



CEQA Topic Paper

Effective Preliminary Review - Avoiding “Ready, Fire, Aim”

What is “Preliminary Review”?

As conducted by a Lead Agency, Preliminary Review is a brief systematic examination of a proposed project, in order to determine if that activity requires analysis and review under CEQA. If the proposal is a private application, the Preliminary Review can be conducted during the 30-day period during which the Lead Agency is determining the application to be complete.

Many state court decisions consistently emphasize Preliminary Review as an important first step in a three step process:

To further these goals, CEQA requires that agencies follow a three-step process when planning an activity that could fall within its scope. The first tier requires an agency to determine whether the proposed activity is a project and, if so, whether the project is exempt from CEQA. (San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356, 1372-1373 (San Lorenzo).) If an agency determines that a project is exempt, no further environmental review is necessary, and it may file a notice of CEQA exemption.

The Preliminary Review process need not be time consuming, but care and forethought at this early stage will save effort in later CEQA phases. A hastily or poorly conducted Preliminary Review process may miss an important aspect of the project or applicable statute - one that could otherwise avoid the need for additional CEQA processing. Early project review also provides the opportunity to revise the project early on before applicant is overly committed to a damaging project. In addition, a careless Preliminary Review may miss a specific detail or issue that clearly triggers and directs further CEQA work.

Points in this paper will help to ensure you select the correct CEQA target before “Taking Aim.”

This discussion looks first at the key determinations to be made during a Preliminary Review (“Getting Ready”). Then the balance of this Topic Paper describes key strategies for effective Preliminary Review in the CEQA process (first taking aim, and then – “Firing”).

What are the Key Components of Preliminary Review?

In order to determine if an activity or action is subject to CEQA, some research is required to understand how that action relates to a larger “project.” An informal consideration of environmental factors is also necessary – in order to determine if there is a potential for physical change. This “early look” at a proposed project also provides an opportunity to change the

project early in the process, to avoid environmental impacts. You do not need to prepare a formalized Initial Study checklist (such as Appendix G of the CEQA Guidelines) during Preliminary Review – but considering an abbreviated format of such a checklist may help you organize your thoughts.

Preliminary Review involves at least four key components:

A. Determine if the proposed action (the “whole of an action”) is a “project” under CEQA.

In other words, would the proposed action, and any related activities such as supporting infrastructure, involve at least one discretionary decision from a public agency and have the potential to cause any physical change in the environment?

For Preliminary Review, you only need to provide just enough description to see if there would be a physical change and if the decision to proceed involves discretion on the part of a public agency. To illustrate, construction for private development or public infrastructure clearly involves physical changes in the environment. Land use entitlements, such as zoning changes, subdivisions, and conditional use permits, may only be regulatory policy directions – but they are clearly intended to lead to construction and physical change as well.

Consideration of the views of other public agencies should also be considered during Preliminary Review. If a Responsible Agency(ies) also has some discretionary approval authority, then coordination with those agency(ies) to help ensure proper CEQA review is important.

AEP has published a separate CEQA Portal Topic Paper on the “Project Description,” which should be consulted for further information.

B. Determine if the project is statutorily exempt from CEQA.

A project is exempt from CEQA if it is subject to a "statutory exemption" granted by the State Legislature.

Most Statutory Exemptions are presented in Sections 15260 to 15285 of the CEQA Guidelines. However, there may be other exemptions from CEQA requirements which could apply to your project or activity. In fact, OPR has published a Technical Advisory titled “CEQA EXEMPTIONS OUTSIDE OF THE CEQA STATUTE”

(http://opr.ca.gov/docs/20180606-Tech_Advisory_CEQA_Exemptions.pdf), which identifies more than 50 such exemptions, including: the Public Resources Code (at least 8 exemptions identified by OPR); Water Code (9 identified); Penal Code (2 identified); Government Code (17 identified); Business and Professions Code (1 identified); Education Code (3 identified); Fish and Game Code (5 identified); Health and Safety Code (5 identified); Military and Veterans Code (1 identified); and Welfare and Institutions Code (1 identified). Further state legislation may create additional exemptions in the future.

C. Determine if the project is categorically exempt from CEQA.

If not statutorily exempt, a project may be exempt from CEQA if it is subject to a "categorical exemption" in Sections 15301 through 15333 of the Guidelines and if the application of the categorical exemption is not barred by an exception set forth in Section 15300.2 of the Guidelines. Exceptions to the categorical exemptions (i.e., non-statutory) include, among other things, where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. (Guidelines, Section 15300.2(c))

AEP has published a CEQA Portal Topic Paper on categorical and statutory "Exemptions," which should be consulted for further information.

D. Determine if there is reason why the project may not require further CEQA review.

Preliminary Review is the ideal time to comprehensively identify the full applicability of CEQA to your project at hand. The "Statutory Exemptions" and "Categorical Exemptions" noted above are not the only opportunities to exempt a project from CEQA. Other opportunities may include, but are not limited to, the following:

1. When "there is no possibility that the activity in question may have a significant effect on the environment" (15061(b) (3))
2. When a Program EIR has been previously certified (15168(c))
3. When a Master EIR has been previously certified (15177(b))
4. When any other type of EIR has been previously certified (15162(a))
5. Certain projects which implement a Specific Plan (15182(a))
6. Certain projects which are consistent with a community plan, General Plan and/or zoning (15183)
7. Certain infill projects which are found consistent with a "sustainable communities strategy" or an "alternative planning strategy" adopted by a metropolitan planning organization (15183.3)
8. Certain agricultural housing, affordable housing and residential infill housing projects (Article 12.5, Sections 15191-15196)

E. Document the results of Preliminary Review in the administrative record for the Project.

Many court decisions underscore the importance of a robust administrative record to ensure legal defensibility of an agency's project approval. If, after Preliminary Review, no further CEQA review of a project is required, this documentation may be a Notice of Exemption or similar notice, and/or other statements within a staff report or resolution.

If a decision is made to analyze the project further through preparation of an Environmental Impact Report or a Negative Declaration, then Preliminary Review has been completed and that process can proceed, with the Initial Study or the Notice of Preparation supporting the administrative record.

When is Preliminary Review Usually Undertaken?

In many public agencies, there are standard lists or procedures for determining if certain projects are subject to CEQA or if they are exempt. Often the Planning Director or other manager provides top down direction for the type of environmental document or conclusion, (e.g., Exemption, Negative Declaration, EIR, etc.). This top-down approach may be efficient and appropriate, but Preliminary Review is still advisable, to provide substantial evidence for that conclusion.

Note: Section 15060(d) of the CEQA Guidelines appears to downplay the importance of Preliminary Review, if it is initially determined that an Environmental Impact Report will need to be prepared. This direction is shortsighted; the fundamental procedures established for Preliminary Review can be applied throughout all aspects of environmental review, including determining the scope and content of Environmental Impact Reports through the Notice of Preparation process described in Section 15082 of the Guidelines.

How Can Preliminary Review Become More Effective? Remember these points:

A. Importance of a complete Project Description

Preliminary Review can be expedited if attention is focused on adequately describing the Project as early as possible in the process. Even if you are not preparing an EIR, you should consider the general approach outlined in Section 15124 of the Guidelines. This approach includes developing information regarding Lead Agency, Responsible Agencies, and Trustee Agencies, as well as a listing of permits and other approvals required to implement the Project. That information is also helpful upfront, in the Preliminary Review process.

The key here is to consider all aspects of the project and to consider all of the agencies, permits, and activities involved in implementing the project.

B. Importance of evidence in the administrative record

CEQA decisions by a Lead Agency must be supported by substantial evidence in the public record. When concluding a Preliminary Review, be sure to “show your work,” and cite and explain the reason why a project or action is exempt from CEQA, or how it is covered by an earlier CEQA document. Guidelines Section 15062(a) provides direction in the case of a statutory or categorical exemption, but the approach is good practice in all circumstances when further analysis and review under CEQA is not required.

Areas of Controversy

A key area of controversy regarding Preliminary Review and CEQA concerns the timing of Preliminary Review in the environmental review process. The question of timing, and deciding when to prepare a CEQA document, does not have a simple answer. Guidelines Section 15004 provides a discussion of this issue. If you are in Preliminary Review and it is not yet possible to prepare a meaningful CEQA document, that decision should be documented. The reason why the immediate action is not subject to CEQA should be stated, along with a clear explanation of when CEQA analysis and review would occur and that it must precede approval of the project.

Relationship to AEP's Public Policy Program

This Topic Paper is consistent with the following components of AEP's Public Policy Program:

Vision:

To support balanced and informed decision-making through the timely and efficient implementation of CEQA's procedural requirements.

Guiding Principles:

AEP supports proposals that:

- Enhance the efficiency and effectiveness of CEQA to achieve its original purposes.
- Strengthen the "tiering" relationship between CEQA documents.

References

- Public Resources Code Section 21003.1
- Article 5 of the CEQA Guidelines, beginning with Section 15060
- Technical Advisory - "CEQA EXEMPTIONS OUTSIDE OF THE CEQA STATUTE," Governor's Office of Planning and Research, June 2018
- CEQA Portal Topic Paper – "What is CEQA?"
- CEQA Portal Topic Paper – "Exemptions"
- CEQA Portal Topic Paper – "Lead Agency, Responsible Agencies, and Trustee Agencies"
- CEQA Portal Topic Paper – "Project Description"

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