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## Are “Certified Regulatory Programs” Functionally Equivalent to CEQA?

### A Comparison of their Statutes and Regulations

*By Daniel Pollak*

*Prepared at the request of  
Senator Sheila James Kuehl,  
Chair of the Senate Committee on  
Natural Resources and Wildlife*

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C A L I F O R N I A

R E S E A R C H B U R E A U

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# Introduction and Overview

The California Environmental Quality Act (CEQA) of 1970 is one of California's most important and powerful environmental laws. It requires public agencies to prepare an Environmental Impact Report (EIR) for any project that will have significant adverse impacts on the environment. The CEQA EIR process requires a public agency to analyze and disclose the potential adverse environmental impacts of a project it is initiating, funding or approving. The EIR process must consider alternatives, develop proposals to mitigate or avoid impacts to the extent feasible, and involve the public and other public agencies in the evaluation process.

Under §21080.5 of CEQA, certain state regulatory programs are exempted from the requirement to prepare an EIR because they have been certified as meeting certain criteria designed to ensure that they meet the basic goals of CEQA. These programs are often referred to as being “functionally equivalent” to the CEQA EIR process.\* The Senate Committee on Natural Resources and Wildlife requested that the California Research Bureau compare several of these programs to CEQA to answer the following questions: To what extent are the laws and regulations for these programs equivalent to the laws and regulations governing the CEQA process, and how do they differ? And what are the policy implications of any such differences?

There are two possible reasons typically cited for having this exemption. First, if a regulatory program already requires a detailed environmental analysis that essentially covers the same ground as the EIR process, then requiring an EIR would arguably be duplicative.

A second, somewhat different justification is that for some regulatory programs, the normal EIR process is said to be too cumbersome to be feasible. For example, the California Department of Forestry and Fire Protection currently reviews and approves about 1,200 Timber Harvest Plans (THPs) every year.<sup>1</sup> Requiring EIRs for all of these THPs could place a considerable additional burden on both the regulators and the timber industry.

This paper will explain what is required for a program to become a certified regulatory program, and the precise scope and nature of the resulting CEQA exemption. It will then examine more closely several of the programs that have been certified under §21080.5. It will compare their environmental analysis and disclosure requirements to CEQA to assess how closely their statutory and regulatory requirements resemble key requirements of CEQA.

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\* According to the discussion notes of CEQA Guidelines §15251, “Certification of a program formally recognizes that an environmental analysis undertaken in compliance with the certified program is the functional equivalent of a CEQA analysis.”

The programs analyzed were:

- *Approval of Timber Harvest Plans* by the California Department of Forestry and Fire Protection
- *Rulemaking* by the California Department of Fish and Game
- *Water quality plan adoption and revision* by the State Water Resources Control Board and the Regional Water Quality Control Boards
- *Registration, evaluation and classification of pesticides* by the Department of Pesticide Regulation

It should be emphasized that this review was confined primarily to a comparison of requirements under regulations and statutes. The implementation of these programs was not analyzed, so it is possible that even where their statutory and regulatory requirements differ from CEQA, their practices and procedures resemble CEQA more closely than would be required by their laws and regulations.

In addition, legal precedents also have an influence on agency practice that goes beyond what is in the letter of the statutes and regulations. I have tried to note instances where important court rulings influence the practices of certified programs with regard to CEQA compliance. However, I have not carried out a comprehensive analysis of all the potentially relevant court rulings.

This comparison will illustrate the ways in which a certified regulatory program can differ from the statutory and regulatory requirements of CEQA. The comparison will show that the various rules governing several certified regulatory programs in some ways correspond closely to CEQA. But as often, they lack some of CEQA's basic requirements.

## Origin and Purpose of §21080.5 Certification

Born in an attempt to strike a compromise between logging interests and environmental protection, Section 21080.5 has always served two purposes that are somewhat at odds with one another. On the one hand, Section 21080.5 is supposed to ensure that certified programs are very similar to CEQA in their environmental review requirements, so that certified programs can be effectively substituted for the EIR process. On the other hand, Section 21080.5 originated in the desire to provide regulatory streamlining where full CEQA compliance was argued to be infeasible. In other words, the backers of Section 21080.5 believed that certified regulatory programs should be similar to CEQA, but not **too** similar.

The amendment creating the Section 21080.5 CEQA exemption was authored by Senator John Nejedly in 1975. Senator Nejedly's bill, SB 707, was an attempt to reconcile the Forest Practice Act of 1973, of which Senator Nejedly had been a co-author, with CEQA, which had passed five years earlier.

The Forest Practice Act had instituted a system of timber regulation in which the California Division of Forestry\* would review Timber Harvest Plans (THPs) submitted by timber harvesters. THPs would be approved or rejected based on their conformance to a set of forest practice rules adopted by the State Board of Forestry.

The Forest Practice Act had not been law for very long before an environmental group seeking tighter regulation of timber harvesting argued in a lawsuit that the timber harvesting process should be regulated by CEQA.<sup>2</sup> Their position was upheld by a trial court judge, and then, while the case was on appeal, by a published opinion of California's Attorney General.<sup>3†</sup>

The California Resources Agency attempted to deal with this issue by issuing emergency regulations creating an exemption in the CEQA Guidelines for programs certified by the Resources Secretary as being the "functional equivalent" of an EIR. However, a Legislative Counsel opinion concluded that in so doing, the agency had exceeded its authority under CEQA.<sup>4</sup>

These developments were viewed with alarm by the timber industry and timber regulators, since it could mean that the approval of THPs based solely on the forest practice rules and the THPs submitted by harvesters would be in violation of CEQA. To require all timber operations to comply with CEQA would, said the State Board of Forestry, cause "a dire economic impact in the timbered areas" and a "serious crisis to the State Administration."<sup>5</sup>

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\* Now known as the California Department of Forestry and Fire Protection.

† In 1976, the appellate court would rule that timber harvesting was indeed fully subject to CEQA.

Buying time, the Legislature passed a stopgap, SB 476 (1975), a bill that provided a temporary CEQA exemption to the timber industry.<sup>6</sup> Meanwhile, with SB 707, Senator Nejedly sought to not only resolve the timber harvesting/CEQA conflict, but also provide a uniform set of standards for settling similar questions regarding other state regulatory programs. Legal challenges were already pending that charged the State Air Resources Board and the North Coast Regional Water Quality Control District with failure to follow the EIR requirements of CEQA.<sup>7</sup>

SB 707 created a statutory basis for something like the “functional equivalence” exemption that the Resources Agency had attempted to provide earlier. The bill authorized the Secretary of the Resources Agency to certify a regulatory program as exempt from CEQA’s EIR requirements provided the program met certain criteria designed to satisfy some of the basic goals of CEQA. These criteria included various procedural and substantive requirements for environmental review and disclosure, consultation with other agencies, and provisions for public participation.

According to Senator Nejedly, SB 707 was intended to “prevent needless duplication” by “specifying that where the plan or document already includes a number of environmental considerations, an environmental impact report need not also be prepared.” The exemption was designed, Nejedly said, to follow a federal legal precedent holding that environmental impact statements were unnecessary for programs that “already included the environmental safeguards that would be provided by an environmental impact statement.”<sup>8</sup>

SB 707 was approved on September 30, 1975. It was vigorously opposed by the timber industry, who favored continuation of the full exemption from CEQA and saw the bill as an expansion of the discretionary powers of the Resources Agency to restrict logging operations.<sup>9</sup> The bill was supported by the California Resources Agency. It was also supported by environmentalists such as the Sierra Club, who favored bringing timber harvesting under CEQA.<sup>10</sup>

Passage of SB 707 meant that timber harvesting would not have to fully comply with CEQA, but instead the timber rules would have to be changed to more closely resemble CEQA. For example, at the time SB 707 was passed, the timber rules did not meet its requirement that a project should not be approved if feasible alternatives or mitigation measures were available. Nor did the rules then require written responses to comments received on proposed plans, as required by CEQA.<sup>11</sup>

After the necessary regulatory changes were enacted, the timber harvest regulatory program was certified under CEQA Section 21080.5 in 1976. Many other programs have been certified since then. The list of certified programs is shown Table 1.



**Table 1: List of Certified Regulatory Programs**

<b>Year</b>	<b>Agency</b>	<b>Program Certified</b>
1976	Department of Forestry & State Board of Forestry	The regulation of timber harvesting operations.
1976	Fish and Game Commission	Regulatory program pursuant to Fish and Game Code.
1977	Coastal Commission	The regulatory program dealing with the consideration and granting of coastal development permits.
1978	Air Resources Board	The adoption, approval, amendment, or repeal of standards, rules, regulations, or plans for the protection and enhancement of ambient air quality in California.
1979	Board of Forestry	Rulemaking and planning under the Z'berg-Nejedly Forest Practice Act.
1979	Coastal Commission	Preparation, approval, and certification of local coastal programs.
1979	State and Regional Water Resources Control Boards	The Water Quality Control (Basin)/208 Planning Program.
1979	BCDC*	Permit and planning programs.
1979	Department of Pesticide Regulation and county agricultural commissioners	The pesticide regulatory program relating to (1) The registration, evaluation, and classification of pesticides; (2) rulemaking for the licensing and regulation of pesticide dealers and pest control operators and advisors; (3) rulemaking for standards dealing with the monitoring of pesticides and of the human health and environmental effects of pesticides; (4) the regulation of the use of pesticides in agricultural and urban areas of the state through the permit system administered by the county agricultural commissioners.
1980	Department of Water Resources	The regulations of weather resources management projects through the issuance of operating permits.
1981	Energy Commission**	The power plant site certification program.
1981	State Water Resources Control Board	Establishment of instream beneficial use protection programs.
1989	South Coast Air Quality Management District	Rulemaking under the Health and Safety Code.
1994	Delta Protection Commission	Preparation and adoption of a Resources Management Plan for the Sacramento-San Joaquin Delta; and review and action on general plan amendments proposed by local governments to make their plans consistent with the provisions of the Commission's Resource Management Plan.
1998	Department of Fish and Game	Rulemaking under the Fish and Game Code.
1999	Department of Fish and Game	Issuance of incidental take permits under the California Endangered Species Act.

\*San Francisco Bay Conservation and Development Commission

\*\*Energy Resources Conservation and Development Commission.



## How §21080.5 Certification Works

CEQA requires any public agency that is going to initiate or approve a project that may have significant adverse effects on the environment to conduct an EIR “whenever it can be fairly argued on the basis of substantial evidence that a proposed project may have a significant environmental impact.”<sup>12</sup>

Regulatory programs certified under §21080.5 are exempt from this requirement. To be so certified, the regulatory program must meet specific requirements in §21080.5 that are designed to ensure that the required document performs essentially the same function as an EIR.

### REQUIREMENTS FOR CERTIFICATION

There are three general criteria for certification:

- 1) *Interdisciplinary approach*: the regulatory program must utilize an “interdisciplinary approach which will ensure the integrated use of the natural and social sciences in decisionmaking . . . .”<sup>13</sup>
- 2) *Enabling statute enshrines environmental protection*: the enabling statute of the program must include protection of the environment among its principal purposes.<sup>14</sup>
- 3) *Authority to promulgate rules and regulations*: the enabling statute must authorize the promulgation of rules and regulations for the protection of the environment and according to standards in the statute.<sup>15</sup>

In addition, there are specific procedural requirements that must be included in the program’s statutes or regulations:

- 1) *Minimization or mitigation of impacts*: the program’s rules must require that an activity not be approved as proposed if there are feasible alternatives or mitigation measures available which would substantially lessen any significant environmental impact.<sup>16</sup>
- 2) *Guidelines for evaluation and preparation*: the program must have guidelines “for the orderly evaluation of proposed activities” and the preparation of the required plan or document.<sup>17</sup>
- 3) *Consultation with other public agencies*: the rules must require the administering agency to consult with all public agencies that have jurisdiction over the proposed activities.<sup>18</sup>
- 4) *Written responses*: the final action on the proposed activity must include the written responses of the issuing authority to “significant environmental points” raised during the evaluation process.<sup>19</sup>

5) *Public notice*: the program must require the public to be notified of the filing of the environmental document, in a manner that will provide “sufficient time to review and comment on the filing.”<sup>20</sup> In addition, the notice of the decision by the administering agency must be filed with the Resources Agency and be available for public inspection for 30 days.<sup>21</sup>

6) *Availability for review and comment*: the environmental document must be available “for a reasonable time” for review and comment by other public agencies and the general public.<sup>22</sup>

7) *Project description and mitigation measures*: the required document must include a description of the proposed activity with alternatives to the activity, as well as mitigation measures to minimize any significant adverse environmental impacts.<sup>23</sup>

## **SCOPE OF THE EXEMPTION FROM THE REQUIREMENTS OF CEQA**

A certified regulatory program is exempt from the requirements of Chapters 3 and 4 of CEQA, as well as Section 21167 of CEQA. The courts have ruled that the certification is limited to these specific sections, and does not provide a blanket exemption from CEQA.<sup>24\*</sup> As the California Supreme Court ruled in *EPIC v. Johnson*, Section 21080.5 “grants only a limited exception to the applicability from CEQA by allowing a timber harvester to prepare a timber harvesting plan in lieu of a complete environmental impact report.”<sup>25</sup>

### **Provisions of CEQA Included in the Exemption**

The most important aspects of CEQA that are included in the exemption are as follows:

- The requirements concerning the need to prepare EIRs and the contents of EIRs.
- Time limits for completing and certifying EIRs and Negative Declarations.
- Consultation by state lead agency with other agencies during the preparation of an EIR, including a requirement to consult the Department of Fish and Game concerning threatened and endangered species.

### **Provisions of CEQA Not Covered by the Exemption**

Certified regulatory programs are **not** exempt from Chapters 1, 2, 2.5, and 5 of CEQA. What is in these parts of CEQA?

Chapter 1 of CEQA (beginning at §21000) states the legislative intent of the Act. For example, the Act declares that it is the policy of the state to “take all action necessary to

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\* Certified regulatory programs should not be confused with “categorically exempt” projects. “Categorically exempt” is a classification given to certain kinds of projects in the CEQA guidelines because they have been determined not to have a significant effect on the environment. (CEQA §21084).

protect, rehabilitate, and enhance the environmental quality of the state.”<sup>26</sup> The Act also declares that “It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”<sup>27</sup> Court decisions such as *EPIC v. Johnson* and *Laupheimer v. State of California* make clear that these broad mandates apply to certified regulatory programs such as timber harvesting.<sup>28</sup>

Chapter 1 also contains a policy that public agencies “should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ... .”<sup>29</sup>

Chapters 2 and 2.5 establish the title of CEQA and governing definitions. Chapter 4.5 provides for regulatory streamlining through use of a “Master Environmental Impact Report” for large projects or general plans. This chapter also deals with environmental review of measures and rules relating to pollution control equipment.

Chapter 5 of CEQA says that whenever a party applies to a public agency for a permit or other entitlement, the public agency can require that they submit “data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment or to prepare an environmental impact report.”<sup>30</sup> The California Supreme Court confirmed in *Sierra Club v. State Board of Forestry* that this authority applies to certified regulatory programs such as timber harvesting.<sup>31</sup>



# How Do Certified Regulatory Program Requirements Compare to CEQA?

How well do the environmental review and disclosure requirements of the certified regulatory programs meet the basic goals of CEQA? The goals of CEQA, as described by the Resource Agency's CEQA Guidelines, are:<sup>32</sup>

- 1) *Inform governmental decision-makers and the public* about the potential, significant environmental effects of proposed activities.
- 2) *Identify ways to reduce damage*: identify the ways that environmental damage can be avoided or significantly reduced.
- 3) *Prevent significant, avoidable damage to the environment* by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.
- 4) *Disclose to the public* the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.

The criteria for certification ensure that each of these purposes must be addressed to some extent in the laws and regulations of the certified regulatory program. But they do not guarantee that every aspect of CEQA will be reflected in the certified programs. By comparing CEQA's key requirements to those of the certified programs, we can determine whether any important CEQA requirements are absent from the rules governing certified programs.

## PROGRAMS CHOSEN FOR COMPARISON

We chose several representative certified regulatory programs to compare their statutory and regulatory requirements to CEQA in more detail. They include a wide range of regulatory activities:

- *Approval of Timber Harvest Plans* by the California Department of Forestry and Fire Protection
- *Rulemaking* by the California Department of Fish and Game
- *Water quality plan adoption and revision* by the State Water Resources Control Board and Regional Water Quality Control Boards
- *Registration, evaluation and classification of pesticides* by the Department of Pesticide Regulation

In each case, the provisions of the certified regulatory program were compared in detail to the CEQA EIR requirements. After briefly describing each of these programs, we will see how closely they match the basic requirements of CEQA.

## **Approval of Timber Harvest Plans**

Under the California Forest Practice Act of 1973, commercial timber harvest on non-federal timberlands cannot proceed until the harvester submits a Timber Harvest Plan (THP) to the Department of Forestry and Fire Protection (CDF). CDF reviews the plans for compliance with the Forest Practice Act and the rules adopted by the State Board of Forestry. THPs must be prepared by Registered Professional Foresters. CDF reviews about 1,200 THPs annually.<sup>33</sup>

The timber rules contain numerous standards and requirements designed to reduce or mitigate the environmental impacts of timber operations. A THP is supposed to document that the proposed harvest will comply with these rules. As noted earlier, the timber industry argued that this process rendered preparation of an EIR unnecessary.

The timber harvest regulatory program was first certified by the Secretary of the Resources Agency in 1976. It was re-certified in 1979. As a result, THPs for timber harvest on private lands are now used to meet the requirements of CEQA that would normally be addressed through preparation of an EIR or a Negative Declaration.

## **Rulemaking by the California Department of Fish and Game**

We typically think of CEQA as governing physical, tangible projects that directly impact the environment, such as construction projects. However, CEQA can also cover public agency activities that only indirectly impact the environment, such as the adoption of plans, the funding of projects, the issuance of permits and licenses, and the making of regulations.<sup>34</sup>

The California Department of Fish and Game is responsible for adopting rules to administer the Fish and Game Code. This rulemaking process was certified under §21080.5 in 1998 as being exempt from CEQA's EIR requirements. In order to qualify for certification, the Department's rules require a streamlined "alternative environmental analysis" to be conducted during the rulemaking process.<sup>35</sup>

This alternative analysis is included in the Department's Initial Statement of Reasons that all state agencies must provide as part of the rulemaking process. Under the Office of Administrative Law's rulemaking process, the Initial Statement of Reasons normally includes, among other things, an explanation of why the proposed rules are needed, identification of studies or reports supporting this need, and a description of the alternatives to the proposal.<sup>36</sup> The CDFG regulations require in addition that the Initial Statement of Reasons include an analysis of environmental impacts, proposed alternatives, and mitigation measures.<sup>37</sup>

## **Water Quality Planning**

In 1979, the Resources Secretary certified two water quality regulatory processes as meeting the requirements of Section 21080.5 of CEQA: basin plans and areawide waste treatment management plans, also known as Section 208 plans.



Under California's Porter-Cologne Water Quality Control Act, each of the nine regional boards must adopt a Water Quality Control Plan, also known as a basin plan.<sup>38</sup> The SWRCB prepares several additional statewide Water Quality Control Plans.\* The basin plans establish water quality standards as required by state and federal law, as well as an implementation program.

In addition, California's basin plans also incorporate the "areawide waste treatment management plans" mandated by Section 208 of the federal Clean Water Act. Areawide waste treatment management plans are supposed to identify all the treatment works and other actions and facilities that will be employed to meet the anticipated waste treatment needs of the region over a 20-year period. These areawide plans are also supposed to identify various sources of point-source and nonpoint source water pollution and provide plans for addressing them.

In order to ensure that the process meets the certification requirements of CEQA Section 21080.5, the basin plan/Section 208 regulations include a streamlined CEQA-like process.<sup>39</sup> The listing of environmental impacts in a basin plan's environmental report can be done through the use of a checklist that only requires "yes," "no," or "maybe" responses regarding the presence or absence of a list of possible impacts. This is less detailed than a full EIR would be.

### **Pesticide Evaluation and Registration**

In 1976, the Attorney General issued an opinion stating that the issuance of county permits for the use of pesticides was subject to CEQA. In 1977, the California Department of Food and Agriculture (CDFA) conducted an assessment that concluded the current programs did not meet CEQA's standards.<sup>40</sup>

However, CDFA's assessment also concluded that it was not feasible to comply with CEQA. To do so would require an EIR for each of hundreds of new pesticide products registered each year in the state, as well as the thousands of permits for the use of hazardous ("restricted") pesticides approved each year by county agricultural commissioners.<sup>41†</sup>

This led to the passage of AB 3765 (Chapter 308, California Statutes of 1978). This legislation acknowledged the infeasibility of full CEQA compliance, and required the

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\* The statewide plans are the Ocean Plan, the Thermal Plan, and the Bay-Delta Plan. See SWRCB Administrative Procedures Manual, August 27, 2001, 8.

† The county agricultural commissioners throughout the state currently issue over 40,000 use permits for restricted pesticides each year.

Department of Food and Agriculture to establish rules and regulations for a streamlined environmental review process that could be certified under CEQA §21080.5.\*

CDFG developed regulations to meet the necessary requirements, and received certification of its pesticide regulatory program from the Resources Agency in 1979. In order to meet the requirements for certification, CDFG adopted regulatory changes including expansion of review of data before registering new pesticides, new public notice requirements, and new requirements regarding permits for the use of restricted pesticides. The regulations also created a mechanism for CDFG to interact with other state agencies with responsibility for resources potentially affected by pesticides.<sup>42</sup>

In 1991, as part of a government reorganization, Governor Wilson moved the Department of Food and Agriculture's pesticide regulatory program, creating the Department of Pesticide Regulation under the newly-created California Environmental Protection Agency.

Although the Section 21080.5 certification covers several activities, including pesticide use permits and pesticide rulemaking, this paper will only consider the certification as it relates to the registration, evaluation and classification of new pesticides by state regulators.

Each year, numerous new pesticides are registered while the registration of other pesticides expires. About 1,000 new pesticides are registered each year. At the same time, about 800 are dropped from the list because the registrant does not seek to renew the registration. So there is currently an annual increase in the registered list by about 200 new pesticides per year. Of these, about half are not actually new products, but are simply new brands of a previously registered product. There are currently a total of about 11,500 registered pesticides.<sup>43</sup>

## **KEY POINTS OF CEQA USED IN THE COMPARISONS**

In this section, we compare the laws and rules of these certified regulatory programs to the laws and rules of CEQA. The comparison will focus on the key principles of CEQA listed earlier. First, it will be necessary to explain the provisions of CEQA that provide the points of comparison. Each point of comparison involves a requirement of the CEQA EIR process that is key to fulfilling the basic purposes of CEQA. These provisions include requirements in the CEQA statute, as well as the regulations contained in the Resources Agency's CEQA Guidelines.<sup>†</sup>

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\* AB 3765 declares that "preparation of environmental impact reports and negative declarations for pesticide permits would be an unreasonable and expensive burden on California agriculture and health protection agencies."

† The CEQA Guidelines have a somewhat ambiguous status, as they are adopted according to the rulemaking procedures mandated by the Administrative Procedures Act but are called "guidelines" and not codified in the California Code of Regulations. The Guidelines refer to themselves as "regulations" (Section 15000). This analysis treats them as such. For further discussion of this point, see Remy, Thomas, et al., *Guide to the California Environmental Quality Act* (1999 edition), 9-10.

## **CEQA Purpose #1: Inform Governmental Decisionmakers and the Public**

*Project description.* Under the CEQA Guidelines, the EIR project description must include the baseline environmental conditions in the vicinity of the project, with special emphasis on rare or unique resources. The EIR must discuss any inconsistencies between the proposed project and applicable general and regional plans.<sup>44</sup> The project description must include the project's location, boundaries on a detailed map; statement of objectives; the project's technical, economic and environmental characteristics; a list of the agencies expected to use the EIR in their decision-making; a list of permits and other approvals required for the project; and a list of related environmental review and consultation requirements required by federal, state, and local laws, regulations or policies.<sup>45</sup>

*Requirement to identify and disclose adverse environmental impacts.* An EIR must discuss significant environmental effects; significant environmental effects which cannot be avoided; and growth-inducing impacts.<sup>46</sup>

*Requirement to identify and disclose adverse cumulative impacts.* CEQA requires a consideration of cumulative impacts when “the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”<sup>47</sup> When the combined cumulative impact associated with the project and other projects is not significant, the EIR shall provide analysis and facts supporting this conclusion.<sup>48</sup>

*Establish criteria for identifying significant effects.* All public agencies must “adopt by ordinance, resolution, rule or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports and negative declarations...”<sup>49</sup> Each public agency is encouraged to develop and publish quantitative or qualitative thresholds of significance that the agency will use in the determination of the significance of environmental impacts. Adoption by an agency of such thresholds requires an ordinance, resolution, rule, or regulation, supported by a public review process and “substantial evidence.”<sup>50</sup>

## **CEQA Purpose #2: Identify Ways to Reduce Damage**

*Describe and Compare Alternatives.* The EIR must describe a range of reasonable alternatives that would feasibly attain most of the basic objectives of the project but avoid or substantially lessen any of the significant effects.<sup>51</sup> The EIR must describe the rationale for selecting the alternatives to be discussed, and must include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. The discussion must include a “no project” alternative in order to compare the impacts of approving the proposed project with the impacts of not approving the project.<sup>52</sup>

*Propose mitigation and avoidance measures.* The EIR must describe proposed measures to minimize significant effects.<sup>53</sup> Where several mitigation measures are available, the basis for selecting a particular one should be identified.<sup>54</sup>

### **CEQA Purpose #3: Prevent Significant, Avoidable Impacts**

*Require mitigation or avoidance to eliminate or substantially lessen impacts.* The lead agency cannot approve the project unless either: (1) the project will not have a significant effect on the environment; or (2) the agency has eliminated or “substantially lessened” all significant environmental effects; or (3) determined that any remaining significant effects are unavoidable due to “overriding considerations.”<sup>55</sup> The lead agency may find that “specific economic, legal, social, technological, or other considerations...make infeasible the mitigation measures or alternatives identified” in the EIR.<sup>56</sup> If so, the agency must state the reasons in a written statement of overriding considerations.<sup>57</sup>

*Enforceability and monitoring of mitigation.* The EIR’s mitigation measures must be fully enforceable through permit conditions, agreements or other measures.<sup>58</sup> When a project is approved on the basis of mitigation and avoidance measures to be adopted, the public agency must adopt a reporting or monitoring program to ensure compliance.<sup>59</sup>

*Authority to disapprove plan or proposal.* More than one agency may disapprove a project under CEQA. The “lead agency” is “the public agency which has the principal responsibility for carrying out or approving the project.”<sup>60</sup> Agencies other than the lead agency that also have responsibility for approving or carrying out some aspect of the project are known as “responsible agencies.”<sup>61</sup>

The CEQA “lead agency” may disapprove a project if necessary in order to avoid significant effects on the environment. A “responsible agency” may disapprove a project in order to avoid effects of that part of the project the responsible agency would be called on to carry out or approve.<sup>62</sup> If the responsible agency believes the final EIR is inadequate, it can take the issue to court, prepare a subsequent EIR, or under certain conditions, assume the role of lead agency and prepare its own EIR.<sup>63</sup>

### **CEQA Purpose #4: Disclose to the Public Reasons for Approval.**

*Notifying and consulting other agencies.* The lead agency is required to request comments on the draft EIR from responsible and trustee agencies. It also must seek comments from the CDFG as to the impact on the continued existence of any endangered or threatened species.<sup>64</sup> The lead agency must also consult with and obtain comments from, any city or county that borders on a city or county within which the project is located.<sup>65</sup>

*Input and review by other agencies.* Responsible and “trustee” agencies are mandated to provide information and analysis during the EIR process (trustee agencies are state agencies that have legal jurisdiction over natural resources affected by the project). They are required to notify the lead agency of the scope and content of the environmental information that is germane to their statutory responsibilities and must be included in the EIR.<sup>66</sup> Prior to close of the public review period, they must advise lead agency of what they consider to be significant environmental effects.<sup>67</sup> They are also required to provide prior to the close of public comment period “complete and detailed performance objectives for mitigation measures which would address the significant effects on the

environment” identified by the responsible or trustee agency.<sup>68</sup>

*Response to agency comments.* The EIR must consider and respond in writing to any comments obtained as a result of consultations with other agencies or comments received during the public comment period. It must prepare a written response that describes the disposition of any significant environmental issue raised.<sup>69</sup>

*Public notice.* The lead agency must provide public notice of the availability of a draft EIR. Notice must be mailed to organizations and individuals who have requested it. Notice shall also be given through publication in a newspaper, posting on and off the project site, or mailing to owners and occupants of property contiguous to site.<sup>70</sup>

*Public comment period.* Public comment period for a draft EIR is no less than 30 days. When the report must be reviewed by other state agencies, then the period is at least 45 days.<sup>71</sup>

*Response to public comments.* The EIR must consider and respond in writing to comments received during the public comment period. It must include a written response that describes the disposition of any significant environmental issue raised.<sup>72</sup>

## **THE COMPARISON**

Table 2 indicates whether or not the rules for each of the four selected certified regulatory programs contain requirements that are substantially the same as the CEQA requirements listed above. Where a check mark (✓) appears, the certified regulatory program’s requirements are substantially the same or very similar to CEQA’s. Where a number appears, an important CEQA requirement is not found in the laws or regulations of the certified regulatory program. Each number corresponds to an explanatory note the discussion that follows the table. For a complete list and explanation of the numbered items in the table, see the Appendix.

**Table 2: Comparison of Certified Regulatory Programs to CEQA**

	<b>Timber Harvest Plans</b>	<b>CDFG Regulations</b>	<b>Water Quality Plans</b>	<b>Pesticide Registration</b>
<b>Basic Goals and Requirements of CEQA</b>				
<b>Inform Governmental Decisionmakers and the Public</b>				
Project description	<b>1</b>	<b>9</b>	<b>17</b>	<b>25</b>
Public notice	√	√	√	√
Notifying and consulting other agencies	√	√	√	√
Requirement to disclose adverse environmental impacts	<b>2</b>	√	<b>18</b>	√
Requirement to disclose adverse cumulative impacts	<b>3</b>	<b>10</b>	<b>19</b>	<b>26</b>
Establish criteria for identifying significant effects	<b>4</b>	<b>11</b>	<b>20</b>	<b>27</b>
<b>Identify Ways to Reduce Damage</b>				
Analyze alternatives	<b>5</b>	<b>12</b>	<b>21</b>	<b>28</b>
Propose measures to mitigate, reduce or avoid adverse impacts	<b>6</b>	<b>13</b>	<b>22</b>	√
<b>Prevent Significant, Avoidable Impacts</b>				
Require mitigation or avoidance to eliminate or substantially lessen impacts	√	√	√	√
Enforceability and monitoring of mitigation required	√	<b>14</b>	√	<b>29</b>
Authority to disapprove plan or proposal	<b>7</b>	<b>15</b>	<b>23</b>	<b>30</b>
<b>Disclose to Public Reasons for Approval</b>				
Notifying and consulting other agencies	√	√	√	√
Input and review by other agencies	<b>8</b>	<b>16</b>	<b>24</b>	<b>31</b>
Response to agency comments	√	√	√	√
Public notice	√	√	√	√
Public comment period	√	√	√	√
Response to public comment	√	√	√	√

## DISCUSSION OF THE COMPARISON TABLE

As Table 2 shows, all the certified programs include what is one of CEQA's most basic requirements: that the agency reviewing the project "should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ... ." <sup>73</sup>

In addition, the certified regulatory programs match up closely with CEQA in several other areas. The certified programs generally produce a publicly reviewable environmental document, consult other agencies, give public notice, and respond in comments in writing. This is not surprising, since each of these is a required criterion for certification under Section 21080.5.

The requirements of CEQA and Section 21080.5 do allow some significant deviations from CEQA in the certified regulatory program. The numbers in Table 2 each identify a discrepancy between CEQA's EIR requirements and the requirements of a certified regulatory program. These differences can be grouped into the following general comments. The numbers that appear in parentheses below correspond to the numbers in Table 2. The complete explanation of Table 2's numbered comments in numerical order is in the Appendix.

### Informing Governmental Decisionmakers and the Public

- *EIR project descriptions*: The rules of some certified programs lack the CEQA requirement to describe environmental baseline conditions (9, 17, 25), and lack CEQA's requirements to provide information such as a list of other agencies expected to use the EIR, the other permits and approvals required for the project, and related environmental review and consultation requirements (1, 9, 17, 25). In some cases, it might be argued that such requirements would not be appropriate. For example, describing baseline conditions might be difficult in the context of broad statewide rulemaking.
- *Requirement to identify adverse environmental impacts*: certified regulatory programs do not always require a detailed description or analysis of such impacts. They may simply disclose them with an abbreviated checklist (18), or require that impacts be considered without necessarily requiring that they be described (2).
- *Requirement to identify adverse cumulative impacts*: unlike CEQA, the rules of certified regulatory programs do not always explicitly require a consideration of cumulative impacts (26). (However, an appellate court ruling has stated that even with a Section 21080.5 exemption, compliance with CEQA still requires some form of cumulative impacts assessment).<sup>74</sup> When certified programs do require such an assessment, however, they need not require an explanation of why a potential cumulative impact was found not to be significant (3, 10, 19).
- *Establish criteria for identifying significant effects*: the rules governing certified regulatory programs often do not require the agency to develop guidelines and

procedures for determining which effects should be considered significant (4, 11, 20, 27).\*

### **Identify Ways to Reduce Damage**

- *Analyze alternatives*: while the requirements of certification make clear that the certified regulatory program must *consider* alternatives to the proposal being evaluated, these programs do not always require the documentation, detailed discussion and comparison of the alternatives mandated by CEQA (5, 21). Furthermore, none of the programs reviewed here have rules requiring a comparison with a “no project” alternative, as required by CEQA. With regard to the basic requirement to discuss alternatives, it is likely that most certified programs will at least include some discussion, although perhaps not as much as would normally be mandated by CEQA. For one thing, there is legal precedent stating that alternatives must be discussed by a certified program’s environmental document.<sup>†</sup> Furthermore, it should be noted that when the project being evaluated is a proposed regulation, the rulemaking process of the Administrative Procedures Act would require discussion of alternatives and reasons why they were rejected.<sup>75</sup>
- *Propose measures to mitigate, reduce or avoid adverse impacts*: all certified regulatory programs have this requirement. The main difference with CEQA is that none of the programs assessed here have a clear statutory or regulatory requirement to explain why a particular mitigation measure was chosen when other choices were available.

### **Prevent Significant, Avoidable Impacts**

- *Enforceability and monitoring of mitigation required*: the rules of the certified regulatory programs reviewed here do not always require the adoption of monitoring to assure compliance with mitigation measures (14, 29). However, the programs generally have authority to require monitoring if they choose. It should also be noted that regulations do require the Department of Pesticide Regulation to establish a statistical monitoring program that monitors at least five percent of the sites where pesticides are applied.<sup>76</sup>

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\* With respect to pesticides, statute requires the Department of Pesticide Regulation to establish detailed criteria for pesticides that could contaminate groundwater. It is also DPR practice to utilize U.S. EPA guidance and criteria in interpreting data on possible adverse effects.

<sup>†</sup> The Department of Forestry and Fire Protection has in the past argued that it would be sufficient to have an implicit consideration of alternatives in the THP’s description of the chosen harvest method, in its responses to public comments, or in its discussion of mitigation measures. A district appeals court rejected this contention, stating that an explicit comparison of alternatives is necessary. This precedent presumably would apply to other certified regulatory programs. See *Friends of the Old Trees v. Department of Forestry and Fire Protection*, et al., 52 Cal App 4<sup>th</sup> 1383, (1<sup>st</sup> Dist., 1997), at 43-45.



- *Authority to disapprove plan or proposal:* under the usual CEQA process, agencies other than the lead agency may have substantial authority to block a project. The responsible agencies may “disapprove a project if necessary in order to avoid one or more significant effects on the environment” for that part of the project the responsible agency would be called on to carry out or approve.<sup>77</sup> Furthermore, if a responsible agency believes the EIR “is not adequate for use by the responsible agency,” the responsible agency may take the issue to court, assume the lead agency role, or prepare its own EIR.<sup>78</sup> In contrast, under the certified regulatory processes, the authority of responsible agencies is more limited. They may prepare their own EIR if they determine that the lead agency has failed to consult them, or failed to discuss significant impacts, alternatives, and mitigation measures.<sup>79</sup>

### **Disclose to Public Reasons for Approval**

- *Input and review by other agencies:* although certified regulatory programs all must consult other agencies, the requirements are often less detailed than CEQA regarding the kind of input they should provide. The rules governing these programs regularly lack several CEQA requirements: that other agencies notify the lead agency of the scope of environmental information that will be needed; that these agencies identify significant effects; and that they provide mitigation performance criteria.



## **Policy Implications of the Comparisons**

To begin with, it should be said that this analysis does **not** say anything about whether any of these programs should or should not have been certified under CEQA Section 21080.5. The purpose of comparing these programs to CEQA was to explore the extent to which the laws and regulations of these programs may actually deviate from normal CEQA EIR requirements.

It should be reiterated that this paper is restricted to a comparison of the laws and rules of the programs reviewed with the laws and rules of CEQA. Case law can have an additional influence – for example, a program may be certified without including CEQA’s requirements for a discussion and comparison of the relative merits of different project alternatives. However, there is legal precedent stating that a certified program must at least discuss alternatives.<sup>80</sup> Furthermore, agency practice may exceed the requirements of law and regulation. For example, the rules for the certified pesticide evaluation program do not mention cumulative impacts, but the Department of Pesticide Regulation still attempts to take into account cumulative impacts in its pesticide evaluation and registration process.<sup>81</sup>

As a result, one cannot conclude solely from this analysis whether a given program’s environmental review process does or does not meet the basic goals of CEQA in actual practice. For example, the comparison in this paper does not tell us whether, for example, the environmental review process for timber harvesting is or is not as strong as CEQA’s. However, the comparison can address the question, “To what extent does certification under Section 21080.5 assure that the laws and regulations of a certified program contain requirements similar to the key CEQA requirements?”

The comparison shows that certified regulatory programs often correspond closely to CEQA. But as often, their rules lack some of the basic requirements of CEQA. This in part reflects the origins of Section 21080.5 as a compromise between those who wanted CEQA to apply fully to programs such as timber harvesting and those who wanted it to apply not at all.

### **STEPS THAT WOULD MAKE CERTIFIED PROGRAMS MORE LIKE CEQA**

Based on this comparison, there are a number of requirements that could be added to Section 21080.5 in order to make the environmental review requirements of certified regulatory programs more like those of CEQA. We can divide these possible changes into two categories. The first category would require more documentation and disclosure. Some might call this “paperwork,” but it would enhance the public disclosure of these programs. In so doing, it would seemingly not change the underlying process of environmental review and analysis for the certified programs. The second category would add substantially to the process of conducting the environmental review itself in order to make it more CEQA-like.

The first category includes the following:

- *Project descriptions*: Require project descriptions to describe environmental baseline conditions. Presumably an analysis that already evaluates environmental impacts involves some assessment of the existing conditions. This requirement may not be logical in some contexts, however, such as in the formulation of statewide regulations.
- *Project descriptions*: Require project descriptions to describe the role of other agencies, such as listing other agencies expected to use the environmental review document in their decision-making. This would not seem to be a major imposition, since certified programs are already supposed to consult with these other agencies before approval.
- *Impacts*: Require that environmental impacts be explicitly disclosed, not merely considered or evaluated. This would just require disclosure of the impacts that already must be evaluated in the decision-making process.
- *Alternatives*: require explicit discussion of alternatives and comparison of their merits. Given that a certified program must consider and evaluate alternatives, this would seemingly just require documentation and disclosure of that analysis. This would also codify a 1997 appellate court ruling stating that the analysis must explicitly discuss alternatives to the proposed project.<sup>82</sup>

The following possible changes would fall into the second category of adding fundamentally new requirements to the environmental review process:

- *Significant impacts*: where certified programs require disclosure of impacts, they often resort to a streamlined checklist. They would match CEQA more closely if they required a fuller characterization and discussion of environmental impacts, including quantification where appropriate.
- *Mitigation*: require explanation of why a particular mitigation measure was chosen when other choices were available.
- *Cumulative impacts*: explicitly require a cumulative impacts assessment. This would just make explicit that cumulative impacts can in fact be significant impacts, which is widely acknowledged as being key to assessing environmental impacts, and is how CEQA is now enforced. This would put into law a principle already upheld by a 1985 appellate court ruling.<sup>83</sup>
- *Alternatives*: require consideration of “no project” alternative. This might not make much sense in the cases where the project in question is the adoption of regulations or broad plans (such as water quality plans).
- *Mitigation*: require that measures be enforceable and require monitoring.

- *Input and review by other agencies:* require that other agencies notify the lead agency of the scope of environmental information that will be needed; identify significant effects; and provide mitigation performance criteria.
- *Authority to disapprove plan or proposal:* broaden the authority of other agencies, acting analogously to CEQA “responsible agencies,” to determine whether a project should be approved or not, or to require a new EIR.

Deciding which, if any, of these changes would be desirable requires consideration of the two somewhat conflicting purposes of Section 21080.5. On the one hand, Section 21080.5 is designed to ensure that certified programs have enough of the fundamental features of CEQA to render an EIR unnecessary. On the other hand, Section 21080.5 is intended to provide a more streamlined alternative to full CEQA compliance.

Furthermore, as noted above, some of these changes might not make sense in certain regulatory contexts. For example, it might not make sense to require a description of environmental baseline conditions when the proposed project is a statewide regulatory change.

It should also be noted that adding new requirements could increase the potential for litigation challenging actions carried out by certified regulatory programs. More legal requirements in their environmental review and disclosure processes could translate into more opportunities to challenge the adequacy of these processes in court.

## **CLOSING A LOOPHOLE**

Under the current wording of Section 21080.5, the law or regulations governing a program could be altered so that the program no longer meets the certification requirements, but the program would not automatically lose its certification. This would seem to represent a loophole – in theory, a program could remain certified even though it no longer meets the statutory requirements for certification.

Section 21080.5 requires the Secretary of Resources to withdraw certification “on determination that the regulatory program has been altered so that it no longer meets” the requirements of certification. The law also provides that after a program has been certified, any proposed change in the program “may be submitted to the Secretary” for review and comment, at which time the Secretary has 30 days to notify the affected agency whether the program’s certification will be withdrawn.

Regulatory programs are frequently altered by amendments to statute and regulations. It is possible for a program’s rules to be so altered by amendments that it no longer meets the requirements of Section 21080.5, yet it could still retain its certification indefinitely, as long as the program was not submitted to the Secretary for review and comment. This loophole could be closed by requiring review by the Secretary any time the laws or regulations cited in the original certification are amended or repealed. However, if this was viewed as too cumbersome, it might be possible instead to mandate periodic review of the certifications by the Secretary every few years.

For illustration, consider Table 3 below. It lists the dates on which the regulations underlying the certification of the timber harvesting program were changed (it doesn't address changes to the underlying statute, which also have occurred).

**Table 3: Changes In the Timber Regulations Cited in the §21080.5 Certification**

Date	14 CCR Sections Affected
6/26/1978	1040
8/3/1978	1037.4; 1037.7; 1054;
2/21/1979	913; 913.2
7/2/1979	913.5; 913.8
12/20/1979	1103.7
1/24/1980	1102; 103; 1103.1;
2/2/1982	1032.7; 1032.8; 1032.9; 1034.1; 1037; 1037.1; 1037.2;
6/7/1983	1080; 1081; 1081.1;
6/11/1980	1103.7
8/5/1983	1100; 1100.1; 1101
10/19/1982	1032.7
10/21/1983	1038.1
1/11/1983	913; 913.1; 913.2; 913.3; 913.4; 913.5; 913.6; 913.7; 913.8; 913.9
1/13/1983	1070; 1071; 1072; 1073; 1074; 1075; 1076
5/31/1983	916; 916.2
8/4/1983	914; 915.5; 915.6; 916.1;
8/5/1983	1103.1; 1103.2; 1103.5; 1103.7; 1104; 1104.1; 1104.3; 1105.2; 1106; 1106.2; 1106.4; 1106.5; 1106.6; 1107; 1107.1; 1107.2; 1108;
8/9/1983	1034; 1037.4; 1037.5; 1038; 1039; 1039.1;
6/19/1984	917.1; 917.3; 917.5;
7/16/1984	1072; 1074; 1074.1;
8/17/1984	914.3; 1103.2
8/28/1984	1042
8/31/1984	1108
1/23/1985	913.3
4/22/1985	1104.2
9/6/1985	1037.10; 1037.11; 1055; 1055.1; 1055.3; 1055.5; 1055.7; 1055.8; 1055.9; 1055.10; 1055.11
1/8/1986	1032.7
7/3/1986	1037.5
8/10/1987	913.8
8/19/1986	1039.1
7/28/1988	1035.4
1/24/1989	914.2
5/25/1989	913.3
9/26/1989	1035; 1035.1; 1035.2; 1035.3;
12/4/1989	914; 915; 915.1; 915.2; 917.3; 1035;
12/20/1989	1034
9/17/1990	1037.4
9/27/1990	1038.2; 1054.2; 1054.5; 1056.1; 1056.2; 1056.3; 1056.4; 1056.5; 1056.6; 1104.1
8/26/1991	1037.5
11/1/1991	1036.1
11/25/1991	913.1; 913.2.5;
11/27/1991	913.4; 1037.5;
2/11/1991	913.8; 914.2
8/5/1991	917.5
8/26/1991	1034; 1037.3;
9/23/1991	914.2; 916.1; 916.2
4/29/1992	1037.8
5/19/1992	1036.1
5/27/1992	1032.7
1/21/1993	917.3; 1034; 1038;
4/5/1993	1038;
1/7/1994	916.10; 913; 913.1; 913.2; 913.3; 913.4; 913.6; 1032.10; 1034;
5/16/1994	913.1; 913.2; 913.6; 913.11; 1034
10/20/1994	1038;
6/16/1995	1038

The changes listed above probably did not materially affect whether the program should remain certified, but do illustrate that laws and regulations cited in the Section 21080.5 certifications frequently are altered after certification has been granted.

## CONCLUDING COMMENTS

Section 21080.5 was ostensibly created to eliminate regulatory duplication, by exempting programs from the normal EIR process where those programs have requirements that are sufficiently similar to the EIR requirements. However, as we have seen, in each of the regulatory programs reviewed, the exemption covers programs whose rules diverge in substantial ways from the requirements of CEQA.

These differences arise in connection with all four of the basic goals of CEQA: informing governmental decision-makers and the public; identifying ways to reduce environmental damage; preventing significant, avoidable adverse impacts; and disclosing to the public the reasons for approval of a project or activity. Whether or not the programs reviewed actually meet these goals of CEQA is, however, a question that is beyond the scope of this analysis. To answer that would require not only comparing their laws and rules to CEQA's, but also evaluating how each program is implemented.



## Appendix: Explanation of Numbered Items on Table 2

Numbers in the table indicate areas where CEQA contains a requirement that is lacking in the certified regulatory program.

### Timber Harvest Plans

1 – Although a project description is required, several items required by CEQA are not included: a list of the agencies expected to use the EIR in their decision-making; a list of permits and other approvals required for the project; a list of related environmental review and consultation requirements required by federal, state, and local laws, regulations or policies; and a discussion of any inconsistencies between the proposed project and applicable general and regional plans.

2 – Timber Harvest Plan (THP) rules do not require an explicit discussion of all significant impacts due to the project. They only require a statement as to whether significant unmitigated impacts are expected: “After considering the rules of the Board and any mitigation measures proposed in the plan, the [THP] shall indicate whether the operation would have any significant adverse impact on the environment.”<sup>84</sup>

3 – Timber rules do not require the applicant to explicitly state the reasons that a potential cumulative impact was not found to be significant.

4 – Timber rules contain detailed guidance for analyzing cumulative effects, but otherwise do not provide or require definitions, guidance, or criteria for identifying the various categories of potential significant adverse effects.

5 – The timber rules require that the preparer of the THP consider alternatives and mitigation measures for significant impacts,<sup>85</sup> but do not require an explicit description or comparison of the merits of the alternatives in the THP. There is no requirement to consider a “no project” alternative. It should be noted, however, that there is legal precedent stating that alternatives must be discussed by a timber harvest plan.<sup>86</sup>

6 – The timber rules do not contain a requirement to explain why a particular mitigation measure was chosen when other choices are available.

7 – In contrast to CEQA, which authorizes lead and responsible agencies to disapprove an EIR, only the Director of CDF may disapprove a THP.<sup>87</sup>

8 – The timber rules do not contain a parallel to the CEQA requirement that responsible agencies must notify the lead agency of the scope and content of the environmental information that is germane to their statutory responsibilities and must be included in the EIR. Nor is there any parallel to the CEQA requirement that responsible agencies provide detailed performance objectives for mitigation measures.<sup>88</sup>

## **Department of Fish and Game Rulemaking**

9 – Although there are requirements to describe the project (the proposed regulation), there is nothing analogous to the following CEQA requirements: a description of environmental baseline conditions; listing of other agencies that will be using the EIR in decision-making; and discussion of any inconsistencies between the proposed project and applicable general and regional plans. Some of these requirements might be difficult to apply in the context of statewide rulemaking, however.

10 – No requirement analogous to CEQA’s requirement to list other past, present, and future projects that could contribute to cumulative impacts. Also, no requirement to indicate why a potential cumulative impact was found to not be significant.

11 – Unlike CEQA, the statute and regulations do not provide or require definitions, guidance, or criteria for identifying the various categories of potential significant adverse effects.

12 – Although the California Department of Fish and Game (CDFG) rules require an evaluation of alternatives, there is no requirement to consider a “no project” alternative.

13 –The CDFG rulemaking process does not require an explanation of why a particular mitigation measure was chosen when other choices are available.

14 – No requirement for monitoring of mitigation measures.

15 - Only the Director of CDFG may disapprove the proposed regulations because of concerns about unmitigated environmental effects. In contrast, lead and responsible agencies can block a project under CEQA.

16 – Several CEQA requirements have no parallel in the CDFG rulemaking process: the requirement that responsible agencies notify the lead agency of the scope and content of the environmental information that is germane to their statutory responsibilities and must be included; that responsible agencies provide detailed performance objectives for mitigation measures; and that responsible and trustee agencies advise the lead agency of what they consider to be significant environmental effects.

## **Water Quality Basin/208 Planning**

17 – there are no requirements directly analogous to the CEQA requirements for a project description, although a good deal of this information might nevertheless be included in the plan.

18 – agency is required to answer “yes,” “no,” or “maybe” to a checklist of questions about whether environmental impacts will occur.<sup>89</sup>

19 – the plan need not explicitly state the reasons that a potential cumulative impact was not found to be significant.

20 – Unlike CEQA, the statute and regulations do not provide or require definitions, guidance, or criteria for identifying significant effects.

21 – The written environmental report that accompanies the basin plan must “include reasonable alternatives to the proposed activity.”<sup>90</sup> However, there is no requirement to compare the alternatives, explain the rationale for choosing the selected alternative, nor compare to a “no project” alternative.

22 – The basin planning process does not have a requirement to explain why a particular mitigation measure was chosen when other choices are available.

23 – Only the State Water Resources Control Board (SWRCB) may disapprove the proposed plan. In contrast, lead and responsible agencies can block approval under CEQA.

24 – Several CEQA requirements have no parallel in the basin planning process: the requirement that responsible agencies notify the lead agency of the scope and content of the environmental information that is germane to their statutory responsibilities and must be included in the EIR; that they provide detailed performance objectives for mitigation measures; and that responsible and trustee agencies advise the lead agency of what they consider to be significant environmental effects.

### **Pesticide Registration**

25 – Although the proposed pesticide must be described, there is nothing analogous to the following CEQA requirements: a description of environmental baseline conditions; listing of other agencies that will be using the EIR in decision-making; and discussion of any inconsistencies between the proposed project and applicable general and regional plans. Some of these requirements might be difficult to apply, however, in the context of approving a pesticide that will be applied statewide.

26 – No explicit requirement to evaluate or discuss cumulative impacts. However, according to the Department, it attempts to include such considerations in its evaluation process.<sup>91</sup>

27 – With the exception of groundwater impacts, there are no definitions, guidance, or criteria for identifying significant effects established or required by law or regulation. The Department uses U.S. EPA guidance and criteria in interpreting data on possible adverse effects. With respect to groundwater, statute requires the Department to establish detailed criteria, reporting requirements and monitoring for pesticides that could contaminate groundwater, and can discontinue the registration of such pesticides after the fact.

28 – There is a requirement to provide a “discussion of reasonable alternatives which would reduce any significant environmental impact.”<sup>92</sup> However, there is no requirement to include a “no project” alternative.

29 – No requirement that mitigation measures be monitored. However, the Department of Pesticide Regulation does have programs to monitor at least a statistical sampling of the sites where pesticides are applied.<sup>93</sup>

30 – Only the Director of the Department of Pesticide Regulation may disapprove the proposed registration. In contrast, lead and responsible agencies can block approval under CEQA.

31 – Several CEQA requirements have no parallel in the pesticide registration process: the requirement that responsible agencies notify the lead agency of the scope and content of the environmental information that is germane to their statutory responsibilities and must be included in the EIR; that they provide detailed performance objectives for mitigation measures; and that responsible and trustee agencies advise the lead agency of what they consider to be significant environmental effects.

## Endnotes

- <sup>1</sup> California Department of Forestry and Fire Protection, “CDF’s Role in Timber Harvesting,” <http://www.cdf.ca.gov/ResourceManagement/THinCA.asp>.
- <sup>2</sup> *Natural Resources Defense Council, Inc., et al., v. Arcata National Corporation, et al.*, 59 Cal. App. 3d 959, (1<sup>st</sup> Dist., 1976).
- <sup>3</sup> Evelle J. Younger, California Attorney General, 57 Cal Ops Atty Gen 587, 590 (November 22, 1974).
- <sup>4</sup> George H. Murphy, Legislative Counsel, and Robert C. Duffy, Deputy Legislative Counsel, Opinion #5032, March 11, 1975, prepared for Sen. John A. Nejedly, March 11, 1975.
- <sup>5</sup> Resolution of the State Board of Forestry, August 22, 1975.
- <sup>6</sup> Statutes of 1975 Chapter 174, enacted June 30, 1975.
- <sup>7</sup> Letter from Sen. John A. Nejedly to Governor Edmund G. Brown, Jr., September 15, 1975.
- <sup>8</sup> Letter from Sen. John A. Nejedly to Governor Edmund G. Brown, Jr.
- <sup>9</sup> Letter from Alan L. Clarke, Legislative Consultant, Associated California Loggers, to Sen. John Nejedly, October 28, 1975; Letter from John T. Hay, Executive Vice President, California Chamber of Commerce, to Governor Edmund G. Brown, Jr., September 15, 1975.
- <sup>10</sup> Assembly Committee on Resources and Land Use, analysis of SB 707 as amended August 5, 1975.
- <sup>11</sup> Memorandum from California Attorney General to California Department of Conservation, November 6, 1975.
- <sup>12</sup> *Cal Jur*, third edition, (San Francisco: Bancroft-Whitney, 2000), §503, 730-731.
- <sup>13</sup> California Public Resources Code §21080.5(d).
- <sup>14</sup> California Public Resources Code §21080.5(d)(1)(i).
- <sup>15</sup> California Public Resources Code §21080.5(d)(1)(ii).
- <sup>16</sup> California Public Resources Code §21080.5(d)(2)(i).
- <sup>17</sup> California Public Resources Code §21080.5(d)(2)(ii).
- <sup>18</sup> California Public Resources Code §21080.5(d)(2)(iii).
- <sup>19</sup> California Public Resources Code §21080.5(d)(2)(iv).
- <sup>20</sup> California Public Resources Code §21080.5(d)(2)(vi).
- <sup>21</sup> California Public Resources Code §21080.5(d)(2)(v).

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- <sup>22</sup> California Public Resources Code §21080.5(d)(3)(ii).
- <sup>23</sup> California Public Resources Code §21080.5(d)(3)(i).
- <sup>24</sup> *Environmental Protection Information Center, Inc. v. Johnson*, 170 Cal. App. 3d 604 (“EPIC v. Johnson”), (1<sup>st</sup> Dist., 1985).
- <sup>25</sup> *Environmental Protection Information Center, Inc. v. Johnson*.
- <sup>26</sup> California Public Resources Code §21001(a).
- <sup>27</sup> California Public Resources Code §21000(g).
- <sup>28</sup> *Environmental Protection Information Center, Inc. v. Johnson; Ronald Laupheimer v. State of California*, 200 Cal. App. 3d 440, (6<sup>th</sup> Dist., 1988).
- <sup>29</sup> California Public Resources Code §21002.
- <sup>30</sup> California Public Resources Code §21160.
- <sup>31</sup> *Sierra Club v. State Board of Forestry*, 7 Cal. 4<sup>th</sup> 1215 (Cal. Sup. Ct., 1994), at 1228.
- <sup>32</sup> California Resources Agency, CEQA Guidelines §15002.
- <sup>33</sup> California Department of Forestry and Fire Protection, “Forest Practice,” <http://www.fire.ca.gov/ResourceManagement/ForestPractice.asp>, February 8, 2001.
- <sup>34</sup> Public Resources Code §21065; CEQA Guidelines §15378. For further discussion of the applicability of CEQA to rulemaking, see Michael H. Remy, Tina A. Thomas, James G. Moose, and Whitman F. Manley, *Guide to the California Environmental Quality Act (CEQA)*, (Point Arena, CA: Solano Press Books, 1999), 65-67, 78-80.
- <sup>35</sup> California Resources Agency, “Statement of Findings: Amendment to the Resources Agency CEQA Guidelines to Certify a Regulatory Program,” August 3, 1998, 1.
- <sup>36</sup> California Government Code §11346.2.
- <sup>37</sup> California Code of Regulations Title 14, §777.6(b).
- <sup>38</sup> California Water Code §13240. There are ten regional plans, because the Central Valley region is divided into two plans.
- <sup>39</sup> These regulations, adopted in 1993, are at California Code of Regulations Title 23, Ch. 27, Article 6.
- <sup>40</sup> California Department of Food and Agriculture, *Report on Environmental Assessment of Pesticide Regulatory Programs*, Summary and Recommendations, 1978, xiv.
- <sup>41</sup> California Department of Pesticide Regulation, *Regulating Pesticides: The California Story*, California Environmental Protection Agency, October 2001, 10.
- <sup>42</sup> California Department of Pesticide Regulation, *Regulating Pesticides*, 10.
- <sup>43</sup> Ann Prichard, Department of Pesticide Regulation, Pesticide Registration Branch, personal communication, September 27, 2001.

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- <sup>44</sup> CEQA Guidelines §15125.
- <sup>45</sup> CEQA Guidelines §15124.
- <sup>46</sup> CEQA Guidelines §15126.
- <sup>47</sup> California Public Resources Code §21083.
- <sup>48</sup> CEQA Guidelines §15130. CEQA Guidelines §15064, 15130, and 15152 stated that cumulative impacts need not be considered significant if they made a “de minimis” contribution to a significant environmental impact caused by other projects. However, this allowance was recently ruled invalid by the Sacramento Superior Court.
- <sup>49</sup> California Public Resources Code §21082.
- <sup>50</sup> California Public Resources Code §15064.7.
- <sup>51</sup> CEQA Guidelines §15126.6.
- <sup>52</sup> CEQA Guidelines §15126.6.
- <sup>53</sup> CEQA Guidelines §15126.
- <sup>54</sup> CEQA Guidelines §15126.4.
- <sup>55</sup> CEQA Guidelines §15092.
- <sup>56</sup> California Public Resources Code §21081.
- <sup>57</sup> California Code of Regulations Title 14, §15093(b).
- <sup>58</sup> CEQA Guidelines §15091(d).
- <sup>59</sup> California Public Resources Code §21081.6.
- <sup>60</sup> California Public Resources Code §21067; CEQA Guidelines §15050.
- <sup>61</sup> California Public Resources Code §21069.
- <sup>62</sup> CEQA Guidelines §15042.
- <sup>63</sup> CEQA Guidelines §15096.
- <sup>64</sup> CEQA Guidelines 15086(a).
- <sup>65</sup> California Public Resources Code §21104.
- <sup>66</sup> California Public Resources Code §21080.4(a).
- <sup>67</sup> CEQA Guidelines §15086(d).
- <sup>68</sup> California Public Resources Code §21081.6(c).
- <sup>69</sup> California Public Resources Code §21091.
- <sup>70</sup> CEQA Guidelines §15087.
- <sup>71</sup> California Public Resources Code §20191.

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- <sup>72</sup> California Public Resources Code §21091.
- <sup>73</sup> California Public Resources Code §21002.
- <sup>74</sup> *Environmental Protection Information Center, Inc. v. Johnson*.
- <sup>75</sup> California Government Code §13146.2.
- <sup>76</sup> California Code of Regulations Title 3, §6436
- <sup>77</sup> CEQA Guidelines §15042.
- <sup>78</sup> CEQA Guidelines §§15096, 15052, 15162.
- <sup>79</sup> CEQA Guidelines §15253.
- <sup>80</sup> *Friends of the Old Trees v. Department of Forestry and Fire Protection*, et al., 52 Cal App 4<sup>th</sup> 1383, (1<sup>st</sup> Dist., 1977), at 43-45.
- <sup>81</sup> Memorandum from Paul H. Gosselin, Chief Deputy Director, Department of Pesticide Regulation, to Daniel Pollak, California Research Bureau, February 5, 2002.
- <sup>82</sup> *Friends of the Old Trees v. Department of Forestry and Fire Protection*.
- <sup>83</sup> *Environmental Protection Information Center v. Johnson*.
- <sup>84</sup> California Code of Regulations Title 14, §898.
- <sup>85</sup> California Code of Regulations Title 14, §896(a).
- <sup>86</sup> *Friends of the Old Trees v. Department of Forestry and Fire Protection* at 43-45
- <sup>87</sup> California Public Resources Code §4582.7(e).
- <sup>88</sup> California Public Resources Code §21081.6(c).
- <sup>89</sup> California Code of Regulations Title 23, Chapter 27, Article 6, Appendix A.
- <sup>90</sup> California Code of Regulations Title 23, §3777(a).
- <sup>91</sup> Memorandum from Paul H. Gosselin to Daniel Pollak, February 5, 2002.
- <sup>92</sup> California Code of Regulations Title 3, §6252.
- <sup>93</sup> California Code of Regulations Title 3, §6436.