



# CEQA Portal Topic Paper

## CEQA Exemptions

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### What Is An Exemption?

While CEQA applies to all discretionary actions taken by government agencies, it also carves out specific individual projects and classes of projects that are exempt from CEQA. If a project fits within one of the specified exemptions, the Lead Agency need not prepare an Initial Study or any other CEQA document. Exemptions are intended to save time and cost related to CEQA compliance for certain activities and projects, including those that the California Legislature or the California Secretary of Natural Resources determined would not have a significant impact on the environment.

This Topic Paper discusses the three primary types of exemptions available under CEQA: statutory, categorical, and the “common sense exemption” (formerly the “general rule”). Statutory exemptions are granted by the California Legislature for individual or classes of projects, and apply regardless of the environmental impacts of the project for state policy reasons. In contrast, categorical exemptions are classes of projects exempted from CEQA because the California Secretary of Natural Resources has determined that they typically do not have substantial impacts on the environment. The common sense exemption applies to projects that don’t necessarily fit within a statutory or categorical exemption, but “where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment,” the activity is exempt from CEQA (CEQA Guidelines Section 15051(b)(3)).

In addition to the three primary types of exemptions discussed in this Topic Paper, there are various other specific CEQA exemptions that have been granted by the Legislature. Examples include exemptions for agricultural housing, affordable housing, and residential infill projects (see Article 12.5 of the CEQA Guidelines); an exemption for sustainable communities projects (see Public Resources Code [PRC] Section 21155.1); an exemption for residential projects pursuant to a specific plan (see CEQA Guidelines Section 15182); an exemption for projects that are consistent with a community plan or zoning (see CEQA Guidelines Section 15183); and various other narrowly applicable exemptions granted by the Legislature.

An additional type of exemption is available only to certain state agencies, a Certified State Regulatory Program exemption. The Certified Regulatory Program exemption is not a complete exemption from CEQA requirements, but rather the substitution of a “CEQA equivalent document” for what CEQA would otherwise require. Certified Regulatory Programs are not further discussed in this Topic Paper.

Although not an exemption in the same sense as otherwise discussed in this Topic Paper, CEQA has the potential to be preempted under federal law, for example, for private rail projects authorized by the Federal Surface Transportation Board under the Interstate Commerce Commission Termination Act. (See, *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314 and cases cited therein.)

## Why Are Exemptions Important?

Exemptions are important for lead agencies, as the proper use of exemptions can save time and money in processing qualifying projects, including both public projects undertaken by the agency itself and private development projects. However, the improper application of an exemption to a project deprives decision makers and the public of information about project impacts. It also opens the Lead Agency to delays in project implementation if, as a result of a successful legal challenge, the agency is ordered to rescind its approvals and complete CEQA review for the project.

## What is the Difference Between Statutory and Categorical Exemptions?

Statutory and categorical exemptions both include individual projects and defined classes of projects that are exempt from CEQA. However, these two types of exemptions differ in purpose and intent. The most notable difference between them is that statutory exemptions are absolute – when a project qualifies for a statutory exemption, CEQA absolutely does not apply. In contrast, categorical exemptions are subject to a variety of “exceptions.” If an exception applies to an otherwise categorically exempt project, the project must go through CEQA review even if it otherwise qualifies for a categorical exemption.

## Statutory Exemptions

The State Legislature can adopt laws that totally exempt certain projects from CEQA. Many of the individual projects and project types that have been granted statutory exemptions are listed in Public Resources Code Sections 21080 et seq., and State CEQA Guidelines Sections 15261 through 15285. Still more statutory exemptions can be found in other sections of the Public Resources Code, or in other California Codes including the Business and Professional Code, California Education Code, Fish and Game Code, Government Code, Health and Safety Code, Military and Veteran’s Code, Penal Code, Water Code, and Welfare and Institutions Code.<sup>1</sup>

Projects covered by statutory exemptions may include those that could result in significant environmental effects, but for which the Legislature has determined that the benefits of these projects to the state or a particular community outweigh the benefits of complying with CEQA. For example, the Legislature created an exemption for hosting the Olympic Games in 1984 in Los Angeles, which brought the City over \$200 million in revenue.

Statutory exemptions range from the broad to the specific. Statutory exemptions that apply to broad categories of actions include:

- **Ministerial Projects**, where the Lead Agency uses objective standards and little or no judgment in its decision-making. For example, approval of most building permits consists of reviewing objective standards as outlined in the City Zoning Code and California Building

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<sup>1</sup> For a complete list of CEQA exemptions outside of Division 13 of the Public Resources Code (i.e., CEQA), see the Governor’s Office of Planning and Research’s Technical Advisory *CEQA Exemptions Outside of the CEQA Statute*.

Code [CEQA Statute Sections 21080(b)(1) and State CEQA Guidelines Sections 15268 and 15369].<sup>2</sup>

- **Emergency Projects**, where urgency is required to implement projects that reduce threats to health and property [CEQA Statute Sections 21080(b)(2)-(4) and State CEQA Guidelines Section 15269].
- **Disapproved Projects**, where an agency declines to approve a project or commence an action [Public Resource Code Section 21080(b)(5) and State CEQA Guidelines Section 15270(a)].

In addition, the following more specific types of actions or projects are also exempt by statute:

- An ongoing project (that was in place before CEQA was passed);
- Feasibility and planning studies (where there are no physical facilities or improvements proposed to be constructed at the time the plan is approved, assumes future CEQA compliance of actual facilities proposed to be constructed);
- Discharge requirements;
- Timberland preserves;
- Adoption of Local Coastal Plans and Programs;
- Granting a General Plan time extension by the Governor's Office of Planning and Research (although approval of a General Plan itself usually requires preparation of a programmatic EIR);
- Financial assistance to low or moderate income housing;
- Early activities related to thermal power plants (does not apply to actual construction of the power plant);
- Olympic games (except for the construction of facilities necessary for such Olympic Games);
- Setting rates, tolls, fares, and charges (as long as they are not tied to constructing new physical facilities);
- Family day care homes (applies to residential structures in residential areas);
- Specified mass transit projects;
- State and regional transportation improvement programs (STIP/RTIP) and county congestion management programs;
- Projects located outside California (or portions of projects that lie outside; the portions that are inside the state must comply);
- Application of coatings (may still be subject to local air district permitting);
- Certain types of pipeline work;
- Air quality permits (unless the permit authorizes a physical or operational change to a source or facility; and
- Other miscellaneous actions per State CEQA Guidelines Section 15282 (a list of 22 specific actions or projects is provided in sub-sections a through v).

**Important Note:** A Lead Agency contemplating using one of these exemptions should carefully review both the Public Resources Code and the State CEQA Guidelines to determine whether specific criteria apply that may or may not be applicable to their proposed project. For example, some statutory exemptions have special noticing requirements that do not apply to others.

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<sup>2</sup> See also the CEQA Triggers Topic Paper.

Additionally, some statutory exemptions are partial exemptions and, therefore, a Lead Agency should be aware of the scope of any applicable statutory exemption.

## Categorical Exemptions

Unlike statutory exemptions, which are adopted by the California Legislature and placed in the California statutes, categorical exemptions are adopted by the California Secretary for Natural Resources and incorporated into the State CEQA Guidelines.

Through Public Resources Code Section 21084, the California Legislature directed the Secretary of Natural Resources to include within the State CEQA Guidelines a list of project “classes” which the Secretary determines do not have a significant effect on the environment and therefore shall be exempt from CEQA review.

State CEQA Guidelines Sections 15301 through 15333 describe the following 33 “classes” of Categorical Exemptions (referred to as Class 1, Class 2, etc.):

1. Existing facilities;
2. Replacement or reconstruction;
3. New construction or conversion of small structures;
4. Minor alterations to land;
5. Minor alterations in land use limitations;
6. Information collection;
7. Actions by regulatory agencies for protection of natural resources;
8. Actions by regulatory agencies for protection of the environment;
9. Inspections;
10. Loans;
11. Accessory structures;
12. Surplus government property sales;
13. Acquisition of lands for wildlife conservation purposes;
14. Minor additions to schools;
15. Minor land divisions;
16. Transfer of ownership of land in order to create parks;

17. Open space contracts or easements;
18. Designation of wilderness areas;
19. Annexations of existing facilities and lots for exempt facilities;
20. Changes in organization of local agencies;
21. Enforcement actions by regulatory agencies;
22. Educational or training programs involving no physical changes;
23. Normal operations of facilities for public gatherings;
24. Regulations of working conditions;
25. Transfers of ownership of interest in land to preserve existing natural conditions and historical resources;
26. Acquisition of housing for housing assistance programs;
27. Leasing new facilities;
28. Small hydroelectric projects at existing facilities;
29. Cogeneration projects at existing facilities;
30. Minor actions to prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release of hazardous waste or hazardous substances;
31. Historical resource restoration/rehabilitation;
32. In-fill development projects; and
33. Small habitat restoration projects.

**Important Note:** The Public Resources Code and especially the State CEQA Guidelines provide additional detail as to when these exemptions may apply. For many of the exemptions, the State CEQA Guidelines also provide non-exhaustive examples of the general types of projects that would fall within the exemption class. For all categorical exemptions, it is the responsibility of the Lead Agency to demonstrate and determine that the proposed action falls within an exempt category, and support this determination with factual evidence. In addition, as noted above and further described below, categorical exemptions cannot be used when any of the “Exceptions” described in Section 15300.2 of the CEQA Guidelines apply.

## General Rule or Common Sense Exemption

Even if an action or project does not fall within any statutory or categorical exemption, if it can still be seen with certainty that there is no possibility that the activity may have a significant impact on the environment, the common sense exemption (formerly the “general rule”) applies. According to the State CEQA Guidelines, “Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA” [State CEQA Guidelines Section 15061(b)(3)]. When determining whether this project applies to a project, please note the use of the words “with certainty” and “no possibility.” A Lead Agency’s determination that the common sense exemption applies must be supported with factual evidence.

## Does My Project Qualify for an Exemption?

After it is determined that an activity or action is a “project” under CEQA (see Preliminary Review Topic Paper), the Lead Agency should next consider whether a specific CEQA exemption applies. In order to determine whether a project qualifies for an exemption, the lead agency evaluates whether the project fits into any of the statutory or categorical exemptions listed in Articles 18 and 19 in the State CEQA Guidelines, respectively. If it is plainly clear that the activity has no potential to result in any significant environmental impacts, a “common sense” exemption may apply [State CEQA Guidelines Section 15061(b)(3)].

## Statutory Exemptions

If a project matches the description of any of the statutory exemptions, no further action is required to determine its exempt status.

## Categorical Exemptions

If a project falls within any of the categorical exemption classes, the Lead Agency must next evaluate whether any exception to the exemptions apply. These exceptions to the exemptions define circumstances that override or negate the agency’s ability to use a categorical exemption. In other words, if an exception applies, then the project no longer qualifies for a categorical exemption. The exceptions are described in Public Resources Code Section 21084(c), (d), and (e) and State CEQA Guidelines Section 15300.2. These exceptions apply (and therefore a categorical exemption does not apply) where:

- The project is located in a sensitive environment such that the project may impact an officially mapped and designated environmental resource of hazardous or critical concern;<sup>3</sup>
- The cumulative effect of successive projects of the same type in the same place, over time, is significant;

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<sup>3</sup> Note: This exception only applies to Class 3 (existing facilities), Class 4 (minor alterations to land), Class 5 (minor alterations in land use limitations), Class 6 (information collection), or Class 11 (accessory structures) exemptions. This exception does not apply to any other categorical exemption.

- The project may have a significant environmental impact due to unusual circumstances;
- The project may damage scenic resources (i.e. trees, historic buildings, or rock outcroppings) within an official state scenic highway;
- The project is located on a listed hazardous waste site; or
- The project may cause a substantial adverse change in the significance of a historical resource.

If any of these exceptions apply to the project or the project site, the agency or governmental unit cannot use a categorical exemption and must instead proceed with environmental review under CEQA.

## The Unusual Circumstances Exception

In the California Supreme Court case *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, the Supreme Court held that the unusual circumstances exception applies only when it can be shown that, **first**, unusual circumstances are present and, **second**, those unusual circumstances lead to a reasonable possibility the project could result in a significant impact. The agency's determination that an unusual circumstance does not apply need only be supported by substantial evidence. However, once the agency has found that an unusual circumstance exists, if there is substantial evidence to support a fair argument that a significant impact might occur as a result of that unusual circumstance, the categorical exemption cannot be used.

## Important Notes

Where a project cannot be fairly said to fall within one of the categorical exemption classes, or where a Lead Agency cannot support its determination that a categorical exemption applies with facts and evidence, the use of the exemption may be challenged in court. If a court determines that the exemption was used in error, the Lead Agency will usually be required to rescind its project approvals unless and until it completes an Initial Study, and re-approves the project based on either a negative declaration, a mitigated negative declaration, or an environmental impact report.

In addition, a project cannot be "mitigated into an exemption" by adding measures or controls during the project's approval process to avoid identified potential environmental impacts. However, sometimes it can be unclear whether an element is a mitigation measure added to the project to reduce a potential impact, or whether it is a project feature or a part of the project's design. Project design features, in contrast to mitigation measures, may be considered in determining whether a project qualifies for a categorical exemption. Typically, if a measure or feature was not originally contemplated in the project's design, but was added in response to an identified potential impact, best practice is to consider it to be a mitigation measure, and not attempt to apply a CEQA exemption.

## Can a Lead Agency Use More Than One Categorical Exemption?

Yes, a Lead Agency may apply multiple categorical exemptions to a single project, as long as each cited exemption applies to the project in full. This is sometimes referred to as “layering.” Generally, the entire project must qualify for each exemption – a Lead Agency cannot “piecemeal” a project by separating it out into smaller pieces, and then use different exemptions to exempt each “piece.”

## What are the Process Requirements for an Exemption?

There are no specific procedures for a Lead Agency to follow prior to approving a project that is exempt from CEQA. Under CEQA, use of an exemption does not require prior public notice, does not require a public comment period, and does not require special findings.<sup>4</sup>

After approval of a project, the lead agency may, but is not required to, prepare and file a Notice of Exemption (NOE) with the County Clerk’s office (or the Office of Planning and Research when a state agency files the NOE). The NOE must include a brief description of the project, the location of the project, a finding that the project is exempt, citations to the exemptions that are being relied upon, an explanation of why the project qualifies for the exemption(s), and the applicants name (if any). Unlike other CEQA notices and documents, NOEs are not subject to public review or circulation.

The principal benefit of filing a NOE, is that it reduces the statute of limitations for filing a legal challenge to the project from 180 days after project approval to 35 days after filing of the NOE. Thus, filing a NOE reduces the timeframe within which a project is susceptible to legal challenge. Therefore, even if it is not required by CEQA, filing a NOE as soon after approval of an exempted project is good practice.

If a lead agency chooses to file a NOE, it must do so **after** the project is approved. The NOE is filed with the County Clerk (or the Office of Planning and Research when filed by a state agency),<sup>5</sup> who posts it within 24 hours of receiving it, and who must keep it posted for 30 days. The 35-day statute of limitations does not begin until the NOE has been filed. If no NOE is filed, the 180-day statute of limitations applies from the date the project is approved.

Appendix E of the State CEQA Guidelines contains a recommended NOE form. The form can also be found online at <http://opr.ca.gov/docs/NOE.pdf>.

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<sup>4</sup> However, a Local Agency’s own local CEQA Guidelines or municipal code may have more requirements. In addition, for strategic reasons, a Lead Agency may wish to provide public notice and allow for public comment prior to relying on an exemption. Doing so may limit who can later file a lawsuit against the use of the exemption, and upon which grounds a lawsuit can be based.

<sup>5</sup> Some statutory exemptions (the statutory agricultural housing exemption, affordable housing exemption, and residential infill exemption) also require filing with the State Clearinghouse.

## If My Project is Exempt, Do I Need to Prepare an IS/MND or EIR?

Once a Lead Agency determines that an exemption applies to a project, no further CEQA compliance or environmental review is required.

## Exemptions in a Joint CEQA/NEPA Document

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. (Council on Environmental Quality and Governor's Office of Planning and Research 2014).

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.

## Important Cases

The following published cases involve issues related to CEQA exemptions:

- *Berkeley Hillside Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App. 5th 880. The appellate court found that, while the site was located in a landslide hazard zone, the "Location" exception to the use of categorical exemptions did not apply. The court noted that earthquakes and landslides are geological events, as opposed to "environmental resources," which are the intent of this exception.
- *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086. California Supreme Court holds that the mere possibility of a significant impact is not, in itself, an unusual circumstance, and therefore is not enough to negate the application of a categorical exemption. Court also explains the history and applicability of categorical exemptions and the unusual circumstances exception.
- *Tomlinson v. County of Alameda* (2012) 54 Cal. 4th 281. California Supreme Court holds that even if not required by CEQA, where an agency gives notice of its grounds for an exemption determination, and the determination is preceded by public hearings giving the public the opportunity to raise objections, CEQA's exhaustion of administrative remedies requirement applies. Under that requirement, only individuals and entities who raised objections to the exemption before the agency may file a lawsuit challenging the agency's use of the exemption.
- *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal. 4th 372. California Supreme Court holds that county adoption of a plan that embraced existing

development restrictions qualified for the “common sense exemption” because the plan was consistent with existing general plan and zoning designations and development controls.

- *Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (1993) 12 Cal. App. 4th 1371. Disapproved projects are not subject to the CEQA environmental review process.

## Exemptions in the CEQA Guidelines

The following sections of the CEQA Guidelines address important concepts regarding exemptions. This is not a comprehensive list:

- **Section 15061** - provides general guidance regarding exemptions from CEQA compliance
- **Section 15061(b)(3)** – Describes the common sense exemption (formerly the “general rule”) that CEQA only applies to projects which have the potential for causing a significant effect on the environment.
- **Section 15062** – Describes the procedures for, and advantages of, filing a Notice of Exemption
- **Sections 15261 through 15285** – Define activities statutorily exempt from CEQA compliance
- **Section 15300.2** – Defines exceptions to categorical exemptions
- **Sections 15301 through 15333** – Define activities categorically exempt from CEQA compliance

## Related CEQA Portal Topics

- Preliminary Review
- Lead Agency, Trustee Agencies, and Responsible Agencies

**Date Updated: February 2, 2020**

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