

CEQA Compliance For CWPP

Now or Later?

San Marcos Pass CWPP Development Team Meeting – June 19, 2017

Options:

1. Request that County Fire, Board of Supervisors or CalFire prepare a negative declaration or program EIR (State CEQA Guidelines § 15168).
2. CEQA compliance is performed for individual projects after completion of the CWPP.

Option 1: CEQA Compliance Now.

A governmental “lead agency” must determine whether an EIR is required. (Guidelines §§ 15050(c), 15060.) The lead agency in this case could be the County of Santa Barbara, County Fire or CalFire – the three agencies which must sign off on the final CWPP. The Development Team cannot make the decision to prepare an EIR (or negative declaration), but would have to persuade one of these three public agencies to assume lead agency status.

The EIR must be prepared “by or under contract to the lead agency.” (Guidelines § 15084(a).) The Final EIR must “reflect[] the lead agency’s independent judgment and analysis.” (Guidelines § 15090(a)(3).) The Lead Agency and not the Development Team would determine the scope and contents of the EIR.

The EIR would probably be a “program EIR” since the CWPP will identify multiple potential individual projects. (Guidelines §§ 15165, 15168.) The Lead Agency would determine the level of detail. Program EIRs typically do not analyze individual projects in full detail, but focus on larger issues, e.g. policy issues, program level alternatives and cumulative impacts. The program EIR most likely would not eliminate the need for later more detailed review of individual fuel modification projects.

Cost would depend upon level of detail. A range of anywhere from \$ 100,000 to \$ 500,000 or more is possible, depending upon the level of detail.

Timing. An EIR is supposed to be completed within one year, but this time limit is often exceeded in practice. (Public Resources Code § 21151.5.) The time would begin to run only after a proposed CWPP was submitted to the lead agency.

Option 2: CEQA Compliance for Individual Projects or Programs Follows Completion of EIR

EIRs (or negative declarations) have generally not be done for CWPPs. Public agencies have used a variety of different rationales, some of which may not withstand analysis. However, the San Marcos Pass CWPP, as currently proposed, should not trigger CEQA requirements.

- CEQA applies to “*projects*” that are “*carried out or approved*” by state or local public agency. (Public Resources Code §§ 21100, 21151; Guidelines §§ 15002(b)-(c), 15060(c).) CEQA does not apply to private actions that do not require governmental approvals or only require ministerial approvals.

- The term “project” is very broadly construed under CEQA 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 ...” (Guidelines § 15378(a); PRC § 21065.)
 - Where projects proceed in stages or require multiple governmental approvals, all phases are considered a part of the same project. (Guidelines § 15378(c).)
 - The CWPP can be construed as an initial planning and informational document for future fire control activities, some of which will be carried out by County or otherwise approved by the County. It is safest to assume that the CWPP is part of a larger long-term project for purposes of CEQA, since adoption of the CWPP will probably be followed by fuel modification activities which clearly will affect the environment.
- However, not all preliminary planning actions or approvals constitute a *project approval* that triggers CEQA requirements.
 - The CEQA Guidelines define “approval” as “the decision by a public agency which commits the agency to a definite course of action in regard to a project.” (Guidelines § 15352(a).)
 - CEQA distinguishes between project “approvals” of actions that may actually affect the environment and planning studies which only provide information that may be used to formulate future projects. (Public Resources Code §§ 21102, 21150; CEQA Guidelines § 15262; see also Guidelines § 15306 (exemption for “information collection”).)
 - Guidelines § 15262 provides:

“A project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded does not require the preparation of an EIR or negative declaration but does require consideration of environmental factors. This section does not apply to the adoption of a plan that will have a legally binding effect on later activities.
- Case law also recognizes a distinction between preliminary planning and project formulation and actual “approvals” that trigger CEQA: (*Save Tara v City of West Hollywood* (2008) 45 Cal.4th 116.)
 - “The problem is to determine when an agency's favoring of and assistance to a project ripens into a ‘commit[ment].’ To be consistent with CEQA's purposes, the line must be drawn neither so early that the burden of environmental review impedes the exploration and formulation of potentially meritorious projects, nor so late that such review loses its power to influence key public decisions about those projects. (*Save Tara*, at p. 130-131
 - “CEQA review was not intended to be only an afterthought to project approval, but neither was it intended to place unneeded obstacles in the path of project formulation and development.” (*Save Tara*, p. 137.)

- Critical factors under *Save Tara* and subsequent case law are (1) whether the governmental action involves a *commitment* to proceed with the project or some part of it, and (2) whether the action “forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.” (*Save Tara*, p. 138-139; Guidelines § 15004.)
- The level of detail of the preliminary planning action involved is not a major consideration:

“we cannot agree with the suggestion of the Court of Appeal ... that any agreement, conditional or unconditional, would be an “approval” requiring prior preparation of CEQA documentation if at the time it was made the project was sufficiently well defined to provide ‘meaningful information for environmental assessment.’ [Citations.] On this theory, once a private project had been described in sufficient detail, *any* public-private agreement related to the project would require CEQA review. This rule would be inconsistent with the CEQA Guidelines’ definition of approval as involving a “commit[ment]” by the agency. [Citation.] Agencies sometimes provide preliminary assistance to persons proposing a development in order that the proposal may be further explored, developed or evaluated. Not all such efforts require prior CEQA review. (See, e.g., Cal.Code Regs., tit. 14, § 15262 [conduct of feasibility or planning studies does not require CEQA review].) Moreover, privately conducted projects often need some form of government consent or assistance to get off the ground, sometimes long before they come up for formal approval. Approval, within the meaning of Public Resources Code sections 21100 and 21151, cannot be equated with the agency’s mere interest in, or inclination to support, a project, no matter how well defined.” (*Save Tara*, p. 136.)

- As currently proposed the CWPP will (1) identify areas where fuel modification projects could potentially increase fire safety; (2) make recommendations for structural improvements and other measures that could increase individual home and community safety; (3) make recommendations for minimizing adverse environmental effects from fuel modification activities; (4) potentially make other recommendations, e.g. regarding evacuation planning. Unlike a general plan or zoning ordinance, the CWPP will not have any legally binding effect on future actions. It also will not result in automatic funding for any activity, nor constitute an approval of funding, permits or official adoption of any project or program recommended in the CWPP. Lastly, it will not preclude any party from pursuing alternative plans or adopting different or additional mitigation measures.