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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCUMENT NO. 36036

VALERO REFINING COMPANY – CALIFORNIA
PETITION FOR DECLARATORY ORDER

REPLY OF THE CITIES OF DAVIS, BERKELEY AND OAKLAND, THE COUNTY OF YOLO, AND THE SACRAMENTO AREA COUNCIL OF GOVERNMENTS IN OPPOSITION TO PETITION FOR DECLARATORY ORDER

Communication with respect to this
document should be addressed to:

Kirk E. Trost
General Counsel
Sacramento Area Council of Governments
1415 L Street, Suite 300
Sacramento, CA 95814
(916) 340-6210
Email: ktrost@sacog.org

Counsel for the Sacramento Area Council of Governments

Harriet Steiner
City Attorney of City of Davis
Best Best & Krieger, LLP
500 Capitol Mall, Suite 1700
Sacramento, CA 95814
(916) 551-2821
Email: Harriet.Steiner@bbklaw.com

Counsel for the City of Davis, California

Zach Cowan
Berkeley City Attorney
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Tel (510) 981-6998
Fax (510) 981-6960
Email: zcowan@cityofberkeley.info

Counsel for the City of Berkeley, California

Barbara J. Parker, City Attorney
Doryanna Moreno, Assistant City Attorney
Mark P. Wald
Senior Deputy City Attorney
Oakland City Attorney's Office
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
(510) 238-3540
Email: mpwald@oaklandcityattorney.org

Charles A. Spitulnik
Allison I. Fultz
Kaplan Kirsch &Rockwell LLP
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600
Email: cspitulnik@kaplankirsch.com
Email: afultz@kaplankirsch.com

Counsel for the City of Oakland, California

Philip J. Pogledich
County Counsel
County of Yolo
625 Court Street, Room 201
Woodland, CA 95695
Tel: (530) 666-8275
Email: philip.pogledich@yolocounty.org
Counsel for the County of Yolo

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The Cities of Davis, Berkeley and Oakland, the County of Yolo, and the Sacramento Area Council of Governments, a California joint powers agency of 22 city and 6 county member jurisdictions (collectively "California Local Government Agencies") hereby reply in opposition to the Petition for Declaratory Order filed by non-carrier Valero Refining Company – California ("Valero") on May 31, 2016. Valero seeks a declaratory order from the Surface Transportation Board ("Board") that the City of Benicia ("City") Planning Commission's decisions (1) declining to certify the Valero Benicia Crude Oil By Rail environmental impact report ("EIR") pursuant to the California Environmental Quality Act (California Public Resources Code section 21000 *et. seq* or "CEQA"), and (2) denying a use permit for changes to oil and refinery operations required by Title 17 of the City's Municipal Code (a denial currently on appeal to the City Council) are preempted by the Interstate Commerce Commission Termination Act ("ICCTA") (49 U.S.C. §§ 10101-16106).

INTRODUCTION

The California Local Government Agencies have an interest in protecting their rights under applicable law to regulate the use of non-railroad property within their respective borders. They are fortunate to have extensive transportation infrastructure – rail, highway and, in certain instances, maritime – and acknowledge the crucial role that these facilities play in their economies. However, the California Local Government Agencies also have an obligation to their citizens to ensure that development and other actions occur in a way that does not harm the health, safety and other interests of its citizens and in a manner consistent with planning, zoning, and environmental laws.[1] They respect the extent to which federal law may preempt state law, but, by participating in this action, they are defending their ability to regulate the use of property subject to their jurisdiction from assertions of preemption and attempts to use federal law as a shield for activity that is not properly covered by those laws.

Valero is not a rail carrier providing transportation subject to the jurisdiction of this Board under the ICCTA. Instead, Valero seeks a use permit from the City of Benicia to enable it to modify its existing refinery in order to receive crude oil by tank car. These modifications involve the installation of rail spur tracks, a tank car unloading rack, pumps, connecting pipelines, and infrastructure including installation of approximately 4,000 feet of 16-inch diameter crude oil pipeline and associated components and pump infrastructure between the offloading rack and the existing crude supply piping, replacement and relocation of

[1] The City of Benicia shares this obligation. (*See e.g.* Municipal Code section 17.104.060 which requires the City to make findings before approving a use permit, such as the one sought by Valero, that 1) the proposed location of the use is in accord with the objectives of the zoning code and the purposes of the district in which the site is located; 2) the proposed location of the conditional use and the proposed conditions under which it would be operated or maintained will be consistent with the general plan and will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of such use, nor detrimental to properties or improvements in the vicinity or to the general welfare of the City; and 3) the proposed conditional use will comply with the provisions of the zoning code, including any specific condition required for the proposed conditional use in the district in which it would be located.)

approximately 1,800 feet of existing tank farm dikes, relocation of an existing firewater pipeline, compressor station, and underground infrastructure. (City of Benicia, Valero Benicia Crude Oil By Rail Project, Draft Environmental Impact Report (2014) at 3-5.[2]) It is undisputed that Valero, a non-carrier, would solely and independently construct and operate the unloading facilities and related infrastructure and fully own those improvements. It is also undisputed that no rail carrier would directly or indirectly control the construction or operation of the unloading facilities.

Valero asserts that the ICCTA prevents the City from refusing to issue Valero a local land use permit, because that would deny "Valero the right to receive rail common carrier service" and "unreasonably burden[] interstate commerce" by "preventing [the Union Pacific Railroad] from providing such service." (Pet. for Dec. Ord., pp. 2-3.) Valero further insists that it "does not seek by this Petition an order declaring that the City of Benicia's permitting authority [] is itself subject to ICCTA preemption. However, the EIR/Permit Denials impinge on Board jurisdiction, regulate rail transportation and unreasonably burden interstate commerce." (Pet. for Dec. Ord., p. 16.)[3] Valero's position is misleading, inconsistent, and finds no support in applicable federal law.

First, Valero's lumping together of (a) the EIR prepared to analyze the proposed use permit, and (b) the use permit, into one phrase "EIR/Permit Denials" misrepresents the requirements of CEQA, as EIRs are <u>not</u> permits that can be approved or denied. "Unlike most

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[2] Available at: http://www.ci.benicia.ca.us/index.asp?SEC=B7EDC93A-FFF0-4A14-9B1A-1C8563BC256A&DE=11318773-7E57-4AE0-9DC0-D1F64E7AA54B&Type=B_BASIC

[3] It is incorrect for Valero to continually refer to "Permit Denials." As Valero admits, it has appealed the Planning Commission's February 11, 2016 denial of its use permit to the City Council. (Pet. for Dec. Ord, p. 2.) As such, the City's review of Valero's use permit application is not yet complete. But, rather than wait to learn whether the City Council would uphold the denial, grant the permit, or grant the permit with conditions, Valero requested that the City Council "defer a decision on Valero's appeal until September 20, 2016." (*Id.*) In other words, it is Valero who has chosen to delay the possible issuance of the use permit. Moreover, Valero's Petition to this Board is actually premature in one sense, since there is not yet any final action that Valero can claim should be preempted. If, however, Valero's intent is to ensure that the City is aware that (in Valero's view), the City cannot deny Valero's application, then it may be appropriate for this Board to clarify that the City may act on this Petition in a way that fulfills its obligations to its citizens because the matter does not affect the business or operation of a rail carrier providing transportation subject to this Board's jurisdiction.

environmental laws, CEQA generally does not contain substantive regulatory standards. Instead of prohibiting agencies from approving projects with adverse environmental effects, CEQA requires only that agencies inform themselves about the environmental effects of their proposed actions, carefully consider all relevant information before they act, give the public an opportunity to comment on the environmental issues, and avoid or reduce significant environmental impacts when it is feasible to do so." (*Practice Under the California Environmental Quality Act*, §1.1, Continuing Education of the Bar – California; Kostka and Zischke, attached hereto as Exhibit 1.) Valero presents no arguments in its Petition (there are none) as to why the informational requirements of CEQA are preempted by the ICCTA when a permit is sought by an entity that is not a rail carrier providing transportation subject to this Board's jurisdiction. As such, it is entirely inappropriate for Valero to bootstrap an attempt to preempt enforcement of CEQA onto its claims about the City's purported denial of a use permit.

Second, Valero asserts that "denial" of the use permit is preempted (Pet. for Dec. Ord., pp. 2-3), yet maintains that it is not seeking an order declaring that the City's authority to issue the use permit is preempted (Pet. for Dec. Ord., p. 16). This brings to mind the famous Henry Ford quote: "you can have a car in any color so as long as it's black." Valero is being disingenuous. Valero is clearly asking the Board to preempt the City's permitting authority – a decision that, as detailed below, would contradict the Board and Federal courts' previous decisions and is inconsistent with the ICCTA.

Declaratory Relief Is Not Appropriate

Valero asserts that requiring oil refineries in California to comply with CEQA and with local planning and zoning laws has impeded its efforts to receive crude oil from within North America via their chosen mode of shipment, rail. (Pet. for Dec. Ord, pp. 3 - 7.) Thus Valero

argues, it is necessary for the Board to issue a declaratory judgment to eliminate controversy and remove uncertainty. (*Id.*) But Valero's complaints do not actually pertain to rail operations at all. They pertain to the operations of oil refineries within California, refineries that wish, for their own financial benefits,[4] to be exempted from compliance with state and local environmental and planning laws. It is outside the role of the Board and, outside the scope of the ICCTA to issue declarations regarding oil refineries' obligations to comply with state and local law. Declaratory relief is not appropriate.

ARGUMENT

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to terminate a controversy or remove uncertainty. (*See Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.E. 2d 675 (1989).) The Board has, on many occasions, used the declaratory order process to address issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b). (*See, e.g.,* STB Finance Docket No. 35788, *14500 Ltd.—Pet. for Declaratory Order*, (Service Date June 5, 2014); STB Finance Docket No. 34662, *CSX Transp., Inc.—Pet. for Declaratory Order*, (Service Date May 3, 2005).) In this matter, the Board should exercise its authority to decline to grant the Petition requested by Valero, as the activities at issue are being conducted by an entity that is not a rail carrier providing transportation subject to the jurisdiction of the Board.

It is, of course, true that the ICCTA protects the ability of a rail carrier to fulfill its common carrier obligations once a shipper has located along its lines and made a reasonable request for rail service. (49 U.S.C. §11101.) However, contrary to Valero's arguments, the

[4] "North American crude oil is economically and competitively accessible to the Benicia refinery only by rail delivery." (Pet. for Dec. Ord., pp. 8-9.)

ICCTA does not guarantee to shippers the right to locate anywhere and to engage in activities that are otherwise precluded by applicable local laws just because the location will, or may have, the benefit of being served by a rail carrier. Adopting Valero's view of the applicable law would stretch this Board's interpretations of its own jurisdiction beyond its limits and should be summarily rejected.

a. The Board's Decision in *SEA-3* Supports the Denial of Valero's Petition

The most recent and instructive Board decision on the question of the ICCTA's preemption of state and local land use and environmental laws when a rail carrier is not the proponent owner or operator of the project is *SEA-3, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 35853 ("*SEA-3*"). In that matter, SEA-3 Inc., like Valero a non-carrier, sought a ruling that the ICCTA preempted zoning claims by the City of Portsmouth regarding SEA-3's proposed construction of five rail berths at a liquefied petroleum gas transload facility owned and operated by SEA-3. (*SEA-3*, slip op. at 1.) Like Valero, SEA-3 claimed that the new rail berths were financially necessary to its propane-selling business. (*SEA-3*, slip op. at 2.) Like Valero, SEA-3 claimed that by opposing SEA-3's zoning approvals the City of Portsmouth was "attempting to regulate rail transportation by [rail carrier] Pan Am through litigation that would frustrate and delay increased rail services to SEA-3's transload facility." (*SEA-3*, slip op. at 3.) The Board denied the Petition for lack of jurisdiction, stating:

> The Board's jurisdiction extends to rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over the third party's operations. The record presented to the Board in this case, however, does not demonstrate that SEA-3 is a carrier or that it is performing transportation-related activities on behalf of Pan Am or any other rail carrier at the transload facility.

(*SEA-3*, slip op. at 5; *see also* STB Finance Docket No. 34824, *Tri-State Brick & Stone of N.Y.—Pet. for Declaratory Order*, slip op. at 6 (Service Date Aug. 11, 2006) ("[W]hile a facility [here the Yard] may be subject to our jurisdiction, not all activities within that facility [here, Coastal's operations] fall under our jurisdiction."). Here, too, the Board should deny Valero's Petition for lack of jurisdiction as Valero – not any rail carrier – will own, construct, control, and operate the unloading facilities.

Seeking to avoid this outcome, Valero argues that *SEA-3* actually supports its Petition because the Board found that SEA-3 "had not identified an attempt by Portsmouth to regulate Pan Am's operations" and noted that such interference "with Pan Am's common carrier operations . . .would be preempted under §10501(b)." (Pet. for Dec. Ord., p. 19, citing *SEA-3*, slip op. at 6 and 7.) Valero claims that, unlike the facts presented in *SEA-3*, the City here is attempting to interfere with rail common carrier operations. (*Id.*) Valero is wrong for two reasons. First, Valero focuses on the fact that the City of Portsmouth did not seek to impose regulations in *SEA-3*, but this is a distinction without a difference. In *SEA-3* the issue under consideration was whether local regulation was permitted <u>*at all*</u>, not whether Portsmouth, in particular, could impose regulations on SEA-3. Second, Valero ignores the actual procedural posture of its application for a use permit from the City: the permit was denied by the Planning Commission and Valero appealed to the City Council. The City Council has not acted on the permit application. The City has not imposed any conditions on a permit's issuance that Valero can complain of (even if such complaints lacked merit). Until its appeal is heard, Valero's permit is still being processed and there is no final action by the City.

Valero's Petition appears to be asking this Board to prospectively hold that state and local governments have no ability to regulate the use by parties who are not railroads of land within

those states' or communities' borders, solely because, once completed, the proposed use of the property will be accompanied by rail service to it. No statute and no case in this Board's jurisprudence, or that of the Interstate Commerce Commission ("ICC") before it, allow this Board to extend its jurisdiction so far. Valero's own description of the current state of affairs confirms that there is no impact on rail transportation that would give rise to an issue over which this Board can assert jurisdiction. Valero contends that "[*if* the EIR had contained rail transportation mitigation and had been certified and *if* the Planning Commission had approved Valero's use permit with rail transportation conditions, those conditions would not have been enforceable." (Pet. for Dec. Ord., p. 16, FN 49 [emphasis added].) But, there are no such conditions for the Board to review and evaluate – the permit was denied and Valero appealed.[5] Thus, as settled in *SEA-3*, the Board does not have jurisdiction over the City's discretionary review of land use permits for non-carriers.

b. Recent Case Law Supports Denial of Valero's Petition

Two U.S. Court of Appeals decisions also affirm that this Board does not have jurisdiction over the City's discretionary review of land use permits for a non-carrier. In *N.Y. & Atl. Ry. Co. v. STB*, 635 F.3d 66 (2nd Cir. 2011) a freight railroad entered into an agreement with Coastal Distribution, LLC to construct and operate a transloading facility on a rail yard leased by the railroad. The Town of Babylon sought to stop work on the facility on grounds that the transloading facility was a prohibited use under a local zoning ordinance. (635 F.3d at 68.)

[5] The California Local Government Agencies have received and reviewed the pleading submitted in this proceeding on July 7, 2016 by the City of Benicia. As a general matter, the California Local Government Agencies agree that the denial of Valero's requested permit is not preempted, as explained more fully in this brief. The California Local Government Agencies do not agree, however, that it is appropriate for this Board to provide the guidance that Benicia seeks without specific information about the nature and content of the conditions that would be proposed. This Board has jurisdiction over rail transportation moving in interstate commerce. Without knowing precisely what conditions Benicia might wish to propose, and how or whether those conditions would impede a railroads' ability to fulfill its common carrier obligation to a shipper that has lawfully located along its lines, it is hard to envision a circumstance where any general advice without knowledge of the specifics would be of value to the parties and would not lead to more uncertainty rather than less.

Babylon petitioned the Board for a declaratory order that the zoning ordinance was not preempted. (*Id*. at 69.) The Board held that it did not have exclusive jurisdiction over the facility because the railroad's responsibility and liability for the cars "end when they are uncoupled at the [] Yard and resumes when they are coupled to [the railroad's] locomotive." (*Id*. at 73.) The Board explained that it has exclusive jurisdiction over transloading facilities if, and only if, "the activities are performed by a rail carrier or the rail carrier holds out its own service through the third-party as an agent or exerts control over the third-party's operation." (*Id*.) The freight railroad and distributor sought review of the Board's decision at the U. S. Court of Appeals. The Court agreed with the Board, holding that the facility did not constitute "transportation by rail carrier" because the railroad did not own or operate the facility and the distributor was not acting as an agent of the railroad. (*Id*. at 75.) This is precisely the analysis that applies to Valero. No railroad owns or will operate Valero's facility, nor will Valero act as the agent of a railroad. Accordingly, the regulation of proposed uses on the Valero site is beyond the jurisdiction of this Board.

Similarly, in *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), a railroad leased rail yard property in the City of West Palm Beach to a third party corporation. The corporation used the rail yard as a transloading facility. (266 F.3d at 1327.) The City of West Palm Beach issued a cease and desist order because the transloading operation did not comply with the city's zoning. (*Id*.) The railroad sued the city, seeking a declaration that the ICCTA preempted the city's zoning. (*Id*.) The Court held that the application of the city's ordinances to the transloading facility did not constitute regulation of "transportation by rail carrier" within the meaning of the ICCTA preemption provision, explaining:

> existing zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad

> for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws 'with respect to regulation of rail transportation.

(*Id.* at 1331.) Therefore, the Court concluded, "in no way does federal pre-emption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad." (*Id.*)

Here, the Valero unloading facilities, just like the transloading facilities in *N.Y. & Atl. Ry. Co.* and *Florida East Coast Railway*, would be owned and operated by a third party - Valero, which in no way would be acting as an agent of a railroad, much less as a rail common carrier. Valero's refinery is subject to the same zoning laws as all property in the City.

c. The Board's Decisions Cited by Valero Have No Application Here

Boston and Main Corporation and Springfield Terminal Railroad Company – Petition for Declaratory Order, STB Financial Docket No. 35749 ("*Winchester*"), involved a local regulation that would have prohibited a rail carrier from operating trains over a rail line. As explained by the Board in *SEA-3*, when considering the *Winchester* matter the Board determined that the ICCTA preempted a local regulation because it directly prevented the rail carrier from conducting its operations. (*SEA-3*, slip op. at 6.) Here, Valero has not identified an attempt by the City to regulate a rail carrier's operations. Instead, the City's denial of a permit to Valero, Valero's appeal to the City Council, and Valero's request for a stay of the Council's consideration of its appeal, impact only Valero's desire to expand its refinery facilities. Valero is not a rail carrier or acting under the auspices of a rail carrier. Thus, as the Board held in *SEA-3*, contrary to the facts of *Winchester*, "the only regulatory action at issue in this case is a local government's participation in zoning [regulation] over the expansion of a non-carrier facility. Without more, this situation does not reflect undue interference with 'transportation by rail carriers.' See 49 U.S.C. § 10501(b)." (*SEA-3*, slip op. at 6-7.)

Valero also attempts to rely on *Norfolk Southern Railway v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2020) ("*Alexandria*"), to ask for preemption of the city and state's environmental and land use land use laws, but that case too is of no assistance. *Alexandria* involved local regulation of an ethanol transload facility constructed and owned by Norfolk Southern Railway Company and operated under its auspices. (608 F.3d at 1326.) Valero does not allege that it is a rail carrier, or that its proposed uploading would be performed under the auspices of a rail carrier, as was the case in *Alexandria*. Therefore, just as this Board held in *SEA-3*, the holdings of *Alexandria* have no relevance here. (*SEA-3*, slip op. at 6.)

CONCLUSION

For the foregoing reasons, the California Local Government Agencies respectfully request that the Board issue an order denying Valero's Petition for Declaratory Order because no transportation by rail carrier that is subject to this Board's jurisdiction is proposed to occur on Valero's property, and no railroad owns or will operate Valero's refinery facility. The City of Benicia is engaging in zoning and environmental regulation over the expansion of a non-carrier facility.

Respectfully submitted,

Dated: July 8, 2016

By: ___s/_Harriet A. Steiner_____ Harriet Steiner City Attorney of City of Davis Best Best & Krieger, LLP 500 Capitol Mall, Suite 1700 Sacramento, CA 95814 (916) 551-2821 Email: Harriet.Steiner@bbklaw.com *Counsel for the City of Davis, California*	By: _____s/_Barbara J. Parker_____ Barbara J. Parker, City Attorney Doryanna Moreno, Assistant City Attorney Mark P. Wald Senior Deputy City Attorney Oakland City Attorney's Office One Frank H. Ogawa Plaza, 6th Floor Oakland, CA 94612 (510) 238-3540 email: mpwald@oaklandcityattorney.org

	Charles A. Spitulnik Allison I. Fultz Kaplan Kirsch &Rockwell LLP 1001 Connecticut Avenue, N.W. Suite 800 Washington, DC 20036 (202) 955-5600 email: cspitulnik@kaplankirsch.com email: afultz@kaplankirsch.com *Counsel for the City of Oakland, California*
By: ____/s Kirk E. Trost_____ Kirk E. Trost General Counsel Sacramento Area Council of Governments 1415 L Street, Suite 300 Sacramento, CA 95814 (916) 340-6210 Email: ktrost@sacog.org *Counsel for the Sacramento Area Council of Governments*	By: _____/s Zach Cowan_____ Zach Cowan Berkeley City Attorney 2180 Milvia Street, Fourth Floor Berkeley, CA 94704 Tel (510) 981-6998 Fax (510) 981-6960 Email: zcowan@cityofberkeley.info *Counsel for the City of Berkeley, California*
By: ___/s Philip J. Pogledich_____ Philip J. Pogledich County Counsel County of Yolo 625 Court Street, Room 201 Woodland, CA 95695 Tel: (530) 666-8275 Email: philip.pogledich@yolocounty.org *Counsel for the County of Yolo*	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **REPLY OF THE CITIES OF DAVIS, BERKELEY AND OAKLAND, THE COUNTY OF YOLO, AND THE SACRAMENTO AREA COUNCIL OF GOVERNMENTS IN OPPOSITION TO PETITION FOR DECLARATORY ORDER** in matter number FD-36036 by using the following service:

SEE ATTACHED SERVICE LIST.

[X **] E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

[X] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **July 8, 2016,** at Sacramento, California.

/s/ Marnie A. Prock
Marnie A. Prock

Service List

Raymond Atkins
1501 K Street NW
Washington, DC 20005
Tel: 2027368417
Party: Union Pacific Railroad Company

Theodore K. Kalick
Canadian National Railway Company
601 Pennsylvania Ave., NW, Ste. 500 North Bldg.
Washington, DC 20004
Tel: (202) 347-7840
Party: Canadian National Railway Company

Rachel Koss
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd. Suite 1000
South San Francisco, CA 94080
Tel: 6505891660
Fax: 6505895062
Email: rkoss@adamsbroadwell.com
Party: Safe Fuel and Energy Resources California

Justin Marks
1666 K Street, NW
Washington, DC 20006
Tel: 202-887-1400

James Brian McDonald
274 Pebble Beach Loop
Pittsburg, CA 94565
Tel: (925) 222-7814
Email: jbmd56@pyahoo.com
Party: James Brian McDonald

Jaclyn H. Prange
Natural Resources Defense Council
111 Sutter Street, 21St Floor
San Francisco, CA 94104
Tel: 415-795-6100
Fax: 415-795-4790
Email: jprange@nrdc.org
Party: Benicians For A Safe And Health Community, Center For Biological Diversity, Communities For A Better Environment, Natural Resources Defense Council, San Francisco Baykeeper, Sierra Club, And Stand

Kevin M. Sheys
Nossaman LLP
1666 K Street, N.W., Suite 500
Washington, DC 20006
Tel: 202-887-1400
Party: Valero Refining Company-California

Peter J. Shudtz
CSX Corporation
1331 Pennsylvania Avenue, NW, Suite 560
Washington, DC 20004
Tel: 202-783-8124
Party: CSX Corporation

Steven G. Churchill
Churchill White LLP
1414 K Street, 3rd Floor
Sacramento, CA 95814
Party: City of Benicia

Jay P. Derr
Van Ness Feldman
719 Second Avenue, Suite 1150
Seattle, WA 98104
Party: Tesoro-Savage Petroleum Terminal LLC d/b/a Vancouver Energy

Jocelyn Thompson
Alston & Bird
333 South Hope, 16th Floor
Los Angeles, CA 90071-1410
Party: Phillips 66 Company

EXHIBIT 1

I. OVERVIEW OF CEQA PROCESS

§1.1 A. Introduction

The California Environmental Quality Act (Pub Res C §§21000–21189.3), commonly referred to as CEQA, was adopted in 1970 and is one of California's most important environmental laws. CEQA applies to most public agency decisions to carry out, authorize, or approve projects that could have adverse effects on the environment. Unlike most environmental laws, CEQA generally does not contain substantive regulatory standards. Instead of prohibiting agencies from approving projects with adverse environmental effects, CEQA requires only that agencies inform themselves about the environmental effects of their proposed actions, carefully consider all relevant information before they act, give the public an opportunity to comment on the environmental issues, and avoid or reduce significant environmental impacts when it is feasible to do so.

Because litigation over CEQA compliance is expensive and time consuming, whether the environmental review of a proposed project complies with CEQA is often a significant factor in an agency's approval decision. A project approval may be set aside if a court finds that a public agency did not comply with CEQA. CEQA lawsuits are frequently filed when a development project or other action is controversial, or when members of the public or other agencies believe that the lead agency has not complied with CEQA's environmental review requirements. For these reasons, attorneys representing any party involved in the CEQA process must thoroughly understand CEQA's varied requirements.

§1.2 B. Scope of Book

This book is intended to guide attorneys and environmental professionals step by step through the CEQA process with a detailed discussion of the legal requirements and practical considerations of practice under CEQA. The book primarily takes the point of view of an attorney representing a project proponent, either a private project applicant or a public agency seeking to comply with CEQA in considering, approving, or applying for particular projects or other actions. This perspective affords the most complete context for discussion of the entire CEQA process. Throughout the text, the authors have included discussions of issues and approaches pertinent to attorneys representing other parties involved in public agency CEQA compliance. Our hope is that attorneys representing any party involved in the CEQA process will find abundant useful information for developing successful legal strategies.

Chapter 1 describes the steps in the CEQA review process (see §§1.3–1.12) and discusses the historical development of CEQA and its current statutory and regulatory framework (see §§1.14–1.34). The roles of the attorney and the public agency in the CEQA review process are covered in chapters 2 and 3, respectively.

In chapters 4 and 5, the reader is led through the initial steps of the CEQA process: determining whether the activity is a project (see chap 4), and ascertaining whether the project is exempt from CEQA requirements under statutory exemptions, categorical exemptions, or the so-called "common sense" exemption for projects that will clearly have no significant environmental impact (see chap 5).

Chapter 6 discusses the next step in the CEQA process, documenting in the initial study whether the project will have a significant effect on the environment and whether a negative declaration or environmental impact report (EIR) will be required (see chap 6). Chapter 7 covers the procedural and substantive requirements for negative declarations.

Chapters 8 through 16 discuss the detailed requirements for EIRs. Chapters 8 and 9 discuss the process for determining the scope of an EIR and the requirements for preparation and public review of draft EIRs. Chapter

10 discusses various special types of EIRs, such as program EIRs and master EIRs, that can be used to streamline CEQA requirements for certain types of actions.

Chapter 11 discusses the overall substantive requirements for an adequate EIR. Chapter 12 covers the project description, environmental setting, and baseline for impact analysis in EIRs. Chapter 13 discusses the evaluation of significant environmental impacts, chapter 14 discusses mitigation measures in EIRs, and chapter 15 discusses the evaluation of alternatives to a project. Chapter 16 covers the requirements for preparation of a final EIR, including the preparation of responses to comments.

Chapter 17 sets forth the requirements for approval of a project, including the adoption of findings. Chapter 18 covers the required adoption of mitigation monitoring or reporting provisions in connection with project approval and findings.

Chapter 19 discusses the requirements for subsequent CEQA review once a project has already been reviewed under CEQA, including the provisions governing subsequent and supplemental EIRs, and addenda to EIRs and negative declarations.

Chapter 20 discusses the relationship between CEQA and various other state and federal environmental statutes. This includes discussion of CEQA's interrelationship with the California Global Warming Solutions Act of 2006 (Health & S C §§38500–38599).

Chapter 21 describes state programs (known as certified regulatory programs) that are exempt from some EIR requirements. Chapter 22 covers preparation of joint federal/state environmental documents when projects are subject to both CEQA and the equivalent federal statute, the National Environmental Policy Act of 1969 (NEPA) (42 USC §§4321–4370h).

Chapter 23 discusses judicial review of public agency approvals that result from the CEQA review process, and the special provisions that govern CEQA litigation.

The full text of the state Guidelines for implementing CEQA are contained in 14 Cal Code Regs §§15000 –15387. These Guidelines are drafted by the state Office of Planning and Research (OPR) and promulgated by the Secretary of the Natural Resources Agency. See §§1.27–1.28. The Guidelines also include appendixes with various informational documents, checklists, and notice forms. See §1.27.

A glossary of CEQA terms is in §1.36.

§1.3 C. Summary of Steps in CEQA Review Process

The CEQA process can be triggered by an application for a public agency approval or by an agency's decision to consider a project. The basic procedural steps of the CEQA process are described in §§1.4–1.12. For detailed discussion of all aspects of these steps, see the applicable chapters in this book.

§1.4 1. Pre-CEQA Application Activities

A substantial period of pre-CEQA application activity may occur before a project applicant formally applies for a development permit or other approval or before an agency formally decides to consider a particular public project. During this time, the applicant or agency staff may conduct feasibility studies, due-diligence reviews, or constraints analyses (*i.e.,* studies to identify physical constraints on the development of the site). On the attorney's involvement in preliminary project activities, see chap 2.

At this point in the process, the project sponsor (*i.e.,* the private applicant deciding to apply for a project or the agency deciding to consider a project) should identify the lead agency (*i.e.,* the agency with primary authority over the action) as well as any responsible agencies (*i.e.,* agencies with other permitting authority) or trustee agencies (*i.e.,* agencies with jurisdiction over natural resources that may be affected by the project). See chap 3. The project sponsor should also evaluate whether any prior CEQA documents have been

prepared for the project or the project site. If a prior CEQA document has been prepared and adopted, this may reduce or eliminate the need for further environmental review. See chap 19.

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§1.5 2. Preliminary Review: Does CEQA Apply to Proposed Action?

The CEQA process starts with a formal proposal to proceed with an action or an application to an agency for a development permit or other approval.

If an applicant applies for a project, the first step is to determine whether the application is complete. Under CEQA and the Permit Streamlining Act (Govt C §§65920–65964), the agency must make this determination within 30 days. The application may be "deemed complete" if the agency fails to act within the 30 days. See 14 Cal Code Regs §§15060, 15101 (CEQA preliminary review). See also §4.2.

The first substantive question under CEQA is whether the action is a "project" subject to CEQA. 14 Cal Code Regs §15060. Generally, a project is a discretionary action undertaken, supported, or authorized by a public agency that may cause a physical change to the environment. See chap 4. If the action is a "project" under CEQA, the lead agency must determine whether the action is exempt from CEQA under a statutory exemption or a categorical (or regulatory) exemption contained in the CEQA Guidelines. 14 Cal Code Regs §15061. See chap 5.

If CEQA does not apply to the action, either because the action is not a "project" or because an exemption applies, an agency may file and post a notice of exemption under CEQA. See §§5.114, 5.116.

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§1.6 3. Initial Study Process: Is There a Potentially Significant Environmental Impact?

If CEQA applies to the project, within 30 days after the application is complete (if there is a project application) the lead agency must prepare an initial study to determine whether the project may have a potentially significant effect on the environment. 14 Cal Code Regs §§15063, 15102. See chap 6.

On the basis of the initial study, the agency must determine the type of CEQA document to be prepared. If the initial study shows that the project may have a significant environmental impact, an EIR must be completed before the project is approved. See chaps 6, 8. If there is no possible significant impact, a negative declaration must be completed before the project is approved. 14 Cal Code Regs §§15063, 15102. See chap 7.

A mitigated negative declaration may be prepared when a possible significant impact can be avoided or substantially mitigated to insignificance by changing the project (usually by adopting or imposing a mitigation measure as a condition of approval). See Pub Res C §21080(c); 14 Cal Code Regs §15070. See also chap 6.

A lead agency may skip the initial study process and proceed directly with preparation of an EIR when it is clear that an EIR is required. Some agencies still use initial studies in such cases to determine the particular issues to be analyzed in the EIR. 14 Cal Code Regs §15063.

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§1.7 4. Negative Declaration Process

If a negative declaration is to be prepared, the lead agency must complete and approve the negative declaration within 180 days after the date on which the application is complete. Pub Res C §§21100.2(a), 21151.5(a); 14 Cal Code Regs §15107. See §7.5.

The lead agency must circulate the proposed negative declaration to responsible agencies, trustee agencies, and the public for comment. The period for review and comment must be 20 days if the document is not submitted to the State Clearinghouse for review, and 30 days for negative declarations that are submitted to the Clearinghouse, unless the Clearinghouse approves a shorter review time. Pub Res C §21091(b); 14 Cal Code Regs §§15072–15073, 15105(b). See §7.20. If the lead agency is considering a mitigated negative

declaration, the lead agency may need to consider whether the document should be recirculated if additional mitigation measures are added. See §7.24. The decision-making body must consider the negative declaration and determine whether to adopt it before approving the project. 14 Cal Code Regs §15074. See §7.25. After approving the negative declaration, the agency may proceed to project approval.

§1.8 5. EIR Process

Several different types of environmental impact reports (EIRs) are prepared in different situations. Most are "project EIRs" covering a particular project. A "master EIR" may be prepared for a planning action or multiphased project. A "program EIR" or "staged EIR" may be prepared in some similar situations. A "focused EIR" may be prepared for an approval following a master EIR (and in certain other situations), and a "subsequent" or "supplemental EIR" may be prepared for later approvals when some change in circumstance or new information requires it. See chap 10 (types of EIRs), chaps 12–15 (general requirements for EIRs), and chap 19 (subsequent EIRs).

For many projects, the first step in the EIR process is selection of the consultant or agency staff who will prepare the EIR (see §§9.6–9.10) and, for private projects, submission of project information by the applicant (see §9.3). The next step is a consultation and scoping process to identify the major issues to be identified and analyzed in the EIR. This process begins with circulation of a notice of preparation by the lead agency to responsible agencies and other involved agencies. Pub Res C §21080.4; 14 Cal Code Regs §15082. Responsible agencies must provide the lead agency with information on the scope and content of the EIR within 30 days following receipt of the notice. Pub Res C §21080.4; 14 Cal Code Regs §§15082, 15103. This process can be expanded to include members of the public. See §8.20.

The EIR preparer conducts the necessary studies (or arranges for consultants to do this) and writes the EIR, often circulating internal administrative drafts during this process. See §9.11. For suggestions on how attorneys can work well with agency staff and consultants during this process, see §2.4. When a draft EIR has been completed and is ready for public review, a notice of completion is prepared. The EIR preparer files a notice of completion with the Office of Planning and Research (OPR) in either a printed hard copy, an electronic form on a disk, or by e-mail submission. 14 Cal Code Regs §15085. Agencies are encouraged to post copies of the notices on the Internet. 14 Cal Code Regs §15085(e). The draft EIR is then circulated for comments by the public and other agencies. The OPR's State Clearinghouse coordinates distribution of the EIR to state and regional agencies for review and comment. 14 Cal Code Regs §§15085–15086. See Pub Res C §§21092, 21161. When review through the State Clearinghouse (SCH) is required, the lead agency must provide one copy of the EIR in electronic format to the Clearinghouse. Pub Res C §21082.1(c)(4). See also §§9.17–9.30. The SCH coordinates the state-level review of environmental documents under CEQA, provides technical assistance on land use planning and CEQA matters, and coordinates state review of certain federal grants programs. The SCH also maintains the CEQAnet database, a searchable database of all environmental documents that SCH receives from public agencies. Information about the SCH and its publications can be obtained from its website.

The public review period is 45 to 60 days, and a public hearing on the draft EIR is encouraged but not required. Agencies may post notices of the hearings on the Internet. 14 Cal Code Regs §§15201–15202. During this period, agencies and individuals provide written comments on the EIR and may also comment at the hearing, if one is held. See 14 Cal Code Regs §§15087, 15105(a), 15202. See also Pub Res C §21091 and §9.28. After the public review period, the lead agency evaluates comments on the draft EIR and prepares responses to those comments. The lead agency then prepares the final EIR, which consists of the draft EIR plus the comments and responses, and any revisions to the draft EIR that are made in response to the submitted comments. 14 Cal Code Regs §§15088–15089. See Pub Res C §§21092.5, 21104, 21153. See also §16.3.

The EIR need not be circulated again for public review unless significant new information is added, in which case further public and agency review is required. Pub Res C §21092.1; 14 Cal Code Regs §15088.5. In all cases, however, the lead agency must provide other commenting agencies with copies of the responses to their comments 10 days before certifying the EIR. See Pub Res C §21092.5. See also §16.14.

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§1.9 6. Project Approval

Before approving a project for which a negative declaration was prepared, the lead agency must consider the negative declaration with any comments received on it and approve the negative declaration. 14 Cal Code Regs §15074. See §7.25.

Before approving a project for which an EIR was prepared, the lead agency must certify the EIR by finding that it was completed in compliance with CEQA and that the information in the EIR was presented and considered before the project was approved. 14 Cal Code Regs §15090. See §16.4.

In conjunction with project approval for an EIR project, the agency must adopt findings regarding mitigation measures, project alternatives, and any unavoidable impacts. Pub Res C §21081; 14 Cal Code Regs §§15091–15092. If significant impacts cannot be mitigated, the agency must adopt a statement of overriding considerations, supported by substantial evidence in the record, stating why the project is being approved despite the unavoidable impacts. 14 Cal Code Regs §15093. See §§17.32–17.34.

In conjunction with adoption of EIR findings or approval of a mitigated negative declaration, the agency must adopt a reporting or monitoring program designed to ensure that mitigation measures for the project actually are implemented. Pub Res C §21081.6. See chap 18.

The agency must file a notice of determination following the project approval (14 Cal Code Regs §§15075, 15094) and may need to pay a filing fee in connection with this notice. See Pub Res C §§21108, 21152. See also §17.46. The agency is encouraged to post the notice on the Internet. 14 Cal Code Regs §15075(h).

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§1.10 7. Subsequent Approvals and CEQA Review

After the lead agency approves a project, other approvals may be required from responsible agencies or additional approvals may be required from the lead agency. With certain exceptions, responsible agencies must use the EIR or negative declaration adopted by the lead agency. See Pub Res C §21167.2. See also §§3.28–3.29. In connection with these approvals, the agency may have to determine whether additional CEQA review is required. See Pub Res C §21166; 14 Cal Code Regs §15162.

Generally, no subsequent or supplemental EIR is required unless (a) a new or more severe significant impact is caused by a change in the project or a changed circumstance or (b) significant new information that could not have been known when the EIR was prepared becomes available. Pub Res C §21166; 14 Cal Code Regs §§15162–15164. See chap 19.

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§1.11 8. Judicial Review of Agency Actions

CEQA establishes short time periods within which any suit challenging an agency's compliance with CEQA must be filed. If a notice of determination is posted after a project is approved following certification of an EIR or adoption of a negative declaration, the time limit is generally 30 days after the date the notice was filed. Pub Res C §21167(e); 14 Cal Code Regs §15112(c)(1).

If a notice of exemption is filed following agency approval of a project that is exempt from CEQA, a CEQA challenge must be brought within 35 days after the filing. Pub Res C §21167(d); 14 Cal Code Regs §15112(c)(2).

If the agency does not file and post a notice of its decision, a CEQA challenge must be filed within 180 days after approval of the project. Pub Res C §21167(a); 14 Cal Code Regs §15112(c)(5).

On these time limits and the standards of judicial review for CEQA actions, see chap 23.

§1.12 9. Special Situations Relating to CEQA

A wide variety of CEQA provisions set out special standards or procedures for specific projects or types of projects. On these provisions and CEQA's relation to planning and environmental laws, see chap 20.

A number of state agency programs are designated by the state Natural Resources Agency as "certified regulatory programs" because the programs already include environmental review that is "functionally equivalent" to CEQA. Special rules govern approvals under certified regulatory programs. See chap 21.

If a project requires approvals from a federal agency, the National Environmental Policy Act of 1969 (NEPA) (42 USC §§4321–4370h), the federal equivalent of CEQA, may apply. If the project involves a "major federal action" with significant impacts, an environmental impact statement (EIS) under NEPA may be required. Sometimes a joint EIR/EIS can be used to satisfy the requirements of both CEQA and NEPA. See chap 22. See also California Land Use Practice, chap 14 (Cal CEB).

§1.13 D. CEQA Process Flow Chart

The steps in the basic CEQA review process, outlined in §§1.3–1.10, are depicted visually in the flow chart on the next page, which appears as CEQA Guidelines Appendix A. For an electronic version of this flow chart, see the Natural Resources Agency website.

CEQA

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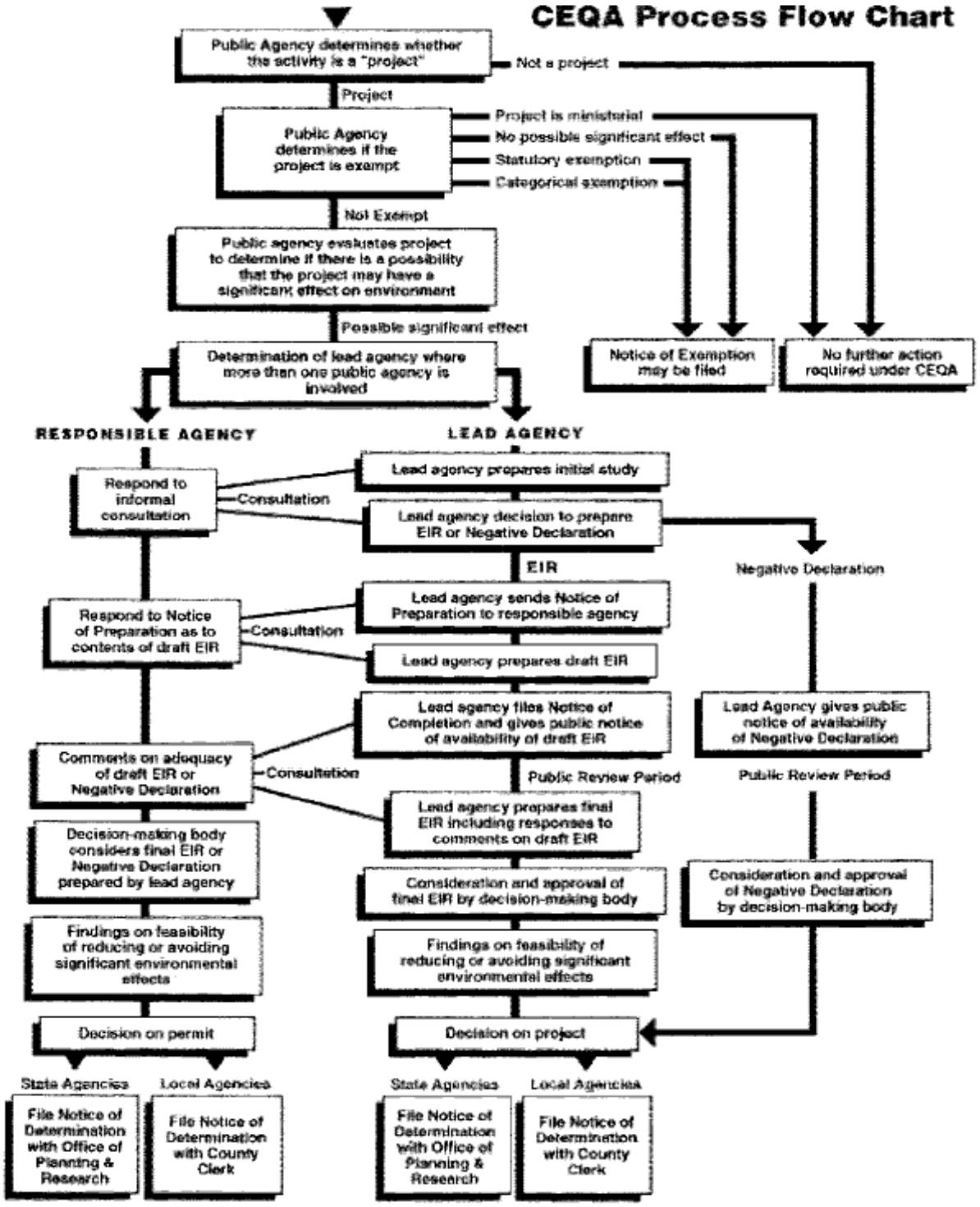
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