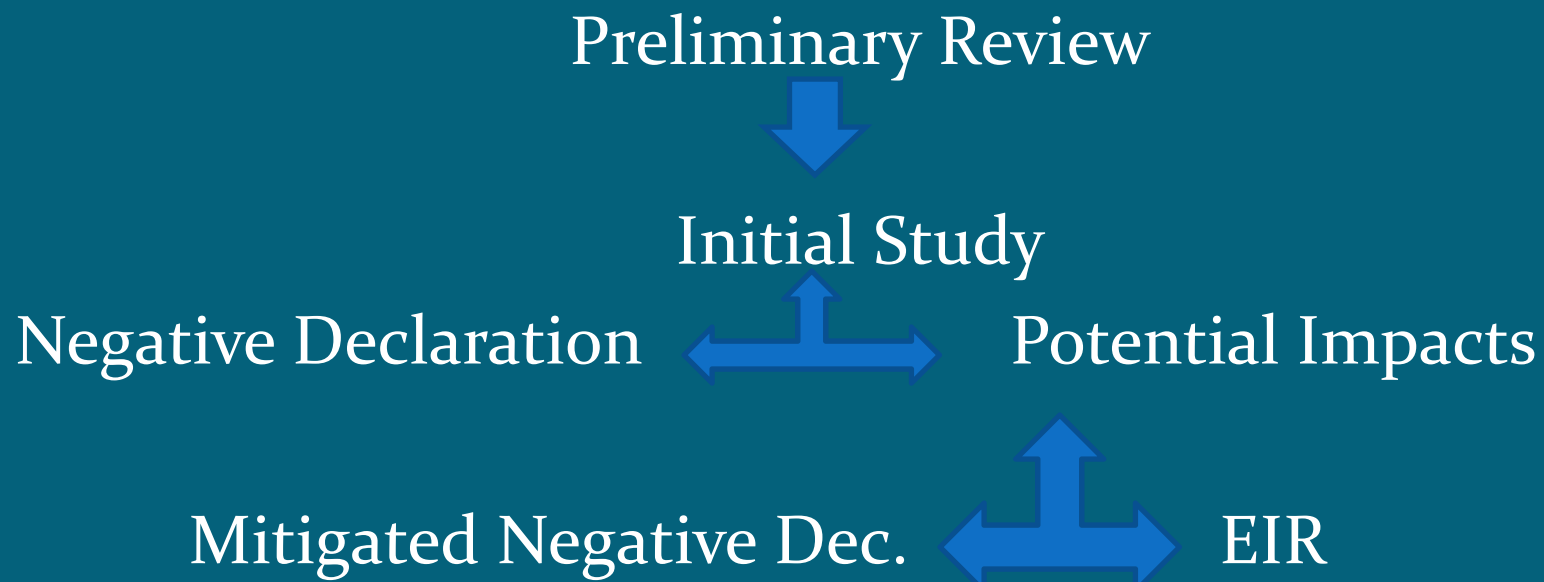


# CEQA Mitigated Negative Declarations and EIRs

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# CEQA Decision Tree



# Common Pitfalls

- Predetermining that an EIR or MND will not be required.
- Misapplying categorical exemptions .
  - Watch out for the “unusual circumstances” exception
    - *Berkeley Hillside Preservation v. City of Berkeley* (2012)
    - *Concerned Dublin Citizens v. City of Dublin* (2013)
- Failing to consider exceptions.
- Failing to prepare an Initial Study (case analysis) or to identify potential impacts in the Initial Study.
- Failing to support conclusions in the ND or MND with evidence from the Initial Study (or in the administrative record).
- A Negative Declaration may only be prepared for a project when there is no substantial evidence that the project or any of its aspects could result in significant adverse impacts. (CEQA Guidelines 15063(b)(2)).
- Is there an existing EIR? (Case analysis)

# Mitigated Negative Declaration (MND)

- When to Use: The Initial Study identified potentially significant environmental effects , but the project can be revised to eliminate or mitigate the impacts to less-than-significant levels.
- An MND can be adopted where there is no substantial evidence in light of the whole record that the project, as revised, by incorporation of the mitigation measures, may have a significant effect on the environment. (CEQA Sec. 21064.5 & CEQA Guidelines Sec. 15070).

# MND “Mitigation Measures”

- These measures **MUST** be incorporated into the project, explained in the project description, and circulated for public review before certification of the MND. (Case analysis)
- A monitoring program must be in place to ensure the mitigation measures are incorporated into the project. (CEQA Guidelines Sec. 15074(d)).

# Common Pitfalls In MND

- The “mitigation measures” are not specific (*e.g.*, “We will adopt a traffic plan to avoid adverse impacts.”)
- The administrative record lacks evidentiary support for the mitigation measures.
- The mitigation measures do not actually mitigate the issues identified in the Initial Study.
- The Initial Study was defective in not identifying potentially significant impacts.
- The “project description” was inadequate.

# What Happens After MND Issued

- Public must receive “Notice of Intent To Approve a Proposed Mitigated Declaration” as set forth in CEQA Guidelines Section 15072.
- Copies must be sent to State Clearinghouse and County Clerk.
- Documents “should” be made available electronically.
- All individuals/organizations that have requested notice should receive a copy. (CEQA Sec. 21092.2 and CEQA Guidelines Sec. 15073.)
- Direct mailing and newspaper notice required. (CEQA Guidelines Sec. 15072.)
- Public hearing must be set and, generally, written comments received.

# Comments To MND

- Agency must consider ALL comments.
- All comments must be included in final MND.
- Comments should be part of the administrative record.
- If it can be “fairly argued,” based upon the comments, that a potentially significant environmental impact will still occur, the MND must be revised and/or an EIR prepared.
- The MND mitigation measures can be replaced following a public hearing without requiring the MND be recirculated if replaced with equivalent or more effective measures. (CEQA Guidelines Sec. 15073.5.)



# Frequent Issues-Public Comments

- How much weight should be given to a “lay person’s” opinion?
- Can the agency disregard the “lay person’s” opinion?
- What happens when qualified outside experts submit opinions?
- What weight should be given to an outside expert’s opinions vs. in-house agency opinions?
- Can an agency disregard an outside expert’s opinions and/or in-house agency opinions?
- What is meant by “fair argument”?

# MND - “Project Approval”

- Agency must review comments and conclude that there is no substantial evidence that the project would have a significant effect on the environment. (CEQA Guidelines Sec. 16074(b)).
- Agency must make appropriate findings in writing.
- Notice of Determination must be filed.
  - 30 day statute of limitations if NOD is filed.
  - 180 day statute of limitations if no NOD is filed.
  - 180 day statute of limitations from date project commences if no formal decision by public agency.

# Environmental Impact Report (“EIR”)

- When to Use: “Fair argument” of potentially significant environmental impacts.
- Typically only required when comments are backed by “substantial evidence.”
- The EIR needs to address the potentially significant impacts identified, but need not totally eliminate those impacts to zero.

# EIR Contents

- Brief description of project background.
- Type of EIR (*e.g.*, Staged, Program, Joint, etc.)
- Summary including table of potential impacts.
- Environmental Setting (CEQA Guidelines Sec. 15125(a)):
  - Aesthetics
  - Agricultural Resources
  - Air Quality
  - Biological Resources
  - Cultural Resources
  - Geology and Soils
  - Hazards and Hazardous Materials
  - Hydrology and Water Quality
  - Land Use and Planning
  - Mineral Resources
  - Noise
  - Population & Housing
  - Public Services
  - Recreation
  - Transportation/Traffic
  - Utilities
  - Energy and Service Systems
  - Growth-Inducing Impacts
  - Cumulative Impacts
  - Significant Irreversible Changes
  - Alternatives

# Aesthetics

- Purpose: Identify and evaluate key visual resources in the project area, and to determine the degree of visual impact that would be attributable to a proposed project.
- Analysis should identify key visual resources that warrant consideration in subsequent plans, so as to ensure, where possible, that the integrity of the landscape and built environment is maintained.
- Considerations: Will the proposed project...
  - Have a substantial adverse effect on a scenic vista?
  - Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, or historic buildings within a scenic highway?
  - Significantly degrade the existing visual character or quality of the site and its surroundings?
  - Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?

# Agricultural Resources

- Considerations: Will the proposed project...
  - Convert “Prime Farmland,” “Unique Farmland,” or “Farmland of Statewide Importance” to non-agricultural use?
    - See maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency for farmland designations.
  - Conflict with existing zoning for agricultural use, or a Williamson Act contract?
  - Involve other changes in the existing environment which, due to their location or nature, could result in the conversion of farmland to non-agricultural use?
- New development adjacent to farmland could increase nuisance complaints about spraying and agricultural operations (*e.g.*, odor), and decrease crop yields on surrounding land due to restrictions on pesticide or fertilizer use near urban areas.

# Air Quality

- Purpose: Address project impacts on ambient air quality and the exposure of people, especially sensitive individuals, to hazardous pollutant concentrations. The pollutants of concern include both criteria pollutants and toxic air contaminants.
  - *Criteria Pollutants* - Regulated by federal and state laws since the 1970s, *e.g.*, ozone, carbon monoxide (CO), suspended particulate matter (PM<sub>10</sub> and/or, possibly, PM<sub>2.5</sub>), oxides of nitrogen (NO<sub>x</sub>), and sulfur dioxide (SO<sub>2</sub>).
  - *Toxic Air Contaminants* - Identified by state regulation, *e.g.*, particulate matter from diesel-fueled engines, asbestos, chlorinated organic compounds, metals, and radon and iodine gas.
- Air emissions commonly associated with campus projects include: exhaust from motor vehicle traffic; emissions from boilers and cogeneration plants used for heating; fume hoods and exhaust; and emissions from construction activities. The EIR must address each of these, as applicable.

# Biological Resources

- Purpose: Address project impacts on vegetation, wildlife, aquatic resources and associated habitats.
- Considerations: Will the proposed project...
  - Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game (CDFG) or U.S. Fish and Wildlife Service (USFWS)?
  - Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, or regulations or by the CDFG or USFWS?
  - Have a substantial adverse effect on federal protected wetlands as defined by Section 404 of the Clean Water Act (*e.g.*, marshes, vernal pools, coastal areas, etc.) through direct removal, filling, hydrological interruption or other means?
  - Interfere substantially with movement of any native resident or migratory fish or wildlife species, or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?
  - Conflict with any applicable local policies protecting biological resources?
  - Conflict with the provisions of an adopted Habitat Conservation Plan (HCP), Natural Communities Conservation Plan (NCCP) or other approved local, regional or state habitat conservation plan?



# Cultural Resources

- Purpose: Identify and evaluate the potential for the project to adversely affect paleontological, archaeological, and historical resources.
- The resources of concern include, but are not limited to, fossils, prehistoric and historic artifacts, burials, sites of religious or cultural significance to Native American groups, and historic structures.

# Geology And Soils

- Purpose: Evaluate whether the proposed project would create a physical change in surface or subsurface soil or rock characteristics, or would expose people or structures to major geotechnical hazards. Changes could also include the damage or destruction of unique geologic/physical features.
- Considerations: Will the proposed project...
  - Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving earthquake, seismic groundshaking, liquefaction, and landslides?
  - Result in substantial soil erosion or the loss of topsoil?
  - Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction, or collapse?
  - Be located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994 or most current edition), creating substantial risks to life or property?
  - Have soils incapable of adequately supporting the use of septic tanks or alternative waste water disposal systems where sewers are not available for the disposal of waste water?

# Hazards And Hazardous Materials

- Purpose: Address the transportation, storage, use, and disposal of hazardous materials that are likely to result from the project, and identify the potential for soil or water contamination that could affect the project.
- What is a “hazardous material”?
  - Refers to both hazardous substances and wastes.
  - A material is “hazardous” if it appears on a list of hazardous materials prepared by a federal, State, or local regulatory agency, or if it has characteristics defined as “hazardous” by such an agency.
  - Biohazardous materials (*i.e.*, biological material capable of causing disease in humans) and radioactive materials (*i.e.*, materials that spontaneously emit ionizing radiation) are regulated separately from “hazardous” chemicals and materials.
- The *State CEQA checklist* also includes physical hazards such as proximity to airports and wildland fire hazards.

# Hydrology And Water Quality

- Purpose: Evaluate and describe the impacts of the LRDP or specific projects on surface and groundwater resources (including aquifer characteristics and water quality), the project's generation of runoff that could affect flooding or drainage characteristics (both on-site and downstream), and flooding from storm events or dam failure inundation.
- Considerations: Will the proposed project...
  - Violate any water quality standards or waste discharge requirements, or substantially degrade water quality?
  - Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (*i.e.*, the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)?
  - Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river:
    - (a) in a manner which would result in substantial erosion or siltation on- or off-site? and/or
    - (b) substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site?
  - Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff?
  - Place housing within a 100-year flood hazard area, as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map?
  - Place structures within a 100-year flood hazard area that would impede or redirect flood flows?
  - Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?
  - Result in inundation by seiche, tsunami, or mudflow?

# Land Use And Planning

- Purpose: Identify and evaluate potential conflicts between the project and 1) local land use plans and policies, and 2) existing land uses.
- Considerations: Will the proposed project...
  - Physically divide an established community?
  - Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (*e.g.*, general plan, specific plan, local coastal plan, zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect?
  - Conflict with any applicable habitat conservation plan or natural community conservation plan?
  - For projects exempt from local land use regulations and controls, substantially conflict with those regulations and controls such that a significant incompatibility is created with any existing land use at the periphery of the campus?
  - Exceed an applicable program EIR standard of significance?

# Mineral Resources

- Purpose: Identify and evaluate the project potential to adversely affect the availability of known mineral resources.
  - The mineral resources of concern include metals, industrial minerals (*e.g.*, aggregate, sand and gravel), oil and gas, and geothermal resources that would be of value to the region and residents of the State.
- Considerations: Will the proposed project...
  - Result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the State?
  - Result in the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan, or other land use plan?

# Noise

- Purpose: Identify, describe, and evaluate noise sources and potential land use conflicts related to environmental noise. Potential sources of ground-borne vibration and exposure to ground-borne vibration is sometimes also addressed in the Noise section.
- Determining the Potential for Significant Noise Impacts: The baseline noise conditions and surrounding existing sensitive land uses need to be characterized. Then, changes in noise levels or changes in noise exposure circumstances caused by the contemplated project need to be evaluated.
- Common noise sources associated with development include construction activities (*e.g.*, heavy truck traffic, pile drivers, pumps and compressors), increased motor vehicle traffic, and other increased outdoor or nighttime activity.

# Population And Housing

- Purpose: Provide a context in which to assess the direct and indirect physical and socioeconomic impacts of campus population growth on general population levels, and the housing stock of the region.
- Considerations: Will the proposed project...
  - Induce substantial population growth or concentration of population in an area, either directly (*e.g.*, new housing and/or businesses) or indirectly (*e.g.*, extension of roads or other infrastructure)?
  - Displace substantial numbers of existing housing necessitating the construction of replacement housing elsewhere?
  - Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere?



# Public Services

- Purpose: Assess project impacts on law enforcement, fire protection, schools, and other public services.
  - The EIR discussion should differentiate between physical impacts on the environment and other impacts of community concern, as well as other public services, as contrasted with those provided by public jurisdictions.
- Considerations: Will the proposed project...
  - Result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts in order to maintain acceptable service ratios, response time or other performance objectives for any of the public services:
    - Fire protection?
    - Police protection?
    - Schools?
    - Parks?
    - Other public facilities?

# Recreation

- Purpose: Discuss the potential increased demand for various recreational facilities, identify any potential need for new recreational facilities generated by the project, and differentiate between physical impacts on the environment associated with the need to construct new recreational facilities and other impacts of community concern.

# Transportation/Traffic

- Purpose: Describe existing and future traffic circulation and parking patterns, and evaluate the project's impact on these conditions. This evaluation should also consider project impacts on public transportation and alternative modes of transportation, such as bicycles, shuttles, and walkways.
- Key Transportation Issues: traffic patterns, trip generation, peak congestion periods, areas and cause of congestion, traffic and pedestrian safety, transit availability, parking availability, and if applicable, bicycle and pedestrian flows. The analysis should focus on both on- and off-campus circulation.
- Scope: The analysis should evaluate project impacts against conditions in and around the project vicinity that are likely to be affected by the changes in transportation/traffic attributed to the project. The analysis should also define the affected traffic study region.

# Utilities, Energy And Service Systems

- Purpose: Assess project impacts on water supply and wastewater, solid waste disposal, electricity, natural gas, telecommunications, chilled water, and steam. This section should also describe existing treatment of wastewater and existing conveyance systems for all utilities.
- This section is divided into subsections on Utilities and Service Systems and Energy.

# Growth Inducing Impacts

- Purpose: Discuss ways in which proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects that would remove obstacles to population growth.
- Population Growth: Increases in population will increase demand on existing community services and/or facilities, which may require provision of additional services or construction of new facilities that could result in secondary environmental effects that may be significant. Characteristics of some projects may encourage or facilitate other activities that could significantly affect the environment, either individually or cumulatively. The analysis should not assume that growth is necessarily beneficial, detrimental, or of little significance to the environment.

# Cumulative Impacts

- Purpose: Evaluate changes in the environment that may result from adding the effect of the project to those effects of closely-related past, present and probable future projects.
- The discussion should focus on whether the impacts of the project would result in cumulative effects, and therefore need not consider cumulative impacts to which the project does not contribute.

# Significant Irreversible Impacts

- Will the proposed project result in significant irreversible effects?
  - Review the project description and all of the technical sections of the EIR to determine whether key resources would be degraded or destroyed such that there would be little possibility of restoring them.
- For example:
  - Building on prime agricultural land or open space lands
  - Obstructing a wildlife corridor with permanent facilities
  - Building facilities on identified mineral resources, thereby precluding future extraction.

# Alternatives

- Purpose: Describe and comparatively evaluate a range of alternatives to the proposed project. (CEQA Guidelines Sec. 15126.6).
- The lead agency is given substantial latitude in determining the range of “reasonable” alternatives under the general guidance that alternatives must be “feasible” and “shall be selected and described in a manner to foster meaningful public participation and informed decision making.”
- The analysis of the environmental effects of the alternatives is intended to be less detailed than the analysis of the proposed project and to be primarily comparative.



# Technical Support/References

- EIR must include summarized technical data, maps, plot plans, diagrams and similar relevant information sufficient to permit full assessment of significant environmental impacts by reviewing agencies and members of the public.
- Avoid placing highly technical and specialized analysis and data in the body of the EIR; include this information as appendices.
- These appendices shall be readily available for public examination and shall be submitted to all clearinghouses that assist in public review (*CEQA Guidelines Sec. 15147*).

# Final Determination/SOL

- Public comment and public agency input essentially the same as for MND.
- The agency must consider comments and substantial evidence.
- The Notice of Determination, etc. is essentially the same as for MND.
- The statute of limitations is essentially the same.

# Conclusion

- The CEQA statute and CEQA guidelines are complex and often unclear.
- There are many pitfalls associated with the preparation of an MND and EIR.
- The comment period may be very short and it is important that “substantial evidence” be received.
- Categorical exemptions, etc... are not always a guarantee of compliance.
- The statute of limitations to file suit is also very short under CEQA as opposed to other remedies.
- The lead agency is NOT required to mitigate all impacts identified in an EIR. CEQA simply requires the study, analysis and consideration of those impacts.
- Many people perceive CEQA as an “anti-development” statute when, in fact, it simply demands that the lead agency analyze the impacts, receive comments and make an informed decision before approving a project.