–1143. One possible means of reconciling these cases is to consider dispositive, or at least important, the fact in the *Miller* case, when the city granted its "Approval in Concept," the city apparently did not file a notice of exemption or undertake any other action indicating that the city regarded its CEQA obligations as being completed. *Id.* at pp. 1124, 1142–1143. In contrast, in *City of Chula Vista*, the county filed an NOE at the time it authorized its staff to negotiate the agreement with the operator of the hazardous waste facility. *City of Chula Vista*, *supra*, 23 Cal. App. 4th at p. 1717. The county thus provided public notice of the fact that it believed it had fulfilled its CEQA obligations. Together, the cases suggest that the courts may defer to an agency's own characterization of whether its action constitutes an "approval" of a project within the meaning of CEQA.

Together, these cases suggest that the courts may defer to an agency's own characterization of whether its action constitutes an approval of a project within the meaning of CEQA.

Notably, the court's decision in *City of Chula Vista* may have the unintended effect of requiring petitioners in similar situations to challenge agency actions that are somewhat tentative in nature, at least where the agency in question has filed

a notice of exemption or notice of determination after taking its action. In other words, based on this precedent, would-be litigants may now feel obligated (and in fact may be required) to file lawsuits prior to the execution of contracts between public agencies and private parties, even though the negotiation process, with its give and take, might eventually obviate the perceived need for such litigation.

CEQA does not apply to projects that an agency disapproves.

c. "Disapproval" Does Not Require CEQA Compliance. CEQA does not apply to projects that an agency disapproves. Pub. Resources Code, § 21080, subd. (b)(5); CEQA Guidelines, § 15270, subd. (a); *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (4th Dist. 2000) 82 Cal. App. 4th 473, 479 [98 Cal. Rptr. 2d 202] (petitioner's appeal could not compel a city to require supplemental environmental analysis based on changed circumstances in connection with a design review application where the city had *denied* the application); *Native Sun/Lyon Communities v. City of Escondido* (4th Dist. 1993) 15 Cal. App. 4th 892, 906–907 [19 Cal. Rptr. 2d 344] (EIR requirement is triggered only when "a public agency *proposes to carry out or approve* a project which may have a significant effect on the environment") (italics in original); *Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (2d Dist. 1993) 12 Cal. App. 4th 1371, 1379–1384 [16 Cal. Rptr. 2d 288] (an EIR was not required to disapprove a proposal to expand a landfill); *City of National City v. State of California* (4th Dist. 1983) 140 Cal. App. 3d 598, 602–603 [189 Cal. Rptr. 682] (CEQA review was not required to rescind a decision to construct a highway and release rights-of-way).

2. Does the Subject Matter of the Proposed Action Constitute a "Project"?

After an agency determines that it proposes to approve an action, its next inquiry is whether the decision finalizing its commitment constitutes a project.

After an agency determines that it proposes to "approve" an action, its next inquiry is whether the decision finalizing its commitment constitutes a "project." *See* Pub. Resources Code, § 21065; CEQA Guidelines, §§ 15357, 15377, 15378.

a. "Project" Definition—Public Resources Code Section 21065. As amended in 1994, CEQA defines "project" to mean "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

(a) An activity which is directly undertaken by any public agency.

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

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

Pub. Resources Code, § 21065[6]

An activity that will not cause any direct environmental effects but that may cause some indirect environmental effects is not a project unless those indirect effects are reasonably foreseeable.

According to the statutory definition, an activity that will not cause any *direct* environmental effects but that may cause some *indirect* environmental effects is not a "project" unless those indirect effects are "reasonably foreseeable."

In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 257–262 [104 Cal. Rptr. 761], the California Supreme Court held that the term "project" includes not only government-initiated actions, but also the government's approval of privately-initiated "permits, leases, and other entitlements." The statutory definition

has codified this conclusion. Pub. Resources Code, § 21065, subd. (c). To constitute a "project," however, a proposed government action affecting private activity must bear "some minimal link with the [private] activity, either by direct proprietary interest or by permitting, regulating, or funding private activity." *Simi Valley Recreation & Park District v. Local Agency Formation Commission* (2d Dist. 1975) 51 Cal. App. 3d 648, 664 [124 Cal. Rptr. 635] (*Simi Valley*).[7] The "minimal link" may be "direct" or "ultimate." CEQA Guidelines, § 15378, subd. (a).

i. **CEQA Defines "Project" Broadly.** Some early Court of Appeal decisions understood the term "project" to have a "sweeping definition." *City of Santa Ana v. City of Garden Grove* (4th Dist. 1979) 100 Cal. App. 3d 521, 526–527 [160 Cal. Rptr. 907].[8] As recently as 1997, one Court of Appeal stated that "CEQA defines a 'project' extremely broadly...." *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (2d Dist. 1997) 52 Cal. App. 4th 1165, 1188 [61 Cal. Rptr. 2d 447].

Other Court of Appeal decisions appear to reflect a fear that too broad an application of the concept of "project" would place too great a burden on agency activities. In *Lexington Hills Association v. State of California* (6th Dist. 1988) 200 Cal. App. 3d 415, 434 [246 Cal. Rptr. 97], for example, the Court of Appeal for the Sixth District described "the burden of preparing environmental reports" as "onerous." In *Simi Valley Recreation & Park District v. Local Agency Formation Commission* (2d Dist. 1975) 51 Cal. App. 3d 648 [124 Cal. Rptr. 635] (*Simi Valley*), the Court of Appeal for the Second District stated:

> CEQA was not intended to make and cannot reasonably be construed to make a project of every activity of a public agency, regardless of the nature and objective of such activity. Such a construction would invoke the expensive and time-consuming procedures required to complete at least a negative declaration in respect of virtually every action of a public agency. It is difficult to conceive of any such action which could not have a 'potential for significant environmental effect[.]

Id. at p. 663

Even actions that might be disparaged as mere governmental paper-shuffling can constitute projects, so long as they culminate in physical impacts to the environment.

ii. **Planning Decisions That May Lead to Physical Environmental Impacts Are Considered "Projects."** Even actions that might be disparaged as mere "governmental paper-shuffling" (*e.g.*, the adoption of a general plan) can constitute projects, so long as they "culminate" in physical impacts to the environment. *Bozung v. Local Agency Formation Commission* (1975) 13 Cal. 3d 263, 277–281 [118 Cal. Rptr. 249]. Thus, a discretionary agency action qualifies as a "project" whenever it is "necessary to the carrying out of some private project involving a physical change in the environment." *Simi Valley Recreation & Park District v. Local Agency Formation Commission* (2d Dist. 1975) 51 Cal. App. 3d 648, 664 [124 Cal. Rptr. 635].[10] For example, general plan amendments frequently can culminate in significant environmental effects, particularly where they will allow specific areas to be developed for previously disallowed land uses,[11] or set new policies with reasonably foreseeable real-world consequences.[12]

Similarly, the rezoning of property to achieve consistency with an existing coastal plan may necessitate the preparation of an EIR, particularly where the rezoning is the first step in processing a development project. In *City of Carmel-By-the-Sea v. Board of Supervisors of Monterey County* (6th Dist. 1986) 183 Cal. App. 3d 229

[227 Cal. Rptr. 899], for example, the court held that the agency must prepare an EIR, rather than a negative declaration, before the agency rezoned property to achieve consistency with a Land Use Plan prepared pursuant to Coastal Act (Pub. Resources Code, § 30000 *et seq.*). The court noted that the rezoning was the first step in processing a proposal to develop the land for residential, commercial, and recreational uses. *Id.* at pp. 243–244.

b. "Project" Definition–CEQA Guidelines Section 15378. The definition of "project" in the CEQA Guidelines includes language similar to that found in the statute (Pub. Resources Code, § 21065), and adds some significant detail. The Guidelines provide that "project" means "the *whole* of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment[.]" CEQA Guidelines, § 15378, subd. (a) (italics added). Examples of "activit[ies] directly undertaken by any public agency" include, but are not limited to, "public works construction and related activities, clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100–65700." CEQA Guidelines, § 15378, subd. (a)(1).

The Guidelines provide that "project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

"The term 'project' refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." CEQA Guidelines, § 15378, subd. (c); *see also Sherwin-Williams Co. v. South Coast Air Quality Management District* (2d Dist. 2001) 86 Cal. App. 4th 1258, 1286 [104 Cal. Rptr. 2d 288]; *Committee for a Progressive Gilroy v. State Water Resources Control Board* (3d Dist. 1987) 192 Cal. App. 3d 847, 863 [237 Cal. Rptr. 723]. "The purpose of Guidelines section 15378, subdivision (c) is to ensure that a project proponent does not file separate environmental reports for the same project to different agencies thereby preventing 'consideration of the cumulative impact on the environment....'" *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (2d Dist. 1997) 52 Cal. App. 4th 1165, 1190, fn. 5 [61 Cal. Rptr. 2d 447] (quoting *City of Santee v. County of San Diego* (4th Dist. 1989) 214 Cal. App. 3d 1438, 1452 [263 Cal. Rptr. 340]).

The term project refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval.

CEQA Guidelines section 15378 also lists several activities that do *not* fall within the meaning of the term "project," and thus are not subject to CEQA. These activities are: (1) proposals for legislation to be enacted by the State legislature; (2) continuing administrative or maintenance activities; (3) the submittal of proposals to a vote of the people of the state or of a particular community that does not involve an agency-sponsored initiative;[13] (4) "[t]he creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment"; and (5) organizational or administrative activities of government that will not result in direct or indirect physical changes in the environment. CEQA Guidelines, § 15378, subds. (b)(1)–(5).[14]

c. "Project" Definition–Leading Cases. Whether a particular activity constitutes a project is a question of law as to which a reviewing court owes no deference to the judgment of a respondent agency. *Fullerton Joint Union High School District v. State Board of Education*

B. CEQA Applies to *Discretionary* Projects

CEQA applies to discretionary projects; it does not apply to projects that are purely ministerial.

CEQA applies to "discretionary projects." CEQA does not apply to projects that are purely "ministerial." Pub. Resources Code, § 21080, subds. (a), (b)(1); CEQA Guidelines, §§ 15268, 15357, 15369.[18] One early Court of Appeal decision indicates, however, that even where a government approval involves virtually no discretion, CEQA review may be required if the approval "is the only point at which the environmental impact of the project may be publicly considered." *Day v. City of Glendale* (2d Dist. 1975) 51 Cal. App. 3d 817, 824 [124 Cal. Rptr. 569] (*Day*) (issuance of grading permit was the only chance for CEQA review in process by which ridge would be cut and canyons filled to facilitate highway construction);[19] *see also Friends of Westwood, Inc. v. City of Los Angeles* (2d Dist. 1987) 191 Cal. App. 3d 259, 271–273 [235 Cal. Rptr. 788] (*Friends of Westwood*) (in order to interpret CEQA "in such manner as to afford the *fullest possible protection* to the environment within the *reasonable* scope of the statutory language," it may be necessary to apply CEQA "even where the process is largely ministerial") (italics in original).

A "discretionary project" is one that "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." CEQA Guidelines, § 15357.[20]

Ministerial projects involve little or no personal judgment by the public official as to the wisdom or manner of carrying out the project; he merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision.

"Ministerial projects," on the other hand, "[involve] little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." CEQA Guidelines, § 15369.[21] "The determination of what is 'ministerial' can most appropriately be made by the particular agency involved based upon its analysis of its own laws, and each public agency should make such determination either as part of its implementing regulations or on a case-by-case basis." CEQA Guidelines, § 15268, subd. (a).[22]

Projects with both ministerial and discretionary attributes are treated as discretionary.

Projects with both ministerial and discretionary attributes are treated as discretionary. CEQA Guidelines, § 15268, subd. (d); *Miller v. City of Hermosa Beach* (2d Dist. 1993) 13 Cal. App. 4th 1118, 1139 [17 Cal. Rptr. 2d 408]; *Friends of Westwood, supra*, 191 Cal. App. 3d at pp. 270–271; *Citizens for Non-Toxic Pest Control v. California Department of Food and Agriculture* (1st Dist. 1986) 187 Cal. App. 3d 1575, 1583 [232 Cal. Rptr. 729]; *Environmental Law Fund v. City of Watsonville* (1st Dist. 1981) 124 Cal. App. 3d 711, 713 [177 Cal. Rptr. 542]; *San Diego Trust and Savings Bank v. Friends of Gill* (4th Dist. 1981) 121 Cal. App. 3d 203, 210–211 [174 Cal. Rptr. 784]; *Natural Resources Defense Council, Inc. v. Arcata National Corp.* (1st Dist. 1976) 59 Cal. App. 3d 959, 970 [131 Cal. Rptr. 172] (*Natural Resources Defense Council*); *Day, supra*, 51 Cal. App. 3d at pp. 823–824.[23] "[D]oubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization." *Friends of Westwood, supra*, 191 Cal. App. 3d at p. 271 (quoting *People v. Department of Housing and Community Development* (3d Dist. 1975) 45 Cal. App. 3d 185, 194 [119 Cal. Rptr. 266]).

local agency decides to file an NOE, then the document is filed with the county clerk. If a state agency decides to file an NOE, then the document is filed with the Office of Planning and Research (OPR). Pub. Resources Code, §§ 21108, subd. (b), 21152, subd. (b); CEQA Guidelines, § 15062.[22] "All public agencies are encouraged to make [their NOEs] available in electronic format on the Internet. Such electronic postings are in addition to the procedures required" by the CEQA Guidelines "and the Public Resources Code." CEQA Guidelines, § 15062, subd. (c)(3). Practitioners should note, however, that while the filing of an NOE is generally optional, there are certain situations in which, by statute, agencies must file with OPR notices that they have determined that approvals of certain kinds of housing projects (*see* Pub. Resources Code, §§ 21159.22–21159.24, discussed in this chapter in section C.2.h, *infra*) have been treated as exempt from CEQA. Pub. Resources Code, § 21152.1, subd. (a).[23]

OPR = Governor's Office of Planning and Research

If the agency files an NOE, then interested persons have 35 days in which to file a legal challenge to the agency's determination of exemption.

ii. Filing a Notice of Exemption Triggers 35-Day Statute of Limitations. If the agency files an NOE, then interested persons have 35 days in which to file a legal challenge to the agency's determination of exemption. Pub. Resources Code, § 21167, subd. (d); CEQA Guidelines, §§ 15062, subd. (d), 15112, subd. (c)(2); *Apartment Association of Greater Los Angeles v. City of Los Angeles* (2d Dist. 2001) 90 Cal. App. 4th 1162, 1171 [109 Cal. Rptr. 2d 504]. The NOE cannot be filed until after the agency acts to approve the project; thus, an NOE filed prior to project approval does not trigger the 35-day statute of limitations. CEQA Guidelines, § 15062, subd. (a); *County of Amador v. El Dorado County Water Agency* (3d Dist. 1999) 76 Cal. App. 4th 931, 962–964 [91 Cal. Rptr. 2d 66] (*County of Amador*). Further, for the 35-day period to apply, state agencies must file NOEs with OPR; and local agencies must file them with the county clerk. Pub. Resources Code, §§ 21108, 21152, 21167, subd. (f); CEQA Guidelines, § 15062, subd. (c); *Lewis v. Seventeenth District Agricultural Association* (3d Dist. 1985) 165 Cal. App. 3d 823, 831 [211 Cal. Rptr. 884]. Once the local agency files the notice with the clerk, the clerk must post the document within 24 hours, for a period of 30 days. Pub. Resources Code, § 21152, subd. (c); *County of Amador*, *supra*, 76 Cal. App. 4th at pp. 962–963.[24]

If the agency does not file an NOE, or if the notice is materially defective, then the statute of limitations period to challenge its determination is 180 days.

If the agency does not file an NOE, or if the notice is materially defective, then the statute of limitations period to challenge its determination is 180 days. Pub. Resources Code, § 21167, subd. (d); CEQA Guidelines, § 15062, subd. (d); *Apartment Association of Greater Los Angeles*, *supra*, 90 Cal. App. 4th at p. 1171; *County of Amador*, *supra*, 76 Cal. App. 4th at p. 963; *City of Chula Vista v. County of San Diego* (4th Dist. 1994) 23 Cal. App. 4th 1713, 1719–1720 [29 Cal. Rptr. 2d 89].[25]

iii. Required Contents of a Notice of Exemption. Appendix E of the CEQA Guidelines provides a suggested format for an NOE, which must contain the following information:

- A brief description of the project
- The location of the project either by street address or map
- A finding that the project is exempt, including a citation to the relevant CEQA Guideline section under which the project is exempt; and
- A brief statement of reasons to support the finding

CEQA Guidelines, § 15062, subd. (a)

environment and are beyond the reach of CEQA. For all intents and purposes, what was visible before will be no different than what will be visible if the modifications are completed. [Footnote omitted.] Both theoretically and practically, the concept of an "environment" must mean something more than what is perceivable only by the one person who wishes to change his or her own decor and those who may visit him at his home."); *id.* at p. 404 (the "sine qua non of CEQA is missing here; no one not actually inside Martin's house will have any percipient awareness that interior modifications have been made. *** *Destruction of an irreplaceable antiquity not being savored by the public does not qualify as a significant effect.*" (italics added.)). A broad reading of the case might for instance lead to the conclusion that impacts to all historical or archeological resources that are underground on private property are not protected by CEQA. Such a conclusion would appear to be at odds with Public Resources Code sections 21083.2 and 21084.1 and CEQA Guidelines section 15064.5, subdivision (c).

18. *See also Qwest Communication Corp. v. City of Berkeley* (N.D. Cal. 2001) 146 F. Supp. 2d 1081, 1105 (CEQA did not apply to an application for excavation because approval of the proposal under the city's general excavation permit process involved a ministerial act).

19. The quotation set forth above may be dicta, and has not been followed by other courts. In any event, the Court of Appeal in *Day v. City of Glendale* (2d Dist. 1975) 51 Cal. App. 3d 817, 824 [124 Cal. Rptr. 569] (*Day*) found that the respondent city's grading ordinance was of a "mixed ministerial-discretionary" character, because the factors to be considered in issuing the permit "require[d] the exercise of judgment, deliberation, and decision by the city engineer." *Day, supra,* 51 Cal. App. 3d at p. 823. As discussed in more detail elsewhere in this section, projects with both ministerial and discretionary attributes are generally treated as being discretionary. CEQA Guidelines, § 15268, subd. (d).

20. *See also* CEQA Guidelines, § 15002, subd. (i) (CEQA applies to discretionary actions); *Johnson v. State of California* (1968) 69 Cal. 2d 782, 788 [73 Cal. Rptr. 240] ("[a] discretionary act is one which requires 'personal deliberation, decision and judgment' while an act is said to be ministerial when it amounts 'only to... the performance of a duty in which the officer is left no choice of his own'"); *Prentiss v. City of South Pasadena* (2d Dist. 1993) 15 Cal. App. 4th 85, 90–91 [18 Cal. Rptr. 2d 641] (*Prentiss*) (quoting CEQA Guidelines sections 15357 and 15369 defining "discretionary" and "ministerial" actions, respectively); *Miller v. City of Hermosa Beach* (2d Dist. 1993) 13 Cal. App. 4th 1118, 1139 [17 Cal. Rptr. 2d 408] (*Miller*) (same); *Natural Resources Defense Council, Inc. v. Arcata National Corp.* (1st Dist. 1976) 59 Cal. App. 3d 959, 969–970 [131 Cal. Rptr. 172] (*Natural Resources Defense Council*) (discussing general principles in determining whether an action is "discretionary" or "ministerial," and concluding that "[a]lthough whether an act qualifies as discretionary or ministerial in a concrete instance is subject to varying interpretation, the cases dealing with environmental disputes point out that statutory policy, not semantics, is the controlling standard"); *Day, supra,* 51 Cal. App. 3d at p. 822 (discussing CEQA Guidelines definitions of "discretionary" and "ministerial" actions and concluding that CEQA does not give local agencies absolute power to determine which projects are ministerial).

21. *See also* CEQA Guidelines, § 15268, subd. (b) (outlining CEQA exemption for ministerial projects).

22. *See also Friends of Davis v. City of Davis* (3d Dist. 2000) 83 Cal. App. 4th 1004, 1015 [100 Cal. Rptr. 2d 413] (quoting CEQA Guidelines, § 15268, subd. (a), in explaining that respondent city's interpretation of the scope of its own design review ordinance is entitled to great weight unless clearly erroneous or unauthorized).

23. *Cf. Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal. 4th 105, 119 [65 Cal. Rptr. 2d 580] ("the Legislature intended CEQA to apply to discretionary projects, even when the agency's discretion to fully comply with CEQA is constrained by the substantive laws governing its actions").

24. *Compare Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (2d Dist. 1993) 15 Cal. App. 4th 200, 207–208 [19 Cal. Rptr. 2d 1] (relying on the implied statutory exemption for projects commenced prior to the enactment of CEQA rather than on the express statutory exemption for ministerial projects, the Court of Appeal held that the respondent water agency was not required to comply with CEQA before making its annual decision to allocate reservoir water amongst various competing agricultural, municipal, and environmental uses; the dam in question had been built in the 1950's); *First Presbyterian Church v. City of Berkeley* (1st Dist. 1997) 59 Cal. App. 4th 1241, 1255–1257 [69 Cal. Rptr. 2d 710] (the Ellis Act (Gov. Code, § 7060 *et seq.*), which allows owners of rental units