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May 15, 2015

via email and hand delivery

London Breed, President
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, Ca. 94102-4689

RE: **2251 Greenwich Street Firehouse #16 Categorical Exemption Appeal**
May 19, 2015; Special Order 3:00 p.m.
Appellants' Supplemental Brief

Dear President Breed and Members of the Board:

This office represents the adjacent neighbors to the proposed project at 2251 Greenwich Street. This is a Supplemental Brief with Authorities on the sole issue of the Appeal---

May the City Issue a Categorical Exemption for a Cortese List (Hazardous Waste) Site When Issuing Such an Exemption is *Specifically* Forbidden by CEQA?

1. The Express Language of the Statute Forbids Issuing a Categorical Exemption for a Cortese List Site and The City Provides No Authority to Overcome the Plain Wording of the Statute.

The EXPRESS LANGUAGE of the statute forbids what the City has done…issued a categorical exemption from CEQA for a site that appears on the Cortese List (Hazardous Waste Site). California Public Resources Code Section 21084(c) provides a specific exception to a Categorical Exemption for any site appearing on any of the State's lists of Hazardous Waste Sites. That section states:

> **"No Project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code shall be exempted from this division …."**

The Department Response admits that the site is on the Cortese List and admits that the EXPRESS language of the statute forbids the issuance of a Categorical Exemption for such sites. The Department claims that other, local safety measures somehow allow the Department to ignore the express language of the statute but offers no authority or citation to support the position.

2. The Express Language of the Planning Department Website Forbids the Categorical Exemption.

Attached hereto as Exhibit 1 is a copy of a Resolution Adopted by the San Francisco Planning Commission to govern the application of Categorical Exemptions echoing the

above code section and using the mandatory language "shall" to make clear that a Categorical Exemption cannot be issued for a hazardous waste site.

3. A Recent Court of Appeal Case Confirmed that the Legislature Intended that a Categorical Exemption May Not Issue for Project Sites Mentioned on the Cortese List --- Even if Those Sites Have Received a Closure Letter and Mitigations.

The recent case of *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal. App. 4th 766 (attached hereto as Exhibit 2), involved a near identical factual situation across the Bay in the city of Berkeley. Neighbors sued in opposition to a housing project on a three-parcel site at the corner of Shattuck and Parker in the City of Berkeley. The site was a former car dealership and service garage and had underground fuel tanks. The City issued a mitigated negative declaration for the project and the neighbors appealed to obtain an EIR. The Court denied the Neighbors' appeal but stated as follows:

> *We agree that the Legislature intended that projects on these sites should not be categorically exempt from CEQA because they may be more likely to involve significant effects on the environment. But whether a project should be categorically exempt from CEQA is different from whether the project involves a significant effect on the environment. The finding that an exception to exemption applies ensures an initial study to investigate whether there is a potential significant effect on the environment but does not establish that such an effect exists. (See Davidon Homes, supra, 54 Cal.App.4th at p.113, 62 Cal.Rptr.2d 612.) As the City points out, a site may stay on the* ***Cortese list*** *even after a determination is made that no further remediation is required, and this is precisely what occurred in this case.* (Id. at p. 781—emphasis added ; Ex. 2-p.6)

This case is directly on point for two reasons: (1) it clearly demonstrates that the clear Legislative intent of the statue is that no Categorical Exemption may be issued for a Hazardous Waste site; and (2) it shows that the Department is applying the wrong standard in claiming that Appellants have to show that a significant environmental impact will occur on the environment.

4. Institutions Throughout the City and State Publish Environmental Policies Making Clear that a Categorical Exemption May Not Issue for a Cortese List Site.

Major Institutions such as Hospitals and Universities have published environmental policies. All such policies echo the City published policy and definitively state that a Categorical Exemption may not issue for a Cortese List site under Government Code Section 65962.5. Attached as Exhibit 3 is the Environmental Policy from UCSF.

5. Many Cities and Municipalities Include the Prohibition on a Categorical Exemption for a Cortese List Site on Project Applications and Initial Screening Materials.

The prohibition against issuing a Categorical Exemption for a Hazardous Waste site is definitive and absolute; so much so that most cities and local government entities have devised development application forms and processes which inform applicants that development projects proposed for sites on the Cortese List do not qualify for a Categorical Exemption from CEQA. Attached as Exhibit 4 are partial forms from numerous California cities (including San Diego, Atascadero, Tehachapi, Napa, Oxnard, Humboldt County, El Cajon and Kern County) informing applicants that locations on the Cortese List are NOT eligible for a categorical exemption from CEQA.

6. Numerous Courts and Regulatory Bodies have Issued Orders and Decisions making Clear a Categorical Exemption MAY NOT Issue for a Site on the Cortese List.

Attached hereto as Exhibit 5 is State Water Resources Control Board Order WQ2009-0010, which clearly states that, in the words of the State Water Resources Control Board:

> *"Because the Site is currently found on the Cortese List, the use of a categorical exemption is not proper and violates CEQA"*

Conclusion

The overwhelming facts and law directly on point in the this matter make crystal clear that a Categorical Exemption MAY NOT ISSUE FOR A SITE ON THE HAZARDOUS WASTE LIST. The Department has offered NO citation to authority or other reference that might overcome this mountain of specific and express language forbidding the action taken by the City in this case. Appellants respectfully request that the appeal be granted.

Respectfully Submitted,

Stephen M. Williams

Exhibit 1

[Revised and Adopted by the San Francisco Planning Commission
Resolution No. 14952, August 17, 2000]

CATEGORICAL EXEMPTIONS FROM THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The California Environmental Quality Act (CEQA) and the Guidelines for implementation of CEQA adopted by the Secretary of the California Resources Agency require that local agencies adopt a list of categorical exemptions from CEQA. Such list must show those specific activities at the local level that fall within each of the classes of exemptions set forth in Article 19 of the CEQA Guidelines, and must be consistent with both the letter and the intent expressed in such classes.

In the list that follows, the classes set forth in CEQA Guidelines Sections 15301 - 15332 are shown in bold italics, with further elaboration or explanation for applying these exemptions in San Francisco shown in normal upper- and lower-case type. The Secretary of the California Resources Agency has determined that the projects in these classes do not have significant effect on the environment, and therefore are categorically exempt from CEQA. The following exceptions, however, are noted in the State Guidelines.

First, Classes 3, 4, 5, 6, 11, and 32 are qualified by consideration of where the project is to be located. A project that would ordinarily be insignificant in its impact on the environment may, in a particularly sensitive or hazardous area, be significant. Therefore, these classes will not apply where the project may impact an area of special significance that has been designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies. These classes have been marked with an asterisk (*) as a reminder.

Second, all classes of exemption are inapplicable when the cumulative impact of successive projects of the same type in the same place over time is significant -- for example, annual additions to an existing building under Class 1. Where there is a reasonable possibility of a significant effect due to unusual circumstances surrounding the project, it is not exempt even if it clearly fits one of the categories. Additionally, small projects which are part of a larger project requiring environmental review generally must be reviewed as part of such larger project, and are not exempt.

Finally, exemptions shall not be applied in the following circumstances: (1) A categorical exemption shall not be used for a project which may result in damage to scenic resources, including, but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway. (This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified EIR.) (2) A categorical exemption shall not be used for a project located on a site which is included on any list of hazardous waste sites compiled pursuant to Section 65962.5 of the Government Code. (3) A categorical exemption shall also not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

It must be observed that categorical exemptions are to be applied only where projects have not already been excluded from CEQA on some other basis. Projects that have no physical effects, or that involve only ministerial government action, are excluded; such projects are shown on a separate list. Feasibility and planning studies and certain emergency projects also are excluded, and private activities having no

List of CEQA Exemption Types

**[Revised and Adopted by the San Francisco Planning Commission
Resolution No. 14952, August 17, 2000]**

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Second, all classes of exemption are inapplicable when the cumulative impact of successive projects of the same type in the same place over time is significant -- for example, annual additions to an existing building under Class 1. Where there is a reasonable possibility of a significant effect due to unusual circumstances surrounding the project, it is not exempt even if it clearly fits one of the categories. Additionally, small projects which are part of a larger project requiring environmental review generally must be reviewed as part of such larger project, and are not exempt.

Finally, exemptions shall not be applied in the following circumstances: (1) A categorical exemption shall not be used for a project which may result in damage to scenic resources, including, but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway. (This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified EIR.) (2) A categorical exemption shall not be used for a project located on a site which is included on any list of hazardous waste sites compiled pursuant to Section 65962.5 of the Government Code. (3) A categorical exemption shall also not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

It must be observed that categorical exemptions are to be applied only where projects have not already been excluded from CEQA on some other basis. Projects that have no physical effects, or that involve only ministerial government action, are excluded; such projects are shown on a separate list. Feasibility and planning studies and certain emergency projects also are excluded, and private activities having no involvement by government are not "projects" within the meaning of CEQA. Some projects not included in this list of categories of projects determined to be exempt from CEQA nevertheless clearly could not possibly have a significant effect on the environment and may be excluded from the application of CEQA under Section 15061 of the CEQA Guidelines. Projects that are initially screened and rejected or disapproved by a public agency are excluded from any CEQA review requirements.

Projects that are not excluded, and are also not categorically exempt according to the following list, are covered by CEQA and require preparation of an initial study or an environmental impact report.

CLASS 1: EXISTING FACILITIES

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures,

Exhibit 2

222 Cal.App.4th 768
Court of Appeal,
First District, Division 4, California.

PARKER SHATTUCK NEIGHBORS et al., Plaintiffs and Appellants,
v.
BERKELEY CITY COUNCIL et al., Defendants and Respondents;
CityCentric Investments, LLC et al., Real Parties in Interest and Respondents.

A136873 | Filed November 7, 2013

Synopsis

Background: Objectors petitioned for writ of mandate challenging city's approval of mixed-use commercial and residential project under California Environmental Quality Act (CEQA). The Superior Court, Alameda County, No. RG12617535, Evelio M. Grillo, J., denied petition. Objectors appealed.

[Holding:] The Court of Appeal, Humes, J., held that evidence that project would involve disturbance of contaminated soil was insufficient to create a fair argument that the project might have a significant effect on the environment.

Affirmed.

**3 Alameda County Superior Court, Honorable Evelio M. Grillo, Judge. (Alameda County Super. Ct. No. RG12617535)

Attorneys and Law Firms

Christina M. Caro, Oakland, Lozeau Drury, Richard Toshiyuki Drury, San Francisco, for Appellant.

Laura Nicole McKinney, Office of City Attorney, for Defendant and Respondent Berkeley City Council.

Andrew Biel Sabey, Linda C. Klein, Cox Castle & Nicholson, San Francisco, for Real Party in Interest and Respondent CityCentric Investments LLC.

Opinion

HUMES, J.

*772 This action was brought under the California Environmental Quality Act (CEQA)[1] to challenge a proposed mixed- **4 use commercial and residential project approved by the City of Berkeley. Appellants are Parker Shattuck Neighbors and two individuals (collectively Parker Shattuck),[2] who contend the City violated CEQA by approving the project without an environmental impact report (EIR). Parker Shattuck petitioned for a writ of mandate, maintaining that an EIR was required because preexisting contamination on the site poses health risks to the project's construction workers and future residents. We affirm the trial court's denial of the writ because Parker Shattuck has failed to identify substantial evidence supporting a fair argument that there may be a significant effect on the environment because of these potential health risks.

1 Public Resources Code sections 21000 through 21178. Unless otherwise indicated, all further statutory references are to that code.

2 Counsel for Parker Shattuck notified us that one of these individuals, Patti Dacey, died while this appeal was pending.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The Parker Place Project is proposed by CityCentric Investments, LLC, and Parker Place Group, LLC and was approved by the Berkeley City Council.[3] When finished, it will consist of three buildings on what are currently three different parcels. A five-story mixed-use building with an underground parking garage will be built at 2600 Shattuck Avenue, another five-story mixed-use building will be built at 2598 Shattuck Avenue, and a three-story residential building will be built at 2037 Parker Street. All told, the project will include 155 residential units and over 20,000 square feet of commercial space.

3 Respondents are CityCentric Investments, LLC, and Parker Place Group, LLC (collectively, CityCentric), which are also the real parties in interest, and the

Berkeley City Council and the City of Berkeley (collectively, the City).

The three parcels are currently occupied by a car dealership, Berkeley Honda. The showroom, offices, and service garage are located at 2600 Shattuck Avenue, and a sales lot is located at 2598 Shattuck Avenue and 2037 Parker Street. Since 1923, 2600 Shattuck Avenue has been the site of a car dealership and service garage, and from at least 1922 to 1960, 2598 Shattuck Avenue was the site of a service station.

***773** Before buying the properties, the current owner commissioned three environmental site-assessment reports, which were issued in two phases. The phase I report was issued in December 2005, and it stated that the properties had a history of containing underground storage tanks. Underground storage tanks are used to store hazardous substances, such as gasoline. (See Health & Saf.Code, § 25281, subd. (y)(1).) In 1988, a 1000-gallon underground storage tank was removed from 2598 Shattuck Avenue, and the Berkeley Department of Health Services issued a letter confirming there was "no significant soil contamination resulting from a discharge in the area surrounding the underground storage tank." In 1990, a 500-gallon tank was removed from 2600 Shattuck Avenue. Fire Department records also indicated there were or might once have been several other underground storage tanks. The phase I report recommended using ground-penetrating radar to clarify whether there were any other underground storage tanks and conducting an investigation to assess ground contamination.

These recommendations were accepted, and the results were described in the phase II report issued in March 2006. The ground-penetrating-radar study located a suspected underground storage tank ****5** under the sidewalk next to 2600 Shattuck Avenue and recommended its removal. It also identified a concrete pad at 2598 Shattuck Avenue that might conceal an underground storage tank. The ground-contamination investigation collected soil samples from 20 borings near areas of potential contamination, and water samples were collected where the borings encountered groundwater. Various volatile organic compounds (VOCs) were detected in two soil samples and a water sample, but they did not "exceed the San Francisco Regional Water Quality Control Board ... Environmental Screening Levels ..., or there are no [environmental-screening levels] established for the contaminant." The report recommended additional soil and water sampling in other areas of concern, including under the concrete pad to determine if there was petroleum in the soil and thus whether an underground storage tank might be there. This recommendation was accepted, and the results were announced in a supplemental phase II report. Although petroleum hydrocarbons, arsenic, and cobalt were detected in amounts exceeding San Francisco Regional Water Quality Control Board (Regional Board) environmental-screening levels for commercial/industrial land use, the report noted that the hydrocarbon contamination was "not likely" to "require cleanup" and that the arsenic and cobalt were probably "naturally occurring." No contaminants were detected in amounts exceeding environmental-screening levels for groundwater that was not a potential source of drinking water. The supplemental report also determined that there was no underground storage tank or soil contamination under the concrete pad.

***774** The storage tank under the sidewalk next to 2600 Shattuck Avenue was removed in April 2006. Because hydrocarbon contamination was observed in the soil surrounding the tank, 75 tons of soil were also removed from the site. The site was then placed on a list, known as the "**Cortese list**," that is comprised of potentially contaminated sites and includes sites with "underground storage tanks for which an unauthorized release report is filed." (Gov.Code, § 65962.5, subd. (c)(1).)

In January 2007, the Regional Board issued a closure letter finding that no further corrective action related to the petroleum contamination was necessary at the project's site. A printout of a State Water Resources Control Board Web site identifying sites on the **Cortese list** showed that the project's site remained on the list but was given the status of "case closed" the day after the Regional Board's closure letter was issued.

Almost two years later, in December 2008, CityCentric applied to begin constructing the project. A use permit was finally approved in 2010 after the City determined that CEQA did not apply because the project fell under a regulatory exemption for urban "In-Fill Development Projects."[4]

4 The in-fill exemption is found in section 15332 of title 14 of the California Code of Regulations. This section is part of the Guidelines for Implementation of the California Environmental Quality Act, which are set forth in title 14 of the California Code of Regulations, sections 15000 through 15387. All further references to Guidelines are to these regulations.

Parker Shattuck brought a writ of mandate to challenge the City's approval of the project in *Parker Shattuck Neighbors v. Berkeley City Council* (Super. Ct. Alameda County, 2011, No. RG10544097). Although the trial court rejected Parker Shattuck's various arguments under CEQA, finding they were not raised at the administrative level, it granted the writ and ordered the City to vacate approval of the project after **6 it found that the City had allowed the project to be modified without first holding a public hearing. The City vacated the project's approval in October 2011.

In the second round of administrative proceedings, the City assumed the CEQA exemption for urban in-fill projects (Guidelines, § 15332) was inapplicable. On November 1, 2011, the City released for public comment a proposed mitigated negative declaration (MND), which incorporated the initial study.

The proposed MND found that the project would potentially affect several environmental factors, including the category entitled "Hazards & Hazardous *775 Materials." A checked box indicated that one potential environmental impact was that the project would "[b]e located on a site which is included on [the Cortese] list ... and, as a result, would ... create a significant hazard to the public or the environment." In its discussion of this potential effect, the MND noted that although the project site appeared on the Cortese list, "both [the City's Toxics Management Division] and the [Regional Board] ha[d] found that the site has undergone adequate discovery and remediation, with the result that the site poses no significant hazard to the public or the environment." The proposed MND also noted that "according to [the City's Toxic Management Division], [t]he recognized soil and groundwater impacts [did] not appear to extend beyond the property boundaries" because various characteristics of petroleum oils made it unlikely they would spread in the soil, groundwater, or air. The MND concluded that mitigation could reduce any potential impact to "less than significant" by "ensur[ing] that there [would] be no significant hazard to the public or the environment during any necessary remediation work during or after construction of the project."

Parker Shattuck submitted comments on the proposed MND, including comments from Matthew Hagemann, a hydrogeologist and expert on air quality. Relying on Hagemann's comments, Parker Shattuck argued that an EIR was required because the MND's mitigation measures failed adequately to address the health threat of the toxic soil contamination to construction workers and future residents of the project. A week later, Parker Shattuck submitted additional comments, which primarily discussed comments on the MND submitted by the East Bay Municipal Utility District (EBMUD). EBMUD's letter informed the City that the utilities district "[would] not inspect, install or maintain pipeline or services" in soil or groundwater that was contaminated above certain levels and until the district was able to review contamination data and remediation plans. Parker Shattuck argued that these comments further demonstrated that the MND's mitigation measures were insufficient.

The Berkeley Zoning Adjustments Board held a public hearing on December 8 and adopted the MND. Parker Shattuck appealed the decision to the Berkeley City Council. In January 2012, the Berkeley City Council approved the project.

Parker Shattuck filed this lawsuit in February 2012, seeking a writ of mandate to compel the City to set aside approval of the MND and project and to prepare an EIR. The lawsuit also sought injunctive relief, costs, and attorney fees. Although during the administrative proceedings Parker Shattuck had raised other concerns about the project, such as the potential for *776 air pollution and noise, the petition's primary contentions were that the site's soil contamination is a significant environmental impact requiring an EIR and the MND failed to provide adequate mitigation measures.

**7 The trial court issued a tentative order denying the petition, and a hearing occurred over two days in July 2012. The court then issued an order and proposed statement of decision denying the petition and entered judgment. Parker Shattuck timely appealed.

II.

DISCUSSION

A. The Background of CEQA.

[1] CEQA reflects the California state policy that "the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions." (§ 21001, subd. (d).) "[T]o implement this policy," CEQA and the Guidelines "have established a three-tiered process to ensure that public agencies inform their decisions with environmental considerations." (*Davidon*

Homes v. City of San Jose (1997) 54 Cal.App.4th 106, 112, 62 Cal.Rptr.2d 612 (*Davidon Homes*).) A public agency must "conduct a preliminary review in order to determine whether CEQA applies to a proposed activity." (*Ibid.*) At this stage, the agency must determine whether any of CEQA's statutory exemptions apply. (*Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1309, 154 Cal.Rptr.3d 682.) If the project is in an exempt category for which there is no exception, " 'no further environmental review is necessary.' " (*Id.* at p. 1310, 154 Cal.Rptr.3d 682; see *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 220, 159 Cal.Rptr.3d 763.)

[2] **[3]** If the project is not exempt from CEQA, the next step is to conduct an initial study. (*Davidon Homes,supra,* 54 Cal.App.4th at p. 113, 62 Cal.Rptr.2d 612.) The initial study determines whether there is " 'substantial evidence that the project may have a significant effect on the environment.' " (*Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1101, 19 Cal.Rptr.3d 469 (*Architectural Heritage*).) If there is no such evidence, " 'CEQA excuses the preparation of an EIR and allows the use of a negative declaration ....' " (*Ibid.*) If there is such evidence, " 'but revisions in the project plans "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 that the project as revised may have a significant effect on the environment, [an MND] may be used.' " (*Ibid.*)

[4] ***777** If neither type of negative declaration is appropriate, the final step is to prepare an EIR. (*AHA,supra,* 122 Cal.App.4th at p. 1101, 19 Cal.Rptr.3d 469.) Given that "the EIR is the 'heart of CEQA,' " doubts about whether an EIR is required are resolved in favor of preparing one. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123, 26 Cal.Rptr.2d 231, 864 P.2d 502; see *Architectural Heritage* at p. 1102, 19 Cal.Rptr.3d 469.)

B. The Applicable Legal Standards.

[5] **[6]** The lead agency must prepare an EIR "whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment.' " (*Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 6 Cal.4th at p. 1123, 26 Cal.Rptr.2d 231, 864 P.2d 502.) "The fair argument standard is a 'low threshold' test for requiring the preparation of an EIR." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928, 21 Cal.Rptr.3d 791.) "[F]acts, reasonable assumptions predicated upon facts, and expert opinion supported by ****8** facts" all constitute "[s]ubstantial evidence" of a significant effect on the environment, and "[a]rgument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible" do not. (Guidelines, § 15064, subd. (f)(5).) As long as there is substantial evidence of a potential significant environmental effect, "contrary evidence is not adequate to support a decision to dispense with an EIR." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316, 8 Cal.Rptr.2d 473.)

[7] **[8]** An agency's decision under CEQA is reviewed for abuse of discretion. (§§ 21168, 21168.5; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945, 91 Cal.Rptr.2d 66.) " 'Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence.' " (*Ibid.*) Review is de novo in the sense that "[t]he appellate court reviews the agency's action, not the trial court's decision." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

[9] **[10]** When reviewing the agency's determination not to prepare an EIR, we "determine whether substantial evidence supported the agency's conclusion as to whether the prescribed 'fair argument' could be made." (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002, 165 Cal.Rptr. 514.) " '[T]he sufficiency of the evidence to support a fair argument' " is a question of law. (*Sierra Club v. County of Sonoma, supra,* 6 Cal.App.4th at p. 1318, 8 Cal.Rptr.2d 473.) When determining whether sufficient evidence exists to support a ***778** fair argument, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." (*Ibid.*)

[11] We limit our review to the administrative record because the agency's determination that an MND is appropriate depends on "the absence of 'substantial evidence in light of the whole record before the ... agency that the project, as revised, may have a significant effect on the environment.' " (*Architectural Heritage,supra,* 122 Cal.App.4th at p. 1111, 19 Cal.Rptr.3d 469, italics omitted; see §§ 21080, subd. (d), 21082.2, subds. (a), (d) [determination whether project will have a significant effect on the environment and whether EIR must be prepared is

made "in light of the whole record before the lead agency"].) Parker Shattuck has the burden of proof "to demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact." (*League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904, 60 Cal.Rptr.2d 821.) "Unless the administrative record contains this evidence, and [plaintiffs] cite[ ] to it, no 'fair argument' that an EIR is necessary can be made." (*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1612–1613, 127 Cal.Rptr.3d 636 (*South Orange County*).)

C. *Parker Shattuck Has Failed to Identify Substantial Evidence Supporting a Fair Argument That the Project's Disturbance of Contaminated Soil May Have a Significant Effect on the Environment.*

[12] **[13]** Parker Shattuck contends that the City is required to prepare an EIR because the MND contains inadequate measures to mitigate environmental effects that will be caused by "excavating and disturbing toxic soil." It argues that the project will have a significant effect on the ****9** environment by threatening the health of construction workers and future residents. We conclude that Parker Shattuck has failed to identify substantial evidence supporting a fair argument that potential health risks to workers and future residents might constitute a significant environmental impact. Accordingly, we need not consider whether the MND contained adequate mitigation measures because such "measures are not required for effects which are not found to be significant." (Guidelines, § 15126.4, subd. (a)(3).) [5]

5 Parker Shattuck filed a motion requesting that we consider evidence outside of the record to show that the City has now violated the MND's mitigation requirements. We deny the motion because the evidence is immaterial to our decision.

[14] " 'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." (§ 21068.) A change in the "environment" is a "change in any of the physical conditions ***779** within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (Guidelines, § 15382.) A finding of a significant environmental effect is mandatory if "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (§ 21083; Guidelines, § 15065, subd. (a)(4).) In other words, while "[e]ffects analyzed under CEQA must be related to a physical change" (Guidelines, § 15358, subd. (b)), such a change may be deemed *significant* based solely on its impact on people.

1. The disturbance of contaminated soil can be a physical change in the environment.

[15] Parker Shattuck argues that disturbing contaminated soil can be a "physical change" in the environment. We agree. (Guidelines, § 15358, subd. (b); *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 332, 127 Cal.Rptr.3d 435 (*Citizens*) [in a case involving soil contamination beneath a former gas station, the court held that "it [could] be fairly argued that [the project at issue] may have a significant environmental impact by disturbing contaminated soils"]; see *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 635, 638–640, 10 Cal.Rptr.3d 560 (*Yosemite Community College*) [project to remove a shooting range that would not increase the lead contamination already present due to bullets might nevertheless "spread[ ] [that] contamination, which is a direct physical change in the environment," through increased vehicle and foot traffic and donations of portion of range to another site].)

The City argues that this case is not about the project affecting the environment, but is instead about the environment (i.e., any contaminated soil or groundwater at the site) affecting the project. In support of its position, it relies on several cases holding that the environment's impact on a project is not a " 'significant effect on the environment.' " But these decisions, with one exception, are not directly applicable here because the projects in those cases, unlike the project here, did not involve a physical change in the environment. [6]

6 The one exception is *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 98 Cal.Rptr.3d 137 (*Long Beach*), which we discuss further below.

In one of the cases, ****10** *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 38 Cal.Rptr.2d 93 (*Baird*), the court considered whether an EIR was required for a planned addiction-treatment facility to be built on and adjacent to contaminated sites. (*Id.* at p. 1466, 38 Cal.Rptr.2d 93.) The plaintiffs contended ***780** that the "preexisting ...

contamination ... [would] have an adverse effect on the proposed facility and its residents." (*Id.* at p. 1468, 38 Cal.Rptr.2d 93, italics omitted.) The court held that "[a]ny such effect [was] beyond the scope of CEQA and its requirement of an EIR" because "[t]he purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment." (*Ibid.*) The court explained that an EIR was not required "for a project that might be affected by preexisting environmental conditions but [would] not change those conditions or otherwise have a significant effect on the environment." (*Id.* at p. 1466, 38 Cal.Rptr.2d 93.)

This holding was premised on the finding that the project would not cause a physical change related to the contamination. The court specifically rejected the plaintiffs' contention "that the construction of the facility 'may expose or exacerbate the existing ground contamination' " because all the contamination sources were several hundred feet away from the building site, and there was no evidence that the project would disturb contaminated soil. (*Baird, supra,* 32 Cal.App.4th at p. 1468, fn. 1, 38 Cal.Rptr.2d 93.) The observation implies that the court would have considered the disturbance of contaminated soil an effect on the environment, further supporting our conclusion that disturbing contaminated soil is a physical change that, under the right circumstances, may cause an environmental effect that is cognizable under CEQA.

In another case relied upon by the City, *South Orange County,* the plaintiff operated a sewage-treatment plant next to the site of a proposed development and contended that an EIR was necessary to consider the effect of the plant's odors on the development. (*SOCWA, supra,* 196 Cal.App.4th at pp. 1608, 1613, 127 Cal.Rptr.3d 636.) The court held that CEQA could not be used "to defend the proposed project (the future residences) from a purportedly adverse existing environment (smells from the sewage treatment plant)." (*Id.* at p. 1614, 127 Cal.Rptr.3d 636.) The court concluded that an EIR was unnecessary because the plaintiff had failed to identify any relevant effect on the environment. (*Id.* at p. 1616, 127 Cal.Rptr.3d 636.) And the same result was reached in yet another case relied upon by the City, *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 134 Cal.Rptr.3d 194 (*Ballona*), where the court held that an EIR did not need to address impacts relating to "sea level rise resulting from global climate change" on a proposed mixed-use development where the project itself would not cause sea levels to rise. (*Id.* at pp. 462–464, 475, 134 Cal.Rptr.3d 194.) Thus, neither *Baird, South Orange County,* nor *Ballona* involved a project that would itself physically change the environment. By contrast, Parker Shattuck has identified an aspect of the project—the disturbance of contaminated soils—that will physically change the environment.

***781** Although we conclude that Parker Shattuck has identified a physical change in the environment that may be cognizable under CEQA, we reject its contention that "the existence of toxic soil contamination at a project site," without any accompanying disturbance or other physical change, "is, in itself, a significant impact requiring CEQA review and mitigation." In making this part of its argument, Parker Shattuck relies on *Citizens.* But this reliance is misplaced. *Citizens* concluded that there was a fair argument the project could ****11** "have a significant environmental impact *by disturbing contaminated soils,*" not merely by being built on a contaminated site. (*CREED, supra,* 197 Cal.App.4th at p. 332, 127 Cal.Rptr.3d 435, italics added.)

[16] We also do not accept Parker Shattuck's argument that an EIR is necessarily required for every project proposed to be built on a site that is mentioned on the **Cortese list**. In arguing that soil contamination at a project site is sufficient to trigger an EIR, Parker Shattuck cites CEQA's exception to categorical exemption for projects to be built on sites included on the **Cortese list**, and the legislative history of Assembly Bill No. 869, (1991–1992 Reg. Sess.), the bill adding that exception. (§ 21084, subd. (d); Stats. 1991, ch. 1212, § 1, p. 5908; see § 21092.6, subd. (a) [requiring lead agency to determine whether a project is on a **Cortese-list** site and disclose that information in CEQA documents].) We agree that the Legislature intended that projects on these sites should not be categorically exempt from CEQA because they may be more likely to involve significant effects on the environment. But whether a project should be categorically exempt from CEQA is different from whether the project involves a significant effect on the environment. The finding that an exception to exemption applies ensures an initial study to investigate *whether* there is a potential significant effect on the environment but does not establish that such an effect exists. (See *Davidon Homes, supra,* 54 Cal.App.4th at p. 113, 62 Cal.Rptr.2d 612.) As the City points out, a site may stay on the **Cortese list** even after a determination is made that no further remediation is required, and this is precisely what occurred in this case. In short, we are not persuaded that projects built on sites identified on the **Cortese list** necessarily involve a significant effect on the environment. [7]

7 A pre-Assembly Bill No. 869 (1991–1992 Reg. Sess.) case cited by Parker Shattuck, *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 249 Cal.Rptr. 439, also dealt with the exemption issue instead of the significant-effect issue. The court observed that a project on a hazardous-waste site should not be exempted from CEQA review given the possibility "that the storage, use, or disposal of [hazardous waste] may ... eventually cause an adverse change in the physical conditions of the affected area." (*Id.* at p. 1149, 249 Cal.Rptr. 439.) Thus, like *CREED, supra,* 197 Cal.App.4th 327, 127 Cal.Rptr.3d 435, the decision assumed that the contamination would cause a physical change.

***782 2. The identified health risks to construction workers and future residents do not establish that the disturbance of contaminated soil may have a significant effect on the environment.**

We next turn to whether the project will have a significant effect on the environment as a result of the potential health risks to people. We conclude that the health risks to workers and residents identified by petitioners do not constitute "substantial adverse effects on human beings" or otherwise create a fair argument that the disturbance of contaminated soil may have a significant effect on the environment.

[17] To begin with, and while we need not and do not decide the issue here, we note that it is far from clear that adverse effects confined only to the people who build or reside in a project can ever suffice to render significant the effects of a physical change. In general, CEQA does not regulate environmental changes that do not affect the public at large: "the question is whether a project [would] affect the environment of persons in general, not whether a project [would] affect particular persons."[8] (****12** *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492, 14 Cal.Rptr.3d 308; accord *Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 404, 37 Cal.Rptr.3d 470.)

8 At oral argument, counsel for petitioners argued that CEQA covers environmental effects on a project's workers and future residents because these groups are made up of people who are part of the public. Although we doubt that CEQA regulates environmental effects confined to such relatively small groups, we note that these groups are not unprotected from risks when a project is built on a potentially contaminated site. (See, e.g., Health & Saf.Code, § 25220 et seq. [regulating building on hazardous-waste sites]; Lab.Code, § 6300 et seq. [regulating workplace safety].)

For example, in *Topanga Beach Renters Assn. v. Department of General Services* (1976) 58 Cal.App.3d 188, 129 Cal.Rptr. 739, the plaintiff argued that the demolition of living structures on a beach would adversely affect humans, and thus constitute a significant effect on the environment requiring an EIR, because "the planned demolition [would] evict people from their homes (with consequent adverse effect on those people) ...." (*Id.* at pp. 191, 194, 129 Cal.Rptr. 739.) The court held that the "[a]dverse effect on persons evicted from Topanga Beach cannot alone invoke the requirements of CEQA, for all government activity has some direct or indirect adverse effect on some persons." (*Id.* at p. 195, 129 Cal.Rptr. 739.) "The issue [was] not whether demolition ***783** of structures [would] adversely affect particular persons but whether demolition of structures [would] adversely affect the environment of persons in general." (*Ibid.*) In short, the court concluded that there was no significant effect on the environment because the identified impact affected only a particular group of people.

We find it significant that in the case before us the only people identified by Parker Shattuck who potentially will be impacted by the project are those who will work on or live at the project site. In *Long Beach,* the court considered the argument that an EIR addressing the proposed construction of a high school to serve over 1,800 students was insufficient because it failed to discuss the project's "cumulative impacts on air quality and traffic 'and in turn, on staff and student health' " in light of already-existing emissions from nearby freeways.[9] (*Long Beach, supra,* 176 Cal.App.4th at pp. 895, 905, 98 Cal.Rptr.3d 137.) The court observed that "generally, '[t]he purpose of an [EIR] is to identify the significant effects on the environment of a project ...' [citations], not the impact of the environment on the project, such as the school's students and staff." (*Id.* at p. 905, 98 Cal.Rptr.3d 137, italics omitted.) As a result, the air quality's effect on staff and student health was "not the aim of the cumulative impacts analysis," and the court did not consider the EIR's failure to discuss health risks germane to the cumulative impacts issue. (*Id.* at pp. 905–912, 98 Cal.Rptr.3d 137.) *Long Beach* instructs that a physical change caused by a project, even one affecting several hundred people, is not necessarily cognizable under CEQA when the people affected are part of the project. (See *Ballona, supra,* 201 Cal.App.4th at pp. 473–474, 134 Cal.Rptr.3d 194 ["identifying the effects on the project *and its users* of locating the project in a particular

environmental setting is neither consistent with CEQA's legislative purpose nor required by the CEQA statutes," italics added].)

9 Cumulative impact analysis addresses " 'whether the additional impact associated with [a] project should be considered significant in light of the serious nature of existing [environmental] problems' " caused by already-existing projects. (*Long Beach, supra,* 176 Cal.App.4th at pp. 905–906, 98 Cal.Rptr.3d 137, italics omitted.)

**13 We recognize that when a project may cause a physical change to the environment, CEQA requires a consideration whether the change will have a potential impact on people. This is the import of section 21083, subdivision (b)(3)'s requirement that an environmental effect be deemed significant if it will have an adverse effect on people. In addition, if the environmental changes are deemed significant, then an EIR must discuss "health and safety problems caused by the physical changes." (Guidelines, § 15126.2, subd. (a).) None of the authorities cited by Parker Shattuck, however, holds that a significant effect on the environment must be found when potential health risks are confined to people associated with a project. (See *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 316–317, 320, 327, 106 Cal.Rptr.3d 502, 226 P.3d 985 [EIR *784 required for petroleum refinery's production of ultralow sulfur diesel fuel where project would greatly increase the emission of nitrogen oxide, which is "a major contributor to smog formation and can cause adverse health effects, especially aggravation of respiratory disease"]; *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 371, 375, 403–405, 145 Cal.Rptr.3d 567 [EIR discussed potential risks to health of school's students and employees to comply with Ed. Code requirements and after initial study's finding of no potential significant environmental effects from hazardous-material contamination]; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 81–82, 89, 108 Cal.Rptr.3d 478 [EIR inadequately addressed whether refinery upgrade would result in processing of heavier crude oil and therefore failed to address potential impacts of such processing, including health risks to members of surrounding community]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219–1220, 22 Cal.Rptr.3d 203 [relying on Guidelines, § 15126.2, subd. (a) to hold that EIR was inadequate because it failed to discuss adverse health effects of increased air pollution]; *ACE, supra,* 116 Cal.App.4th 629, 10 Cal.Rptr.3d 560 [no discussion of impacts on human health]; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1350, 1352, 1364, 111 Cal.Rptr.2d 598 [where EIR for airport expansion acknowledged significant effects on air quality, EIR was inadequate because it failed to include assessment of increased air pollution's risk to people living near airport].)

We also reject Parker Shattuck's argument that CEQA requires consideration of the potential impact Parker Shattuck has identified simply because the MND mentioned a consideration of "the [p]roject's impacts on the public and construction workers" after a box was checked on a form checklist indicating that the site was on the **Cortese list**. The form checklist comes from appendix G of the Guidelines, which provides a suggested list of potentially significant impacts to be considered when preparing an initial study. We do not believe the MND establishes that the City conceded that CEQA required consideration of health risks limited to workers and future residents. Furthermore, even if the MND's consideration of a potential factor on a form checklist could be construed as some sort of admission, the admission would not offset the weight of authority indicating that an EIR is not required for environmental effects that impact only a limited group of people. (See *SOCWA,supra,* 196 Cal.App.4th at p. 1616, 127 Cal.Rptr.3d 636 ["A few questions on a suggested checklist in an appendix to the [G]uidelines do not seem to us to **14 provide a strong enough foundation on which to base a reversal of the entire purpose of CEQA."].)

Ultimately, and notwithstanding the parties' extensive briefing on the issue, we need not decide whether the potential effects of a physical change that *785 poses a risk only to the people who will construct and reside in a project may ever be deemed significant. (See *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2013) 218 Cal.App.4th 1171, 1195, 161 Cal.Rptr.3d 128, review granted Nov. 26, 2013, S213478 [declining to "decide whether *Baird, Long Beach, South Orange County,* and *Ballona* were correctly decided or whether, as a general rule, an EIR may be required solely because the existing environment may adversely affect future occupants of a project"].) This is because the evidence Parker Shattuck has identified does not support a fair argument of significance even if health risks to a project's workers and future residents alone could establish that a physical change would have a significant effect on the environment.

Parker Shattuck relies on Hagemann's comments in support of its argument that disturbing the contaminated soil will

have a significant environmental effect due to the health risk the site's contamination poses to workers and future residents. [10] His conclusions were based on the levels at the site of 1,2-dichloroethane and benzene, both VOCs, and of total petroleum hydrocarbons. [11]

10 Parker Shattuck also refers to EBMUD's letter, but it does not support a fair argument of a significant environmental effect. Rather, it merely states that should the soil and groundwater be contaminated at unspecified levels, EBMUD will not work at the site.

11 Parker Shattuck also mentions the phase I report's statement that polychlorinated biphenyls (PCBs) might be present because hydraulic lifts were observed at the site. Hagemann's comments do not mention PCBs or any health risks they may pose, and Parker Shattuck has not identified any evidence that the presence of PCBs is more than a "speculative possibilit[y]." (*Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 756, 272 Cal.Rptr. 83.) Indeed, during phase II several soil samples were tested for PCBs, and no such contamination was found.

1,2-dichloroethane, a potential human carcinogen, was present in one groundwater sample from 2600 Shattuck Avenue at the level of 14 ug/L (micrograms/liter). Hagemann stated that the safe level of this compound in drinking water is 0.5 ug/L, the Regional Board recommends a vapor-intrusion study when the level exceeds 0.5 ug/L, and the United States Environmental Protection Agency recommends such a study when the level exceeds 5 ug/L. [12] Benzene, a known human carcinogen, was present in one groundwater sample from 2600 Shattuck Avenue at 9.3 ug/L. Hagemann stated that the safe level of this compound in drinking water is 1 ug/L, the Regional Board recommends a vapor-intrusion study when the level exceeds 1 ug/L, and the United States Environmental Protection Agency recommends such a study when the level exceeds 5 ug/L. Finally, total petroleum hydrocarbons were found in the soil at one boring at 2600 Shattuck Avenue at a level of 1,900 mg/kg (milligrams/kilogram), which exceeds the Regional Board screening level for industrial/commercial use of 1,000 mg/kg.

12 In his discussion of 1,2-dichloroethane, Hagemann sometimes refers to benzene, but we assume he meant the former compound.

[18] ***786** Hagemann contended that future residents are at risk because vapors from the two VOCs may travel through the soil into buildings constructed on the site through a process known as vapor intrusion and thereby expose these buildings' ****15** residents to polluted air. [13] Based on the levels of the two VOCs, Hagemann suggested that a vapor-intrusion study be performed. This opinion is insufficient to create a fair argument of a significant effect on the environment because a suggestion to investigate further is not evidence, much less substantial evidence, of an adverse impact. [14]

13 Hagemann also challenged the conclusion of the City's Toxic Management Division, to which the Regional Board deferred, that the Cortese-list case closure combined with mitigation measures established the site would be safe for residential, not just commercial, use. The issue of whether the Toxic Management Division rightly relied on the case closure to establish the site's safety for residential use does not bear on our decision because Hagemann's comments are not sufficient evidence that the health of future residents may be at risk.

14 Our conclusion that Hagemann's call for a vapor-intrusion study is not substantial evidence creating a fair argument of a significant effect on the environment is bolstered by the uncontroverted evidence that 26,000 cubic yards of soil will be excavated from 2600 Shattuck Avenue before construction and that underground parking and the ground floor will separate residential units from any vapor-intrusion pathway.

Hagemann also contended that construction workers may be exposed to the VOCs by inhaling their vapors and to the VOCs and hydrocarbons through dermal contact. Even assuming that the disturbance of contaminated soil would cause these risks, we conclude Hagemann's contention still fails to amount to substantial evidence supporting a fair argument of a significant effect on the environment. First, while the levels of the two VOCs exceed screening levels for drinking water and, according to Hagemann, suggested the need for a vapor-intrusion study, the levels do not exceed Regional Board levels for nonpotable water. Hagemann provided no explanation why levels below the Regional Board screening levels might pose health risks where the water will not be drunk. Second, Hagemann did not discuss the significance for human health of exposure to petroleum hydrocarbons or challenge the phase II supplemental report's finding that the contamination from the hydrocarbons is not the type that would usually "require cleanup." Instead, he simply claimed that the level of total petroleum hydrocarbons should lead to further investigation.

We conclude that, even if health risks confined to a project's construction workers and future residents could ever trigger CEQA review, substantial evidence was not identified in the record to create a fair argument that the disturbance of contaminated soil may have a significant effect on the environment.

***787 III.**

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

We concur:

Reardon, Acting P.J.

Rivera, J.

Parallel Citations

222 Cal.App.4th 768, 14 Cal. Daily Op. Serv. 74, 2013 Daily Journal D.A.R. 16,952

End of Document

Exhibit 3

environmental analysis substantiates the decision-making process (See *CEQA Guidelines Section 15300.2* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art19.html).

Categorical exemptions cannot be used if the project triggers any of the following exceptions:

- Sensitive location. If the project generally would be insignificant, but the location is sensitive resulting in significant effects, Categorical Exemption Classes 3, 4, 5, 6, and 11 cannot be used. For example, the minor expansion of an existing maintenance facility may be an exempt activity. However, if the expansion were to occur on wetlands, the exemption would not be applicable.

- Cumulative impact. The cumulative impact of the project and successive similar projects in the same location create a significant impact.

- Unusual circumstances. If there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances, a categorical exemption shall not be used.

- Scenic Highway. A categorical exemption shall not be used if a project will damage scenic resources, including, but not limited to trees, historic buildings, rock outcroppings, or similar resources within an officially designated scenic highway.

- Hazardous Waste Site. A categorical exemption shall not be used for a project located on a site which is included on any list of hazardous waste sites (Cortese list, Government Code 65962.5)

- Historic Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historic resource.

2.1.3 CEQA Exemptions

A number of projects are exempt from CEQA either by law or because they fall within classes of projects that have been determined generally not to have a significant effect on the environment.

Statutory Exemptions

Statutory exemptions, found in *CEQA Guidelines* Sections 15260 to 15285 http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art18.html, are provisions in CEQA or other statutes that indicate that by law certain projects are either completely or partially exempt from CEQA's environmental review requirements, or have special requirements.

A number of University of California projects are frequently exempt from CEQA under the following statutory exemptions:

- Feasibility and planning studies that are not legally binding and which have not been approved, adopted or funded (*CEQA Statutes Section 21102* http://ceres.ca.gov/ceqa/stat/chap3.html, *CEQA Guidelines Section 15262* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art18.html).

- Ministerial projects including issuance of building permits and approval of individual utility service connections and disconnections (*CEQA Guidelines Section 15268* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art18.html). Projects that have both ministerial and discretionary aspects should be considered discretionary overall and subject to CEQA.

- Emergency projects such as actions required to restore damaged facilities or mitigate an emergency (*CEQA Guidelines Section 15269* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art18.html).

- Special rules also apply to projects in areas subject to redevelopment plans or military base reuse plans. (*CEQA Statutes Section 21083.8.1 and 21090* http://ceres.ca.gov/ceqa/stat/chap2_6.html.

Categorical Exemptions

Categorically exempt projects are classes of projects that the State Resources Agency has determined do not have a significant effect on the environment and therefore do not require preparation of environmental documents. Examples of categorically exempt projects include minor alterations to existing facilities and minor alterations to land. Categorically exempt projects are described in detail in *CEQA Guidelines Sections 15300 to 15332* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art19.html.

Notice of Exemption for Categorically Exempt Project Approved by Campus

A Notice of Exemption (NOE) (http://ceres.ca.gov/topic/env_law/ceqa/guidelines/appendices.html) is a brief notice that the campus may file with the State Office of Planning and Research (OPR) after it determines that a project is exempt from CEQA and decides to carry out or approve a project. Directions for

preparing a Notice of Exemption are found in *CEQA Guidelines Section 15062* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art5.html . (See *UC CEQA Handbook, Appendix D)* If the Regents approve an exempt project, Planning, Design and Construction will file an NOE.

The filing of a Notice of Exemption with OPR begins a 35-day *statute of limitations* (See *CEQA Guidelines Section 15112(c)(2)* and http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art8.html) on legal challenges to the campus's decision that the project is exempt from CEQA. A statute of limitations defines the period of time during which a lawsuit may be filed or other legal action taken. If a Notice of Exemption is not filed, a 180-day statute of limitations applies. (See *CEQA Guidelines Section 15062(d)* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art5.html).

Steps for Filing a Notice of Exemption

- Prepare approval letter for Chancellor signature (*UC CEQA Handbook, Appendix K*).
- Recommend that the project be deemed exempt from CEQA.
- Decide whether to file NOE and apply the 35-day statute of limitations or do not file the NOE and apply the 180-day statute of limitations.
- Prepare a Notice of Exemption that includes the following requirements-(see Section 15062 of the *CEQA Guidelines* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art5.html):

    1. A brief description of the project that supports the specific exemption and explains that no exceptions to the exemption apply;
    2. A finding that the project is exempt from CEQA, including citation to the CEQA Guideline(s) under which it is found to be exempt; and
    3. A brief statement of reasons to support the finding.

- Consult with Offices of the President and General Counsel.
- Send two copies of the Notice of Exemption to OPR. Request that one be date stamped and returned to verify receipt by OPR. Copies of the NOE should be sent to Planning, Design and Construction at the Office of the President, and the Office of General Counsel.
- Campuses can also confirm OPR receipt of Notices by monitoring the on-line State Clearinghouse Newsletter http://www.opr.ca.gov/clearinghouse/Newsletter.shtml .

Exceptions to the Exemptions

Special circumstances can affect exemption status; thus, it is advisable to consider any project in light of the exceptions. In these situations, the Office of the President recommends that the campus prepare an environmental analysis to verify that an exemption from CEQA is appropriate, or to demonstrate that due to an exception, environmental review is required. The

environmental analysis substantiates the decision-making process (See *CEQA Guidelines Section 15300.2* http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art19.html).

Categorical exemptions cannot be used if the project triggers any of the following exceptions:

- Sensitive location. If the project generally would be insignificant, but the location is sensitive resulting in significant effects, Categorical Exemption Classes 3, 4, 5, 6, and 11 cannot be used. For example, the minor expansion of an existing maintenance facility may be an exempt activity. However, if the expansion were to occur on wetlands, the exemption would not be applicable.

- Cumulative impact. The cumulative impact of the project and successive similar projects in the same location create a significant impact.

- Unusual circumstances. If there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances, a categorical exemption shall not be used.

- Scenic Highway. A categorical exemption shall not be used if a project will damage scenic resources, including, but not limited to trees, historic buildings, rock outcroppings, or similar resources within an officially designated scenic highway.

- Hazardous Waste Site. A categorical exemption shall not be used for a project located on a site which is included on any list of hazardous waste sites (Cortese list, Government Code 65962.5)

- Historic Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historic resource.

Exhibit 4

California Environmental Protection Agency
"Cortese List" Applicant Form

An applicant for a development project must consult the Cortese List, and include in its application a statement indicating whether the project site is on the Cortese List. (See Gov. Code § 65962.5, subd. (f).) In addition, under the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq., development projects proposed on a site on the Cortese List do not qualify for the exemptions from CEQA adopted under Public Resources Code section 21084, subdivision (a). (See Pub. Res. Code § 21084. (c).)

Applicant statement indicating whether project site is on the Cortese List or not:

I, the applicant, have referenced the Cortese List and concluded that the project site in question is ☐ / is not ☐ found on the Cortese List. If the project site is found on the list, an Environmental Impact Report (EIR) is required.

_____

Applicant Name (Please Print)

_____

Applicant Signature Date

Cortese List

COUNTY	PLACE_CITY	PLACE_NAME	PLACE_ADDRESS	ZIP	
San Luis Obispo	ATASCADERO	ATASCADERO WWTP	6500 Palma Ave.	93422	
OWNER	ENF_TYPE	EFFECTIVE_DATE	ORDER_NO	REGION	WDID
ATASCADERO, CITY OF	CDO	10-Jul-92	92-068	3	3 400100001
COUNTY	PLACE_CITY	PLACE_NAME	PLACE_ADDRESS	ZIP	
San Luis Obispo	ATASCADERO	SAN GABRIEL ROAD, ATASCADERO	9155 SAN GABRIEL RD	93422	
OWNER	ENF_TYPE	EFFECTIVE_DATE	ORDER_NO	REGION	WDID
SHELL OIL COMPANY	CAO	11-Sep-92	92-112	3	3 400000N53
COUNTY	PLACE_CITY	PLACE_NAME	PLACE_ADDRESS	ZIP	
San Luis Obispo	ATASCADERO	SS # 5679	6105 SAN ANSELMO RD	93422	
OWNER	ENF_TYPE	EFFECTIVE_DATE	ORDER_NO	REGION	WDID
UNOCAL CORPORATION	CAO	13-Sep-91	91-097	3	3 400000N61

The updated Cortese List has been posted at the following Internet website (should be updated every six months; last updated 12/1/06):

"http://www.calep.ca.gov/SiteCleanup/CorteseList/Default.htm"

The information is also accessible from the Cal/EPA Home Page (www.calepa.ca.gov) on the left sidebar, under "Cal/EPA Programs." If you have any questions about this information, please contact me at (916)322-6996.

PART F: HAZARDOUS WASTE SITE DATA: (Must be completed by the applicant)

Pursuant to Section 65962.5(f) of the California Government Code, which states:

> "(f) Before a lead agency accepts as complete an application for any development project which will be used by any person, the applicant shall consult the lists sent to the appropriate city or county and shall submit a signed statement to the local agency indicating whether the project and any alternatives are located on a site that is included on any of the lists compiled pursuant to this section and shall specify the lists."

The following statement must be completed by the owner of the subject property or the owners authorized agent before this application can be certified complete by the Kings County Planning Division:

STATEMENT:

I have reviewed the attached "Cortese List Data Resources" list(s) from the www.calepa.ca.gov website and state that:

The subject site(s) of this application ___ is / ___ is not on the " Cortese List Data Resources " lists.

Site Address: _____ Site APN:_____

PART G: SITE PLAN DRAWING: INSTRUCTIONS FOR PREPARING A SITE PLAN DRAWING (This must be completed by the applicant):

The site plan must be drawn in a neat and legible manner on paper a minimum of 8½ by 11 inches to a maximum of 24 by 36 inches in size. The scale must be large enough to show all details clearly. Twenty-two (22) copies of the site plan and technical report must be submitted with this application form (21 copies may be submitted on CD). If additional copies will be necessary you will be notified. The following information must be included on the site plan. **Site plans shall be professionally drawn to scale or to the satisfaction of the Zoning Administrator**.

a. Name and address of the legal owner of the site, and of the applicant, if not the owner.
b. Address of the property, if it has been assigned.
c. Assessor's Parcel Number (APN).
d. Date, north arrow, and scale of drawing.
e. Dimension of the exterior boundaries of the site.
f. Name all adjacent streets, roads, or alleys, showing right-of-way and dedication widths, reservation widths, and all types of improvements existing or proposed.
g. Locate and give dimensions of all existing and proposed structures on the property. Indicate the height and depth of the buildings and their distance to at least two (2) property lines. For structures that are proposed near or along streets in an agricultural zone district, also provide the distance from the structure to the centerline of the street.
h. Show access, internal circulation, parking, and loading space. Detail off-street parking, exits and entrances, complete with dimensions and numbers of parking spaces, including handicapped spaces.
i. Show all walls, fences and gates; their locations, heights, materials and/or type.
j. Show all signs; their location, size, height, and material used.
k. Note all external lighting; location and the general nature and hooding devices.
l. Indicate location of existing and proposed septic tanks and leach lines, and water wells within 50 feet of the property if the proposed use is not connected to a municipal water and sewer system (i.e. City of Hanford, Armona CSD, etc.).
m. Show all water courses on site and within 100 feet of the property.
n. Indicate method of storm water drainage.
o. Note the distances to the nearest fire hydrant and proposed method of fire protection.
p. Note any special method of fire protection (i.e., water tanks, new fire hydrant, etc.).
q. Show existing and proposed landscaping.
r. The location of all wells (include a 100 foot setback arc).
s. Location of the dead animal storage area.
t. Location of any abandoned oil or gas wells.
u. Other data may be required to permit the zoning administrator to make the required findings.
v. The applicant should include any additional information that may be pertinent or helpful concerning this application.

TEHACHAPI
CALIFORNIA
Live Up.

Description of improvement and use for which Site Plan and Architectural Review is being requested:

_____

_____

The street address (if there is no street address indicate Block No.) is:_____

The Legal Description (As shown on Deed, Official County Records, or Title Report) is:_____

_____

Assessors Parcel Number:_____Property Zoning Designation_____

Is the site on the Cortese List? Yes ☐ No ☐

The following attachment is mandatory for this application to be processed.

A. **TWO (2) SIGNED INDEMNITY AGREEMENTS, NINE COPIES AND ONE 8½ X 11 OF SITE PLAN AND COLORED ELEVATIONS, FULL SIZE SITE PLAN AND COLORED ELEVATIONS MOUNTED ON FORM BOARD** drawn to scale and fully dimensioned showing the following: The entire lot as described in the legal description; all existing and proposed buildings and uses; walls and fences (location, height and materials); existing and proposed parking (number of spaces; striping and wheel stops); method of ingress and egress; signs (area and elevations); loading areas; exterior lighting methods; elevations of all buildings and structures indicating building materials and colors, landscaping plan (area and plant species).

B. **FEES**

Public Hearing Fee	$130.00
Property Owner Notification Fee	$25.00
Change in Use	$2,478.00
Remodel	$1,765.00
Multi-Family Residential	$2,378.00
Commercial	$2,378.00
Industrial	$2,378.00
Categorical Exemption	$211.00
Negative Declaration	$3,190.00
Fish & Game Fee Neg Dec	$2,156.50
Fish & Game Fee EIR	$2,995.25
County Clerk Recording Fee	$50.00
Scan Approved Plan on CD	$11.00 First Page
Additional Pages	$3.00 per page

As part of the review process of your project, you will be required to post signs on your property giving notice of your proposal. A Posting Public Hearing Signs Application must be submitted with this application

Applicant_____Signature_____
(Print or Type)

Address_____Phone_____Fax_____

City_____State_____Zip_____Email_____

Record Owner_____Signature_____
(Print or Type)

Address_____Phone_____Fax_____

City_____State_____Zip_____Email_____

SUPPLEMENTAL APPLICATION
INFORMATION FORM
GENERAL PLAN AMENDMENT

This document will provide necessary information about the proposed project. It will also be used to evaluate potential environmental impacts created by the project. Please be as accurate and complete as possible in answering the questions. Further environmental information could be required from the applicant to evaluate the project.

PLEASE PRINT CLEARLY OR TYPE
USE A SEPARATE SHEET, IF NECESSARY, TO EXPLAIN THE FOLLOWING:

I. Project Characteristics:

A. Describe all existing buildings and uses of the property: _____
_____
_____

B. Parcel size (square feet or acres): _____
_____
_____

C. Describe surrounding land uses:

North _____
South _____
East _____
West _____

II. Is the proposed property located on a site which is included on the Hazardous Waste and Substances List (Cortese List)? Y ____ N ____

The Cortese List is available for review at the Community Development Department counter. If the property is on the List, please contact the Planning Division to determine appropriate notification procedures prior to submitting your application for processing (Government Code Section 65962.5).

I hereby certify, to the best of my knowledge, that the above statements are correct.

_____ _____ _____
Signature of Person Preparing Form Date Telephone Number

CATEGORICAL EXEMPTION/6004 CATEGORICAL EXCLUSION DETERMINATION FORM

Revised July 1, 2007

01 – HUM – 0 · CR	42.65	01-924736L	ER 4400(051)
Dist.-Co.-Rte. (or Local Agency)	P.M/P.M.	E.A. (State project)	Federal-Aid Project No. (Local project)/ Proj. No.

PROJECT DESCRIPTION: (Briefly describe project, purpose, location, limits, right-of-way requirements, and activities

Enter project description in this text box. Use Continuation Sheet, if necessary

See continuation sheet for details:

CEQA COMPLIANCE *(for State Projects only)*

Based on an examination of this proposal, supporting information, and the following statements (See 14 CCR 15300 et seq.):

- If this project falls within exempt class 3, 4, 5, 6 or 11, it does not impact an environmental resource of hazardous or critical concern where designated, precisely mapped and officially adopted pursuant to law.
- There will not be a significant cumulative effect by this project and successive projects of the same type in the same place, over time.
- There is not a reasonable possibility that the project will have a significant effect on the environment due to unusual circumstances.
- This project does not damage a scenic resource within an officially designated state scenic highway.
- This project is not located on a site included on any list compiled pursuant to Govt. Code § 65962.5 ("Cortese List").
- This project does not cause a substantial adverse change in the significance of a historical resource.

CALTRANS CEQA DETERMINATION

☐ **Exempt by Statute.** (PRC 21080[b]; 14 CCR 15260 et seq.)

Based on an examination of this proposal, supporting information, and the above statements, the project is:

☐ **Categorically Exempt. Class ___.** (PRC 21084; 14 CCR 15300 et seq.)

☐ **Categorically Exempt. General Rule exemption.** [This project does not fall within an exempt class, but it can be seen with certainty that there is no possibility that the activity may have a significant effect on the environment (CCR 15061[b][3])

NA		NA	
Signature: Environmental Branch Chief	Date	Signature: Project Manager	Date

NEPA COMPLIANCE

In accordance with 23 CFR 771.117, and based on an examination of this proposal and supporting information, the State has determined that this project:

- does not individually or cumulatively have a significant impact on the environment as defined by NEPA and is excluded from the requirements to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS), and
- has considered unusual circumstances pursuant to 23 CFR 771.117(b) (http://www.fhwa.dot.gov/hep/23cfr771.htm - sec.771.117).

In non-attainment or maintenance areas for Federal air quality standards, it is determined that this project comes from a currently conforming Regional Transportation Plan and Transportation Improvement Program or is exempt from regional conformity.

CALTRANS NEPA DETERMINATION

☒ **Section 6004:** The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to Chapter 3 of Title 23, United States Code, Section 326 and a Memorandum of Understanding (MOU) dated June 7, 2007, executed between the FHWA and the State. The State has determined that the project is a Categorical Exclusion under:

- 23 CFR 771 activity (c)(___)
- 23 CFR 771 activity (d)(___)
- Activity _4__ listed in the MOU between FHWA and the State

☐ **Section 6005:** Based on an examination of this proposal and supporting information, the State has determined that the project is a CE under Section 6005 of 23 U.S.C. 326.

Deborah L Harmon	11/10/09	Signature	11/9/09
Signature: Environmental Branch Chief	Date	Signature: Project Manager/DLA Engineer	Date

Briefly list environmental commitments on continuation sheet. Reference additional information, as appropriate (e.g., air quality studies, documentation of exemption from regional conformity, or use of CO Protocol; §106 commitments; § 4(f); § 7 results; Wetlands Finding; Floodplain Finding; additional studies; and design conditions). **Revised July 1, 2007**

CATEGORICAL EXEMPTION/ CATEGORICAL EXCLUSION DETERMINATION FORM

City of El Cajon	NA	NA	SRTSL-5211(024)
Dist.-Co.-Rte. (or Local Agency)	P.M/P.M.	E.A. (State project)	Federal-Aid Project No. (Local project)/ Proj. No.

PROJECT DESCRIPTION:

(Briefly describe project, purpose, location, limits, right-of-way requirements, and activities involved.)

The City of El Cajon proposes to construct sidewalk, curb, gutter, and ADA curb ramps and install pedestrian signals along Greenfield Drive between Gorsline Drive and Haden Lane. No new right-of-way is required. **(Continued on next page)**

CEQA COMPLIANCE *(for State Projects only)*

Based on an examination of this proposal, supporting information, and the following statements (See 14 CCR 15300 et seq.):

- If this project falls within exempt class 3, 4, 5, 6 or 11, it does not impact an environmental resource of hazardous or critical concern where designated, precisely mapped and officially adopted pursuant to law.
- There will not be a significant cumulative effect by this project and successive projects of the same type in the same place, over time.
- There is not a reasonable possibility that the project will have a significant effect on the environment due to unusual circumstances.
- This project does not damage a scenic resource within an officially designated state scenic highway.
- This project is not located on a site included on any list compiled pursuant to Govt. Code § 65962.5 ("Cortese List").
- This project does not cause a substantial adverse change in the significance of a historical resource.

CALTRANS CEQA DETERMINATION (Check one)

☐ **Exempt by Statute.** (PRC 21080[b]; 14 CCR 15260 et seq.)

Based on an examination of this proposal, supporting information, and the above statements, the project is:

☐ **Categorically Exempt. Class ____.** (PRC 21084; 14 CCR 15300 et seq.)

☐ **Categorically Exempt. General Rule exemption.** [This project does not fall within an exempt class, but it can be seen with certainty that there is no possibility that the activity may have a significant effect on the environment (CCR 15061[b][3])

Print Name: Environmental Branch Chief		Print Name: Project Manager/DLA Engineer	
Signature	Date	Signature	Date

NEPA COMPLIANCE

In accordance with 23 CFR 771.117, and based on an examination of this proposal and supporting information, the State has determined that this project:

- does not individually or cumulatively have a significant impact on the environment as defined by NEPA and is excluded from the requirements to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS), and
- has considered unusual circumstances pursuant to 23 CFR 771.117(b) (http://www.fhwa.dot.gov/hep/23cfr771.htm - sec.771.117).

In non-attainment or maintenance areas for Federal air quality standards, the project is either exempt from all conformity requirements, or conformity analysis has been completed pursuant to 42 USC 7506(c) and 40 CFR 93.

CALTRANS NEPA DETERMINATION (Check one)

☒ **Section 6004:** The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to Chapter 3 of Title 23, United States Code, Section 326 and a Memorandum of Understanding (MOU) dated June 7, 2010, executed between the FHWA and the State. The State has determined that the project is a Categorical Exclusion under:

- ☒ **23 CFR 771.117(c): activity (c)(3)**
- ☐ **23 CFR 771.117(d): activity (d)(__**
- ☐ **Activity ___ listed in the MOU between FHWA and the State**

☐ **Section 6005:** Based on an examination of this proposal and supporting information, the State has determined that the project is a CE under Section 6005 of 23 U.S.C. 327.

Print Name: Environmental Branch Chief		Print Name: Project Manager/DLA Engineer	
Signature	Date	Signature	Date
Vivian Horey	5/16/12	ERWIN GOJUANGCO	5/16/12

Briefly list environmental commitments on continuation sheet. Reference additional information, as appropriate (e.g., air quality studies, documentation of conformity exemption, FHWA conformity determination if Section 6005 project; §106 commitments; §4(f); §7 results; Wetlands Finding; Floodplain Finding; additional studies; and design conditions). **Revised June 7, 2010**

City _____ **State** _____ **Zip Code** _____

Property Owner's Signature [see note1 below] _____ **Date** _____

AUTHORIZED AGENT: _____ **Phone** _____ **Fax** _____

Address _____ **Email** _____

City _____ **State** _____ **Zip Code** _____

Authorized Agent's Signature _____ **Date** _____

PROJECT DESCRIPTION: *[Briefly describe project below* **and** *attach detailed project description & justification for approval:]*

_____

_____

_____

PROJECT RELATED TOPICS: I have noted below the items that are applicable to the project:

☐ In the Redevelopment Area ☐ Subject to future street widening
☐ In a Specific Plan Area ☐ Includes a drive-through facility (Special notice requirements, per GC Section 65091 (d))

HAZARDOUS WASTE AND SUBSTANCES SITES: Pursuant to Section 65962.5 of the Government Code, I have reviewed the Hazardous Waste and Substances Site List (see reverse side) and determined that the project:

☐ IS NOT included in the LIST ☐ IS included in the LIST

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[1]**RIGHT OF ENTRY:** The abovesigned ("Property Owner") is the owner of certain real property identified above in Costa Mesa, California ("Property"), acknowledges that the application process requires the property to be posted with a public hearing notice, where applicable. Property Owner hereby permits the City of Costa Mesa ("City"), by and through its employees or agents, to enter upon the property for the sole purpose of posting, modifying, and removing a public hearing notice relating to Property Owner's Planning Application. The right of entry shall be granted by Property Owner to City at no cost to City and shall remain in effect until the removal of the public hearing notice. Owner further agrees to release, waive, discharge and hold harmless City, its employees and agents, from and

Exhibit 5

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2009-0010

In the Matter of the Petition of

KEN BERRY AND CALIFORNIA CITIZENS FOR ENVIRONMENTAL JUSTICE

For Review of Cleanup and Abatement Order No. R2-2008-0095 for City of Richmond, U.S. Department of Defense, Department of the Navy, Former Point Molate Naval Fuel Depot
Issued by the
California Regional Water Quality Control Board,
San Francisco Bay Region

SWRCB/OCC FILE A-1972

BY THE BOARD:

On November 12, 2008, the San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) issued Cleanup and Abatement Order (CAO) No. R2-2008-0095 to the City of Richmond and the United States Department of Defense, Department of the Navy concerning the Point Molate Naval Fuel Depot (Site). Mr. Ken Berry and California Citizens for Environmental Justice (Petitioners) filed a timely petition requesting review by the State Water Resources Control Board (State Water Board). In this Order, the State Water Board grants the petition and remands the matter to the San Francisco Bay Water Board.

I. BACKGROUND

The Site is a former Navy facility adjacent to San Francisco Bay in the City of Richmond and is comprised of approximately 413 acres. Residual contamination from former military operations has been found at concentrations that necessitate remedies involving a combination of source removal, groundwater monitoring, and adoption of institutional controls to assure that the cleanup is consistent with the intended reuses of the Site and protective of human health and the environment. At one time, the Site had twenty underground storage tanks, each of which had a capacity to store approximately two million gallons of fuel and oil.

Because of historical releases of hazardous materials at the Site, the Site appears on the Cortese List maintained by the California Environmental Protection Agency.[1]

The San Francisco Bay Water Board adopted the CAO at its meeting on November 12, 2008. The CAO requires the submission of a number of studies, plans, and reports, but does not require any specific cleanup actions. The CAO also prohibits the discharge of waste, pollution migration to waters of the state, pollution migration associated with the cleanup and any investigation, and the creation of a condition of nuisance as a result of cleanup activities.

II. ISSUE AND FINDING

The Petitioners' sole contention is that the San Francisco Bay Water Board failed to comply with the requirements of the California Environmental Quality Act[2] (CEQA). The San Francisco Bay Water Board found that the adoption of the CAO was "categorically exempt" from the requirements of CEQA.[3] Government Code section 65962.5 requires the State Water Board to compile a list of certain sites "that concern the discharge of wastes that are hazardous materials."[4] This list is commonly referred to as "the Cortese List."[5] The Petitioners claim that the use of a categorical exemption is unlawful because CEQA prohibits the use of categorical exemptions for projects that take place on sites included on the Cortese List.

CEQA was enacted in 1970 with the intent that all state agencies that regulate activities found to affect the quality of the environment, do so giving major consideration to preventing environmental damage.[6] As such, CEQA is to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.[7]

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[1] Cortese List Data Resources <http://www.calepa.ca.gov/SiteCleanup/CorteseList/> [as of Jul. 2, 2009] and see, e.g., <https://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T10000001149> [as of Jul. 2, 2009] [identifying open underground storage tank case at the site, among 24 other tank cases at the Site].

[2] Pub. Resources Code, § 21000 et seq.

[3] The Petitioners' contention is identical to the contention raised in SWRCB/OCC File A-1973. However, due to factual differences, the two petitions have not been consolidated.

[4] Gov. Code, § 65962.5, subd. (c)(3).

[5] The author of the original legislation was Assemblyman Cortese.

[6] Pub. Resources Code, § 21000, subd. (g).

[7] *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

However, courts have noted that, like all laws, CEQA's provisions should be given a reasonable and practical construction.[8]

CEQA's statutory framework sets forth a series of analytical steps intended to promote the goals and purposes of environmental review: information, participation, mitigation, and accountability. CEQA's implementing guidelines establish a three-tiered process to ensure that these goals are carried out.[9] The first tier is jurisdictional, requiring an agency to conduct a preliminary review to determine whether an activity is subject to CEQA. An activity that is not a discretionary "project" is not subject to CEQA.

A "project" is defined as "the whole of an action, which has a potential for resulting in a direct physical change in the environment, or a reasonably foreseeable, indirect physical change in the environment. . . ."[10] Keeping in mind the purposes of CEQA, the issue of when to start the environmental review process is crucial. Environmental review must occur late enough in the development process to contain meaningful information, but early enough so that whatever information is obtained can practically serve as input into the decision-making process.[11] Environmental review that occurs too early cannot identify specific physical changes – direct or indirect – and would result in sheer speculation. If a specific agency action does not fit within the definition of "project," CEQA is not applicable and no further environmental review is required.

The second tier of the CEQA review process concerns exemptions.[12] If a project fits within an appropriate exemption, no further CEQA review is necessary. There are two types of exemptions – statutory and categorical. Because CEQA is statutory rather than constitutional in origin, the Legislature may create exemptions from CEQA's requirements, regardless of their

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[8] *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 593.

[9] *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 379-380 (quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74).

[10] Cal. Code Regs., tit. 14, § 15378, subd. (a).

[11] See *Id.*, § 15004, subd. (b); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 129-130 (quoting *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d 68, 77).

[12] The third tier applies only if the agency determines substantial evidence exists that the project may cause a significant effect on the environment. This third tier is not relevant to this petition and will not be discussed.

potential for adverse environmental consequences.[13] These legislatively created exemptions are statutory exemptions.

Categorical exemptions represent those classes of activities that the Secretary of the Natural Resources Agency has determined do not have a significant effect on the environment.[14] The Legislature has identified certain projects that may not use categorical exemptions to avoid CEQA review. The relevant exception is the "Cortese List" exception. Under CEQA, any project located on a site found on the Cortese List is not eligible for a categorical exemption.[15]

The San Francisco Bay Water Board's adoption of the CAO was a discretionary action that constitutes a project under CEQA. It found that this action was categorically exempt from CEQA's requirements. One of the CAO's findings stated that "this action is categorically exempt from [CEQA] pursuant to Section 15321 of the CEQA Guidelines."[16] Because the Site is currently found on the Cortese List, the use of a categorical exemption is not proper and violates CEQA.

While the Site's placement on the Cortese List precludes the use of categorical exemptions, it does not preclude the use of statutory exemptions or the preparation of environmental documents[17] in order to comply with CEQA. Upon remand, the San Francisco Bay Water Board may determine that the CAO's adoption is eligible for a statutory exemption, may prepare an environmental document, or may determine that the CAO's adoption qualifies for CEQA's common sense exception.[18]

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[13] *Napa Valley Wine Train, Inc. v. P. U. C.* (1990) 50 Cal.3d 370, 376.

[14] Pub. Resources Code, § 21084, subd. (a).

[15] *Id.*, subd. (c).

[16] San Francisco Bay Water Board Order No. R2-2008-0095, Finding No. 22. Section 15321 of the CEQA Guidelines exempts projects that are "actions by regulatory agencies to enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency."

[17] "Environmental documents" is a defined term under CEQA and refers to Initial Studies, Negative Declarations, draft and final Environmental Impact Reports. (Cal. Code Regs., tit. 14, § 15361.)

[18] In its response to this petition, the San Francisco Bay Water Board asserts that "even if the categorical exemption does not or cannot apply, the CAO falls within the general common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment." (Response to Petition SWRCB/OCC File A-1972, p. 3.) While this assertion may or may not be correct, the State Water Board is not in a position to make that determination. Because of the narrow legal grounds upon which the petition was filed, the administrative record was not requested by the State Water Board. No party objected to this procedure.

ORDER

IT IS HEREBY ORDERED that the CAO is vacated and remanded to the San Francisco Bay Water Board. Upon remand, the San Francisco Bay Water Board shall make a CEQA determination consistent with this Order.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 15, 2009.

AYE:	Chairman Charles R. Hoppin Vice Chair Frances Spivy-Weber Board Member Tam M. Doduc
NAY:	None
ABSENT:	Board Member Arthur G. Baggett, Jr.
ABSTAIN:	None

Jeanine Townsend
Clerk to the Board