
Arnold Schwarzenegger, Governor

Mitigated Negative Declarations

CEQA Technical Advice Series



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The **CEQA Technical Advice Series** is intended to offer CEQA practitioners, particularly at the local level, concise information about some aspects of the California Environmental Quality Act. This series of publications is part of OPR's public education and training program for planners, developers and others. As with all OPR publications, you are free to photocopy this publication in whole or in part. You need not secure written permission; simply cite OPR on any copied information.

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I. Introduction

A. Background of CEQA

The California Environmental Quality Act (CEQA) encourages protection of all aspects of the physical environment through disclosure of potential environmental impacts and appropriate action with regard to those impacts. CEQA has changed the course of development and decision making in the public and private sector in California. There are several objectives of CEQA centering on public participation, reduction in environmental damage, interagency coordination and exploration of feasible alternatives and mitigation measures.

For many years, lead agencies have adopted “mitigated negative declarations” (MND) that are designed to mitigate or avoid a project’s potential significant impacts. CEQA encouraged the use of MNDs but the process was never specifically part of the law until 1993; two bills, Senate Bill 919 (Stats. 1993, Ch. 1131) and Assembly Bill 1888 (Stats. 1993, Ch. 1130) were passed that outlined the requirements for the adoption of a MND under the appropriate circumstances. *Mitigated Negative Declarations* discusses the process of adopting a MND in accordance with these two important statutes and the court decisions interpreting the law.

This advisory publication is aimed primarily at local public agencies and CEQA practitioners. It is intended to offer basic guidance in the preparation of MNDs and to encourage their use where appropriate. *Mitigated Negative Declarations* is neither a replacement of nor an amendment to the *CEQA Guidelines* (Title 14, Ch. 3, § 15000 et seq). All code citations refer to the Public Resources code unless noted otherwise.

B. Organization of this Advisory

This technical advisory explains the statutory basis for using a MND, the circumstances under which the use of a MND is appropriate, the importance of a well documented initial study, the types of project modifications and mitigation measures that may be used to reduce significant effects, and examples of how some lead agencies enforce compliance with mitigation measures. It also discusses how a MND may be used in conjunction with other types of environmental documents, and a brief summary of court cases that specifically address the proper use of MNDs.

Appendix A contains the full text of code sections relating to MNDs. Appendix B includes examples of MND agreements which suggest acceptable format for the disclosure of mitigation measures between the project proponent and the Lead Agency. Appendix C summarizes additional court cases that are not directly related to MNDs but are cited in this publication as cases because they set precedence to steps in the MND process.

II. Determining Which CEQA Document to Prepare

A. What is a Negative Declaration?

When faced with a discretionary project which is not exempt from (CEQA), a Lead Agency must prepare an initial study to determine whether the project may have a significant adverse effect on the environment. If such an effect may occur, the Lead Agency must prepare an Environmental Impact Report (EIR).

If there are no adverse effects, or if the potential effect can be reduced to a level that is less than significant through project revisions, a Negative Declaration or MND can be adopted (§21080). A MND is a type of Negative Declaration that allows the Lead Agency to revise the project prior to circulating the environmental document for public review. The statute provides that MNDs may be used, “when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment” (§21064.5).

The prerequisites for adopting a MND include:

1. Making a good faith effort to determine whether there is substantial evidence that the project would result in any significant environmental effect.
2. Incorporating effective revisions or mitigation measures into the project to alleviate potential significant effects prior to circulating the draft Negative Declaration for public review.
3. Evidence in the record to support the agency's determination that there will be no significant effect as a result of the project.

B. The Initial Study

An initial study formalizes the Lead Agency’s preliminary analysis to determine whether an EIR or Negative Declaration must be prepared. Most commonly, the initial study is based upon a checklist which illuminates the various environmental impacts which may result from project completion. The checklist, however, is only one part of the initial study. The initial study must also give support for the checklist findings and note or reference the source or content of the data relied upon in its preparation. Simply filling out an initial study checklist without citing supporting information is insufficient to show the absence of significant effects (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d. 296). At the same time, the initial study is not intended to provide the thorough analysis expected of a complete EIR. (*Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal. App. 3d. 1337 and *San Joaquin Raptor/ Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal. App. 4th 608).

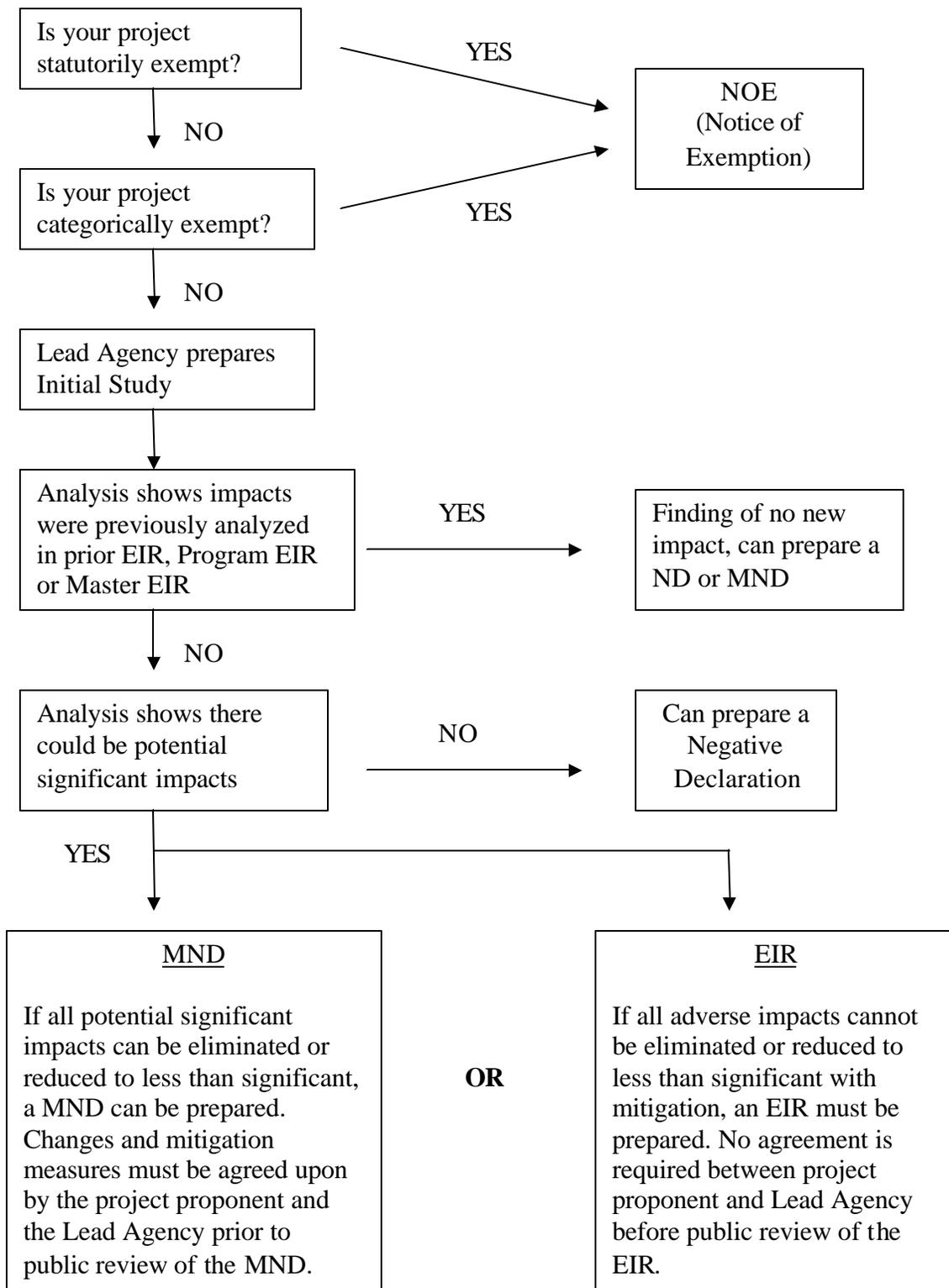
Supporting information may include specific studies which examine the potential significance of an anticipated environmental effect. It may include references to previous environmental documents or other information sources. In any case, a thorough, referenced

initial study is a crucial part of the record supporting the Lead Agency's determination to prepare a MND.

CEQA requires that the Lead Agency, through its initial study, evaluate the whole of a project. A project must not be broken into smaller parts, each of which alone might qualify for a Negative Declaration, in an attempt to avoid preparing an EIR (*Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151). The decision to prepare a Negative Declaration or a MND must be grounded in an objective, good faith effort on the part of the Lead Agency to review the project's potential for significant impacts (*Sundstrom v. County of Mendocino*, supra).

The initial study must be attached to the Negative Declaration circulated for public review according to §15071 of the CEQA Guidelines. The purpose of this is to document the reasons supporting the finding that the project will not result in a significant effect on the environment. OPR recommends that prior to circulating a draft MND the Lead Agency revise or annotate the initial study, if necessary, to reflect revisions to the project. The initial study circulated with a MND should not indicate that there will be any significant effects from the project and should identify or reference the data which supports its determination that any potentially significant effects have been mitigated or avoided.

Generalized CEQA Process Flow Chart



C. Fair Argument Test

The original determination made on the basis of the initial study whether to prepare either a Negative Declaration or an EIR is subject to the "fair argument" test (*Laurel Heights Improvement Assoc. v. U.C. Regents* (1993) 47 Cal.4th 376). In other words, if a fair argument can be made on the basis of "substantial evidence" in the record that the project may have a significant adverse environmental impact - even if evidence also exists to the contrary - then an EIR is required. A Negative Declaration is authorized when the Lead Agency determines that no substantial evidence exists supporting a fair argument of significant effect. A MND applies when changes to the project or mitigation measures reduce the significant effects to a less than significant level or avoid them all together.

According to §21080 (d) and (e), if there is substantial evidence of significant effects, even though the full analysis has yet to be prepared, an EIR is required. This provides the Lead Agency a means by which to gauge the quality of evidence discovered during its review of a project. Similarly, a court examining the actions of the Lead Agency now has a consistent standard by which to judge the quality of the evidence which was available.

Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." It does not include "argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment." Further, public controversy over the possible environmental effects of a project is not sufficient reason to require an EIR "if there is no substantial evidence in light of the whole record before the Lead Agency that the project may have a significant effect on the environment" (§ 21082.2).

D. Required Contents-Project Mitigation and Revision

There are two tests for determining whether a MND can be used. These criteria distinguish a MND from a Negative Declaration:

1. All potentially significant effects of the project can and will be avoided or mitigated to a less than significant level by project revisions or other requirements imposed on the project. A MND is based on the premise that the project will not result in a significant effect. For example, suppose a project would increase traffic from Level of Service (LOS) B to LOS D where local guidelines have identified LOS D as the threshold for significance. If mitigation can reduce the impact to LOS C, then the project's impact would not be considered significant.
2. The project changes and mitigation measures must be agreed to or made by the proponent before the draft MND is circulated for public review and comment. In other words, the draft document must reflect the revised project, with changes and mitigation measures. A few agencies require proponents to submit a new project description before the draft MND is released. This procedure is not required by CEQA if the proponent has otherwise agreed to or made the revisions and mitigations. However, requiring or allowing an applicant to adopt prospective mitigation measures which are to be recommended in a future study, but which are not incorporated into the project before the proposed MND is released for public review, is not allowed (*Sundstrom v. County of Mendocino*, supra).

A key question for the Lead Agency is: What level of mitigation or project revision is sufficient to avoid or eliminate a potential significant effect? There is no ironclad answer which would apply in every instance. The answer depends upon the specific situation; the Lead Agency must use its own independent and objective judgment, based on the information before it, to determine that "clearly no significant effect on the environment would occur" (§ 21064.5). Further, there must be evidence in the record as a whole to support that conclusion.

Pursuant to § 15370 of the CEQA Guidelines, mitigation includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

Project revisions may include such things as changes in design, location, operations, or scope. Effective project revisions will achieve any or all of the above objectives.

Effective mitigation measures are those written in clear, declaratory language specifying what is required to be done, how it is to be done, when it is to be done, and who will be responsible for doing it. The words "will" and "shall" are preferred to "may" and "should" when directing an action. Furthermore, measures must be feasible to undertake and complete. Avoid measures that are conditional upon feasibility (i.e., required only "when feasible"), rather than applied directly or at a specified project stage. Also avoid deferred mitigation and mitigation measures consisting of monitoring and future studies not tied to performance standards and contingency plans (*Sundstrom v. County of Mendocino*, supra).

E. Negotiations

Some jurisdictions require the applicant to sign the draft MND, indicating agreement with the mitigation measures or project revisions included therein, prior to circulating the document. In others, the applicant and the agency may negotiate the revisions or mitigation measures until they are mutually acceptable and enter into a more formal agreement. Whatever the procedure, agreement must be reached before the draft MND is circulated for review and comment. Examples of some agreement forms are included in Appendix B of this publication.

F. Public Review and Comment

A MND is subject to the same consultation and notice requirements as any Negative Declaration (see § 21080.3, 21091, and 21092 for details on current requirements). The Lead Agency shall provide a public review period of no less than 20 days. When a Negative

Declaration or MND is submitted to the State Clearinghouse, the review period shall last no less than 30 days, unless a shorter period is approved. The notice of a draft Negative Declaration must include an address where copies of the draft and all documents referenced in the draft will be available for review during the comment period.

The Lead Agency must consider the comments it receives during the review period prior to adopting a MND. If these comments include substantial evidence that a potential environmental effect may occur despite the project revisions or mitigation measures included in the MND, the Lead Agency must either require further revisions to the project which would effectively avoid or mitigate that effect, or if that is not possible, prepare an EIR. Although not explicitly required by CEQA, OPR recommends that under the first circumstance the Lead Agency re-circulate the revised MND for review prior to acting on the project and adopting the MND. This ensures that the public will have been afforded the chance to review the new mitigation measures as well as the revised project (*Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337 and *Perley v. County of Calaveras* (1982) 137 Cal.App.3d 424). As before, the proponent must have agreed to or made the additional project changes before the MND is re-circulated.

Upon adopting a MND, the Lead Agency must make both of the following findings: Revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur.

2. There is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment. (§ 21064.5 and 21080(c)).

G. Substituting Mitigation Measures

If the Lead Agency concludes prior to approval of a project that one or more of the mitigation measures identified in the MND are infeasible or otherwise undesirable, § 21080(f) provides that the Lead Agency may delete those measures and substitute other equivalent or better measures without having to re-circulate the MND for review. The Lead Agency must: (1) hold a public hearing on the matter before substituting new mitigation measures; (2) impose the new measures as conditions of project approval or otherwise make them a part of the project approval; and (3) find that the new measures will effectively reduce potentially significant effects to a less than significant level and will not cause any potentially significant effects of their own.

When a mitigation measure imposed as a condition of project approval is set aside by either an administrative body or a court, the Lead Agency's approval of the MND for the project is invalidated and a new environmental review is required. However, pursuant to § 21080(g), the Lead Agency may avoid invalidation and the need for a new environmental review if it substitutes equivalent or better measures. The procedure and findings for substituting new measures is the same as described above.

After project approval an agency has some flexibility in interpreting the manner in which mitigation measures are complied with, within reasonable bounds. "[T]he agency's interpretation is reasonable in the CEQA context only if it imposes no significant new or adverse environmental impacts. Such a standard would promote the Legislature's expressed concern for balancing environmental considerations against the social and economic burdens of compliance

with CEQA mandates" (*Stone v. Board of Supervisors* (1988) 205 Cal.App.3d 927, 934). Although the court allowed the defendant county in this case to substitute one means of complying with a mitigation measure for its functional equivalent, it also implied that actually amending a mitigation measure would require further CEQA review.

H. Mitigation Monitoring or Reporting Program

Upon approving a project for which a MND is adopted, the Lead Agency must also adopt a mitigation monitoring or reporting program pursuant to § 21081.6. The purpose of the program is to ensure compliance with the required mitigation measures or project revisions during project implementation. Section 21081.6 also requires that mitigation measures be adopted as conditions of approval. A detailed discussion of program requirements is contained in OPR's publication, *Tracking CEQA Mitigation Measures*.

III. Use with Other Documents

In a number of situations where an environmental document has already been prepared, a MND may be sufficient to address subsequent projects which have been largely examined in the previous document and which will have no unavoidable significant impacts. The most common of these and suggested findings for adopting a MND are summarized below. In no case where a MND is being adopted is it necessary to also adopt EIR findings pursuant to § 21081.

A. Master EIR

The Master EIR is a 1994 statutory innovation intended to provide a detailed environmental review of plans and programs upon which the analysis of subsequent related development proposals can be based. Pursuant to AB 1888 of 1993 and its enabling legislation, a Master EIR must, to the greatest extent feasible, evaluate the cumulative impacts, growth inducing impacts, and irreversible significant effects on the environment of specific, subsequent projects. The review of later projects which were described in the Master EIR can be limited to the extent that the Master EIR has already reviewed project impacts and set forth mitigation measures (§ 21156).

AB 1888 provides that a MND shall be prepared for a later project identified in a Master EIR when there is no substantial evidence before the Lead Agency that the project may have a significant effect on the environment and both of the following occur:

1. An initial study has identified potentially new or additional significant effects on the environment that were not analyzed in the Master EIR.
2. Feasible mitigation measures or alternatives will be incorporated to revise the proposed later project, before the MND is released for public review, such that the new potential significant effects are eliminated or reduced to a less than significant level (§ 21157.5).

The subsequent project must incorporate all applicable mitigation measures or project alternatives from the Master EIR, as well as the measures adopted pursuant to the MND.

Findings -- Upon adopting a MND under these circumstances, OPR recommends that the Lead Agency make the following findings pursuant to § 21064.5, 21080(c), and 21157.5.

1. The subsequent project is identified in the Master EIR.
2. The project incorporates all applicable mitigation measures or project alternatives from the Master EIR.
3. There is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.
4. Feasible mitigation measures or alternatives were incorporated to revise the proposed later project, before the MND was released for public review, such that the potential significant effects have been eliminated or reduced to a less than significant level.

B. Program EIR

A Program EIR may be prepared on a series of related actions which can be characterized as one large project (CEQA Guidelines § 15168). A Program EIR can be used to support the determination made in an initial study to prepare either a Negative Declaration or an EIR for a later project under the program.

Pursuant to subdivision (c) of CEQA Guidelines § 15168, a MND prepared for a later project would focus on new effects which had not previously been considered in the Program EIR, and which can be reduced to a less than significant level by mitigation measures or revisions incorporated into the project. In addition to these measures or revisions, the project must incorporate all applicable mitigation measures and alternatives identified in the Program EIR (CEQA Guidelines §15168(c)). A MND is not recommended when the Program EIR identified unavoidable significant cumulative effects.

Findings -- OPR recommends that, in addition to the findings required under § 21080(c) and 21064.5, the Lead Agency find:

1. The project is consistent with the plans for which the Program EIR was prepared;
2. New effects which had not previously been considered in the program EIR have been reduced to less than significant by mitigation measures or revisions incorporated into the project; and
3. The project incorporates all applicable mitigation measures and alternatives identified in the program EIR.

C. Tiering

CEQA Guidelines § 15152 and § 21083.3 of the Public Resources Code allow a Negative Declaration to be adopted when an EIR has previously been prepared for a program, policy, plan or ordinance. The later project must be consistent with that program or other action and must not result in any significant effects which were not examined in that previous EIR. In order to tier from an EIR, the later project must be consistent with the general plan and zoning of the applicable city or county. The Negative Declaration must clearly state that it is being tiered upon a previous EIR, reference that EIR, and state where a copy of the EIR can be examined.

These requirements apply equally to MNDs. Of course, any potential significant effects that were not examined in the previous EIR must be avoided or completely mitigated if a MND is to be adopted. A MND is not recommended when the document on which it is being tiered has identified unavoidable significant cumulative effects.

Findings -- In addition to the findings required of a MND pursuant to § 21080 and 21064.5, OPR recommends that the Lead Agency find that:

1. The project is consistent with the program, policy, plan or ordinance for which the previous EIR was prepared.
2. The project is consistent with the general plan and zoning of the applicable city or county.
3. The project, as revised or mitigated, will not result in any significant effects which were not examined in the previous EIR.

D. Subsequent Negative Declarations

Where an EIR or Negative Declaration has been certified or adopted for a project, no additional EIR need be prepared for the same project unless there is substantial evidence before the agency that any of the following have occurred (CEQA Guidelines § 15162):

1. Subsequent changes are proposed in the project which will require important revisions of the previous EIR or Negative Declaration due to new significant effects not considered in the previous EIR or Negative Declaration.
2. Substantial changes occur with respect to the circumstances under which the project is undertaken which will require important revisions in the previous EIR or Negative Declaration due to the involvement of new significant effects not considered in the previous EIR or Negative Declaration.
3. New information relating to the significant effects of the project and means of reducing or avoiding those effects, which was not known and could not have been known at the time the previous EIR or Negative Declaration was certified or adopted, becomes available. "New information" is further defined in CEQA Guidelines § 15162(a)(3).

Because the project has already been the subject of either an EIR or Negative Declaration and the time for challenging the adequacy of the previous document is passed, the "fair argument" test does not apply (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065). The project is judged by the "traditional substantial evidence" test instead. In other words, an EIR does not need to be prepared when substantial evidence exists for the occurrence of a significant effect, as long as the Lead Agency has substantial evidence showing none of the three situations described above exist. The courts will respect the Lead Agency's decision not to prepare a subsequent or supplemental EIR if there is substantial evidence in the record supporting the Lead Agency's finding that none of the three conditions exist that would warrant preparation of subsequent or supplemental EIR under § 15162 of the Guidelines.

Findings -- The findings required under § 21064.5 and 21080 should be sufficient.

IV. Court Cases Regarding MNDs

In recent years, the courts have supported the use of MNDs where the Lead Agency has been careful neither to ignore substantial evidence of one or more significant effects, nor attempted to defer mitigation. Following are very brief summaries of additional cases involving MNDs. Refer to the cases themselves for more specific information.

A. Mitigated Negative Declaration Upheld

The following cases from 1982-2004 summarize decisions in which the use of a MND was upheld by the courts.

Perley v. Board of Supervisors (1982) 187 Cal. Rptr. 53

This case was the first to challenge the validity of a MND. The petitioner claimed that a MND was a way for the board to cut out the public and avoid an EIR. Even though the specific code authorizing MNDs had not yet been passed, the court ruled an EIR was not required because there was no public controversy about the project and it could be shown to have no significant effect on the environment with mitigation measures.

Citizens for Responsible Development in West Hollywood v. City of West Hollywood (1995) 39 Cal.App.4th 925

The court affirmed the city's MND for a 40-unit low-income housing project which would rehabilitate and restore two craftsman-style homes on the front of the property and demolish another four buildings in the rear. West Hollywood had established a "Craftsman District" which encompassed the front buildings for purposes of historic preservation and established a Cultural Heritage Advisory Board (CHAB) to evaluate proposed activities within the district. The housing project was reviewed and approved by the CHAB as being benign relative to the architectural features and historic value of the front buildings and in conformance with the Secretary of Interior's rehabilitation standards.

The court found that there was no substantial evidence to support Citizen's claim that a historical resource was being adversely affected. Those structures deemed to be of historical importance were being rehabilitated and restored in accordance with adopted city, state, and federal regulations. The structures proposed for demolition were neither on a historic register nor eligible for the California Register, and their potential historical significance was duly investigated by the city during creation of the Craftsman District and dismissed.

Citizens' Committee to Save Our Village v. City of Claremont (1995) 37 CalApp.4th 1157

The city did not abuse its discretion by rejecting as irrelevant and untimely "new evidence" submitted by project opponents regarding a MND for a new, two-story college building. In prior litigation on the project, the trial court had ordered the city to make findings to support the MND. The project's opponents attempted to introduce new evidence at the hearing that the project would adversely affect a historically significant landscape garden. The court concluded that the material presented at the hearing was not new and that no substantial evidence

existed that a landscape garden planned for the project site in 1905 had ever been installed or maintained. Without evidence of an impact, no EIR was required.

San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1996) 42 Cal.App.4th 608

The court upheld a MND for a surface mining operation where there was no substantial evidence to support a fair argument of significant effect. The plaintiff's claim that the project would result in cumulative effects on birds, including the Swainson's Hawk, was vague and unsubstantiated by facts or expert opinion. The County, on the other hand, had three biologists confirm that the project would have no impact on endangered species. Further, the court affirmed, based on the Leonoff decision, that absent substantial evidence that the project would have a considerable incremental effect, and in the presence of expert testimony that it would not, an in-depth study of potential cumulative impacts was not a prerequisite to preparing a MND.

Bowman v. City of Berkeley (2004) 18 Cal.Rptr. 3d. 814

A neighborhood group challenged the approval of a MND prepared for a mixed-use, affordable senior housing project. Their main complaint was that the MND did not acknowledge a significant aesthetic impact of the project on the surrounding area. The project would have a four-story façade in an area with mainly two-story buildings. The court upheld the MND on the grounds that aesthetics were objective and the physical impact to the surrounding area was not significant.

B. Mitigated Negative Declaration Inadequate

The following cases from 1990-2004 summarize decisions in which the MND was found inadequate or insufficient by the court.

Oro Fino Gold Mining Corp. v. County of El Dorado (1990) 225 Cal.App. 3d 872.

The El Dorado County Planning Staff prepared a MND for the special use permit application of Oro Fino to perform exploratory mineral drilling. The El Dorado Planning Commission rejected the application, citing significant impacts that warranted an EIR. Oro Fino appealed to the County Board of Supervisors who also ruled an EIR was needed for the permit. Oro Fino sued and also claimed that a prior permit issued for exploratory drilling to another mining company under a MND gave precedent for their case. The Superior court denied their permit. The appellate court affirmed the lower courts decision. They found that there was substantial evidence to support the county's determination. The project could have a significant effect and therefore an EIR was required. The court also found that the project proponent could not use a prior case involving a different mining company since the two cases were not identical.

Quail Botanical Gardens Foundation v. City of Encinitas (1994) 29 Cal.App.4th 1597

The court overturned a MND for a 40-lot subdivision adjacent to the botanical garden on "fair argument" grounds. Expert testimony presented during the city's consideration of the subdivision indicated that the project would obscure views of the ocean from the Gardens,

resulting in a significant aesthetic impact that could not be completely mitigated. Since the impact could not be mitigated completely, a Negative Declaration could not be used.

Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359

The court set aside and ordered the city to reconsider the MND for a proposed 500-lot subdivision. Substantial evidence existed that the project would adversely impact the endangered Stephens kangaroo rat. In addition, Murrieta attempted to defer mitigation of this impact pending further study, as held improper in *Sundstrom v. County of Mendocino*. The city had also made a variety of procedural errors in circulating the Negative Declaration for review.

Stanislaus Audubon Society v. County of Stanislaus (1995) 33 Cal.App.4th 144

The court concluded that a country club and golf course proposed on agricultural land required preparation of an EIR. The court found that during the process of considering the project the county had been presented with an abundant amount of substantial evidence, including testimony from its own planning staff in the initial study, to support a fair argument that the project would have a significant growth-inducing effect on the surrounding agricultural area.

League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland (1997) 52 Cal.App.4th 896

The city approved a shopping center which proposed to demolish the old Montgomery Ward store. The city had adopted a MND for the project, requiring that the store be documented before demolition, that the new center utilize design elements from the store, that a qualified archaeologist oversee the demolition, and other measures as mitigation for the impact on historical resources. Section 21084.1 provides that "[a] project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." The court held that because the Ward building is eligible for historic status and is described as historic in the city's general plan, § 21084.1 requires the city to consider this action a significant effect requiring preparation of an EIR.

Ocean View Estates Homeowners Association, Inc. v. Montecito Water District. (2004) 10 Cal. Rptr. 3d 451

The water district prepared a MND for a proposal to cover a reservoir. The project would place a four acre aluminum cover over the reservoir and provide landscaping to mitigate the impact on views from surrounding homes. The homeowner's association sued on the grounds that the aesthetic impact was significant and thus required an EIR. The Superior Court denied the petition. The Court of Appeal held that the mitigation measures discussed in the MND did not satisfy the requirements of CEQA and substantial evidence existed to support a fair argument that the project might have significant aesthetic impacts, and an EIR was required.

Architectural Heritage Association v. County of Monterey (2004) 19 Cal. Rptr. 3d 469

The County of Monterey proposed to demolish an old jail by way of a MND. The plaintiff sued due to inadequate mitigation measures and loss of historic value under the fair argument rule. The jail has historic value not only for architectural reasons but also that Cesar Chavez was incarcerated there for approximately two weeks. The court held that the County erred in proceeding without benefit of a full EIR. The mitigation measures, which consisted of photographs and documentation do not reasonably alleviate the impact of the jail's destruction.

V. Final Words

The use of MNDs has been affirmed by the courts since 1982 (*Perley v. County of Calaveras* 137 Cal.App. 3d. 424) and statutorily authorized since 1993. The purpose of the MND is to identify areas of potential significant impacts and incorporate mitigation measures to eliminate significant impacts before the environmental documentation is circulated for public review. This is beneficial to the Lead Agency because it can be more efficient than preparing an EIR. The MND can potentially benefit the community because the Lead Agency and project proponent have an agreement that legally obligates the project proponent to perform the mitigation measures. Through court cases the appropriate use of MNDs has been refined. The MND is becoming a more common tool because it is effective at reducing environmental impacts while streamlining the CEQA process.

Appendix A

Selected Excerpts from the Public Resources Code and CEQA Guidelines

Public Resources Code

21064.5

"Mitigated negative declaration" means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.

21080 (e)

(1) For the purposes of this section and this division, substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.

(2) Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

21082.2

(a) The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record.

(b) The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment.

(c) Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment, is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

(d) If there is substantial evidence, in light of the whole record before the lead agency, that a project may have a significant effect on the environment, an environmental impact report shall be prepared.

(e) Statements in an environmental impact report and comments with respect to an environmental impact report shall not be deemed determinative of whether the project may have a significant effect on the environment.

CEQA Guidelines

15041. Authority to Mitigate

Within the limitations described in Section 15040 :

(a) A lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the "nexus" and "rough proportionality" standards established by case law (Nollan v. California Coastal Commission (1987) 483 U.S. 825, Dolan v. City of Tigard, (1994) 512 U.S. 374, Ehrlich v. City of Culver City, (1996) 12 Cal. 4th 854.).

(b) When a public agency acts as a Responsible Agency for a project, the agency shall have more limited authority than a Lead Agency. The Responsible Agency may require changes in a project to lessen or avoid only the effects, either direct or indirect, of that part of the project which the agency will be called on to carry out or approve.

(c) With respect to a project which includes housing development, a Lead or Responsible Agency shall not reduce the proposed number of housing units as a mitigation measure or alternative to lessen a particular significant effect on the environment if that agency determines that there is another feasible, specific mitigation measure or alternative that would provide a comparable lessening of the significant effect.

15063 (c) Initial Study

(excerpt)

(c) Purposes. The purposes of an Initial Study are to:

(1) Provide the Lead Agency with information to use as the basis for deciding whether to prepare an EIR or a Negative Declaration.

(2) Enable an applicant or Lead Agency to modify a project, mitigating adverse impacts before an EIR is prepared, thereby enabling the project to qualify for a Negative Declaration.

15064 (f) Determining the Significance of the Environmental Effects Caused by a Project

(excerpt)

(f) The decision as to whether a project may have one or more significant effects shall be based on substantial evidence in the record of the lead agency.

(1) If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR (*Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988). Said another way, if a lead agency is presented with a fair argument that a project may have a significant effect on the environment,

the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68).

(2) If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment but the lead agency determines that revisions in the project plans or proposals made by, or agreed to by, the applicant would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur and there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment then a mitigated negative declaration shall be prepared.

15070. Decision to Prepare a Negative or Mitigated Negative Declaration

A public agency shall prepare or have prepared a proposed negative declaration or mitigated negative declaration for a project subject to CEQA when:

(a) The initial study shows that there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment, or

(b) The initial study identifies potentially significant effects, but:

(1) Revisions in the project plans or proposals made by, or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and

(2) There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment.

15071. Contents

A Negative Declaration circulated for public review shall include:

(a) A brief description of the project, including a commonly used name for the project, if any;

(b) The location of the project, preferably shown on a map, and the name of the project proponent;

(c) A proposed finding that the project will not have a significant effect on the environment;

(d) An attached copy of the Initial Study documenting reasons to support the finding; and

(e) Mitigation measures, if any, included in the project to avoid potentially significant effects.

15369.5. Mitigated Negative Declaration

"Mitigated negative declaration" means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.

15370. Mitigation

"Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

Appendix B

Examples of Project Mitigation or Revision Agreements

- Kern County
- City of Stockton
- Marin County

NEGATIVE DECLARATION

TO WHOM IT MAY CONCERN:

Pursuant to the California Environmental Quality Act of 1970 (CEQA),* the State CEQA Guidelines,** and the Kern County Guidelines for Implementation of CEQA and State CEQA Guidelines,*** the Kern County Planning Department has made an Initial Study of possible environmental impacts of the following-described project:

APPLICANT:

APPLICATION:

LOCATION:

DESCRIPTION OF PROPOSED PROJECT:

MITIGATION MEASURES Included in the Proposed Project to Avoid Potentially Significant Effects (if required):

INCLUSION OF MITIGATION MEASURES AS PART OF PROJECT:

I, as applicant/authorized agent, have reviewed the mitigation measures noted above and agree to include said measures as part of this project.

Signed: _____ Dated: _____

FINDINGS: It has been found that this project, as described and proposed to be mitigated herein, will not have a significant effect on the environment and that an environmental impact report (EIR) is, therefore, not required. A brief statement of reasons supporting such findings is as follows:

KERN COUNTY

PUBLIC INQUIRY: Any person may object to dispensing with such EIR or respond to the findings herein. Information relating to the proposed project is on file in the office of the Planning Department at the address shown below. Any person wishing to examine or obtain a copy of that information or this document, or seeking information as to the time and manner to so object or respond, may do so by inquiring at said office during regular business hours.

A copy of the Initial Study is attached hereto.

PROPOSED NEGATIVE DECLARATION DATE: _____
NEGATIVE DECLARATION REVIEW PERIOD ENDS: _____

TED JAMES, AICP, Director
Planning Department

Kern County Planning Department
2700 "M" Street, Suite 100
Bakersfield, CA 93301
(661) 862-8600

By David B. Rickels, AICP
Planning Division Chief

AGENCY CONSULTATION REQUIRED: Yes ___ No

AGENCIES CONSULTED: Kern County Planning Department/Planning Operations; County Clerk; City of Bakersfield; BLM - Bakersfield; Fish & Wildlife/Sacramento; Soil Conservation/Bak; KC Airports; ESS/Floodplain; KC Environmental Health; KC Fire; KC Parks and Recreation; KC Sheriff; KC Roads; KC Waste Management; Lamont Union School District; Kern County High School District; KC Superintendent of Schools; Kern Delta Water District; Kern County Water Agency; SJVUAPCD; SBCPacific Bell - Fresno; PG&E - Bakersfield; So. Cal Gas; Smart Growth Coalition; So. San Joaquin Arch Info. Center; Caltrans/Dist 6/Ray Chopra; Division of Oil & Gas/Bak; State Fish & Game - Fresno; CRWQCB/Central

STATE CLEARINGHOUSE NUMBER (if required):

INITIAL STUDY PREPARED BY: _____/Planning
Department

DATE POSTED: _____ **DATE OF NOTICE TO PUBLIC:** _____

* Public Resources Code, Section 21000, et seq.
** Title 14, Division 6, California Administrative Code, as amended
*** Resolution No. 88-068, adopted January 19, 1988

KM:paw (date typed – name of document)

Attachment

**FREE RECORDING REQUESTED PURSUANT TO
GOVERNMENT CODE SECTION 27383, BY:**

City of Stockton
c/o Community Development Department/Planning Division
345 North El Dorado Street
Stockton, CA 95202-1997

AND WHEN RECORDED MAIL TO:

City of Stockton
c/o Community Development Department/Planning Division
345 North El Dorado Street
Stockton, CA 95202-1997

**CITY OF STOCKTON
MITIGATION AGREEMENT FOR PROPOSED PROJECT**

[California Code of Regulations Title 14, Sections 15040(c), 15064, and 15070 or 15126.4]

Lead Agency Address: City of Stockton
c/o Community Development Department/Planning Division
345 North El Dorado Street
Stockton, CA 95202-1997
Lead Agency Phone: (209) 937-8266

Project Title: _____

Property Owner: _____

Environmental Document: Proposed Mitigated Negative Declaration/ Initial Study (IS _____);
(Type/File No.) Draft Addendum/Initial Study for Mitigated Negative Declaration (IS _____);
Notice of Preparation for Draft EIR/Initial Study (EIR _____ /IS _____)
Draft Environmental Impact Report (EIR _____);
Draft Supplement to EIR/Initial Study (SEIR _____ /IS _____); or
Draft Addendum/Initial Study for Prior EIR (IS _____)

Discretionary Application(s): _____
{Type/File No(s).}

Project Description/Location: _____

Legal Description of Property: Attached as Exhibit A {legal description includes metes and bounds (bearings and dimensions) or existing lots of record and corresponding map(s) for affected property}.

MITIGATION AGREEMENT:

Pursuant to Section 15064 of the Guidelines for the Implementation of the California Environmental Quality Act (State CEQA Guidelines), the City of Stockton (lead agency) has prepared the above-noted draft environmental document and has independently determined that there is substantial evidence, in light of the whole record before it, that the proposed project may have one or more significant effects on the environment unless those effects are avoided or mitigated to an acceptable level. Accordingly, as the property owner, applicant, or the legal representative for the above-described project/subject site, I hereby agree to make revisions to the project description, plans, or proposals by incorporating feasible mitigation measures which will avoid or reduce some or all of the potentially significant adverse environmental effects to a point where, clearly, those effects will not be significant. The applicable mitigation measures are identified in the above-referenced environmental document, and/or in a separate document, which is incorporated by this reference and attached hereto as Exhibit B.

CITY OF STOCKTON

Based on the substantial evidence in the whole record before it, the City of Stockton has determined that the project, as revised by this Mitigation Agreement, will avoid or mitigate some or all of the potentially significant adverse environmental effects (as identified in Exhibit B) to a point where, clearly, those effects will not be significant. This determination and Agreement is based on, and subject to, the following findings, terms, and conditions, as applicable:

- This Agreement is binding on the property owner(s), applicant(s), and on any successors-in-interest. Therefore, they are responsible for incorporating the identified feasible mitigation or avoidance measures, and/or equivalent or more effective measures, as revisions to the project and for implementing those measures in coordination with project design, construction, and operation.
- This agreement has been executed prior to the distribution of the above-referenced environmental document for public review. However, additional mitigation measures may be required, and/or equivalent or more effective measures may be substituted, following the review of the above-referenced environmental document by the public, by responsible and trustee agencies, and/or by City of Stockton advisory and final decision-making bodies.
- Pursuant to Section 15074 or 15091 of the State CEQA Guidelines, as applicable, any project approval shall be based upon, and subject to, the adoption of related "CEQA Findings" for each significant and potentially significant environmental effect identified in the above-referenced environmental document. Furthermore, in accordance with Guidelines Section 15097, this Mitigation Agreement, and any subsequently adopted mitigation/avoidance measures, will be subject to the provisions of a related "Mitigation Monitoring and Reporting Program" which must be adopted in conjunction with the approval of the above-noted discretionary application(s) for the proposed project. The Monitoring Program shall ensure that the applicable mitigation and avoidance measures are actually implemented.
- Where applicable, in accordance with Section 15064 and/or 15152 of the State CEQA Guidelines, this Agreement incorporates any previously adopted measures designed to mitigate the significant adverse incremental or cumulatively considerable effects identified in a prior certified EIR or adopted Mitigated Negative Declaration (MND) for an earlier related project or project phase. Said measures are contained in Exhibit B, if applicable.
- Pursuant to Section 15152(f) of the State CEQA Guidelines, if the above-referenced environmental document concludes that certain significant environmental effects were adequately addressed in a prior EIR for an earlier related project or project phase and that those effects remain unavoidable and/or infeasible to mitigate, then, the proposed project may rely on a Statement of Overriding Consideration which was previously adopted in accordance with Guidelines Section 15093. Said Statement of Overriding Consideration is contained in Exhibit B, if applicable.
- Implementation of this fully executed Agreement shall be initiated following the date of its recordation at the San Joaquin County Recorder's Office. The applicable recording fee (payable to San Joaquin County) shall be submitted to the City's Community Development Department/Planning Division (CDD/PD) and the CDD//PD shall record the Agreement within five (5) calendar days after the City's final approval of the above-noted discretionary application(s). Upon recordation of this Agreement, the owners, applicants, and/or successors-in-interest may submit applications for site plan approvals, building and/or grading permits, final subdivision or parcel maps, improvement plan approvals, or other ministerial approvals to facilitate project implementation.
- In the event that all of the above-referenced discretionary application(s) for the project are withdrawn, denied, expired, terminated, or revoked, this Agreement shall be null and void.

IN WITNESS WHEREOF, the Community Development Director or his assign, representing the City of Stockton, and the applicant/owner or their legal representatives have executed this agreement on this _____ day of _____, _____.

A notarized acknowledgement form must be attached for each of the signatures provided below (except City Attorney).

COMMUNITY DEVELOPMENT DEPARTMENT
CITY OF STOCKTON

APPROVED AS TO FORM:

OFFICE OF THE CITY ATTORNEY
CITY OF STOCKTON

CITY OF STOCKTON

By _____

By _____

Planner USE SECOND PAGE LOCATED IN
Attorney

Guy D. Petzold, Deputy City

ENVIRONMENTAL FORMS BINDER)

PROPERTY OWNER(S) NAME AND ADDRESS:
(Type or Print):

APPLICANT(S) NAME AND ADDRESS:
(Type or Print):

SIGNATURE OF OWNER/LEGAL AGENT:
AGENT:

SIGNATURE OF APPLICANT/LEGAL

State of California

County of San Joaquin

On _____ before me _____
DATE NAME, TITLE OF OFFICER

personally appeared _____

,

NAME(S) OF SIGNER(S)

personally known to me - **OR** - proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER

DESCRIPTION OF ATTACHED DOCUMENT

- INDIVIDUAL
- CORPORATE OFFICER

TITLE(S)

TITLE OR TYPE OF DOCUMENT

CITY OF STOCKTON

- PARTNER(S) LIMITED
- GENERAL

- ATTORNEY-IN-FACT
- TRUSTEE(S)
- GUARDIAN/CONSERVATOR
- OTHER: _____

 NUMBER OF PAGES

 DATE OF DOCUMENT

SIGNER IS REPRESENTING:
 NAME OF PERSON(S) OR ENTITY(IES)

 SIGNER(S) OTHER THAN NAMED ABOVE

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-3-

Revised 03-01-01

MARIN COUNTY

(Mitigation agreement as excerpt from Initial Study)

VII. PROJECT SPONSOR'S INCORPORATION OF MITIGATION MEASURES:

Acting on behalf of the project sponsor or the authorized agent of the project sponsor, I (undersigned) have reviewed the Initial Study for the (Project Name) _____ and have particularly reviewed the mitigation measures and monitoring programs identified herein. I accept the findings of the Initial Study, including the recommended mitigation measures, and hereby agree to modify the proposed project applications now on file with Marin County to include and incorporate all mitigation measures and monitoring programs set out in this Initial Study.

(Project Sponsor's Name or Representative) Date

(Project Sponsor's Name or Representative) Date

VIII. DETERMINATION: (Completed by Marin County Environmental Coordinator). Pursuant to Sections 15081 and 15070 of the State Guidelines, the forgoing Initial Study evaluation, and the entire administrative record for the project:

- [] I find that the proposed project WILL NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.
[] I find that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because the mitigation measures described on an attached sheet have been added to the project. A NEGATIVE DECLARATION will be prepared.
[] I find that the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.

Signature

Date

Printed Name

For

Appendix C

Court Cases Cited

The court cases listed here were referenced in this publication. While they may not involve a MND as the central issue, these cases help support findings for or against preparing a MND.

Citizens Association. For Sensible Development of Bishop Area v. County of Inyo (1985) 217 Cal. Rptr. 893

The Inyo County Board of Supervisors divided the required approval of a shopping center into two projects. The first consideration was general plan amendments and zoning changes; the second was tentative tract map approval and road abandonment. The board then adopted a negative declaration for each portion of the project. The petitioner sued the Board on the ground that adequate environmental review was not conducted according to CEQA. The trial court denied their claim. The court of appeal reversed the decision, holding that the separate environmental documents failed to address the cumulative effects of the project. The appellate court required one EIR to be prepared for the project and it must address the economic and social impacts of the project.

Bowman v. City of Petaluma (1986) 230 Cal. Rptr. 413

The EIR prepared for a subdivision was challenged. The Superior Court extended the City's review of the action so they could assess whether substantial evidence existed to prepare a subsequent EIR. The developer appealed the decision. The Court of Appeal found that a subsequent EIR is subject to the substantial evidence test, and that there was substantial evidence to show that a subsequent EIR was not required.

Laurel Heights Improvement Association v. Regents of University of California (1988) 253 Cal Rptr. 426

The Association challenged the EIR prepared by the Regents of California on the grounds that it did not discuss future anticipated activities, it did not discuss feasible alternatives, and there was no substantial evidence that the project's adverse environmental effects would be mitigated. The trial court denied the petition. The Court of Appeals reversed and remanded the decision. The Regents then petitioned for review to the Supreme Court. The Supreme Court found that the EIR was deficient, and that a new EIR must be prepared addressing future uses and discussion of alternatives; the mitigation measures were sufficient.

Stone v. Board of Supervisors (1988) 252 Cal.Rptr. 692

The owners of property near a gold mine (Stone) sued the County Board of Supervisors over its decision that the mining company was in compliance with the liability insurance for their permit. The Superior Court denied the petition. The Court of Appeal affirmed, stating that the decision was reasonable and did not trigger a de facto amendment requiring formal findings under CEQA.

Sundstrom v. County of Mendocino (1988) 248 Cal. Rptr. 352

An applicant applied for a permit from the County to construct a private sewage treatment plant. The Board of Supervisors approved the permit upon conditions recommended by the planning commission. A Negative Declaration was adopted and no EIR was required. A nearby property owner challenged the issuance of the permit on CEQA grounds. The Superior Court denied the petition. The Court of Appeal reversed on the grounds that the initial study was insufficient. The checklist did not explain or provide sources for each response to environmental impacts. The Court of Appeal also found that there was substantial evidence to require an EIR.

Leonoff v. Monterey County Board of Supervisors (1990) 272 Cal. Rptr. 372

The Monterey County Planning Commission granted a developer a permit to build a service center based on a Negative Declaration. The petitioner appealed the decision, but the commission denied the appeal. The petitioners sued and the trial court denied the petition. The petitioner failed to show substantial evidence supporting a fair argument of significant environmental impacts. The Court of Appeal affirmed. They held that the initial study was not deficient. They also stated that even if an initial study is defective, that does not disqualify the Negative Declaration.