NEPA and CEQA:

Integrating Federal and State Environmental Reviews

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I. Introduction:

This handbook provides advisory guidance to Federal, state, and local agencies and others regarding projects that are subject to both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA).

Once President Nixon signed NEPA on January 1, 1970, and California Governor Reagan followed suit signing CEQA into law on September 18 of the same year, these laws expressly required the incorporation of environmental values into governmental decision making. Those statutes require Federal, state, and local agencies to analyze and disclose the potential environmental impacts of their decisions, and, in the case of CEQA, to minimize significant adverse environmental effects to the extent feasible.

NEPA was codified under Title 42 of the United States Code, in section 4331 et seq. (42 U.S.C. § 4331 et seq.). Under NEPA, Congress established the White House Council on Environmental Quality (CEQ) to ensure that Federal agencies meet their obligations of the Act. CEQ's Regulations for Implementing the Procedural Provisions of NEPA (hereinafter CEQ NEPA Regulations) are in Title 40 of Code of Federal Regulations section 1500 et seq. (40 C.F.R. § 1500 et seq.). In California, CEQA was codified under Division 13 of California's Public Resources Code, in sections 21000 et seq. (Cal. Pub. Resources Code, § 21000 et seq.). The Guidelines for Implementation of the California Environmental Quality Act are in Title 14 of California's Code of Regulations, section 15000 et seq. (Cal. Code Regs., tit. 14, § 15000 et seq.; hereafter CEQA Guidelines).

NEPA and CEQA are similar, both in intent and in the review process (the analyses, public engagement, and document preparation) that they dictate. Importantly, both statutes encourage a joint Federal and state review where a project requires both Federal and state approvals. Indeed, in such cases, a joint review process can avoid redundancy, improve efficiency and interagency cooperation, and be easier for applicants and citizens to navigate. Despite the similarities between NEPA and CEQA, there are several differences that require careful coordination between the Federal and state agencies responsible for complying with NEPA and CEQA. Conflict arising from these differences can create unnecessary delay, confusion, and legal vulnerability.

Federal, state and local agencies have cooperated in the environmental review of projects ranging from infrastructure to renewable energy permitting. As the state and Federal governments pursue shared goals, there will be a continued need for an efficient, transparent environmental review process that meets the requirements of both NEPA and CEQA.

Recognizing the importance of implementing NEPA and CEQA efficiently and effectively, the CEQ and the California Governor's Office of Planning and Research (OPR) developed this handbook to provide advisory guidance on conducting joint NEPA and CEQA review processes. The CEQ oversees Federal agency implementation of NEPA, which includes writing the CEQ NEPA Regulations[1] and preparing guidance and handbooks for Federal agencies. OPR plays

[1] The CEQ Regulations for Implementing the Procedural Provisions of NEPA are *available on* www.nepa.gov *at* ceq.hss.doe.gov/ceq_regulations/regulations.html.

several roles in the administration of CEQA, including developing the CEQA Guidelines[2] in coordination with the California Natural Resources Agency, providing technical assistance to state and local agencies, and coordinating state level review of CEQA documents.

The purpose of this handbook is to provide practitioners with an overview of the NEPA and CEQA processes, and to provide practical suggestions on developing a single environmental review process that can meet the requirements of both statutes. This handbook contains three main sections. First is a "Question and Answer" section that addresses the key similarities and differences between NEPA and CEQA. This section compares each law's requirements or common practices, and identifies possible strategies for meeting the requirements of both laws. These strategies are not meant to prescribe methods that agencies must use; rather, this handbook provides suggestions that will help agencies identify and think through potential issues. Indeed, developing a common understanding of the NEPA and CEQA review processes and their differences at the beginning of a joint review process may be among the most important ways to conduct an efficient and effective review process.

Second, this handbook provides a framework for a Memorandum of Understanding (MOU) between two or more agencies entering a joint NEPA/CEQA review process. MOUs can clarify responsibilities and avoid potential conflicts. The MOU framework in this handbook highlights a number of issues that agencies can consider before embarking on their joint effort. This handbook is not intended to replace or replicate any existing MOUs; rather, it raises topics agencies might consider incorporating into their own MOUs. Much like the Q&A document, a key goal of this framework is to encourage state and Federal agencies to consider and resolve potential challenges common to joint NEPA/CEQA review processes in order to avoid complications late in the review process.

Finally, the third section addresses the California Energy Commission (CEC) licensing process for decisions on thermal power plants 50 megawatts and larger. This licensing process is a certified regulatory program under CEQA and therefore the process and documents prepared by the CEC serve as the functional equivalent of a CEQA review (CEQA Guidelines, § 15251, subd. (j)).

As noted above, this handbook is advisory and does not supplant the administrative regulations set forth in the CEQA Guidelines, or the CEQ NEPA Regulations. Agencies conducting an environmental review must also take into account any additional requirements or time periods established in an individual agency's administrative regulations or procedures implementing NEPA and CEQA, which could prescribe additional or more stringent requirements than the CEQ NEPA Regulations and the CEQA Guidelines.

[2] The CEQA Guidelines are found in section 15000 et seq. of Title 14 of the California Code of Regulations.

II. Questions and Answers

A. Stage 1: Preliminary Questions

1. What Activities Require Environmental Review?

NEPA and CEQA promote informed decision making by requiring an environmental review process (i.e., analyses and documentation) before a final decision on whether and how to proceed. NEPA applies specifically to Federal proposed actions and CEQA applies to state and local government proposed actions.

NEPA Requirement: NEPA was the first major environmental law in the United States. It requires agencies to assess the environmental effects of a proposed agency action and any reasonable alternatives before making a decision on whether, and if so, how to proceed. The NEPA review (a process involving environmental analyses and documentation) ensures that decisions are better informed and allows for greater public involvement. NEPA applies to all Federal agencies in the executive branch (40 C.F.R. § 1507.1).[3] NEPA applies to Federal actions including not only broad actions, such as establishing or updating land management plans, programs, or policies, but also to specific projects (*Id*. at § 1508.18(b)). With regard to private actions, NEPA applies to any Federal decisions on approvals, permits, or funding required for the private action. For example, private projects may involve Federal loan guarantees, Clean Water Act section 404 permits, and Endangered Species Act Incidental Take Permits.

The CEQ NEPA Regulations encourage cooperation with state and local agencies in an effort to reduce duplication in the NEPA process (40 C.F.R. § 1506.2). The regulation states that cooperation shall include:

(1) Joint planning processes.
(2) Joint environmental research and studies.
(3) Joint public hearings (except where otherwise provided by statute).
(4) Joint environmental assessments.

Federal agencies are directed to cooperate in fulfilling the requirements of state and local laws and ordinances where those requirements are in addition to, but not in conflict with, Federal requirements, by preparing one document that complies with all applicable laws (40 C.F.R. § 1506.2(c)). When preparing a joint Environmental Impact Statement (EIS)/Environmental Impact Report (EIR), "one or more Federal agencies and one or more state or local agencies shall be joint lead agencies" (*Id*. at § 1506.2(c)). CEQ NEPA Regulations further provide agencies with the ability to combine documents, by stating that "any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork" (*Id*. at § 1506.4). Furthermore, if an existing document cannot be utilized,

[3] NEPA does not apply to the President, the Congress, or the Federal courts (40 C.F.R. § 1508.12).

portions may be incorporated by reference (See below, Q&A, WHEN CAN INCORPORATION BY REFERENCE BE USED?).

CEQA Requirement: CEQA applies to projects of all California state, regional or local agencies, but not to Federal agencies. Its purposes are similar to NEPA. They include ensuring informed governmental decisions, identifying ways to avoid or reduce environmental damage through feasible mitigation or project alternatives, and providing for public disclosure (CEQA Guidelines, § 15002, subd. (a)(1)-(4)). CEQA requirements apply to public agency projects including "activities directly undertaken by a governmental agency, activities financed in whole or in part by a governmental agency, or private activities which require approval from a governmental agency" (*Id.* at14 CCR § 15002, subd. (b)(1)-(2)). CEQA also applies to private projects that involve governmental participation, financing, or approval (*Id*. at §§ 15002, subd. (c) & 15378, subd. (a)(2)).

Like NEPA, CEQA encourages cooperation with Federal agencies to reduce duplication in the CEQA process. In fact, CEQA recommends that lead agencies rely on a Federal EIS "whenever possible," so long as the EIS satisfies the requirements of CEQA (Cal. Pub. Resources Code, § 21083.7). CEQA does not authorize state agencies to simply delay action until Federal agencies complete the NEPA process. Rather, CEQA Guidelines section 15223 provides that if a state agency knows that its authorization will be needed for a project undergoing Federal environmental review, that agency "shall consult as soon as possible with the Federal agency" (emphasis added).

Opportunities for Coordination: Both NEPA and CEQA have similar goals of ensuring that governmental actors are making informed decisions regarding projects and operations that may affect the environment, and their implementing regulations are designed to allow flexibility in consolidating and avoiding duplication among multiple governmental layers of review.

2. What Level of Environmental Review is Needed?

Both NEPA and CEQA require agencies to determine whether a proposed action or project may have a significant impact on the environment, and to determine the appropriate level of environmental review. When NEPA and CEQA apply, agencies must therefore first determine what level of review is required. The agency has the following three options: (1) Categorical Exclusion/Categorical Exemption; (2) Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) (or Mitigated FONSI)/Initial Study (IS)) and Negative Declaration (ND) (or Mitigated Negative Declaration (MND)); or (3) EIS/EIR.

NEPA Requirement: Individual agencies may designate Categorical Exclusions in their agency NEPA implementing procedures that identify categories of actions they have determined typically do not have a significant impact on the environment, and for which neither an EA nor an EIS is necessary (40 C.F.R. § 1508.4). If the proposed project is an activity described in a Categorical Exclusion, and there are no extraordinary circumstances—the "safety net" provision ensuring that there are no unusual circumstances associated with applying the Categorical Exclusion to a specific proposed action—then the NEPA review is complete.

When the proposed action is not subject to a Categorical Exclusion, and is not one which the Federal agency has determined to have the potential to cause significant environmental effects, requiring an EIS, then the agency can prepare an EA (40 C.F.R. § 1508.9). An EA is a typically concise public document that provides evidence and analysis on the proposed action's potential environmental effects. An EA is prepared to determine whether a project would cause any significant effects. The EA process concludes with one of four agency decisions: 1) a FONSI; 2) a Mitigated FONSI; 3) a decision to prepare an EIS; or 4) a decision not to proceed with the project. A FONSI is appropriate where the agency determines the project has no potentially significant effects. A Mitigated FONSI is appropriate where any potentially significant impacts can be mitigated to a point where they are no longer potentially significant (40 C.F.R. § 1508.13). If the EA identifies any significant impact that the agency cannot mitigate, has not disclosed in a broader (programmatic) NEPA environmental review, or does not commit to mitigating to a point where the impact is less than significant, then the agency prepares a Notice of Intent to begin the EIS process, or decides not to proceed with the proposed action (40 C.F.R. § 1501.4).

Where agency experience and judgment indicate the potential for significant impacts, the agency may choose to bypass preparation of an EA and instead prepare an EIS from the outset. The most rigorous NEPA review, an EIS is a detailed discussion of a project's potential environmental effects with all relevant data and analysis and an evaluation of alternatives. An EIS is required for "major Federal actions significantly affecting the quality of the human environment." There is no initial test of whether the action is major or minor; instead, an EIS is required when there is the potential for a proposed action to have a significant impact on the human environment (40 C.F.R. § 1508.18). In cases where an EIS is not required, agencies may be able to meet their NEPA responsibilities by applying a Categorical Exclusion or preparing an EA.

CEQA Requirement: The CEQA Guidelines contain a list of Categorical Exemptions for which no additional environmental analysis is needed, subject to certain exceptions (CEQA Guidelines, § 15300 et seq.). Likewise, the CEQA Guidelines contain a list of many of the Statutory Exemptions for which no additional environmental analysis is needed. Some Statutory Exemptions are complete exemptions from CEQA without exception" (*Id*. at § 15260). Note that not all of the Statutory Exemptions are listed in the CEQA Guidelines. Similar to NEPA, an agency prepares an IS if the project is not exempt. A CEQA lead agency must prepare an EIR if there is "substantial evidence" that a project "may have a significant effect on the environment" (*Id*. at § 21082.2, subds. (a) & (d))." If the project will not have any adverse impacts, or such impacts can be mitigated to a point where clearly no significant effects would occur, the lead agency may adopt a ND or a MND (*Id*. at §§ 15063, subd. (b)(2) & 15064, subd. (b)(2)).

Opportunities for Coordination: NEPA and CEQA largely dictate the same process for determining the need for an EIS or EIR. Where it is not clear whether an EIS/EIR will be required, agencies prepare a less detailed analysis (IS or EA) to get a sense of the potential extent of any impacts and whether such impacts can be mitigated. If the action will not have significant impacts, agencies may adopt a FONSI/Mitigated FONSI and ND/MND. If a project will clearly have one or more significant impacts, agencies can immediately proceed to preparing an EIS/EIR without first preparing an EA or an IS (40 C.F.R. § 1501.3(a); CEQA Guidelines, § 15063, subd. (a)).

There is some divergence between the laws in the standard for determining significance. Under CEQA, an EIR is required if substantial evidence supports a *fair argument* that a project *may* have a significant impact, even if other substantial evidence indicates that the impact will not be significant. Under NEPA, deference is given to the agency's determination based on its assessment of the context and intensity of the potential impacts, when that determination is demonstrated in the NEPA document and supported by the administrative record (40 C.F.R. § 1508.27).

NEPA and CEQA lead agencies must each reach their own conclusions about which level of environmental review and environmental document a particular proposed project requires. The lead agencies should keep each other informed about what they are considering and why. If beneficial, agencies may do a joint IS/EA to gauge the potential significance of a project's impacts.

Because the fair argument standard, described above, favors preparation of an EIR, a CEQA lead agency may decide that an EIR is appropriate, while a NEPA lead agency may decide that an EA is appropriate for the same action. It is still possible to write a joint EA/EIR—indeed, this is fairly common with transportation projects. The joint document should explain why one agency has identified a potential significant impact, while another has not. This explanation can describe the different definitions of significance and different standards for determining

significance. Even if a joint document is not prepared, agencies can make the process more efficient by sharing background reports, data, analyses, and other common elements.

Table 1: Summary and Comparison of NEPA and CEQA Processes

National Environmental Policy Act	California Environmental Quality Act

Initial Review for Categorical Exclusion
• Excluded if there are no extraordinary circumstances
	Initial Review for Categorical Exemption
	• Exempt if the project falls within:
	  o A statutory exemption, or
	  o A categorical exemption, and no exception applies

Environmental Assessment • Engage the public to the extent practicable • If no significant impacts, adopt a Finding of No Significant Impact or, if mitigation is required to reduce an impact, a Mitigated Finding of No Significant Impact • If there is the potential for an impact to be significant, prepare an Environmental Impact Statement	Initial Study • Required consultation with responsible and trustee agencies • Notice of Intent • Public and Agency Review and Comment • If no significant impacts, adopt a Negative Declaration or, if mitigation is required to reduce an impact, a Mitigated Negative Declaration • If there is the potential for an impact to be significant, prepare an Environmental Impact Report
Environmental Impact Statement	Environmental Impact Report

3. How Does NEPA and CEQA Terminology Differ?

a. "Action" (NEPA) versus "project" (CEQA):

NEPA applies to Federal agency decisions on "proposals for legislation and other major Federal actions" (42 U.S.C. § 4332(2)(c)). Federal actions include actions with the potential for environmental impacts. Such actions may include adoption and approval of official policy, formal plans, programs, and specific Federal projects (40 C.F.R. § 1508.18). NEPA also applies in cases where an agency is exercising its discretion in deciding whether and how to exercise its authority over an otherwise non-Federal project (for example, issuing a permit or approving funding).[4]

CEQA applies to state and local agency decisions to carry out or approve "discretionary projects… including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from this division" (Cal. Pub. Resources Code, § 21080). CEQA broadly defines "project" to include "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" (CEQA Guidelines, § 15378). Therefore, CEQA may apply to a broader range of projects than does NEPA.

b. Significance:

"Significance" is a term used in both NEPA and CEQA (40 C.F.R. § 1508.27; CEQA Guidelines, § 15382).

NEPA requires that an EIS be prepared when the proposed Federal action as a whole has the potential to "significantly [affect] the quality of the human environment…." (42 U.S.C. § 4332.) The NEPA determination of significance is based on context and intensity. (40 C.F.R. § 1508.27.) Under NEPA, an EA can be prepared to determine whether a finding of no significant impact can be made (*Id*. at § 1508.9). An EIS is needed when the proposal has the potential for a significant impact as shown by an EA or when an agency's initial determination indicates an EIS is appropriate. (*Id*. at § 1501.4.)

[4] A NEPA review is not required when an agency has no discretion (no decisionmaking) for a proposed action. The courts have held that ministerial acts which require no agency discretion or decisionmaking are not within the purview of NEPA. *State of South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980), *cert. denied*, ("since Department of the Interior had no discretion to consider environmental factors in issuing a mineral patent, it was a ministerial act and not subject to NEPA") (citing *Sugarloaf Citizens Ass'n v. F.E.R.C.*, 959 F.2d 508, 513 (4th Cir. 1992). *See also, Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979); NAACP v. Medical Center, Inc., 584 F.2d 619 (3d Cir. 1978). Further, *State of Alaska v. Andrus*, 591 F.2d 537, 538, 541 (9th Cir. 1979) ("the nonexercise of power by an executive-branch office does not call for compliance with NEPA"). The D.C. Circuit, for example, has reasoned that: "No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980).

CEQA requires the identification of each "significant effect on the environment" resulting from the whole of the action and ways to mitigate each significant effect (CEQA Guidelines, §§ 15064, subd. (a) & 15126.4). If the action may have a significant effect on any environmental resource, an EIR must be prepared (*Id*. at § 15063, subd. (b)). In addition, the CEQA Guidelines list a number of circumstances requiring a mandatory finding of significance, and, therefore, preparation of an EIR (*Id*. at § 15065). Each and every significant effect on the environment must be disclosed in the EIR and mitigated if feasible (*Id*. at §§ 15126.2 & 15126.4).

Agency staff engaged in joint processes should, therefore, take into account that some impacts determined to be significant under CEQA may not necessarily be determined significant under NEPA.

c. Agency Designations:

Lead Agency: Under NEPA, the lead agency has "primary responsibility for preparing the environmental impact statement" (40 C.F.R. § 1508.16), or EA. NEPA allows agencies to share the lead role as co-leads. CEQA defines the lead agency as "the public agency which has the principal responsibility for carrying out or approving a project. The lead agency will decide whether an EIR or Negative Declaration will be required for the project and will cause the document to be prepared" (CEQA Guidelines, §§ 15051 & 15367). CEQA does not provide for co-leads; consequently, where more than one agency has responsibility for a project, one agency shall be the lead agency that prepares the CEQA review for that project (*Id*. at § 15050, subd. (a)). Therefore, there may be a NEPA and a CEQA co-lead; however, there may not be multiple CEQA leads. For ease of administration and to reduce public confusion, the Federal agencies should endeavor to have one lead for purposes of developing the environmental review with the CEQA co-lead.

Cooperating Agency versus Responsible and Trustee Agencies: Under NEPA, a cooperating agency is "any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal. . . " (40 C.F.R. § 1508.5). Tribal, state, local, or other Federal governmental agencies with responsibilities for managing resources potentially affected by the proposed action may also, with the agreement of the lead agency, become cooperating agencies. Cooperating agencies participate in the NEPA process at the request of the lead agency and, upon request, provide expertise for the environmental analysis. Under CEQA, responsible agencies are "all public agencies other than the Lead Agency which have discretionary approval power over the project," and participate in the CEQA process through required consultation with the lead agency (CEQA Guidelines, §§ 15096 & 15381). Agencies without approval authority, but which have jurisdiction by law over resources potentially affected by the project, are known as trustee agencies which must be included in the consultation and review process (*Id*. at § 15386).

d. Categorical Exclusion versus Categorical Exemption:

NEPA and CEQA both allow certain government actions to proceed without further NEPA or CEQA review if that type of action has been previously determined not to have a significant impact on the environment. Actions defined in either a Categorical Exclusion or Categorical

Exemption may be subject to further environmental review in the case of extraordinary circumstances under NEPA or exceptions to the exemptions under CEQA (40 C.F.R. § 1508.4; CEQA Guidelines, §§ 15061, subd. (b), & 15300.2).

California currently has thirty-three Categorical Exemptions identified in sections 15301 through 15333 of the CEQA Guidelines, as well as exceptions to those exemptions in section 15300.2. Individual state and local agencies may also specify in their own implementing regulations which particular activities tend to fall within those Categorical Exemptions (CEQA Guidelines, § 15022, subd. (a)). Under CEQA, a Categorical Exemption applies to classes of projects, regardless of the agency considering the project proposal. Under NEPA, the Categorical Exclusions are specific to the agency that has established them and included them in their NEPA implementing procedures. Consequently, a proposed project requiring multiple Federal agency actions will require a NEPA review that satisfies all the agencies' implementing procedures and could, if each of the agencies does not have an appropriate Categorical Exclusion, require further review in an EA or an EIS.

All Categorical Exemptions are subject to certain exceptions (CEQA Guidelines, § 15300.2). CEQA gives lead agencies the discretionary authority to determine whether substantial evidence supports application of a Categorical Exemption for the proposed project (*Id*. at § 15061). NEPA allows agencies to determine Categorical Exclusions on an independent basis (See 40 C.F.R. §§ 1507.3 & 1508.4). The agency Categorical Exclusions are found in the agency NEPA implementing procedures available at http://ceq.hss.doe.gov/nepa_contacts/Federal_Agency_NEPA_Implementing_Procedures_7March2013.pdf.

In cases where both a Categorical Exclusion under NEPA and a Categorical Exemption under CEQA may apply, the agencies should coordinate to ensure that the consideration of potential effects is consistent with the review of extraordinary circumstances or exceptions.

Both NEPA and CEQA also provide for certain statutory exemptions. As acts of Congress and of the California Legislature, NEPA and CEQA are subject to exceptions also enacted by Congress or the Legislature. The exemptions can be complete, limited, or conditional depending on the statutory language in the exemption. Many CEQA statutory exemptions are contained within CEQA while others are found in other laws. The NEPA statutory exemptions are contained in other laws.

e. Environmental Assessment and Finding of No Significant Impact versus Initial Study and Negative Declaration:

A FONSI under NEPA is a brief statement by an agency that explains why an action will not have a significant effect on the human environment (40 C.F.R. § 1508.13). A FONSI generally includes the EA document, which provides the basis for the FONSI. Federal agencies shall engage the public in the preparation of an EA; however, the type and form of public involvement

is left to the individual agency. NEPA also provides for a Mitigated FONSI, [5] which explains that an action may pose some significant effects, but that mitigation measures that will be adopted by the agency will reduce these effects to a level where they are no longer significant.

Under CEQA, the lead agency may adopt a ND if "there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment" (CEQA Guidelines, § 15070, subd. (a)). A proposed ND must be circulated for public review along with an IS. An IS briefly describes the project and any potential impacts. As with NEPA, CEQA allows for a MND in which mitigation measures are proposed to reduce potentially significant effects so that they are less than significant (*Id*. at § 15369.5). Proposed mitigation measures must generally be subject to review by the public, responsible agencies, trustee agencies, and the county clerk of each county within which the proposed project is located, prior to adoption of a MND (*Id*. at §§ 15072 (requirements for notice of intent to adopt a negative declaration), 15073.5 (new mitigation measures necessary to reduce a significant impact require recirculation) & 15074.1 (different mitigation measures may be substituted if they are equally effective if the lead agency holds a hearing and makes a specific finding)).

Table 2: Comparison of the EA and IS Processes

[5] See the CEQ Memorandum to the Heads of Federal Departments and Agencies, *Appropriate Use of Mitigation and Monitoring and Appropriate Use of Mitigated Findings of No Significant Impact*, January 14, 2013, *available at* http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

	National Environmental Policy Act	California Environmental Quality Act
Environmental Document	*Environmental Assessment* (EA): a concise document discussing the need for the project, alternative courses of action, and environmental impacts	*Initial Study* (IS): brief description of the project and any potential impacts.
Application	Project is not subject to a Categorical Exclusion and it is unclear whether, or unlikely that, project has the potential to cause significant environmental effects.	Project is not exempt, and there is no substantial evidence that a project may have significant effects on the environment.
Conclusions	*Finding of No Significant Impacts*: the determination that a proposed project will not cause any significant environmental impacts.	*Negative Declaration*: there is no substantial evidence that the project may have a significant effect on the environment.
	Mitigated Finding of No Significant Impact: the project may result in significant impacts to the environment but the agency's proposed mitigation measures will reduce the impacts to the point that they are no longer significant	*Mitigated Negative Declaration*: any adverse impacts of the project can be mitigated to a point where it is clear that no significant effects would occur
	Determination to Prepare an Environmental Impact Statement	*Determination to Prepare an Environmental Impact Report*
Notice of Intent	Not Required	Required for a Negative Declaration
Scoping	Agency has discretion whether and how to scope.	Required for projects of statewide or area-wide significance
Public/ Agency Engagement	Agencies have discretion to involve the public and agencies.	Required consultation with responsible and trustee agencies
Commenting	Agency must provide FONSI for public review only when the action has never before been done by that agency or it is something that would typically require an EIS. The review period lasts 30 days.	A Negative Declaration must be circulated for public review along with the IS. Proposed Mitigation Measures are also generally subject to review.
Review Period	30 days as described above	20 days - most projects 30 days - projects where state agency is the lead/responsible/trustee agency or are of state/area/region-wide significance

f. Environmental Impact Statement versus Environmental Impact Review:

An EIS under NEPA closely resembles an EIR under CEQA. A table summarizing and comparing the NEPA and CEQA processes and the procedural differences between an EIS and an EIR follows.

Table 1: Comparison of EIS and EIR Processes

Environmental Impact Statement Process	Environmental Impact Report Process
Notice of Intent	Notice of Preparation
Scoping	Scoping
Draft EIS	Draft EIR
Filing with EPA which publishes a Notice of Availability in the Federal Register	State Clearinghouse Distribution for State Agency Review (if required)
Public and Agency Review and Comment	Public and Agency Review and Comment
Final EIS	Final EIR
	Provide proposed responses to public agency comments at least 10 days prior to certification of the EIR
Filing and EPA Notice of Availability in the Federal Register, Public and Agency Review (if designated)	Certify EIR, adopt Findings on Project' Significant Environmental Impacts and Alternatives, Mitigation Monitoring and Reporting Program, and, if necessary, a Statement of Overriding Considerations
30 Day Review Period (Agency may convert this into a public review and comment period).	
Agency Decision	Agency Decision
Record of Decision	Notice of Determination

4. Can an Existing Review (Analysis and Documentation) be Used?

a. Can Existing CEQA Review Satisfy NEPA?

Under NEPA, a Federal agency may use a completed CEQA review when it has participated in the preparation of the CEQA review and the CEQA review will meet NEPA requirements. Agencies should note, however, that compliance with other laws may also be necessary for proposed actions, including, but not limited to, Section 7 of the Federal Endangered Species Act, Section 106 of the National Historic Preservation Act, and Section 404 of the Clean Water Act. Consequently, agencies should consider working collaboratively to address those requirements as well.

NEPA Requirement: Under NEPA, a Federal agency must participate in the preparation of an environmental review (the analysis and documentation) in order for it to satisfy NEPA (42 U.S.C. § 4332(2)(D)(ii)). Furthermore, a Federal agency may not use a completed EIR to meet its own requirements until the Federal agency has reviewed the CEQA document and accompanying administrative record and determined that it satisfies all the agency's NEPA requirements.

Opportunities for Coordination: Federal agencies interested in using a CEQA document for their own requirements should work closely with the agency preparing the environmental review as soon as possible in an effort to prepare a joint document that complies with NEPA requirements.

In the event that a joint document complying with NEPA cannot be prepared, CEQ regulations allow agencies to incorporate by reference the relevant portions of the CEQA review (See below, Q&A, WHEN CAN INCORPORATION BY REFERENCE BE USED?).

b. Can Existing NEPA Review Satisfy CEQA?

The CEQA Guidelines allow a state or local agency to use an EIS or EA and FONSI <u>if</u> completed before an EIR or ND would otherwise be prepared for the project <u>and</u> the NEPA review meets CEQA requirements.

CEQA Requirement: Section 15221 of the CEQA Guidelines sets forth rules governing use of a NEPA document to satisfy CEQA. It states:

> (a) When a project will require compliance with both CEQA and NEPA, State or local agencies should use the EIS or Finding of No Significant Impact rather than preparing an EIR or Negative Declaration if the following two conditions occur:
> (1) An EIS or Finding of No Significant Impact will be prepared before an EIR or Negative Declaration would otherwise be completed for the project; and
> (2) The EIS or Finding of No Significant Impact complies with the provisions of these Guidelines.

(b) Because NEPA does not require separate discussion of mitigation measures or growth inducing impacts, these points of analysis will need to be added, supplemented, or identified before the EIS can be used as an EIR.

Opportunities for Coordination: State or local agencies interested in using Federal documents to satisfy state requirements should work closely with the Federal agency preparing the NEPA review as soon as possible in order to ensure that it meets the requirements of CEQA, or prepare any additional analysis needed to meet CEQA standards.

If the timing of the NEPA and CEQA review processes is such that an EIS or EA/FONSI would not be done before an EIR or Negative Declaration, agencies should enter a joint NEPA/CEQA process (CEQA Guidelines, §§ 15222 & 15226).

B. Stage 2: Integrating and Managing NEPA and CEQA Processes

1. When Can Incorporation by Reference be Used?

To reduce duplication and bulk, NEPA and CEQA allow environmental documents to reference and summarize information from other documents rather than repeating large amounts of information.

NEPA Requirement: Agencies can, consistent with NEPA and the CEQ NEPA Regulations, incorporate by reference analyses and information from existing documents into an EA or EIS provided the material has been appropriately cited and described, and the materials are reasonably available for review by interested parties (40 C.F.R. § 1502.21).

CEQA Requirement: An EIR or ND can incorporate by reference any document that is part of the public record or available to the public (CEQA Guidelines, § 15150, subd. (a)). The incorporated part of the referenced document must be briefly summarized or described (*Id*. at § 15150, subd. (b)).

Opportunities for Coordination: NEPA and CEQA both allow incorporation by reference, as long as the referenced material is briefly summarized in the environmental document and is available for public review within the time allowed for comment. Agencies can make referenced material readily available by publishing the relevant materials in an appendix or otherwise making them available to the public. Some techniques that would take the place of publishing the materials in a publicly available appendix include providing a hyperlink to an internet copy of the material or placing material in local libraries or facilities accessible to the public (CEQ, IMPROVING THE PROCESS FOR PREPARING EFFICIENT AND TIMELY ENVIRONMENTAL REVIEWS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, 2012, *available at*: http://ceq.hss.doe.gov/current_developments/docs/Improving_NEPA_Efficiencies_06Mar2012.pdf).

2. When Can Tiering from an EIS/EIR be Used?

If previous environmental documents have already analyzed a particular impact, NEPA and CEQA allow subsequent environmental analysis and documents to tier from an earlier analysis rather than duplicating work.

NEPA Requirement: Agencies are encouraged to issue a tiered or subsequent EIS or EA when the environmental issues have been analyzed in a broader (programmatic) NEPA review. The tiered analysis and documentation can thereby focus on specific issues relevant to the subsequent action (40 C.F.R. § 1502.20).

CEQA Requirement: CEQA encourages tiering from a broader EIR, like a General Plan EIR, when appropriate. This allows subsequent analyses to focus on project-specific impacts (CEQA Guidelines, § 15152).

Opportunities for Coordination: Although NEPA and CEQA allow similar tiering processes, they do not expressly allow the tiering of a CEQA document from a previous NEPA document, nor vice versa. A joint NEPA/CEQA document could tier from a broader joint NEPA/CEQA analysis to take full advantage of the benefits of a tiered analysis. When tiering, the responsible agencies need to ensure that the relevant resource impacts were sufficiently analyzed in the broader joint (programmatic) document when they rely upon that analysis in the subsequent, tiered document.

3. When Should the Environmental Review Process Begin?

Generally, the environmental review process should begin as early as possible to facilitate timely government decisions and avoid delay. Environmental values should be considered early in the process but late enough that there is sufficient context for the review and information about the proposed action or project to provide a useful analysis.

NEPA Requirement: The preparation of environmental reviews shall occur as close as possible to the time an agency begins developing or is presented with a proposal so that the environmental review will serve as an important contribution to the decision making process (40 C.F.R. § 1502.5). A proposal exists when an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the NEPA analysis begins when environmental effects can be meaningfully evaluated (40 C.F.R. § 1508.23). Applying NEPA early in the process also ensures that the planning reflects environmental values early, avoiding potential delay later in the process (40 C.F.R. § 1501.2). Environmental reviews should not justify or rationalize decisions already made (40 C.F.R. § 1502.5). Until an agency issues a Record of Decision, regulatory limitations preclude the agency from taking actions during the NEPA process which would (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives (40 C.F.R. § 1506.1).

CEQA Requirement: EIRs and NDs should be prepared early enough to allow environmental considerations to influence project design and yet late enough to provide meaningful information for environmental review (CEQA Guidelines, § 15004, subd. (b)). California agencies cannot commit to carrying out actions concerning a project that will have significant impacts or limit the choice of alternatives or mitigation measures before a CEQA review is complete.[6]

Opportunities for Coordination: Similar to CEQA, CEQ NEPA Regulations forbid project activity during environmental review that would impact the environment or limit alternatives. However, NEPA recognizes that some projects may proceed if they are independently justified, accompanied by their own NEPA review (e.g. Categorical Exclusion, EA, or EIS) and will not prejudice the ultimate decision (40 C.F.R. § 1501.6(c)(1)-(3)).

CEQA recognizes that limited project-related activities may occur prior to completion of environmental review.[7] CEQA review must be complete, however, before California agencies constrain their discretion in any way, particularly regarding the adoption of project alternatives or mitigation measures.

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[6] Such activities could include, depending on the circumstances, entering into development and services agreements (See, e.g., *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116).

[7] Agencies may designate a preferred site for CEQA review and enter into land acquisition agreements when the agency has conditioned the site's further use on CEQA compliance (CEQA Guidelines, § 15004, subd. (b)(2)(A)). Agencies should be aware that environmental review will have to occur for that purchase before it actually takes place (See, *Save Tara, supra*, 45 Cal.4th 116). Depending on the circumstances, an agency may choose to enter into an option agreement rather than a purchase and sale agreement if environmental review has not yet been completed (See, e.g., *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150 (analyzing whether a "term sheet" constituted a project requiring prior CEQA review)).

State and Federal agencies should begin NEPA/CEQA procedures as early as possible in their planning processes in order to allow environmental considerations to influence project design. As always, these issues are subject to individual agency regulations regarding implementation of NEPA and CEQA, which could prescribe more stringent requirements than the general regulations.

Experience has shown that critical environmental concerns can often be most efficiently and effectively addressed in early phases of project development; consequently, we recommend:

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    - Conduct early, in-depth resource analyses through processes such as the lead agencies' due diligence process or project application submittal. Completing key environmental analyses (e.g. estimation of the extent of state jurisdictional waters and Waters of the U.S., quantification of potential impacts to threatened and endangered species, and identification of compensatory mitigation lands) as early as possible can help determine a project's viability and avoid potential project delays later in the process.
    - Direct applicants, during the early stages of a project application process, to fully consider environmentally-preferable alternatives, including alternate sizes and/or siting locations (e.g., consider any available neighboring disturbed sites). Information regarding the availability of suitable alternative sites not on Federal lands is important for Federal agencies to consider in their assessment of the "No Action" alternative, since it is reasonable to expect that, in the event a Federal land management agency does not approve a proposed right-of-way, a project proponent would consider alternative locations. Consistent resource analyses, across a range of alternatives, should be conducted as early as possible to set the stage for a robust alternatives analysis in the subsequent NEPA process, and to facilitate incorporating environmental improvements into the project design.

4. How Can Public Involvement Requirements be Satisfied?

Public involvement in the NEPA and CEQA review process is critical for the overall framework of informed decision making. Public review serves as a check on accuracy in analysis. Public comments inform agencies about public opinions and values. The specific procedures used under the two statutes differ in some ways and need to be followed carefully.

NEPA Requirement: CEQ NEPA Regulations require agencies to make diligent efforts to involve the public in implementing their NEPA procedures and preparing environmental reviews (40 C.F.R. § 1506.6). The EA, FONSI, and EIS all have different requirements for public involvement.

EA: Agencies preparing an EA are required to involve "environmental agencies, applicants, and the public, *to the extent practicable*" (emphasis added) (40 C.F.R. § 1501.4(b)). Although public involvement is required, it is up to the individual agencies in their NEPA implementing procedures or agency practice to determine the extent to which they engage the public in preparing an EA. Some agencies engage the public through scoping-like outreach during the development of the EA, while others wait and provide the public an opportunity to review the EA or FONSI. In *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs* (9th Cir. 2008) 524 F.3d 938, 953, the Ninth Circuit stated (citing CEQ NEPA Regulations) that the EA must "provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process."

FONSI: Under 40 C.F.R. § 1501.4(e)(2), agencies have a duty to provide a FONSI for public review for a period of 30 days when "the type of proposed action hasn't been done before by the particular agency, or . . . the action is something that typically would require an EIS under the agency NEPA procedures." Otherwise, public review of a FONSI is not required by the CEQ NEPA Regulations.

EIS Notice of Intent and Scoping: An agency begins the EIS process with a Notice of Intent (NOI) stating the agency's intent to prepare an EIS (40 C.F.R. § 1508.22). This is published in the Federal Register and includes information regarding meetings and information about how the public can get involved. At the scoping level, public involvement is encouraged to help identify impacts and alternatives regarding the proposed project as well as any existing studies or information that can be used during the NEPA review. Using scoping to identify issues that do not require detailed analysis or are not relevant is just as important as identifying those issues that merit detailed analysis. Following scoping, agencies prepare a draft EIS and make it available for public review and comment for a minimum of 45 days (40 C.F.R. § 1506.10, 1503.1(a)(4)).[8] A Notice of Availability is published by the Environmental Protection Agency (EPA) to begin the required review and comment period. During the comment period, agencies may conduct public meetings or hearings to help solicit comments.

[8] Be sure to check the Federal agency's NEPA implementing procedures to see whether a longer period is required.

Final EIS: Once a Final EIS is complete, the agency files the Final EIS with EPA which publishes a Notice of Availability in the Federal Register. A minimum 30-day waiting period before an agency makes a decision on a proposed action is required by the CEQ NEPA Regulations; however, the agency may designate this as a notice and comment period (40 C.F.R. § 1503.1(b)) and the agency may also provide a longer time period. When an agency provides an administrative appeal process that provides an opportunity to alter the decision, then the agency may make the decision at the same time that the final EIS is published (40 C.F.R. § 1506.10(b)). After the minimum 30 day period, the agency issues a Record of Decision informing the public of the final decision and identifying all alternatives considered in reaching the decision (40 C.F.R. § 1505.2).

Supplemental EIS: In the event the agency needs to prepare a Supplemental EIS, then the same process, including the public review and comment periods, that applies to a regular EIS should be followed, except that scoping is not required. Agencies shall prepare supplements to a draft or final EIS if substantial changes are made to the proposed action that raise environmental concerns; or if there are significant new circumstances or information relevant to environmental concerns (40 C.F.R. § 1502.9(c)(1)(i)-(ii)). Because the NEPA process varies among agencies, a Federal agency's NEPA implementing procedures may provide additional opportunities for public involvement throughout the process.

CEQA Requirement: Public participation plays an important and protected role in the CEQA process. (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 ("The EIR process protects not only the environment but also informed self government."); *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936 (members of the public have a "privileged position" in the CEQA process).)

"Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities. Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency" (CEQA Guidelines, § 15201). The lead agency must consider all "comments it receives on a draft environmental impact report, proposed negative declaration, or proposed mitigated declaration" (Cal. Pub. Resources Code, § 21091, subd. (d)(1); CEQA Guidelines, § 15074, subd. (b)). At a minimum, state and local agencies must adhere to the consultation and public notice requirements set forth in the state CEQA Guidelines.

EIR or Negative Declaration: Under CEQA, agencies preparing either a Negative Declaration or an EIR are required to file a Notice of Intent to adopt and provide a public and agency comment period prior to certification (Cal. Pub. Resources Code, § 21092). An agency must provide the public a minimum review period of 20 days for review of a Negative Declaration. However, projects involving a state agency, as a lead, responsible or trustee agency, or projects of

statewide, regional, or area-wide significance must be submitted to the State Clearinghouse[9] and require a 30 day comment period (CEQA Guidelines, § 15205, subd. (d)). The review period for a draft EIR "shall not be less than 30 days nor should it be longer than 60 days except under unusual circumstances," although projects submitted to the State Clearinghouse should have a comment period of at least 45 days (*Id*. at § 15105, subd. (a)). Since review by some state agency is typically required, the longer review period will normally apply.[10]

Under CEQA, lead agencies may provide a review period for the final EIR, but are not required to do so (CEQA Guidelines, § 15089, subd. (b)). Lead agencies must provide proposed responses to public agency comments to those commenting agencies at least 10 days before certifying the final EIR (*Id.* at § 15088, subd. (b)).

Agency Consultation: In addition to the public review periods described above, the CEQA Guidelines also provide for consultation with specific agencies under certain circumstances. For example, agencies are required to "consult with all responsible agencies and trustee agencies" prior to determining whether a Negative Declaration or EIR is required (Cal. Pub. Resources Code, § 21080.3). Applicants that request a lease, permit, license, certificate, or other entitlement for use approval by a public agency are entitled, upon their request, to a pre-application consultation period with the lead agency. In such cases, the lead agency is required to consult regarding "the range of actions, potential alternatives, mitigation measures, and any potential and significant effects on the environment" (*Id.* at § 21080.1). If the project is "of statewide, regional or area wide significance," the lead agency is also required to consult with regional transportation agencies and public agencies that have transportation facilities (*Id.* at § 21092.4). If a public agency submits comments, the lead agency is required to notify that agency in writing of any public hearing for the project going forward (*Id.* at § 21092.5; CEQA Guidelines, § 15073, subd. (e)).

Scoping: Additionally, agencies must provide at least one scoping meeting for projects of statewide or area-wide significance for which an EIR will be prepared, and must invite neighboring cities and counties, any responsible agencies, and any agencies with jurisdiction by law over any resources affected by the project (CEQA Guidelines, § 15082). Scoping is also specifically required for joint NEPA/CEQA documents (*Id*. at § 15083).

Opportunities for Coordination: In general, comment periods are similar for CEQA and NEPA. Public involvement primarily occurs during scoping, after draft environmental documents are released for public review, and when the lead agency requests public comments.

Timing requirements in the two review processes differ somewhat. Comment periods for Draft EISs are specifically mandated to be no less than 45-days, where EIRs may in some limited

[9] The "State Clearinghouse" is a unit within OPR that is responsible for distributing environmental documents to state agencies, departments, boards, and commissions for review and comment (CEQA Guidelines, § 15023, subd. (c)).

[10] Under certain circumstances, OPR may provide for a shorter review period. Such shorter review may be appropriate where the document is a supplement to a previously reviewed document, or the project is under extreme time constraints (See CEQA Guidelines, Appendix K).

circumstances only require a 30-day review period. The review period for EIRs also generally would not exceed 60 days. Remember that the individual Federal agencies' own NEPA implementing procedures may require review periods longer than 45-days.[11] It should be noted that although the CEQA Guidelines provide for an EIR comment period of up to 60 days, barring "unusual circumstances," a Federal agency requiring a longer comment period would likely qualify as an unusual circumstance that would permit a CEQA agency to extend its comment period.[12]

Finally, a Record of Decision (ROD) may only be issued 30 days after the Notice of Availability of a Final EIS and 90 days after the Notice of Availability for a Draft EIS have been published (40 C.F.R. § 1506.10(b)(1)-(2)).

In cases where agencies have formal internal appeals, an exception to the rules on timing may be made (40 C.F.R. § 1506.10(b)(2)). Likewise, "an agency engaged in rulemaking under the Administrative Procedure Act or other statute specifically for the purpose of protecting the public health or safety, may waive the time period" and publish a decision of the final rule simultaneously with the publication of the notice of availability of final EIS (*Ibid.*).

Where possible, joint NEPA/CEQA documents should attempt to provide a unified public participation process, including jointly conducted public hearings, comment periods and final review periods. Both NEPA and CEQA regulations recommend joint public hearings that would meet both agencies' requirements (40 C.F.R. § 1506.2(b); CEQA Guidelines, § 15226). When combining documents and analyses, agencies must adhere to the strictest requirements. At a minimum, a joint FONSI/Negative Declaration document requires an initial filing of a Notice of Intent to adopt the proposed declaration. Subsequently, 30 days of public and agency comment prior to certification would also be required to ensure that the CEQA requirement is met. A joint draft EIS/EIR document requires 45 days for public review and comment to ensure the NEPA requirement is met. Lastly, the joint NEPA/CEQA documents should also comply with CEQA's consultation requirements outlined above. As a practical matter, the agencies should keep in mind that cultivating active public participation and responding to public concerns about projects can help to minimize the risk of legal challenge and protracted litigation.

[11] For instance, the BLM's internal guidance calls for a 45 day comment period for most Draft EIS's (Interior Departmental Manual 516 4.26), but a 90 day comment period is required for Draft EIS's amending a BLM land use plan (BLM Land Use Planning Handbook H-1601-1).

[12] Note that section 15105 of the CEQA Guidelines states that the comment period "should" not be longer than 60 days. The CEQA Guidelines use the word "should" to indicate that the directive is strongly suggested absent countervailing policies.

5. What Other Timelines Apply to Environmental Review Schedules?

Both NEPA and CEQA provide for developing schedules to guide the review processes. However, the mandatory requirements differ between the two processes.

NEPA Requirement: NEPA regulations require few mandatory timelines. Under 40 C.F.R. § 1501.8, agencies are encouraged to and, "shall set time limits if an applicant for the proposed action requests them" (40 C.F.R. § 1501.8(a)). Factors an agency may consider when setting time lines include the potential for environmental harm, magnitude of the proposed project, public need for the project etc. (See 40 C.F.R. § 1501.8(b)(1)(i)-(viii)). Similarly, an agency may set timelines regarding the process such as scoping, preparation of draft EIS, review of comments, preparation of final EIS, etc. (See 40 C.F.R. § 1501.8(b)(2)(i)-(vii)).

CEQA Requirement: CEQA is intended to be implemented in conjunction with other planning and review processes. Two statutory timeframes can affect the CEQA process. First, the CEQA Guidelines set deadlines for completing and certifying a Negative Declaration or EIR for a private project, barring unreasonable delay by an applicant (CEQA Guidelines, §§ 15107-15109). However these provisions do not apply to projects with Federal involvement, as the lead agency may waive the Negative Declaration or EIR deadline at the request of an applicant (Cal. Gov. Code, § 65954; CEQA Guidelines, § 15110).

Second, the California Permit Streamlining Act (Cal. Gov. Code, § 65920 et seq.) (PSA) also sets time limits on how much time a state or local agency has to accept an application as complete before the CEQA process begins, and to make a decision following the completion of the CEQA process (Cal. Gov. Code, § 65950). For projects that are subject to the PSA, the agency must approve or deny the application within 90 to 180 days of EIR certification or within 60 days of adoption of a Negative Declaration of a finding of exemption (*Ibid*).

An environmental document will not be deemed approved based on an agency's failure to meet the CEQA deadlines. Case law treats CEQA deadlines as directory, not mandatory.[13]

Opportunities for Coordination: The only set time periods under NEPA are the public review and comment periods following the Notice of Availability of a Draft or Final EIS. NEPA does not set time periods for the overall review.[14] Certain projects submitted to California agencies for review by non-agency proponents may be subject to the provisions of the PSA, which requires accelerated timetables in order to speed permit issuance. However, the PSA specifically states that accelerated timetables do not apply when there are longer Federal timelines. Further, the PSA timelines for project consideration under CEQA, the decision on the proposed action under NEPA, do not begin to run until after the joint NEPA/CEQA process is complete.

[13] *Eller Media Co. v. City of Los Angeles* (2001) 87 Cal.App.4th 1217, 1221.

[14] Recent legislation specific to surface transportation projects does set overall timelines (MAP-21, Transportation Reauthorization 2012).

C. Stage 3: Preparing the NEPA and CEQA Analyses and Documentation

1. How Can Purpose and Need and Project Objectives be Aligned?

Both NEPA and CEQA agencies must include a statement in the environmental document explaining why the agency is considering a particular action or project. This is particularly important when the objectives of multiple agencies are not identical.

NEPA Requirement: The NEPA regulations require a description of "the underlying purpose and need to which the agency is responding" in considering a project (40 C.F.R. § 1502.13).

CEQA Requirement: The CEQA Guidelines require the description of a project in an EIR to include a "statement of objectives sought by the proposed project (CEQA Guidelines, § 15124, subd. (b))."

Opportunities for Coordination: Under both CEQA and NEPA, the purpose and need/project objectives provide similar functions: to explain why the project is being considered and assist in the decision making process. Significantly, both the purpose and need and the project objectives help determine which alternatives are considered in the environmental analysis. Different agencies considering a project may have different missions or authorities, which in turn could create different goals for a single project. Furthermore, lead agencies should cooperatively review proposed project purpose and need and project objectives statements with other participating or cooperating agencies that have jurisdiction and decision making roles for the proposed action. This will provide an opportunity to accommodate the needs of all agencies responsible for making a decision needed for the project to proceed by including all project relevant NEPA and CEQA requirements in the joint document.

Where the involved Federal and state/local agencies do not share the same objectives, a joint document may describe the Federal agency's purpose and need and the CEQA project objectives in separate sections. These sections can be accompanied by an explanation of why the agencies' goals differ (e.g., that their statutory authorities or obligations require a different focus). Such an explanation will also help explain any differences in the alternatives considered by the Federal and state agencies (See below, Q&A, ARE EIS/EIR ALTERNATIVES CONSISTENT?).

2. Are EIS/EIR Alternatives Consistent?

Both CEQA and NEPA require analysis of alternatives to the proposal before the agency. The alternatives can be approached the same way for both, but each law requires certain matters to specifically be addressed. Differences may arise over the number or range of alternatives that agencies consider feasible and the level of detail in which alternatives are discussed.

NEPA Requirement: Analysis of an agency's alternatives, including the proposed action, are "the heart of the environmental impact statement" (40 C.F.R. § 1502.14). NEPA regulations require an agency to "rigorously explore and objectively evaluate all reasonable alternatives" (40 C.F.R. § 1502.14(a)), to devote substantial treatment to each alternative (40 C.F.R. § 1502.14(b)), to identify the preferred alternative where one or more exists (40 C.F.R. § 1502.14(e)), and to present the environmental impacts of the proposed action and the alternatives in comparative form to sharply define the issues and provide a clear basis for a choice among alternatives by the decision maker and the public. Other requirements include:

- Providing a "no action" alternative (40 C.F.R. § 1502.14(d));
- Explaining why any alternatives were eliminated from detailed analysis (40 C.F.R. § 1502.14(a));
- Identifying the environmentally preferred alternative (40 C.F.R. § 1502.14(e)).

When determining the scope of an environmental review, the CEQ NEPA Regulations require an agency to consider three types of alternatives. The three alternatives include the no action alternative, other reasonable courses of action, and mitigation measures that are not an element of the proposed action (40 C.F.R. § 1508.25(b)(1)-(3)).

When an agency has concluded an EIS, the decision is recorded in a public ROD (40 C.F.R. § 1505.2). The ROD needs to "identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable" (40 C.F.R. § 1505.2(b)). The agency must discuss *all* factors essential to the agency decision and discuss how those factors influenced the agency's decision (40 C.F.R. § 1505.2(b)).

In addition to discussion of alternatives, the ROD shall state "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and if not, why they were not" (40 C.F.R. § 1505.2(C)). Finally, the preferred alternative is not necessarily the environmentally superior alternative. Nothing in NEPA requires that the agency's preferred alternative must have the least environmental impact.

CEQA Requirement: CEQA also requires analysis of a reasonable range of alternatives to the proposed project to foster informed decision making and public participation (CEQA Guidelines, § 15126.6, subd. (a)). CEQA states that, "[t]he EIR shall include *sufficient information* about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. A matrix displaying the major characteristics and significant environmental effects of each alternative may be used to summarize the comparison. If an alternative would cause one or

more significant effects in addition to those that would be caused by the project as proposed, the significant effects of the alternative shall be discussed, *but in less detail than the significant effects of the project as proposed*" (emphasis added) (*Id*. at § 15126.6). The alternatives need only "include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project" (*Id*. at § 15126.6, subd. (d)). Other requirements include:

- Providing a "no project" alternative (*Id*. at § 15126.6, subd. (e));
- Explaining why rejected alternatives are considered infeasible (*Id*. at § 15126.6, subd. (c)); and
- Identifying the agency's "environmentally superior alternative." If the environmentally superior alternative is the "no project" alternative, then the EIR must identify an environmentally superior alternative among the other alternatives" (*Id*. at § 15126.6, subd. (e)(2)).

Opportunities for Coordination: The framework for considering alternatives to a proposal as a means of reducing environmental impacts is similar under NEPA and CEQA. The "no action" and "no project" requirements are functionally the same and should examine the reasonably foreseeable consequences of not taking the proposed action. They serve the purpose of describing the current and future state of the potentially affected environment without considering the potential impacts of the proposed action or project.

In practice, the NEPA standard of "devoting substantial treatment" to each alternative tends to result in a more detailed look at alternatives. On the other hand, the CEQA focus on mitigation, requires CEQA "reasonable" alternatives to include those that "are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly" (CEQA Guidelines, § 15126.6, subd. (b)). NEPA alternatives are generally restricted to those that meet the agency's purpose and need (40 C.F.R. § 1502.13); however, mitigation alternatives should be considered (40 C.F.R. § 1508.25(b)(3)). Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply being desirable from the standpoint of the applicant (NEPA's 40 Most Asked Questions, 19b, *available at*, http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm).

Consequently, in practice, an EIS may contain the analysis of fewer alternatives but in more detail than an EIR. Furthermore, differing purpose and need and objectives statements (see above, Q&A) can lead to different ranges of alternatives. An alternative that meets the objectives of one agency may not be consistent with the purpose and need of another agency, and those differences should be explained in a joint document.

Since joint documents must satisfy the requirements of both NEPA and CEQA, joint EIS/EIRs should meet the NEPA standard for level of detail in describing the alternatives and their impacts, as there is nothing in CEQA to prevent an agency from providing a more detailed alternatives description than is customary. Such alternatives should also represent a range of alternatives, including alternatives that would lessen any significant effects associated with the proposed project. If an agency believes it must analyze a particular alternative, but that

alternative is not considered reasonable by another agency, one strategy would be to label that particular alternative as a NEPA-only or CEQA-only alternative, explaining why one agency is considering it but the other agency is not.[15]

A robust range of reasonable alternatives will include alternatives for avoiding significant environmental impacts and quantifying those impacts where possible can facilitate the comparison between alternatives. Examples of alternatives considered in recent NEPA and CEQA reviews for California energy projects include:

- Considering reduced acreage, reduced megawatt and modified footprint alternatives, as well as alternative sites that focus on disturbed sites, degraded sites, contaminated sites, and fallow or impaired agricultural lands;

- Considering alternative generating technologies and providing a description of the benefits associated with those technologies; and

- Considering relocating portions of the project in other areas, including private land, to reduce environmental impacts.

[15] Agencies should consider the utility of analyzing alternatives that are not considered reasonable by one or more agencies, and therefore presumably could not be implemented. NEPA does allow agencies to consider alternatives outside their jurisdiction if those alternatives are reasonable (40 C.F.R. § 1502.14(c)).

3. How Should Environmental Impacts/Effects/Consequences be Considered?

A key requirement of both NEPA and CEQA is the analysis of a project's environmental impacts. Generally the analysis of impacts under one law will meet the requirements of the other. However, the individual laws include slightly different issues in their lists of subjects to be addressed.

NEPA Requirement: The CEQ NEPA regulations use the terms "effects" and "impacts" synonymously. The environmental consequences section of an EIS must discuss direct and indirect impacts of the proposed project (40 C.F.R. § 1502.16(a)-(b)). The regulations define "effects" as "direct effects, which are caused by the action and occur at the same time and place" (40 C.F.R. § 1508.8(a)). Indirect effects include effects "later in time or farther removed in distance, but are still reasonably foreseeable" (40 C.F.R. § 1508.8(b)). "Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems" (40 C.F.R. § 1508.8). Finally, cumulative impacts must be considered. A "cumulative impact" is the environmental impact resulting from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions that can result from individually minor but collectively significant actions taking place over a period of time (40 C.F.R. § 1508.7).

Impacts should be addressed in proportion to their significance (40 C.F.R. § 1502.2(b)), meaning that severe impacts should be described in more detail than less consequential impacts. This is intended to help decision makers and the public focus on the project's key effects. The NEPA regulations explicitly require certain impacts to be discussed, including:

- Irreversible or irretrievable commitment of resources (40 C.F.R. § 1502.16);
- Tradeoffs between short term uses of the environment and long term productivity (40 C.F.R. § 1502.16); and
- Energy requirements and conservation potential of alternatives (40 C.F.R. § 1502.16(e)).

Effects include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." Effects may also be both beneficial and detrimental (40 C.F.R. § 1508.8).

Effects are measured against the "no action alternative" (CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Answer to Question 3 (the "no action alternative" analysis "provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives")).

CEQA Requirement: CEQA focuses on adverse environmental changes (CEQA Guidelines, § 15382). The environmental impacts section of an EIR also must consider direct and indirect impacts of the project (Cal. Pub. Resources Code, § 21065.3). EIRs should focus on significant

impacts (CEQA Guidelines, § 15126.2, subd. (a)). Impacts that are less than significant need only be briefly described (*Id. at* § 15128). All potentially significant effects must be addressed. Impacts are normally to be measured against the environmental setting, which the CEQA Guidelines define to mean "physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective" (*Id.* at § 15125, subd. (a)).[16]

To assist lead agencies in evaluating all impacts, Appendix G of the CEQA Guidelines provides an environmental checklist that informs the framing of the analysis.[17] In addition, the CEQA Guidelines specifically require consideration of:

- Impacts of greenhouse gas emissions (CEQA Guidelines, § 15064.4);
- Energy Impacts (*Id.* at Appendix F);
- Impacts associated with placing projects in hazardous locations (*Id.* at § 15126.2, subd. (a));[18]
- Growth-inducing impacts (*Id.* at § 15126.2, subd. (d));
- Irreversible significant environmental impacts for some types of projects, including those requiring an EIS under NEPA (Cal. Pub. Resources Code, § 21100, subd. (b)(2); CEQA Guidelines, § 15127, subd. (c)).

Individual agencies may also specify particular types of analysis that must be performed. For example, the California Energy Commission has specific regulations, discussed further in Section IV, below (20 CCR § 1743).

Opportunities for Coordination: Both laws encourage an environmental document to focus on the most consequential potential impacts. CEQA agencies often structure their impact analysis around the environmental factors listed in Appendix G of the CEQA Guidelines. However, this checklist is only a sample form, and does not encompass all possible impacts that a project might have (See, e.g., *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099). Similarly, the CEQ NEPA Regulations describe potential effects broadly and call for the lead agency to focus the analysis on the relevant effects.

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[16] The California Supreme Court recently addressed when it is appropriate to depart from use of existing conditions to analyze impacts and instead rely on projected future conditions. The Court explained: "Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in Guidelines section 15125(a)—is justified by unusual aspects of the project or the surrounding conditions. … [A]n agency does have discretion to completely omit an analysis of impacts on existing conditions when inclusion of such an analysis would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public" (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 451-452).

[17] http://opr.ca.gov/docs/Inital_Study_Checklist_Form.pdf.

[18] The validity of CEQA Guidelines section 15126.2(a), to the extent that it would require analysis of the impacts of the environment on a project, was called into question in *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455.

The regulations governing the content of NEPA and CEQA accommodate joint analysis of environmental impacts. Even requirements that are specific to one law can be applied to both. For instance, NEPA has no explicit requirement to analyze a proposed action's greenhouse gas emissions. However, nothing precludes a Federal agency from analyzing greenhouse gases—indeed, if the project will have emissions, a good NEPA analysis would analyze these impacts regardless of CEQA requirements. Similarly, issues raised in a NEPA analysis of environmental justice would be appropriately addressed in the environmental setting and cumulative impacts analysis of a CEQA document. When the combined document addresses an issue that either NEPA or CEQA would not typically require, that analysis can be labeled as a NEPA-only or CEQA-only analysis.

Finally, agencies may reach different conclusions about the extent of some impacts, complicating the drafting of the environmental impacts section (See below, discussion of Significance). For example, different conclusions may result when the existing conditions used for the CEQA analysis are different from the affected environment under the "no action alternative" used for the NEPA analysis. Obviously, open communication between agencies throughout the analysis of impacts will help to minimize these conflicts. If there is a difference in the document, then the differences should be explained. It is good practice to have both agencies disclose differences in methodology and assumptions, and to explain their respective approaches in the documents so that the public and decision makers understand why there is a difference. However, agencies may also wish to discuss this scenario at the beginning of a joint process and agree on how to manage such a disagreement. Agencies should consider memorializing such a process in their MOU. Such up front discussions will help resolve conflicts that arise late in the process when deadlines are looming.

NEPA and CEQA review of large projects can necessitates numerous, detailed technical reports, studies and data collection, as well as secondary review and approval. Moreover, in terms of time and cost, these technical studies and secondary reviews approach or exceed the cost of preparing the actual environmental document. While each agency is responsible for fulfilling its own directives, improved integration between analogous state and federal regulations and guidelines would help reduce compliance costs.

4. How Should Cumulative Impacts be Considered?

Analyzing a project's cumulative impacts can be one of the most challenging tasks in an environmental review. Both CEQA and NEPA require cumulative impact analysis.

NEPA Requirement: NEPA defines a cumulative impact as an "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (40 C.F.R. § 1508.7). The CEQ NEPA Regulations do not provide specific criteria for a cumulative impact analysis, but the CEQ has produced a handbook and guidance for doing cumulative effects analysis. The handbook recommends temporally and spatially bounding the analysis by establishing a geographic scope and time frame that addresses past, present, and reasonably foreseeable projects that could combine with the proposed action to create cumulative impacts (CEQ, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, 1997, *available at*: http://ceq.hss.doe.gov/publications/cumulative_effects.html). Furthermore, CEQ guidance states the CEQ NEPA Regulations do not require agencies to catalogue or exhaustively "list or analyze all individual past actions unless such information is necessary to describe the cumulative effect of all past actions combined" (CEQ, GUIDANCE ON THE CONSIDERATION OF PAST ACTIONS IN CUMULATIVE EFFECTS ANALYSIS, 2005, *available at*: http://ceq.hss.doe.gov/nepa/regs/Guidance_on_CE.pdf).

CEQA Requirement: CEQA defines a cumulative effect as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts" (CEQA Guidelines, § 15355). The environmental document should focus on instances in which the proposed project would incrementally contribute to a significant cumulative impact. It need not discuss cumulative impacts that are not significant in detail beyond justifying this determination, nor must it consider cumulative effects to which the proposed project does not contribute (*Id.* at § 15130, subd. (a)).

Discussion of cumulative impacts should reflect those impacts' severity and likelihood of occurrence. The analysis may not require the same level of detail as the discussion of effects attributable to the project alone (CEQA Guidelines, § 15130, subd. (b)). The analysis should define and justify the geographic scope of the area affected by the cumulative impact (*Id.* at § 15130, subd. (b)(3)). The analysis may rely on considerations of past, present, or probable future projects producing related or cumulative effects, including projects outside the agency's control, or may rely on projections of future effects contained in specified plans (*Id.* at § 15130, subd. (b)(1)(A)). CEQA also does not require agencies to catalogue or exhaustively list or analyze all individual past actions.

The CEQA Guidelines explicitly allow the cumulative effects analysis to be less detailed than the discussion of effects attributable to the project alone; however, a sufficient amount of detail to adequately apprise the public and decision-makers of a project's cumulative effects must be provided and so will depend on the circumstances surrounding the project and the impact at issue.

Opportunities for Coordination: The CEQA Guidelines and the CEQ NEPA Regulations, CEQ handbook, and guidance spell out similar cumulative impact analysis procedures:

- The analysis should address past, present, and reasonably foreseeable/probable future projects that could combine with the impacts of the proposal at hand;
- The agencies should define and justify the geographic scope of possible cumulative effects for each affected resource;
- The agencies should define and justify the temporal scope of possible cumulative effects for each affected resource by establishing a timeframe which covers the reasonably foreseeable duration of the effects; and
- A greater emphasis should be placed on those impacts that will be more severe, to focus public review.

The main difference is the level of detail required for the analysis. To ensure compliance with both laws, the cumulative impact analysis may need more detail than California agencies typically provide under CEQA.

5. What are the Differences in Determining Significance?

NEPA and CEQA have a shared purpose of identifying significant environmental impacts. They have slightly different, although not incongruous, definitions, and approaches to determining significance.

NEPA Requirement: The NEPA regulations define significance in terms of context and intensity. Context refers to the need to consider impacts within the setting in which they occur (40 C.F.R. § 1508.27(a)). Intensity refers to the severity of the impact, with 10 non-exclusive criteria to consider specified in the regulations (*Id*. at § 1508.27(b)). If an agency determines that an action will have one or more significant impacts on the environment, it must prepare an EIS (42 U.S.C. § 4332(c)).

CEQA Requirement: The CEQA Guidelines define a significant impact as "a substantial, or potentially substantial, adverse change within the area affected by the project" (CEQA Guidelines, § 15382). The CEQA Guidelines encourage agencies to adopt their own thresholds for what constitutes a significant impact (*Id.* at § 15064.7, subd. (a)). A "threshold of significance" is "an identifiable quantitative, qualitative, or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant" (*Id.* at § 15064.7). Thus, some state or local agencies may have specific definitions of significance for particular resources or impacts. Even in the absence of adopted thresholds, CEQA requires an agency to evaluate the factual and scientific data to determine whether an impact may be significant. The determination of significance may depend to some degree on the project's context (*Id.* at § 15064, subd. (b)). CEQA documents also must explicitly identify each impact the agency has determined to be significant (*Id.* at § 15126.2, subd. (a)). These significance determinations must be "based on substantial evidence in the record" (*Id.* at § 15064, subd. (f)). For the purposes of determining whether an EIR must be prepared, the CEQA Guidelines identify certain circumstances in which a lead agency must find that a project may have a "significant effect on the environment" (*Id.* at § 15065).

Opportunities for Coordination: NEPA and CEQA define significance in different terms. Therefore, NEPA and CEQA agencies tend to treat significance differently in their environmental documents.

CEQA and NEPA practices can be aligned in a joint environmental document by explaining which significance determinations are being made. Specific significance determinations should then be set forth in the document. The Federal and state agencies can describe each specific impact in common language that is consistent with both NEPA and CEQA practice. Following each description, the agencies should include a section in which the determination is made and explained.

6. When Should an EIS/EIR be Supplemented or Re-Released?

Under NEPA and CEQA, agencies consider a similar set of circumstances under which an environmental document must be re-released for public and agency review when new information becomes available after publication of the draft or final document.

NEPA Requirement: NEPA dictates a process for incorporating new information into an already published EIS called supplementation. A supplemental EIS must be prepared if there are "substantial changes in the proposed action" relevant to environmental concerns, or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" (40 C.F.R. § 1502.9(c)(1)). The supplement should focus on the new information (40 C.F.R. § 1502.9(c)(1)). The CEQ has clarified that new alternatives outside the range of alternatives already analyzed would trigger the requirement for a supplemental review (NEPA's 40 Most Asked Questions, 29b). Supplements may be prepared for either draft or final EISs.

Although scoping is not required, an agency must publish the draft Supplemental EIS for public review and comment before issuing a final EIS (40 C.F.R. § 1502.9(c)(4)). Agencies conducting NEPA reviews also need to be sure to have support in their administrative record for their decisions on whether and how to supplement to ensure those decisions are not arbitrary and capricious.

CEQA Requirement: CEQA provides a similar process for recirculation of draft documents, and supplementation of certified final documents. An agency must recirculate an EIR when "significant new information" is added after the draft EIR is made available for public review, but before the lead agency certifies the final EIR. Significant new information can include changes to the project or circumstances surrounding the project leading to a new significant environmental impact, a substantial increase in severity of an impact, or another feasible alternative that would reduce impacts and is considerably different from other alternatives (CEQA Guidelines, § 15088.5, subd. (a)). Recirculation is not necessary for new information that merely clarifies, amplifies, or makes insignificant modifications to information that was already presented to the public (*Id.* at § 15088.5, subd. (b)). An agency must provide adequate notice of a recirculation (*Id.* at § 15088.5, subd. (d)), and if the new information only affects a few sections of the EIR, only those sections must be recirculated (*Id.* at § 15088.5, subd. (c)).

Following certification of an EIR, new information will only trigger a subsequent or supplemental EIR in limited circumstances. Supplemental review is required only if (1) the project requires a further discretionary approval and (2) new information reveals that the project will cause a new or substantially more severe impact or that mitigation measures or alternatives would substantially reduce one or more significant impacts, but the project proponent declines to adopt such measures or alternatives (CEQA Guidelines, § 15162). Where new information triggers the need for supplemental review, no further discretionary approvals may be granted until after the supplemental review is completed. Minor changes in the project or project circumstances that do not trigger the requirements for supplemental review can be addressed in

an addendum to a previously adopted negative declaration or certified EIR (*Id.* at § 15164). An addendum need not be circulated for additional public or agency review.

The CEQA guidelines include an explicit standard for supporting a decision not to recirculate new information with "substantial evidence."

Opportunities for Coordination: Under both NEPA and CEQA, recirculation/supplementation is needed when any of the following occur:

- substantial changes to the proposal itself;
- a new alternative arises outside the range of those already analyzed; or
- any other new information arises that would significantly change the analysis of impacts.

What constitutes "significant" or "substantial" new information may be interpreted differently. It is possible that NEPA and CEQA agencies may reach different conclusions on the need to supplement or recirculate an analysis. Agencies should discuss how they will handle this type of disagreement before embarking on a joint process, rather than trying to manage it ad hoc when the issue arises and time may be short. Agencies may wish to memorialize a process for sorting out such disagreements in their MOU.

Both NEPA and CEQA require similar notice and public review procedures, and both require the agency to only recirculate the new information as long as the original EIS or EIR being supplemented/ recirculated is available to the public.

The two laws' requirements for recirculating/supplementing environmental documents are similar enough that agencies presented with new information or project changes should generally treat that information the same way (i.e., by supplementing or substantiating their determination not to). Just as with the draft EIS/EIR, agencies should be able to release a joint supplemental analysis with a joint public review period.

7. How do Mitigation Requirements Differ?

Both NEPA and CEQA require consideration in environmental analyses of ways to lessen a project's adverse environmental impacts. NEPA and CEQA differ, however, on whether such mitigation must actually be adopted as part of a project approval.

NEPA Requirement: Under NEPA, mitigation includes avoiding, minimizing, rectifying, reducing over time, or compensating for an impact (40 C.F.R. § 1508.20). CEQ guidance says that "all relevant, reasonable mitigation measures that could improve the project are to be identified," including those outside the agency's jurisdiction (NEPA's 40 Most Asked Questions, 19b, *available at*, http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm). An agency is not limited to considering mitigation only for significant impacts. It should identify feasible measures for *any* adverse environmental impacts, even those that are not considered significant (40 C.F.R. § 1502.16(h)).

The CEQ NEPA Regulations do not require an agency to *impose* identified mitigation measures for an environmental impact. When an agency determines it can mitigate impacts so that they are not significant, then the agency can provide a commitment to ensure that mitigation is performed and conclude the NEPA review with a mitigated FONSI. If the agency does not commit to the mitigation, it can proceed to an EIS. If an agency does not adopt a feasible mitigation measure in an EIS, it must justify its decision. If it does adopt mitigation measures, then it must put in place a mitigation monitoring and enforcement program and, where applicable, that program should be summarized in the ROD (40 C.F.R. § 1505.2(c)).

CEQA Requirement: CEQA defines mitigation the same way as NEPA (CEQA Guidelines, § 15370). An EIR must describe feasible mitigation measures for significant adverse impacts (*Id.* at § 15126.4, subd. (a)(1)), and the agency must adopt feasible mitigation measures or alternatives to substantially lessen the significant effect before approving the project (Cal. Pub. Resources Code, §§ 21002 & 21002.1). "Feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors" (CEQA Guidelines, § 15364). Mitigation measures may also be adopted, but are not required, for environmental impacts that are not found to be significant (*Id.* at § 15126.4, subd. (a)(3)). When a lead agency relies on mitigation measures to avoid preparation of an EIR, those proposed measures must be circulated for public review with a proposed mitigated negative declaration prior to adoption of the project (*Id.* at § 15070, subd. (b)(1)). A mitigation monitoring program must also be adopted to ensure measures are implemented (*Id.* at § 15097, subd. (a)).

Opportunities for Coordination: The term "mitigation" means the same thing to NEPA and CEQA agencies for purposes of meeting their NEPA and CEQA responsibilities.[19] There are two significant differences related to mitigation between NEPA and CEQA:

[19] The definition of mitigation may not be the same for other substantive environmental laws, such as the federal and California Endangered Species Acts.

1) CEQA requires that any feasible mitigation measures that can reduce a significant impact be adopted, while NEPA does not (as long as the agency justifies its decision not to adopt feasible measures); and
2) CEQA mitigation requirements apply only to adverse environmental impacts found to be significant, while NEPA's regulations apply to any adverse impacts, even if not significant.

Agencies should make sure they are clear with each other and with the public about who is proposing each mitigation measure and who would monitor and enforce measures that are adopted.

Agencies should discuss whether a joint monitoring program would be efficient. CEQA agencies used to focusing on mitigating only significant impacts will need to expect a broader approach in joint documents, as NEPA agencies must at least consider mitigation for all adverse impacts. NEPA agencies, in turn, should be aware of the CEQA requirement to mitigate significant impacts if feasible.

D. Stage 4: The Decision

1. How Do Agencies Document Their Final Environmental Decision Making?

Federal and California agencies must make certain findings regarding environmental effects when they make a decision at the end of the process.

NEPA Requirement: When an EA and FONSI are prepared, the lead agency must determine either that there are no significant impacts or that any significant impacts can be mitigated so that they are no longer significant (40 C.F.R. § 1508.13). When a mitigated EA/FONSI is prepared, the lead agency should adopt a mitigation monitoring and reporting program (CEQ Guidance, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, January 14, 2011).

When an EIS is prepared, NEPA requires lead agencies to prepare a ROD setting forth the agency's decision on the project, describing the alternatives considered, and stating whether mitigation measures have been adopted (40 C.F.R. § 1505.2). When an EIS has been prepared, the ROD cannot be issued until 30 days after the Federal Register publishes EPA's Notice of Availability of the Final EIS.

CEQA Requirement: CEQA requires a lead agency to adopt several sets of determinations prior to approving a project. Where an Initial Study and Negative Declaration were prepared for the project, the lead agency must determine that there is no substantial evidence that the project may cause a significant effect. Where a Mitigated Negative Declaration was prepared, the lead agency must also adopt a mitigation monitoring and reporting program (CEQA Guidelines, § 15074).

CEQA requires agency decisions to be made with varying degrees of formality. When the statute or the guidelines uses the term "determine" or "determination," the agency can simply announce a conclusion on an issue so long as there is evidence in the record to support that conclusion. With regard to *each* significant effect identified in an EIR, the agency must make a formal written finding at the end of the process (Cal. Pub. Resources Code, § 21081; CEQA Guidelines, § 15091). The agency must state one of three possible statutory conclusions in written findings, explain briefly why that conclusion was reached, and have support in the record for the conclusion.

The three possible conclusions are: (1) that changes have been made or conditions required in the project that will avoid or reduce the significant effect to a level of less than significant; (2) that the changes are within the responsibility of another agency; or (3) that no changes are feasible. If a significant effect can be changed to less than significant with mitigation measures alone, the findings do not need to address alternatives (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 400-403). However, if mitigation alone leaves even one effect remaining significant, the agency must make a formal written finding as to the feasibility of each alternative (*Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 445).

Where changes were made or required in a project to lessen the significant effects shown in an EIR, the agency must adopt a mitigation monitoring and reporting program (CEQA Guidelines, § 15091, subd. (d)). If the project as approved will result in any effects that cannot be reduced to less than a significant level, the agency must adopt a statement of overriding considerations explaining why the benefits of the project outweigh its remaining significant and unavoidable effects (*Id.* at § 15093).

Within five days of project approval, an agency must file a Notice of Determination (*Id*. at § 15094).

Opportunities for Coordination: Both Federal and California agencies must make certain findings prior to making the decision on the proposed project. Federal findings under NEPA are the determination there are no significant impacts when preparing an EA which is documented in a FONSI, or the determinations are documented in a ROD. Those findings are generally supported with information developed during the environmental review process. The specific findings that CEQA requires, however, will drive how California agencies conduct the review process. For example, CEQA documents must identify whether impacts are significant because that finding triggers the duty to mitigate or avoid such impacts. Doing so also determines which impacts must be addressed in the agency's findings, since findings are not required for less than significant effects.

Federal and California agencies must each present their own findings to their decision-makers. The Federal EA/FONSI and ROD and the CEQA findings are not joint documents. The findings are the separate responsibility of each agency explaining its own decision. However, joint work is needed to make sure there is information in the administrative record to support the findings. Agencies should coordinate with each other to make sure that their individual decisions are not incompatible with the decisions of the other agencies involved with the project. Agencies should collectively discuss how they will handle this type of disagreement, should it arise, before embarking on a joint process, rather than trying to manage it ad hoc when the issue arises and time may be short. Agencies may wish to memorialize a process for sorting out such disagreements in their MOU.

2. Which Statute of Limitations Will Apply?

The statutes of limitations for legal challenges to CEQA and NEPA decisions are different.

NEPA Requirement: NEPA challenges are generally raised under the Administrative Procedure Act (5 U.S.C. § 551 et seq. (hereinafter APA)), focusing on final decisions and whether they are in compliance with the law and not arbitrary or capricious. The APA statute of limitations is six years. Other statutes, such as the Safe Accountable Flexible Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU, the 2005 transportation reauthorization) or Moving Ahead for Progress in the 21st Century Act (MAP-21, the 2012 transportation reauthorization), may allow for a shorter statute of limitations period.

CEQA Requirement: CEQA challenges proceed as writs of mandate in which the trial court is asked to determine whether the respondent agency has proceeded in the manner provided by law and whether the agency's determinations are supported by substantial evidence in the administrative record (Cal. Pub. Resources Code, §§ 21168, 21168.5). CEQA provides "unusually short" statutes of limitations on approval of projects. (*Id*. at § 21167.) Different statutes of limitations for challenges apply depending on whether or how a lead agency complied with CEQA, as outlined in CEQA Guidelines section 15112. Generally, challenges to a project's EIR, Negative Declaration or certified regulatory document must be filed within 30 days of the posting of a Notice of Determination. Challenges to a determination that a project is exempt from CEQA must be filed within 35 days of the posting of a Notice of Exemption, if one is filed, or if not, then 180 days from project approval. All other challenges to a project based on CEQA must be filed within 180 days of project approval.

Opportunities for Coordination: The NEPA process does not mandate a distinct statute of limitations for challenging the environmental reviews as does CEQA. The APA's six-year review limit is much longer than the CEQA challenge period, which is a maximum of six months after an agency's decision. Consequently, the federal agency's action could be challenged in Federal court under NEPA after the time that a challenge could be brought under CEQA.

III. MOU Framework

A. MOU Elements

This section is intended to serve as a resource for agencies preparing a Memorandum of Understanding (MOU) to aid in the creation of an environmental review document that satisfies the requirements of NEPA and CEQA. The writing of an inter-agency MOU should take place through meaningful communication and collaboration between the agencies involved and should occur **before** starting to develop the NEPA/CEQA review planning and documentation. This is necessary in order to accurately characterize the nature and scope of the project, identify the parties and define respective roles and responsibilities, and establish a cooperative and collaborative environment for the entirety of the project and environmental review. The Federal and state lead agencies are encouraged to include non-lead Federal agencies in the NEPA/CEQA MOU – all of the benefits of early, meaningful communication and collaboration between the Federal and state lead agencies apply with equal or greater force to the non-lead Federal action agencies. The MOU Framework should encourage the Federal and state lead agencies to bring other Federal agencies to the table early, to plan their participation in the process, and include them as signatories to the MOU. Each Federal agency has its own NEPA procedures (40 C.F.R. § 1507.3) that describe the agency's internal review and approval process. Ideally, the MOU should lay out the procedures for the various agencies and describe how those will be integrated to ensure all agencies are moving forward together.

The potential elements of the MOU are outlined and explained below. This resource is not intended to be comprehensive and not every element discussed below may be necessary for the writing of an MOU. There is "example text" provided to stimulate thinking – not to encourage the use of unnecessary boilerplate. Determining which elements are applicable to a particular MOU requires consideration of the circumstances under which the MOU is being drafted. For example, an MOU can be written for a single project, or, if a Federal and California state/local agency work together frequently, for many projects. An MOU may also be expanded to address cooperation in meeting environmental review and consultation requirements beyond NEPA and CEQA.

The basic elements described below are:

a. Introduction/ Purpose
b. Goals/ Benefits
c. Defining the Aspects of the Project's Environmental Review/ Roles and Responsibilities
d. Issue Resolution
e. Amendments/ Changes to the MOU
f. Post NEPA/ CEQA Collaboration and Cooperation

Agencies should, whenever practicable, follow these best practices:

- Relying on the same sets of data, field study results, and analysis for both NEPA and CEQA;
- Determining and publishing a schedule for when and how analysis is done;
- Properly scoping activities and focusing on the project under consideration; and
- Having all agencies follow a similar timeline.

1. Introduction/Purpose

This portion of the MOU explains the need for the MOU, outlines the big-picture actions and responsibilities for the agencies involved, and summarizes the overall goal. An MOU can be developed and used for a specific project or a suite of projects or program (the "proposed action" in the example text).

EXAMPLE TEXT: "*The purpose of this Memorandum of Understanding is to provide a framework for cooperation between the [Federal agency] and the [CA state/local agency] as joint lead agencies in preparing and completing a joint environmental analysis and document that analyzes the potential environmental consequences of [insert proposed action]*.

This MOU will facilitate a joint environmental review process between [CA state/local agency] and [Federal agency], ultimately aiding the goals and missions of both agencies in the fulfillment of their environmental reviews and simplifying the process for the public. While each agency will assist other agencies to the best extent possible, it will ultimately be the responsibility of [Federal Agency] to comply with the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.), and the responsibility of [CA state agency] to comply with the California Environmental Quality Act (CEQA) (Cal. Pub. Resources Code, § 21000 et seq.).

NEPA regulations (40 C.F.R. § 1506.2) direct federal agencies to cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state/local requirements, including joint planning processes, environmental research and studies, public hearings, and Environmental Impact Statements. CEQA Guidelines sections 15222 and 15226 encourage similar cooperation by state and local agencies with Federal agencies when environmental review is required under both NEPA and CEQA. Under these conditions, the Parties shall be joint lead agencies involved with a single planning process which complies with all applicable laws."

The Parties will prepare the joint environmental analysis and document pursuant to NEPA, CEQA, and all applicable laws, executive orders, regulations, direction, and guidelines. Work may include, but is not limited to, environmental and technical information collection/analysis, public engagement and outreach, and drafting a joint environmental analysis document. Should

the decision be made to advance (authorize/approve/fund) the proposed project, this Memorandum of Understanding continues the cooperation during the implementation of any decision to include implementation of any mitigation measures and monitoring developed through the NEPA/CEQA process. This cooperation serves the mutual interest of the Parties and the public."

2. Parties and Goals/Mutual Benefit and Interests

This section identifies the parties and their decision-making responsibilities. In other words, provide the general – rather than "proposed action" specific – reason the parties are entering into the MOU. The goals/mutual benefits and interests can take the form of setting out guiding principles, such as the goal of providing better information to decision-makers and the public on the environmental consequences of the proposed action, meeting the individual parties' responsibilities and obligations for funding/permitting, or otherwise approving the proposed action, satisfying regulatory requirements, and increasing collaboration.

EXAMPLE TEXT: The Federal and State agencies (Parties) are committed to demonstrating cooperation as they develop the environmental review that will provide the public and decision-makers with useful information that will inform their decision on "the proposed action." The Parties enter this MOU agreeing to:

- *Create a framework where all Parties have a voice in the environmental review process, and agree to open, frequent and candid communication.*
- *Integrate each Party's mission and each Party's statutory and legal responsibilities into this framework because nothing in this MOU can alter the Parties' independent governing or regulatory obligations.*
- *Develop a coordination schedule for the environmental review with input from each Party, and use best efforts to meet that schedule.*
- *Provide the necessary staffing and resources to ensure a meaningful and substantive planning process, including attending periodic meetings and conference calls.*
- *Communicate with each other within an agreed upon timeframe if a Party is unable to meet the schedule.*
- *Exchange information in a timely manner. The lead agencies will provide the Parties with information and materials in an agreed upon timeframe. In turn, the Parties agree to perform the review of documents and provide substantive feedback within the specified timeframe.*
- *Designate a point-of-contact (POC) for each Party and agree that all written communication to that Party will include the POC. The POC agrees to provide or coordinate timely written communication on behalf of the POC's Party. A Party wishing to issue written binding communication regarding the Party's approvals or disapprovals*

on critical issues or documents will clearly state that the written communication is intended to represent the Party's position. The POC's routine communications are not binding on that Party.

- *Affirm that the lead agencies have the sole and ultimate decision-making authority for the selection of the alternatives and Record of Decision, and primary responsibility for NEPA and CEQA compliance as well as compliance with other relevant environmental laws and regulations.*
- *Facilitate early engagement and coordination in identifying issues, studies and overall development of the environmental review.*
- *Identify environmental goals for the "proposed action" with the intent of using these goals to improve project level coordination and implementation.*
- *Work collaboratively to support the development of the environmental review and to identify environmental issues related to the development of a range of alternatives and environmental analysis.*
- *Efficiently identify, communicate and resolve issues or disagreements.*
- *Consider the views of all the Parties.*

- All actions governed by applicable California state/Federal laws. An MOU does not grant the signatories any additional rights or powers, nor does it excuse the signatories from fulfilling any other statutory obligation they might have. As such, it is good practice to explicitly state this in the MOU.
- Each Party is responsible for its own actions/omissions. In line with the previous element, an MOU in no way incurs upon the signatories a shared statutory responsibility to fulfill the obligations of the other signatories. As such, the MOU should indicate the actions for which each signatory is responsible.

3. Defining the Aspects of the Project's Environmental Review/Roles and Responsibilities

The MOU can identify the parties and set out how they will handle the process by describing their respective roles and responsibilities.

- Identification of the Principal Contacts for the joint effort, and provision of their contact information. The MOU should be viewed as an information resource for the involved agencies. One of the most important pieces of information is who to contact at each agency. The text of the MOU should identify the agency contact in a manner that stays current through the entirety of the joint procedure – for instance, the MOU might designate the contact by office rather than by name.

The MOU can be divided by sections that correlate with the stages of the process – "early planning" and "preparing the document" are used below as examples.

Early planning. The MOU may describe roles and responsibilities for the stage preceding actual development of analyses or documents. This early planning can include scoping and other activities that precede drafting the NEPA/CEQA documents such as:

- Identification of affected resources.
- Identification of affected stakeholders, including organizations, members of the public, and other agencies with responsibility for associated resource protection and management
- Outreach and management of involved stakeholders.
- Identification of data needs.
- Determination of methodologies to be applied to data collection/analysis on which resources to include in an analysis and work on individual resources as the process moves forward.
- Using/hiring of independent experts/specialists (e.g., academic institutions, etc.).
- Identification of research needs.
- Identification of existing research and incorporation of existing studies and information.

- Communicating with the applicant. If the environmental review is applicant-driven (e.g., the issuance of a permit), the MOU can outline which agency will handle contact with the applicant and ask for additional information and clarification when needed.

- Identifying and coordinating with other Federal and California state processes (e.g., Endangered Species Act, National Historic Preservation Act, and Native American consultation). The MOU can assign responsibility for identifying and coordinating the completion of CA state and Federal requirements.

- Timeframes and Milestones. This section describes the timeframe of the project, including major project milestones. These timeframes can be as general or as specific as the signatories find relevant or useful for the purpose of their progress, but their inclusion provides a common roadmap for agencies to plan their work schedule around.
  - Examples of Milestones include intermediate steps as well as conclusions: Scoping, informal or formal consultation under the Endangered Species Act, consultation under the National Historic Preservation Act Section 106 process, internal review of documents, publication of draft documents, public comment periods, etc.

- Data and Methodology. The MOU can address the determinations that will be made regarding what data is needed and when the amount and quality of data is considered adequate. The MOU can describe which agency will determine which standards apply to each stage of the planning and environmental review process.
  - The agencies should have specialists work together to develop methodologies. This may involve adopting the more stringent of two requirements or merely disclosing the different methodologies and results to the public.
    - EXAMPLE TEXT FOR USING MOST STRINGENT REQUIREMENT: *"The Draft and Final EIR/EIS and related analyses will apply whichever NEPA/CEQA requirement or other substantive legal/regulatory requirement is more stringent in its analysis."*

- Consultation with other parties. This element identifies those parties that are involved in the environmental review but are not a party to the MOU, and identifies which Party to the MOU will coordinate efforts with those entities.

- Using a Contractor:
  - Selection of a contractor (if any) is a joint process. If desired, the parties in the MOU can agree to how the lead agency will select the contractor. Both NEPA and CEQA leaders should have a role in contractor selection to ensure the contractor can meet the NEPA and CEQA requirements. Check with your agency counsel to ensure that any considerations under the California and Federal Acquisition Regulations are addressed as well as State

laws, including but not necessarily limited to, laws under the California Public Contracts Code.

- Working with the contractor. The MOU should specify how each agency can work with the contractor. For example, if one agency hires the contractor, can another agency access that contractor directly, or must they work though the contracting agency?

Preparing the Document. The MOU should specify which agency will be responsible for preparing particular analyses and the writing of the document. For example, the MOU can identify the sections of the document each agency will provide (e.g., the Federal agency would provide information and analysis specific to NEPA requirements, while the California state agency would provide information and analysis specific to CEQA requirements).

- The MOU can identify the agencies' responsibilities for the various determinations made during the development of the joint analysis and documentation.
  - Scope and content of the document and underlying analyses.
  - Defining what constitutes "satisfactory" work.
  - Describing how to include other agencies that may become involved in review.
  - Determining data adequacy: significant figures, common data frameworks, file formats, collection methodology, software, etc.

- Develop mailing lists for outreach and document distribution. This element identifies the agency that will manage the address list for the distribution of materials, information, and the environmental review document to stakeholders and members of the general public for review.

- Gathering and maintaining public comments and the administrative record. Identify the agency responsible for gathering, docketing, and maintaining the public comments as well as the other elements of the administrative record.

- Review and respond to public comments. Designating a single agency to coordinate responses to public comments is helpful, but the California and Federal joint lead agencies should be actively involved in the review of comments in order to ensure all relevant issues are addressed and receive responses as required by NEPA and CEQA.

- Organizing/running joint public meetings. Identifying which agency will be responsible for scheduling and running public meetings will facilitate collaboration in planning and the public comment processes as well as in any subsequent studies and analyses.

- Sharing and disclosure of information. The MOU can include a statement identifying the type of communications and data that is subject to disclosure under laws including the Freedom of Information Act (FOIA) and the California Public Records Act (PRA). The

MOU can address whether an applicant can have access to information and whether that makes the information subject to broader disclosure and release. Agency staff should seek legal assistance to assist in understanding the FOIA and the PRA requirements relevant to the various communications, data, analyses, and draft documents developed, gathered, and used during the joint NEPA-CEQA process.

- Final approval and submission of documents to appropriate entity. Joint documents are generally approved by authorities at different levels of government. This element identifies those authorities as well as defines which agency will hold ultimate approval authority to ensure that the NEPA/CEQA review meets relevant requirements.

- Media releases, hand-outs, talking points, presentations. The MOU can address how agencies will coordinate key messages and set out the procedures for overarching communications and consultation. The MOU can assign responsibilities for producing and approving media releases and hand-outs for public distribution. Depending on the likely responses and issues surrounding a project, as well as resource and staffing constraints, an MOU may designate a particular agency to coordinate content and distribute the materials to specific stakeholders and address concerns and responses from stakeholders and the public.

- Process for reviewing contractor work, approving publication. The MOU could address the procedure for review of documents provided by the contractor and assign responsibility for final approval and release or publication.

4. Issue Resolution

- Identify potential issues. This element applies to any other agency needing to contact or discuss the document with the contractor. It should also be addressed by the agency in the agreement with the contractor.

- Raising Potential Issues. Some joint processes may identify issues or potential areas of concern early in the collaboration. Including those issues in the MOU allows the involved agencies to focus on resolving and ameliorating them as part of the planning and environmental review.

- Issue Resolution Process. Conflicts will arise during the joint document process on any number of issues, including proper procedure, methodologies for studies/surveys/determinations, amount of information to be developed/included in the documents, and strategies for addressing questions raised in the public comment process. Agencies should establish a method for productively resolving these conflicts in the MOU. Involvement of agency counsel early is important, particularly where any legal requirements are at issue. If the involved parties feel the joint process could become contentious, include a process to identify and engage a facilitator or mediator.

  EXAMPLE TEXT: *"In case of a dispute arising from the implementation of this Memorandum of Understanding, the Parties shall exhaust alternative dispute resolution methods such as negotiation and mediation before elevating the issue to their leadership. Parties shall act in good faith to resolve the dispute."*

  EXAMPLE TEXT: "*If disagreements on the findings, conclusions, impacts, or resource condition in the joint environmental analysis cannot be resolved, each Party shall provide an explanation of assumptions used to reach these conclusions including reasons for the differing conclusions for insertion in separate NEPA/CEQA sections of the document."*

- Format of environmental document. Agency regulations may mandate a set format for environmental reviews. An MOU can address any differences between agency NEPA and CEQA document formats by describing the format that will be used.
  - The MOU can specify whether any agency has the ability to halt publication if the document does not meet their needs, and set out a process for making sure that all comments are adequately addressed.

5. Amendments/Changes to the MOU

- Mutual consent needed to modify the MOU. The MOU should outline the procedure for modifications made to the MOU, especially stating that mutual consent between all parties is necessary to modify the structure or provisions in the MOU.

- Notice for amendment/termination of the MOU. The MOU should state how much time a party must give in its notice to amend or terminate the MOU.

6. Post NEPA/CEQA collaboration and Cooperation:

- Implementing/monitoring/enforcing mitigation. Depending on the project and its requirements, agencies involved in the MOU might have statutory authority to enforce mitigation elements in the project. This element of the MOU outlines the mitigation measures that are relied upon in concluding the NEPA/CEQA review and identify which agency(s) will have a role in implementation and/or monitoring.

Since 2007, the California Department of Transportation (Caltrans) and the Federal Highway Administration (FHWA) have participated in a unique environmental program referred to as "NEPA Assignment," which is authorized under the transportation reauthorization laws. To implement the program, Caltrans and FHWA entered into a Memorandum of Understanding pursuant to 23 U.S.C. 327. Under this MOU, FHWA assigned, and Caltrans accepted, responsibility for NEPA. First established as a Pilot Program by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A legacy for Users (SAFETEA-LU), this was made permanent, renewable every five years, with the enactment of the Moving Ahead for Progress in the 21st Century Act (Map-21) in 2012.

IV. Joint Analyses Involving the California Energy Commission

Over the past several years, pursuit of renewable energy goals has increased the relevance of coordinating joint NEPA and CEQA review processes. The Federal government has targets for renewable energy production on public lands and has offered financial incentives for projects, while California has an aggressive Renewable Portfolio Standard. Large scale renewable energy projects proposed for Federal land or pursuing Federal funding have also required state licensing or local permitting, requiring both NEPA and CEQA compliance.

The California Energy Commission licenses thermal power plants 50 megawatts and larger, as well as the plant's related facilities such as transmission lines, fuel supply lines, water pipelines, etc. The Energy Commission's licensing process is a certified regulatory program under CEQA, meaning that the documents prepared in that process will serve as the functional equivalent of an Environmental Impact Report (CEQA Guidelines, § 15251, subd. (j)). Regulations governing the power plant siting certification process are contained in Division 2 of Title 20 of the California Code of Regulations and are available online at http://www.energy.ca.gov/reports/title20/index.html.

Though it is a functionally equivalent process, the Energy Commission's licensing process is unique in several ways. For example, the licensing proceedings are adjudicatory, and staff is a party separate from the decision-maker. Further, the proceedings include evidentiary hearings with sworn testimony. Such differences can be disorienting, and require additional coordination between state and Federal partners. The process of the California Energy Commission is summarized and roughly equated to the NEPA process in the table below. Note, however, not all Federal agencies view the steps identified in the following table as equivalents. These differences highlight the benefit to Federal and California agencies of working through such procedural issues beforehand in an MOU.

Table 4: Summary and Comparison of NEPA and the CEC's Power Plant Siting Processes

National Environmental Policy Act	California Energy Commission Process
Initial Review for Applicability of a Categorical Exclusion • Excluded if there are no extraordinary circumstances	Initial Review for Plant Size • Projects under 50 MW are not subject to CEC jurisdiction • Projects under 100 MW may be licensed or may be subject to the Small Power Plant Exemption (note: this still requires an environmental document)
Environmental Assessment • If no significant impacts, adopt a Finding of No Significant Impact • If significant impacts can be mitigated, prepare a mitigated FONSI • If impacts may be significant, prepare an Environmental Impact Statement	
Environmental Impact Statement Process	**Application for Certification**
Notice of Intent	Application for Certification Accepted
Scoping	Informational Hearing(s); Site Visit
Draft EIS	Preliminary Staff Assessment Filed
Filing with EPA, which publishes a Notice of Availability in the Federal Register	
Public Agency Review and Comment	Preliminary Staff Assessment Public Workshop
Final EIS	Final Staff Assessment
	Evidentiary Hearings
Final EIS and Filing with EPA, which publishes a Notice of Availability in the Federal Register	Presiding Member's Proposed Decision
30 Day Review Period (Agency may convert this into a public review and comment period).	Public Review and Comment Period (30 Days)
Record of Decision	Decision

Beyond the procedural differences noted above, substantive differences between NEPA and CEQA, as well as differences in agency mission, may require special attention in the project's pre-planning process. As noted in this handbook, while the NEPA requirement for a "purpose and need" statement and CEQA's requirement for identification of "project objectives" are facially similar, in practice they may differ. For example, under CEQA, project objectives for a renewable energy project might include the production of renewable energy, fulfillment of state policy goals, and local economic development. Under NEPA, on the other hand, the Bureau of Land Management's primary objective might be to fulfill its statutory obligation to approve or deny a right-of-way application for a solar energy project on public land, rather than the broader goals or underlying purpose of the project itself. These differences become important in selecting the range of alternatives. As suggested in this handbook, Lead Agencies should cooperatively review proposed project purpose and need and project objectives statements. If necessary, a joint document may describe the Federal agency's purpose and need and the CEQA project objectives in separate sections, together with an explanation of why the agencies' goals differ (e.g., that their statutory authorities or obligations require a different focus).

Examples of alternatives considered in recent NEPA and CEQA reviews for California energy projects include:

- reduced acreage, reduced megawatt and modified footprint alternatives, as well as alternative sites that focus on disturbed sites, degraded sites, contaminated sites, and fallow or impaired agricultural lands;

- alternative generating technologies and providing a description of the benefits associated with those technologies; and

- relocating portions of the project in other areas, including private land, to reduce environmental impacts.

Substantively, Energy Commission projects may require analysis beyond what NEPA would otherwise require. For example, the California Energy Commission has specific regulations requiring it to analyze several issues related to energy, including transmission, generating efficiency, and reliability (See, e.g., Cal. Code Regulations, tit. 20, § 1743).

Though challenging, these differences can be addressed through close coordination. As suggested in this handbook, pre-project planning and development of a Memorandum of Understanding between the state and Federal agency partners can help facilitate the joint environmental review process.