

A Note about Cumulative Impact Analysis under Functionally Equivalent Programs

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Although the California Environmental Quality Act (CEQA) applies to all state agencies, some regulatory programs are exempt from certain CEQA requirements because they prepare environmental documents that are functionally equivalent to Environmental Impact Reports (EIRs).¹ Under CEQA, the Secretary of the California Natural Resources Agency can certify an agency's regulatory program as functionally equivalent to CEQA if it involves the issuance "of a lease, permit, license, certificate, or other entitlement for use . . . [or t]he adoption or approval of standards, rules, regulations, or plans for use in the regulatory program."² Functionally Equivalent Programs (FEPs) are exempt from:

The requirements concerning the need to prepare EIRs and the contents of EIRs;

Time limits for completing and certifying EIRs and Negative Declarations[; and]

Consultation by the state lead agency with other agencies during the preparation of an EIR, including a requirement to consult the [California] Department of Fish and [Wildlife] concerning threatened and endangered species.³

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1. CAL. PUB. RES. CODE § 21080.5 (2014).
2. *Id.* § 21080.5(a), (b).
3. DANIEL POLLAK, CAL. RESEARCH BUREAU, ARE "CERTIFIED REGULATORY PROGRAMS" FUNCTIONALLY EQUIVALENT TO CEQA? A COMPARISON OF THEIR STATUTES AND

Instead of fulfilling CEQA's EIR, Negative Declaration, and Initial Study requirements, agencies operating pursuant to a certified FEP can meet their environmental documentation obligation with a plan or other written document containing environmental information.⁴ The Secretary of the California Natural Resources Agency can certify a FEP if it meets some basic requirements of CEQA, including an analysis of alternatives, a description of mitigation measures, and opportunities for the public and other agencies to participate.⁵ In addition, the environmental document that replaces the EIR or the Negative Declaration must describe the proposed activity, alternatives to the activity, and mitigation measures, or state that the project will have no significant effect.⁶ Once the California Natural Resources Agency has formally certified that an individual FEP meets CEQA's certification requirements, the program is listed in the CEQA regulations as a certified state regulatory program.⁷

Unlike California projects subject to CEQA's environmental review requirements, there is no consistent guidance for how agencies with certified FEPs should conduct cumulative impact assessments. In 2002, the California Research Bureau compared four FEPs to determine whether their requirements were indeed functionally equivalent to CEQA's.⁸ Among the findings most relevant to cumulative impacts assessment, the author found that CEQA's requirement to describe baseline environmen-

REGULATIONS 8 (2002), available at <http://tinyurl.com/l7nasj6>.

4. CAL. PUB. RES. CODE § 21080.5(a) (2014); CAL. CODE REGS. tit. 14, § 15250 (2014).

5. CAL. PUB. RES. CODE § 21080.5(d) (2014). The enabling legislation of the regulatory program must provide the administering agency with rulemaking authority to carry out a principal purpose of environmental protection. *Id.*

6. CAL. CODE REGS. tit. 14, § 15252(a) (2014).

7. *See id.* § 15251. The California Coastal Commission's Coastal Development Permit (CDP) program, governed by the California Coastal Act, the Fish and Game Commission's regulatory program, certain components of the Department of Fish and Wildlife's regulatory program, and its program for the adoption of regulations are among the certified FEPs that affect California's ocean and coast. *Id.* Seventeen regulatory programs are currently certified as functional equivalent programs. In addition to the these programs just listed, FEPs are administered by a diverse set of state agencies, including the California Department of Forestry and State Forestry Board, Air Resources Board, State Water Resources Control Board and Regional Water Quality Control Boards, San Francisco Bay Conservation and Development Commission, and Department of Pesticide Regulation. *Id.*

8. *See generally* Pollak, *supra* note 3. The four programs studied include (1) Approval of Timber Harvest Plans by the California Department of Forestry and Fire Protection; (2) Rulemaking by the California Department of Fish and Game; (3) Water quality plan adoption and revision by the State Water Resources Control Board and Regional Water Quality Control Boards; and (4) Registration, evaluation, and classification of pesticides by the Department of Pesticide Regulation. *Id.* at 11.

tal conditions was not present in some of the certified programs' rules.⁹ The study also noted that FEPs "do not always require a detailed description or analysis of [adverse environmental] impacts. They may simply disclose them with an abbreviated checklist, or require that impacts be considered without necessarily requiring that they be described."¹⁰ Finally, "unlike CEQA, the rules of certified regulatory programs do not always explicitly require a consideration of cumulative impacts," and those that do require cumulative impacts assessments do not always require agencies to explain why a potential cumulative impact was found not to be significant.¹¹

The study concluded,

certified regulatory programs often correspond closely to CEQA. But as often, their rules lack some of the basic requirements of CEQA. This in part reflects the origins of [s]ection 21080.5 as a compromise between those who wanted CEQA to apply fully to programs such as timber harvesting and those who wanted it to apply not at all.¹²

However, the study did not assess implementation of these programs to understand whether they provide an equivalent environmental review in practice.

With the relationship between CEQA and FEPs not always clear, questions remain about whether agencies with certified FEPs have leeway to conduct cumulative impacts assessments differently than agencies bound to CEQA guidance and CEQA case law interpretations. Because FEPs operate within the general scope of CEQA, conflicts between FEPs and CEQA may arise. In such circumstances, case law has clarified that unless CEQA explicitly states that the FEP's provisions will govern, agencies should strive to harmonize the FEP and CEQA. The California Court of Appeal noted in *Environmental Protection Information Center, Inc. v. Johnson* that CEQA is a general statute, while the Z'berg-Nejedly Forest Practice Act (a certified FEP administered by the California Department of Forestry) is a "specific statutory scheme."¹³ In dealing with CEQA and the Forest Practice Act, the respondents argued that only the Forest Practice Act applied to evaluation of a Timber Harvesting Plan, and not CEQA, because the processes un-

9. *Id.* at 19.

10. *Id.*

11. *Id.*

12. *Id.* at 23.

13. *Env'tl. Prot. Info. Ctr. v. Johnson*, 216 Cal. Rptr. 502, 509 (Cal. Ct. App. 1985).

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der the two laws were in conflict.¹⁴ However, the court concluded “the
two should be reconciled and construed so as to uphold both of them if it
is reasonably possible to do so.”¹⁵

In contrast, in *Hines v. California Coastal Commission*, the Court of Appeal found that when “provisions of the Coastal Act and CEQA are inconsistent, [the] Coastal Act provisions govern.”¹⁶ The court relied on a provision of CEQA that had explicit language to that effect.¹⁷ Based on these two cases, unless CEQA specifically states that the FEP will govern in case of a conflict with CEQA, agencies should attempt to harmonize the two laws. Regardless of how conflicts between CEQA and individual FEPs are resolved, the separate question of whether changes in CEQA, its regulations, or its case law affect FEPs is also important. No case law to date has considered how statutory, regulatory, or case law changes in CEQA affect FEP requirements.

Case law clarifies that agencies with certified FEPs must also assess cumulative impacts. According to CEQA regulations, FEPs are “exempt from the requirements for preparing EIRs, [N]egative [D]eclarations, and [I]nitial [S]tudies . . . [but] remain[] subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible.”¹⁸ CEQA regulations do not explicitly require that FEPs conduct cumulative impacts assessments, as CEQA’s cumulative effects requirement is located within the EIR chapter of the statute.¹⁹ However, California courts have read the cumulative impacts assessment requirement into all FEPs.²⁰

In *Environmental Protection Information Center v. Johnson*, the court distinguished between procedural and substantive elements of CEQA and concluded that FEPs must still follow the substantive requirements (e.g., cumulative impacts assessment) of CEQA.²¹ In that case, the Court of Appeal focused on the California Department of Forestry’s certified FEP, the Z’berg-Nejedly Forest Protection Act, address-

14. *Id.* at 508.

15. *Id.* (quoting *Natural Res. Def. Council v. Arcata Nat. Corp.*, 131 Cal. Rptr. 172, 175-76 (Cal. Ct. App. 1976)).

16. *Hines v. Cal. Coastal Comm’n*, 112 Cal. Rptr. 3d 354, 363 (Cal. Ct. App. 2010).

17. *Id.* (citing CAL. PUB. RES. CODE § 21174).

18. CAL. CODE REGS. tit. 14, § 15250 (2014).

19. CAL. PUB. RES. CODE § 21080.5(c) (2014) (providing that a “regulatory program certified pursuant to this section is exempt from Chapter 3 (commencing with [s]ection 21100)”). Chapter 3 of CEQA discusses EIRs and their contents. *Id.* §§ 21100-21108.

20. *See Laupheimer v. State of California*, 246 Cal. Rptr. 82, 93-96 (Cal. Ct. App. 1988); *Envtl. Prot. Info. Ctr.*, 216 Cal. Rptr. at 515-16.

21. *Envtl. Prot. Info. Ctr.*, 216 Cal. Rptr. at 511-12.

ing whether the Act required the Department to consider the cumulative impacts of a Timber Harvesting Plan (THP) prepared pursuant to the FEP even though the program did not explicitly require a cumulative impact assessment.²² The court concluded that when acting pursuant to its FEP, the California Department of Forestry was required to consider cumulative impacts “as a substantive criteria for the evaluation of the environmental impact of a proposed project.”²³ Another appellate court more narrowly followed *Environmental Protection Information Center in Laupheimer v. State of California*.²⁴ That court noted that at least in circumstances where the public “vividly and repeatedly” raises the issue of cumulative impacts to an agency administering a FEP, the agency must consider cumulative impacts.²⁵

While case law interprets CEQA to require a current conditions baseline in most cases,²⁶ agencies have sufficient discretion to use a historic conditions baseline in some circumstances, and agencies with best available science mandates can rely on those requirements to use a historic conditions baseline. For example, the California Coastal Act requires the California Coastal Commission to utilize “sound and timely scientific recommendations . . . necessary for many coastal planning, conservation, and development decisions.”²⁷ Even where CEQA case law suggests use of an existing conditions baseline, the Coastal Commission would have to select a historic baseline for its permit and planning reviews if the best available science indicated that was the appropriate baseline.

The Secretary of Natural Resources must withdraw a FEP certification if the Secretary determines that the program “has been altered so that it no longer meets those qualifications.”²⁸ To determine whether the program continues to meet the qualifications, “a proposed change in the program . . . may be submitted to the Secretary of the Resources Agency for review and comment.”²⁹ This discretionary submission prevents the Secretary from withdrawing the certification, effectively obstructing review of proposed FEP changes. While it is unclear whether a third party

22. *Id.* at 513-16.

23. *Id.* at 516.

24. 246 Cal. Rptr. 82.

25. *Id.* at 96.

26. See Erin E. Prahler et al., *It All Adds Up: Enhancing Ocean Health by Improving Cumulative Impacts Analyses in Environmental Review Documents*, 33 STAN. ENVTL. L.J. 351, 377-92 (2014).

27. CAL. PUB. RES. CODE § 30006.5 (2014).

28. *Id.* § 21080.5(e)(1).

29. *Id.* § 21080.5(f).

lawsuit aiming to compel the Natural Resources Agency to review a proposed FEP change would succeed, the California Supreme Court noted in dicta the potential for a citizen plaintiff to petition for writ of mandate to direct the Secretary to withdraw certification.³⁰

The Legislature could close this gap by amending CEQA to require review by the Secretary of the Natural Resources Agency whenever an agency changes its FEP. Alternatively, the Legislature could amend CEQA to require the Natural Resources Agency to conduct periodic reviews of certified programs.³¹ This review authority would encourage agencies to maintain consistency with CEQA's substantive requirements. Either of these options raises questions about the Natural Resources Agency's capacity to timely review FEP amendments or conduct periodic reviews and potentially subjects FEPs to political manipulation because the Natural Resources Agency Secretary reports to the Governor.

Additionally, it is not clear from the relevant case law whether changes in CEQA's substantive requirements should also apply to FEPs. Although two Forest Protection Act cases have determined that CEQA's cumulative impacts assessment requirement does apply to FEPs, the Legislature could settle the matter by amending CEQA section 21080.5 to explicitly require a cumulative impacts assessment.³² This would ensure that all agencies with certified regulatory programs undertake cumulative impacts assessments. FEPs should also be required to explicitly disclose environmental impacts, rather than simply consider or evaluate these impacts,³³ and discuss why environmental and cumulative impacts are found not to be significant.³⁴ These additional disclosure requirements would improve the transparency of decisionmaking by FEP agencies.

FIVE LEGAL RECOMMENDATIONS FOR INCORPORATING CUMULATIVE IMPACTS ANALYSIS INTO FEPs

1. Rely on best available science mandates to improve cumulative impacts analyses.
2. Amend CEQA to require review by the Secretary of the Natural Resources Agency whenever an agency changes its FEP.

30. *Mountain Lion Found. v. Fish & Game Comm'n*, 939 P.2d 1280, 1295 (Cal. 1997).

31. *See generally* Pollak, *supra* note 3.

32. *Id.* at 24.

33. *Id.*

34. *Id.* at 30.

3. Amend CEQA to require the Natural Resources Agency to conduct periodic reviews of certified programs.
4. Amend CEQA section 21080.5 to explicitly require a cumulative impacts assessment.
5. Amend CEQA's FEP provisions to require disclosure of environmental impacts by FEPs.