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Why CEQA Exemption Decisions Need Additional Notice Requirements

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*Deborah Behles**

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INTRODUCTION

San Francisco's Planning Department erroneously exempted a project to construct a ten -million gallon biodiesel facility in an urban area from environmental review.¹ This decision was made despite the fact that the facility's potential air emissions, water discharges, and hazardous material usage could significantly impact the low-income minority community where it was planned.² This decision was also at odds with similar projects in California that had undergone environmental review,³ and the U.S. Environmental Protection Agency's recommendation that these projects be reviewed under the analogous federal requirements.⁴ Fortunately, the community discovered this exemption decision in an off-hand reference in meeting minutes before a different agency and was able to appeal the decision.⁵ No official notice of this decision was posted or given to the community. Although the Planning Department's exemption decision, which was eventually set aside, was erroneous, the lack of notice of its decision was legally permissible.

Public agencies that exempt projects from environmental review under the California Environmental Quality Act (CEQA) are not required to record or publish their decisions. Because of this dearth of requirements, large projects, such as the one described above, can be erroneously exempted from CEQA's environmental assessment requirements without the public's knowledge. This problem can be remedied. Exemption decisions made for projects that could cause environmental impacts should have notice requirements. Otherwise exemption decisions will remain unchecked and communities will have no way

¹ See City and County of San Francisco Board of Supervisors, Agenda for Apr. 7, 2009, at Item 19, *available at* <http://www.sfbos.org/index.aspx?page=2618>. The Planning Department rescinded its exemption decision before the hearing.

² The U.S. Environmental Protection Agency recently published a manual that describes the environmental concerns associated with biodiesel facilities. See generally U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL LAWS APPLICABLE TO CONSTRUCTION AND OPERATION OF BIODIESEL PRODUCTION FACILITIES (2008) [hereinafter EPA BIODIESEL MANUAL], *available at* http://www.epa.gov/region7/priorities/agriculture/biodiesel_manual.pdf. In addition, a number of newspaper articles have documented accidental releases, fires and explosions at biodiesel facilities. See, e.g., Perry Beeman, *Biofuel Plants Generate New Air, Water, Soil Problems for Iowa*, DES MOINES REG., June 3, 2007; Kris Bevill, *North Dakota Plant Destroyed By Fire*, BIODIESEL MAG., Sept. 8, 2008.

³ See, e.g., TRA ENVTL. SCIENCES, INC., CITY OF PACIFICA WASTEWATER FACILITIES PLAN ENVIRONMENTAL IMPACT REPORT ADDENDUM 3 (Jan. 2, 2008), *available at* <http://www.cityofpacific.org/civica/filebank/blobdload.asp?BlobID=2933>.

⁴ See EPA BIODIESEL MANUAL, *supra* note 2, at 2-3.

⁵ See City & County of San Francisco Port Commission, Minutes of the Meeting, Sept. 9, 2008, at 10, *available at* <http://www.sfgov.org/site/uploadedfiles/port/meetings/minutes/2008/M09092008.pdf>. The biodiesel facility was planned for the Bayview Hunters Point area in Southeast San Francisco. Southeast San Francisco's residential neighborhoods predominately consist of communities of color and include some of San Francisco's most economically disadvantaged residents. See San Francisco Board of Supervisors Resolution No. 465-08 (adopted Oct. 28, 2008), *available at* <http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=20904>.

to ensure that significant projects undergo environmental review.

This article will initially describe CEQA, its exemptions, and the lack of notice requirements for exemption decisions. Next, this article will set forth the reasons why additional notice provisions are necessary to protect communities from agencies erroneously exempting projects that adversely impact the environment from environmental review. Lastly, this article will propose guidelines for projects that should require additional notice, explain how to implement them, and outline the information the notice should contain.

I. OVERVIEW OF CEQA AND ITS EXEMPTIONS

CEQA has been widely recognized as an effective vehicle for public participation in proceedings that evaluate the environmental impact of projects.⁶ This valuable opportunity does not occur when decisions are exempted from CEQA analysis.⁷ This section will describe this backdrop by explaining CEQA generally, CEQA's exemptions, and the notice requirements and standards for reviewing exemption decisions.⁸

A. CEQA Generally

"CEQA is a comprehensive legislative scheme designed to provide long-term protection to the environment."⁹ To accomplish this, CEQA directs public agencies responsible for regulating activities affecting the environment to give prime consideration to preventing environmental damage when carrying out their duties.¹⁰ A public agency's CEQA analysis must also provide a vehicle for public participation by creating a record that is "sufficient to allow informed decision-making."¹¹ This requirement promotes public participation, which is

⁶ See, e.g., Luke Cole, *Legal Services, Public Participation, and Environmental Justice*, CLEARINGHOUSE REV. (Special Issue 1995). See also *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990) (the CEQA process "protects not only the environment but also informed self-government"); Planning and Conservation League Foundation, Sponsorship Invitation for CEQA Workshop, available at <http://www.pclfoundation.org/foundation/CEQAWorkshop/Tujunga-6-7-09-CEQA.pdf> (describing CEQA as California's "premier environmental law" and a "powerful tool for public participation").

⁷ See discussion *infra* Parts I.B, I.C (describing CEQA's exemptions generally and CEQA's notice requirements for exemption decisions).

⁸ See generally STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, *PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT* (2d ed. 2008) (providing excellent overview of CEQA).

⁹ See *Mountain Lion Found. v. Fish & Game Comm'n*, 16 Cal. 4th 105, 112 (1997). See also California Natural Resources Agency, *Frequently Asked Questions About CEQA*, <http://ceres.ca.gov/ceqa/more/faq.html> (last visited Oct. 18, 2009) (describing CEQA generally).

¹⁰ See CAL. PUB. RES. CODE §§ 21000, *et. seq.* (West 2009). See also California Natural Resources Agency, CEQA, <http://ceres.ca.gov/ceqa/summary.html> (last visited Oct. 18, 2009).

¹¹ See *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 404-05 (1988). See also Arthur Pugsley, *Timing is Everything: Ensuring Meaningful CEQA Review by Avoiding Improper "Precommitment" to a Project*, 5 CAL. ENVTL. L. REP. 1, 1 (2009) (explaining

considered “an essential part of the CEQA process.”¹² CEQA’s focus on providing information to the public is reiterated throughout its requirements.¹³

A CEQA evaluation begins with an agency deciding what level of analysis CEQA requires for a particular project.¹⁴ An agency’s first step is determining whether a project is a project subject to CEQA review.¹⁵ If the project could be subject to CEQA, the agency’s next step is to determine whether the project is categorically or statutorily exempt from CEQA.¹⁶ If a project fits within a categorical or statutory exemption, no formal evaluation is required, and the project can be implemented without any CEQA evaluation.¹⁷

If a project is not exempt, the public agency must perform an initial study to determine whether the project will have a significant effect on the environment.¹⁸ If the project would not have a significant effect on the environment, the agency prepares a negative declaration.¹⁹ When the project will have a significant impact on the environment, CEQA requires further agency action. The agency may prepare a mitigated negative declaration if revisions to the project made or agreed to by the applicant would avoid or mitigate impacts to a point where clearly no significant impacts would occur.²⁰ Otherwise, the agency must prepare an environmental impact report, which

that CEQA’s functions are well-served by a commitment to public input).

¹² See CAL. CODE REGS. tit. 14, § 15201 (2009).

¹³ See, e.g., CAL. PUB. RES. CODE § 21092 (West 2009) (requiring notice of draft negative declaration and environmental impact report to individuals who request a copy). This is also included in local city ordinances. For example, under the San Francisco Administrative Code, one of the purposes of CEQA is to “[p]rovide decision makers and the public with meaningful information regarding the environmental consequences of proposed activities.” S.F., CAL., ADMIN. CODE § 31.02 (2001).

¹⁴ See California Natural Resources Agency, CEQA Process Flow Chart, <http://ceres.ca.gov/ceqa/flowchart/> (last visited Oct. 18, 2009) (chart describing the steps of a CEQA analysis).

¹⁵ See tit. 14, § 15060(c) (listing classes of project subject to CEQA). See also S.F., CAL. ENV’T. CODE § 101 (2003) (providing that San Francisco government decisions must be made according to the precautionary principle).

¹⁶ See tit. 14, § 15061(a). See also discussion *infra* Part II.B (describing CEQA’s exemptions); California Natural Resources Agency, How does a Public Agency determine whether a project is exempt under CEQA?, <http://ceres.ca.gov/ceqa/flowchart/exemptions/index.html> (last visited Oct. 18, 2009).

¹⁷ See tit. 14, § 15061(b). See also State of California, How does a Public Agency determine whether a project is exempt under CEQA?, <http://ceres.ca.gov/ceqa/flowchart/exemptions/index.html> (last visited Oct. 18, 2009).

¹⁸ See tit. 14, § 15063. The initial study is the preliminary investigative tool to identify environmental effects and can be part of the basis of a decision whether or not an environmental impact report should be prepared.

¹⁹ See *id.* § 15070. If the initial study does not produce a fair argument of a reasonable possibility of significant adverse environmental impacts, the agency may adopt a negative declaration.

²⁰ See *id.* § 15070(b). If a project owner agrees to mitigate the project to either eliminate significant impacts or to reduce the impacts where clearly no significant impact would occur, a mitigated negative declaration can be used.

analyzes alternatives to the project and determines whether less harmful alternatives are feasible.²¹

B. CEQA's Exemptions

As described above, CEQA has two categories of exemptions – statutory and categorical. The purpose of these exemptions is to expedite review of and minimize resources spent reviewing emergency projects, required projects, or projects which are unlikely to significantly impact the environment.²²

Statutory exemptions are exemptions specified by the Legislature that exempt certain types of projects either completely from CEQA, from some CEQA requirements, or from some of the timing rules.²³ Statutory exemptions can apply to projects despite potential environmental impacts.²⁴ Some statutory exemptions cover specific types of projects such as the issuance of discharge requirements, adoption of coastal plans and programs, and disapproved projects.²⁵ Other statutory exemptions apply on a case-by-case basis for projects that qualify as ministerial²⁶ or emergency projects.²⁷ Ministerial projects are projects like the issuance of permits or licenses that are not discretionary.²⁸ Emergency projects are projects necessitated from the occurrence of some unexpected event.²⁹

Categorical exemptions apply to project categories that the Secretary of the California Natural Resources Agency has found not to have significant effect on the environment.³⁰ The CEQA Guidelines, found in Title 14 of the California

²¹ See *id.* § 15081.5.

²² See CAL. PUB. RES. CODE §§ 21069-21071, 21083, 21084 (2009).

²³ See *id.* §§ 21080(b), 21083; CAL. CODE REGS. tit. 14, § 15260.

²⁴ See *W. Mun. Water Dist. of Riverside County v. Super. Ct. of San Bernardino County*, 187 Cal. App. 3d 1104, 1113 (Ct. App. 1986) (“the self-evident purpose of a [statutory] exemption is to provide an escape from the EIR requirement despite a project’s clear, significant impact.”).

²⁵ See, e.g., §§ 21102, 21150, 21169-71, 21083; CAL. GOV’T CODE § 51119 (2009); tit. 14, §§ 15260-15285. Other examples of projects that are statutorily exempt are timber preserves, family day care homes and early activities related to thermal power plants.

²⁶ Ministerial projects can be defined by the particular agency: “Each public agency should, in its implementing regulations or ordinances, provide an identification or itemization of its projects or actions which are deemed ministerial under the applicable laws and ordinances.” tit. 14, § 15268.

²⁷ Emergency actions cover “[s]pecific actions to prevent or mitigate an emergency” or “[p]rojects undertaken, carried out, or approved by a public agency to maintain, repair, or restore an existing highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, provided that the project is within the existing right of way of that highway and is initiated within one year of the damage occurring.” *Id.* § 15269. See also CAL. PUB. RES. CODE §§ 21080(b), 21080.33, 21172 (2009).

²⁸ See, e.g., *Friends of Westwood, Inc. v. Los Angeles*, 191 Cal. App. 3d 259, 269 (Ct. App. 1986) (term ministerial is limited to projects that can be legally compelled without substantial modification).

²⁹ See, e.g., *W. Mun. Water Dist. of Riverside County v. Super. Ct. of San Bernardino County*, 187 Cal. App. 3d 1104, 1110 (Ct. App. 1987) (an emergency is an occurrence that involves clear and imminent danger and demands immediate attention).

³⁰ See CAL. PUB. RES. CODE §§ 21084-21085; tit. 14, §§ 15300-15329, 15354.

Code of Regulations, set forth over thirty categorical exemptions.³¹ These exemptions cover a broad array of projects ranging from minor alterations of existing facilities to the construction of certain types of buildings.³² Like the statutory exemptions, if a project fits within a categorical exemption,³³ no formal evaluation is required, and the project can be implemented without a CEQA evaluation.³⁴

However, unlike the statutory exemptions, a project can only be categorically exempt if it does not fit under a listed exception.³⁵ These exceptions prevent projects from being exempted if there is a reasonable possibility that significant environmental impacts will result due to unusual circumstances.³⁶ The determination of “whether a circumstance is ‘unusual’ is judged relative to the typical circumstances related to an otherwise typically exempt project.”³⁷ For example, in a case examining whether a categorical exemption for existing facilities applied to a landfill’s plan to dump an additional 3.2 million tons of municipal waste,³⁸ the court found the exemption did not apply because there was a threat to the environment posed by the eighty acre unlined site “due to numerous circumstances that are unusual [when compared to] *existing facilities* in general.”³⁹

Categorical exemptions also cannot apply if significant cumulative impacts could result from successive projects of same type in the same place.⁴⁰ These exceptions also require projects that could impact scenic highways,⁴¹ projects

³¹ See tit. 14, §§ 15300-15332. The CEQA Guidelines are careful to explain that categorical exemptions should not be applied to projects that are already determined to be exempt under a statutory exemption. *Id.* §15300.2.

³² See discussion *infra* Part II.A (discussing types of projects covered under categorical exemptions).

³³ See tit. 14, §§ 15301-15333.

³⁴ See *id.* § 15061(b).

³⁵ See CAL. PUB. RES. CODE § 21084 (2009).

³⁶ See tit. 14, § 15300.2(c). The application of the “significant effect” exception requires two distinct inquiries. See also *Banker’s Hill vs. City of San Diego*, 139 Cal. App. 4th 249, 278 (Ct. App. 2006). First, a party must make a “fair argument” that there is a “reasonable possibility” a project will have a significant effect on the environment. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, 1197-98 (Ct. App. 1997). Second, the “change in the environment” must be “due to unusual circumstances.” *Banker’s Hill*, 139 Cal. App. 4th at 278.

³⁷ *Santa Monica Chamber of Commerce v. City of Santa Monica*, 101 Cal. App. 4th 786, 801 (Ct. App. 2002). “The test is satisfied where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects.” *Azusa*, 52 Cal. App. 4th at 1207.

³⁸ See *Azusa*, 52 Cal. App. 4th at 1187.

³⁹ *Id.* at 1209 (emphasis added).

⁴⁰ Tit. 14, § 15300.2(b).

⁴¹ CAL. PUB. RES. CODE § 21084(b) (2009). This exception provides that a project that “may result in damage to scenic resources, including, but not limited to, trees, historical buildings, rock outcroppings, or similar resources” cannot be exempted. *Id.*

located on sites impacted by hazardous wastes⁴² and projects that may affect historical resources⁴³ to undergo environmental review. In addition, in certain situations, agencies cannot exempt projects in sensitive environments.⁴⁴

C. Lack of Notice Requirements for Exemption Decisions

Once a public agency finds that a project is exempt, it is not required to record its decision⁴⁵ or the reasons for its decision.⁴⁶ An agency also does not have to provide the public with an opportunity to review its decision.⁴⁷ If an agency does record its decision, the agency may file a notice of it, called a Notice of Exemption, with the county clerk for local agencies or with the State's Office of Planning and Research (OPR) for state agencies.⁴⁸ An applicant can also file a notice of an exemption decision as long as the certificate of determination is attached.⁴⁹ If a local agency records and files a notice,⁵⁰ it must retain the notice for twelve months.⁵¹

The statute of limitations to appeal an exemption decision is determined by whether or not the notice is filed. If an agency or applicant with either the county clerk of the Office of Planning and Research, there is a thirty-five day statute of limitations period for litigation on CEQA grounds.⁵² If the agency or applicant does not file a notice of the exemption decision, the statute of limitations is 180 days from the date the decision is made to carry out or approve the project. Where an agency has not made a formal decision approving the project, the statute of limitations is 180 days from the date the project is commenced.⁵³

Although all public agencies are encouraged to make copies of Notices of

⁴² See *id.* § 21084(c). Projects cannot be exempt under this provision if they are located on sites the Department of Toxic Substances Control and the Secretary for Environmental Protection have identified as affected by hazardous waste pursuant to Government Code section 65962.5.

⁴³ See *id.* § 21084(e). Projects "that may cause a substantial adverse change in the significance of an historical resource" cannot be exempted. *Id.*

⁴⁴ See tit. 14, § 15300.2(a) (2009). This section includes installing small new facilities, minor public or private alternations in the conditions of land, water or vegetation, and construction of minor structures accessory to existing facilities. *Id.*

⁴⁵ See, e.g., *id.* § 15062 (providing no requirement to write down decision).

⁴⁶ *Id.* §§ 15060-15061. See also *CalBeach Advocates v. City of Solana Beach*, 127 Cal. Rptr. 2d 1, 9 (Ct. App. 2002) (holding no specified findings required to support an exemption decision); *Magan v. County of Kings*, 129 Cal. Rptr. 2d 344, 349 (Ct. App. 2002).

⁴⁷ One court stated that although the city "chose to combine approval processes for the site development, permit and the categorical exemption in a public hearing does not mean the public hearing was mandated by state law or local ordinance." *Ass'n for Prot. of Env'tl. Values in Ukiah v. City of Ukiah*, 2 Cal. App. 4th 720, 731 (Ct. App. 1991).

⁴⁸ See tit. 14, § 15062.

⁴⁹ See CAL. PUB. RES. CODE §§ 21108(b), 21152(b) (West 2009).

⁵⁰ See *id.* §§ 21108(c), 21152(c).

⁵¹ See *id.* § 21152(c).

⁵² *Id.* § 21167(d). See also tit. 14, § 15112(c)(2).

⁵³ CAL. PUB. RES. CODE § 21167(d) (West 2009); tit. 14, § 15112(c)(5).

Exemption available on the internet,⁵⁴ only the OPR, which handles decisions made by state agencies, is required to make all notices of exemption that it receives electronically available.⁵⁵ If the notice is not posted, another way to receive it is to submit a written request before the project is approved. The lead agency is then required to mail the notice.⁵⁶ But, notably, even though this requirement exists, there is no requirement that state or local agencies write or file notices in the first place.

The notice provisions are much stronger for projects not exempted from CEQA. Specifically, CEQA requires that a decision for non-exempted projects in the form of either a negative declaration or environmental impact report be recorded and provided to the public for notice and comment.⁵⁷ Thus, in contrast with the notice requirements for more extensive CEQA analyses, CEQA does not provide requirements to ensure that interested individuals find out about exemption decisions.

D. Standard for Reviewing Exemption Decisions

If the public discovers an erroneous exemption decision despite the lack of notice requirements, the judicial standard of review requires a careful analysis of the erroneous decision. Agencies are required to construe CEQA exemptions narrowly.⁵⁸ As one court summarized, “[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.”⁵⁹ Categorical exemptions, thus, should be interpreted by agencies to provide the fullest possible environmental protection within the scope of the statutory language.⁶⁰

Questions concerning the scope of an exemption are subject to review by courts.⁶¹ When determining the scope of an exemption, an agency’s failure to “proceed in the manner CEQA provides” is by itself a prejudicial abuse of discretion, whether or not the agency has substantial evidence to bolster its position.⁶² In other words, courts “determine *de novo* whether the agency has employed the correct procedures, scrupulously enforc[ing] all legislatively

⁵⁴ See tit. 14, §§ 15062, 15075, 15085.

⁵⁵ See CAL. PUB. RES. CODE § 21159.9(c) (West 2009). Notices available at www.ceqanet.ca.gov.

⁵⁶ § 21167(f).

⁵⁷ See, e.g., *id.* §§ 21091-21092, 21104, 21153. See also tit. 14, §§ 15073, 15075, 15083, 15085.

⁵⁸ *Santa Monica Chamber of Commerce v. City of Santa Monica*, 101 Cal. App. 4th 786, 793 (Ct. App. 2002).

⁵⁹ See *Mountain Lion Found. v. Fish & Game Comm’n*, 16 Cal. 4th 105, 125 (1997).

⁶⁰ See *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 966 (Ct. App. 1999).

⁶¹ *Fairbank v. City of Mill Valley*, 75 Cal. App. 4th 1243, 1251 (Ct. App. 1999).

⁶² See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435 (2007).

mandated CEQA requirements.”⁶³

To decide whether an exception to a categorical exemption applies, courts use the fair argument test.⁶⁴ For example, a court will apply the fair argument test to determine whether a project creates a reasonable possibility of significant effects due to unusual circumstances. The fair argument standard creates a “low threshold” for further environmental review and “reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.”⁶⁵ Although courts can provide meaningful review of erroneous exemption decisions, this review is meaningless if communities never find out about erroneous decisions in the first place.

II. COMMUNITIES NEED ADDITIONAL NOTICE FOR SIGNIFICANT EXEMPTED PROJECTS

Although CEQA exemptions save agency resources by exempting projects that do not impact the environment,⁶⁶ these exemptions have erroneously exempted harmful projects from environmental review.⁶⁷ Additional notice requirements would provide a check on potentially erroneous decisions and would allow greater public participation in decision-making.⁶⁸ Without notice of CEQA exemption decisions, local communities will have no way to ensure that potentially harmful projects in their community are reviewed.⁶⁹

A. *Exemption Categories are Ambiguous and Can Be Interpreted Broadly*

Communities should be given notice of decisions to exempt potentially harmful projects to assure that exemptions are correctly applied. Although CEQA directs agencies to narrowly interpret exemptions to ensure protection of

⁶³ *Id.* (internal quotations omitted).

⁶⁴ See *Banker's Hill, Hillcrest, Park West Cmty. Pres. Group v. City of San Diego*, 139 Cal. App. 4th 249, 261-67 (Ct. App. 2006). But see *Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039, 1069-72 (Ct. App. 2008) (refusing to apply the fair argument standard).

⁶⁵ *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th 1307, 1316-17 (Ct. App. 1992).

⁶⁶ See Stephanie Young, *Categorical Exclusions: Are Agencies Silencing the Public's Voice?*, 23 NAT. RES. & ENV'T 39, 40 (2009) (“When correctly developed and used, CEs [categorical exclusions] can save agency resources, which have become more limited over the past years as agency budgets have been reduced.”).

⁶⁷ See *id.* See also Kevin H. Moriarity, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312, 2335 (2004).

⁶⁸ See *Ultramar, Inc. v. S. Coast Air Quality Mgmt. Dist.*, 17 Cal. App. 4th 689, 705 (Ct. App. 1993) (“we cannot overemphasize the importance of full compliance with all the notice provisions of applicable law, so that there will be maximum public comment and involvement Given the significance of whatever path is followed, any decision must be subject to full public review before its implementation.”).

⁶⁹ As the Ninth Circuit recently articulated, “[t]here is no doubt that the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project.” *Save Strawberry Canyon v. Dept. of Energy*, 613 F. Supp. 2d 1177, 1187 (N.D. Cal. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

the environment, agencies can interpret and have historically interpreted exemptions more broadly than their intended purpose. Ambiguous language in categorical and some statutory exemptions gives regulators significant interpretive latitude and thus, creates uncertainty in the application of the exemptions.⁷⁰ In addition, the extensive list of exemptions is not limited to categories of projects that will never have a significant impact on the environment.⁷¹ Rather, an agency has to decide whether a project that fits the ambiguous boundaries of an exemption could cause environmental impacts.

For example, one category of exemptions, called the "existing facilities exemption", applies to "the operation, repair, maintenance, permitting, leasing, licensing or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use."⁷² Cases interpreting terms such as "minor alterations," "repair," "maintenance," or "replacement" of existing facilities demonstrate that there is wide variation in the interpretation of these terms.⁷³ Indeed, agencies have erroneously applied this exemption to large projects such as the addition of a ten-million gallon biodiesel facility in a poor neighborhood.⁷⁴ The existing facilities exemption was also erroneously applied to a landfill accepting an additional 3.2 million tons of waste.⁷⁵ Disturbingly, the agency made this decision despite its finding that the existing landfill was leaking, that it may continue leaking, and that additional waste may exacerbate the problem.⁷⁶ Although both of these decisions were later rescinded,⁷⁷ these examples illustrate how an agency could erroneously apply this vague exemption to projects which could significantly impact the environment.

Other exemptions also contain vague language. One such exemption applies

⁷⁰ See Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW 949, 958 (2006) (discussing how the language may "significantly" impact the environment introduces "great uncertainty in application").

⁷¹ See *id.* at 960 ("[T]he list of exempt projects is long, adding to the complexity of administration. It is also sometimes arbitrary, with some exceptions overtly based on politics rather than on neutral judgments about environmental effects.").

⁷² CAL. CODE REGS. tit. 14, § 15301 (2009). This section provides a list of examples of projects that could be exempted including "[a]dditions to existing structures provided that the additional will not result in an increase of more than: . . . 10,000 square feet if . . ." certain conditions are met.

⁷³ See, e.g., *Prats v. Port Authority*, 315 F.3d 146, 148-49 (2d Cir. 2002) (discussing cases interpreting terms "repair" and "alteration"); *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 910-11 (7th Cir. 1009); *United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272 (S.D. Ind. 2005) (describing disagreement over interpretation of the terms "routine," "maintenance," "repair," or "replacement").

⁷⁴ See discussion *supra* pp. 1-2 (discussing erroneous interpretation and application to biodiesel facility).

⁷⁵ See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, 1176-77, 1192-93 (Ct. App. 1997).

⁷⁶ See *id.* at 1198-99, 1205-06.

⁷⁷ See discussion *supra* p. 1 (discussing San Francisco's decision to rescind the biodiesel decision). See also *Azusa*, 52 Cal. App. 4th at 1165 (overturning exemption decision).

to the “replacement or reconstruction of existing structures or facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity.”⁷⁸ This exemption can extend to the “[r]eplacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity”⁷⁹ and the “[r]eplacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity.”⁸⁰ The reconstruction of a utility system could allow a system to operate longer which could significantly impact the neighboring community. In addition, words like “substantially” and “negligible” in these examples can be interpreted differently by an affected community and the proponent of the project.

Another broad exemption covers “construction and location of limited numbers of new, small facilities or structures”⁸¹ including a “store, motel, office, restaurant or similar structure not involving the use of significant amounts of hazardous substances, and not exceeding 2500 square feet in floor area.”⁸² An additional exemption excludes “minor actions to prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release of hazardous waste or hazardous substances.”⁸³ Yet another exemption excludes cogeneration projects at existing facilities.⁸⁴ The co-generation exemption has erroneously been used to exempt a co-generation facility from being constructed on a superfund site.⁸⁵

Other broadly drafted exemptions apply to projects that impact natural resources. For example, one exemption applies to annexing land containing existing facilities with certain exceptions.⁸⁶ Other exemptions specifically cover projects that maintain or protect natural resources.⁸⁷ These exemptions have

⁷⁸ CAL. CODE REGS. tit. 14, § 15302 (2009) (discussing the “Replacement or Reconstruction” exemption).

⁷⁹ *Id.* § 15302(b).

⁸⁰ *Id.* § 15302(c).

⁸¹ *Id.* § 15303.

⁸² *Id.* § 15303(c). Another example under this exemption provides that: “In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use is not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is environmentally sensitive.”

⁸³ *Id.* § 15330. This exemption is entitled “Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances.”

⁸⁴ CAL. CODE REGS. tit. 14, § 15329 (2009). This exemption is entitled “Cogeneration Projects at Existing Facilities.”

⁸⁵ The project, which was planned by Roseburg Forest Products, was exempted by Siskiyou County. The decision was revoked when the local community protested the decision. See Paul Boerger, *Co-Generation Plant Moves Toward CEQA Review Phase*, Apr. 11, 2007, <http://www.timberbuysell.com/Community/DisplayAd.asp?id=800>.

⁸⁶ tit. 14, § 15319(a).

⁸⁷ See *id.* §§ 15307, 15308. These exemptions have been erroneously applied to hunting and fishing issues. See, e.g., *Wildlife Alive v. Chickering*, 132 Cal. Rptr. 377, 385-86 (1976) (rejecting application of exemption to setting of hunting and fishing seasons).

been erroneously applied to exempt a regulation that allowed a large increase of nitrogen oxide emissions from certain facilities.⁸⁸ The Bay Area Air Quality Management District also relied on this type of exemption to exempt regulatory amendments governing the solvent content in architectural coatings.⁸⁹ After reviewing the record, the court found that the exemption was improperly applied because “there is evidence that the new regulations require lower quality products. As a result, more product will be used which will lead to a net increase in VOC emissions.”⁹⁰

As these examples demonstrate, many categorical exemptions are broadly written and could be erroneously applied to projects that significantly impact the environment. To give communities a check on these potentially erroneous decisions, notice should be required.

B. Additional Notice Requirements Would Help Communities Overburdened by Pollution

Communities that are already significantly impacted by environmental pollution are more likely than other communities to experience harm from proposed projects.⁹¹ Low income and minority communities currently bear more of the cumulative burden of pollution in California and around the nation.⁹² Consequently, these communities disproportionately suffer adverse environmental and health impacts associated with industrial pollution.⁹³ An example of an overburdened community is the Bayview Hunters Point neighborhood in San Francisco.⁹⁴ This community has endured high levels of industrial development “achieved at extensive costs to environmental health.”⁹⁵ Additional pollution such as air emissions are especially concerning in this

⁸⁸ See, e.g., *Int'l Longshoremen's and Warehousemen's Union v. Bd. of Supervisors of San Bernardino County*, 171 Cal. Rptr. 875, 881-82 (Cal. Ct. App. 1981). This exemption decision was ultimately struck down by a court, which found that “[m]anifestly, there is a reasonable possibility that doubling the NOx emissions allowed into the atmosphere may have ‘a significant effect on the environment.’” *Id.*

⁸⁹ *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.*, 9 Cal App. 4th 644, 656-58 (Ct. App. 1992).

⁹⁰ See *id.* at 658.

⁹¹ As aptly noted by one comment, “[e]ven relatively innocuous projects, located in the ‘wrong’ place from an environmental standpoint, can do serious damage.” See Selmi, *supra* note 70, at 962.

⁹² See, e.g., Clifford Rechtschaffen, *The Evidence of Environmental Injustice*, 12 ENVTL. L. NEWS 3, 12 (2003). See generally ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY 1987-2007 (2007), available at <http://www.ucc.org/assets/pdfs/toxic20.pdf>.

⁹³ See generally Rechtschaffen, *supra* note 92; BULLARD, *supra* note 92. See also California Environmental Justice Movement, The California Environmental Justice Movement's Declaration Against the Use of Carbon Trading Schemes to Address Climate Change, available at http://www.ejcc.org/assets/declaration_carbon_trading.pdf (last visited Oct. 18, 2009).

⁹⁴ See San Francisco Planning Dept., Bayview Hunters Point Area Plan, available at http://www.sfgov.org/site/planning_index.asp?id=41398 (last visited Oct. 18, 2009).

⁹⁵ *Id.*

community, which has been designated by the air district as a highly impacted area.⁹⁶

In overburdened communities, small changes can cause significant environmental problems since the communities have already been impacted by environmental toxins.⁹⁷ These potential cumulative impacts⁹⁸ may not be taken fully into account during a routine exemption review. In addition to experiencing a higher burden of pollution, many of these communities lack a voice in the decision-making process.⁹⁹

Consequently, the lack of notice for exemption decisions has potential environmental justice implications that need to be addressed.¹⁰⁰ In California, environmental justice has been defined as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.”¹⁰¹ One of the principles of environmental justice is that it “demands the right to participate as equal partners at every level of decision making including needs assessment, planning, implementation, enforcement and evaluation.”¹⁰² To advance this principle, environmental justice seeks to “[e]nsure meaningful public participation and promote community-capacity building to allow communities to be effective participants in environmental decision-making processes.”¹⁰³ This can be accomplished, in part, by

⁹⁶ See Bay Area Air Quality Management District, CARE Program, <http://www.baaqmd.gov/Divisions/Planning-and-Research/Planning-Programs-and-Initiatives/CARE-Program.aspx> (last visited Oct. 18, 2009).

⁹⁷ See *Communities for a Better Env't v. Cal. Res. Agency*, 126 Cal. Rptr. 2d 441, 452-53 (Ct. App. 2002) (“One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.”).

⁹⁸ The CEQA Guidelines define “cumulative impacts” as “two or more individual effects which, when considered together, are considerable or which compound or increase other impacts Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” CAL. CODE REGS. tit. 14, § 15355 (2009).

⁹⁹ See, e.g., Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 572 (1997) (noting “[i]n many cases minority and low-income communities are disparately impacted by government actions because the communities do not have a voice in the decision-making process, and the communities lack the influence or political power of special interest groups that may support the government action.”).

¹⁰⁰ In determining whether the application of an exemption is appropriate, courts will consider the project's location. See, e.g., *Lewis v. Seventeenth Dist. Agric. Ass'n*, 165 Cal. App. 3d 823, 825-26 (Ct. App. 1985) (finding application of the exemption was improper due to the proximity of residential area).

¹⁰¹ See CAL. GOV'T CODE § 65040.12 (West 2009).

¹⁰² See Center for Public Environmental Oversight, Principles of Environmental Justice, available at <http://www.cpeo.org/pubs/ejprinc.html> (last visited Oct. 18, 2009).

¹⁰³ CAL. ENVTL. PROT. AGENCY INTERAGENCY WORKING GROUP ON ENVTL. JUSTICE RESOLUTION, RECOMMENDATIONS FOR THE DEVELOPMENT OF AN INTRA-AGENCY ENVIRONMENTAL JUSTICE STRATEGY 3 (2003), available at <http://www.calepa.ca.gov/EnvJustice/IWG/DraftIWGRec.pdf>.

procedures that “ensure that public documents, notices, and public hearings relating to human health or the environment, are concise, understandable, and readily accessible to the public.”¹⁰⁴

Work still needs to be done to ensure that the most vulnerable communities are treated with respect in environmental decisions.¹⁰⁵ Procedural protections have been required to accommodate environmental justice concerns¹⁰⁶ and should be made to protect communities from the overbroad application of exemptions. Creating additional CEQA notice requirements is especially important since CEQA is one of the most useful tools against harmful land uses.¹⁰⁷

C. Notice Would Further CEQA's Purpose

One of CEQA's central purposes is to promote government accountability and transparency.¹⁰⁸ Requiring additional notice for exemption decisions would advance this purpose.¹⁰⁹ Without any accountability, the public cannot be assured that agencies will make correct exemption decisions. As the California Supreme Court noted: “[a]t the very least, however, the People have a right to expect that those who must decide will approach their task neutrally, with no parochial interest at stake.”¹¹⁰ It may be difficult to trust a local government “to put regional environmental considerations above the narrow selfish interests of their city” when the local government forms a relationship with a developer.¹¹¹ Opportunities for public review of decisions are thus important to demonstrate

¹⁰⁴ *Id.* at 1.

¹⁰⁵ See GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, ENVIRONMENTAL JUSTICE IN CALIFORNIA STATE GOVERNMENT 4 (2003) (stating “[m]uch work remains to ensure that the most vulnerable of Californians, including people of color and low-income persons, are treated with dignity and respect regarding environmental decisions.”), available at http://www.opr.ca.gov/planning/publications/OPR_EJ_Report_Oct2003.pdf.

¹⁰⁶ See *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 Env'tl. L. Rep. 20,357, No. 366045, Ruling on Submitted Matter Dec. 30, 1991 (Cal. App. Dep't Super. Ct. 1991) (finding lack of translation precluded meaningful public involvement under CEQA for community where 95% of the residents are Latino).

¹⁰⁷ See Luke Cole, *Legal Services, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE REV. 449, 451 (1995).

¹⁰⁸ CAL. CODE REGS. tit. 14, § 15201 (2009) (“Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement”). Cases have also emphasized this requirement. See, e.g., *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 136 (2008) (discussing “CEQA's goal of environmental transparency in environmental decision-making”).

¹⁰⁹ See *Save Strawberry Canyon v. Dept. of Energy*, 613 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009).

¹¹⁰ See *Bozung v. Local Agency Formation Comm'n of Ventura County*, 13 Cal. 3d 263, 283 (1975). See also Pugsley, *supra* note 11, at 1 (discussing case).

¹¹¹ See *Bozung*, 13 Cal. 3d at 283. As one court stated: “[P]ublic review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources.” *Schoen v. Cal. Dept. of Forestry and Fire Prot.*, 58 Cal. App. 4th 556, 573 (Ct. App. 1997).

to the public that environmental impacts are fairly taken into account.¹¹²

Public participation can also lead to better decisions for the community and the environment.¹¹³ This is partly because measures protecting the right to public participation help ensure that environmental impacts will actually be evaluated.¹¹⁴ Increased access could also help develop positive participation from the community.¹¹⁵ As a result, public participation can provide accountability for government decision-making¹¹⁶ and provide a valuable review of decisions.¹¹⁷

D. Changing CEQA Could Influence Other Regulatory Schemes

Changing CEQA's notice requirements for exemptions could also influence other statutes that also lack notice for exemption decisions.¹¹⁸ Like CEQA, exemption decisions under the National Environmental Policy Act ("NEPA")

¹¹² As the California Supreme Court has noted, the transparency functions of the CEQA process serve to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." *No Oil Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 86 (1974).

¹¹³ See THOMAS DIETZ & PAUL C. STERN, *PANEL ON PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING* 76-85 (Nat'l Academies Press 2008). This study found public participation can lead to better federal agency decisions. The same has been said with respect to NEPA. See, e.g., Sharon Buccino, *Expedited NEPA Review for Alternative Energy Projects*, 39 ENVTL. L. REP. 10,581, 10,583 (2009) (stating that she sees NEPA as a "fundamental tool for both the environmental review and public participation that we rely on to produce both informed government decisions and decisions that are accepted by the people who are affected by them").

¹¹⁴ See Selmi, *supra* note 70, at 979-80 ("[t]he public commenting process can help ensure the fulfillment of this purpose by insisting on a kind of rational dialogue about environmental impacts").

¹¹⁵ See Stephanie Tai, *Three Asymmetries of Informed Environmental Decision-making*, 78 TEMP. L. REV. 659, 678 (2005) ("[P]ublic participation mechanisms are seen as a step towards the development of civic virtues by providing a means for citizens to become involved in the regulatory decision-making process.").

¹¹⁶ See David E. Seidemann, *Insufficient Accountability: Case Study of the Recycling Plan of a Public Interest Research Group*, 3 BUFF. ENVTL. L.J. 221, 222 (1995) ("Over the past several decades, as the public's faith in the capacity of government and industry to behave responsibly has diminished, the public has turned increasingly to environmental advocacy groups for help in holding government and industry accountable. Environmental groups have become useful watchdogs because they have both the technical expertise and the inclination to monitor those segments of society in which the public has lost faith . . .").

¹¹⁷ See Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 79 (1996) ("NEPA public participation takes the form of pseudo peer review science, in which the agency uses public participation to ensure that agency experts have, indeed, considered all the relevant information.").

¹¹⁸ See e.g., Kenneth S. Weiner, *NEPA and State NEPAs: Learning From the Past, Foresight for the Future*, 39 ENVTL. L. REP. 10,675, 10,678 (2009) (describing how state environmental assessment acts influenced the 1978 NEPA amendments); Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 568 (1997) ("[W]hen Congress enacted NEPA it envisioned NEPA as a model for state environmental review laws, but in the truest sense of cooperative federalism, state laws can now be used as models for changes to NEPA.").

should have additional notice requirements.¹¹⁹ Under NEPA requirements, each federal agency defines categories of projects within its jurisdiction that “do not individually or cumulatively have a significant effect on the human environment” to be excluded from NEPA’s requirements.¹²⁰ Similar to CEQA’s exceptions, NEPA provides a safeguard to prevent projects that may have a significant environmental effect from being exempted from review.¹²¹ This safeguard’s usefulness, however, can be limited because it is defined using ambiguous terms such as “extraordinary” which are subject to differing interpretation. In addition, the safeguard only applies to some of exempted projects.¹²²

Like CEQA, NEPA lacks basic procedural requirements for exemption decisions, and projects can be improperly exempted from NEPA without the public’s knowledge.¹²³ In particular, federal agencies do not always have to publish information supporting an exemption decision.¹²⁴ Thus, an environmentally significant NEPA project could be exempted without the public’s knowledge.¹²⁵ NEPA’s categorical exemptions can be interpreted to include projects which could seriously impact the environment.¹²⁶ In particular, the state’s Forest Service has been extensively criticized for its broad categorical exclusions.¹²⁷ Although at least one of these exclusions have been found to be

¹¹⁹ There are notable differences between the categorical exemptions in NEPA and CEQA. For example, NEPA’s categorical exemptions can be created by individual agencies while CEQA directly references the creation of categorical exemptions. Compare 40 C.F.R. § 1500.4 (2009) with CAL. PUB. RES. CODE § 21084(a) (2009).

¹²⁰ See 40 C.F.R. §§ 1500.4, 1508.4.

¹²¹ See *id.* § 1508.4. Under this provision, if “extraordinary circumstances” are present, the agency must complete additional analysis and documentation either through an environmental assessment or environmental impact statement.

¹²² The Bureau of Land Management (“BLM”) has interpreted the categorical exclusions Congress passed for oil and gas exploration and development activities as not being subject to the “extraordinary circumstances” analysis that limits the use of other categorical exemptions. See Young, *supra* note 66, at 42 (discussing BLM interpretation of Pub. L. No. 109-58, 119 Stat. 594 (2005)).

¹²³ See Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 615 (2006) (suggesting that projects which could have environmental impact could be exempt).

¹²⁴ See, e.g., §§ 6.203, 6.204 (not requiring notice for exemption decisions, and not requiring that all exemption decisions are recorded).

¹²⁵ See CHARLES H. ECCLESTON, *THE NEPA PLANNING PROCESS* 132 (John Wiley & Sons, Inc. 1999).

¹²⁶ See Young, *supra* note 66, at 40. (“in recent years, agencies have expanded the use of CEs beyond their intended purpose and have approved CEs for activities that raise serious concerns regarding the impact these actions will have on the environment”).

¹²⁷ See, e.g., Myron L. Scott, *Defining NEPA Out of Existence: Reflections on the Forest Service Experiment with “Case-by-Case” Categorical Exclusion*, 21 ENVTL. L. 807, 814 (1991); William Snape III & John M. Carter II, *Weakening the National Environmental Policy Act: How the Bush Administration Uses the Judicial System to Weaken Environmental Protections*, available at <http://www.mindfully.org/Heritage/2003/Bush-Weakening-NEPA2ma03.htm> (last visited Oct. 18, 2009). See also Young, *supra* note 66, at 40 (“[t]he use of a CE for the adoption or major revision of

an illegal interpretation of NEPA,¹²⁸ most of them are still effective.

Some states that have enacted requirements similar to CEQA and NEPA also have issues with notice for exemption decisions.¹²⁹ These states have exempted large proposals like alternative energy projects¹³⁰ and have ambiguous thresholds for determining whether projects are exempt.¹³¹ This has led to uncertain and unreliable results,¹³² which may not have correlate to the likelihood that a project will impact the environment.¹³³ Requiring public notice for these types of exemption decisions will address some of this uncertainty. A change to CEQA's notice requirements could provide a model for this next step.

E. Requiring Notice is the Easiest Way to Protect Against Erroneous Exemption Decisions

Another possible way to fix the problem of environmentally significant projects being exempted from CEQA is to eliminate controversial categorical exemptions.¹³⁴ While it is true some exemption categories need to be narrowed,¹³⁵ this piecemeal approach would likely take significant time and

a national forest management plan is improper"); Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312, 2314-15 (2004).

¹²⁸ See *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173, 1191 (D. Or. 2003).

¹²⁹ These state plans are typically called "State Environmental Policy Acts" (SEPA's). The number of states that have enacted SEPA's varies depending on the requirements in question. Compare Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 209 (1992) (stating that 28 states have enacted requirements similar to NEPA) with Selmi, *supra* note 70, at 951 (stating that 16 states, the District of Columbia, and Puerto Rico have "enacted some version of environmental impact reporting laws").

¹³⁰ See, e.g., 10 C.F.R. Pt. 1021(d), app. at C12 (2008) (including within its list of actions that ordinarily require EAs (need to establish what EA's and EIS's are before using short form), "but not necessarily EIS's," the "[s]iting, construction, and operation of energy system prototypes including, but not limited to, wind resource, hydropower, geothermal, fossil fuel, biomass, and solar energy pilot projects."); Tom Munteer & Jeff Allmon, *Environmental Review of Energy Projects Seeking Recovery Act Loan Guarantees*, 40 ENVTL. L. 1215, 1215 (2009) (describing that this exclusion could be used for a facility retrofit that changes facility from auto parts to solar cell manufacturer).

¹³¹ See, e.g., WASH. REV. STAT. § 43.21C.110(1)(a) (West 2009) ("The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment.").

¹³² See Thomas Schmid, *Defining "Significance": Balancing Procedural and Substantive Judicial Review of Negative Declarations Under the Minnesota Environmental Policy Act*, 10 MO. ENVTL. L. & POL'Y REV. 104, 110 (2003) ("Minnesota case law has produced inconsistent results and approaches to judicial review of an agency's issuance of a negative declaration.").

¹³³ See William H. Rodgers, Jr., *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 45 (1984) ("[o]ne is tempted to invoke sheer interest group politics as the most satisfactory explanation for the generous and sometimes implausible exemptions extended to a number of agencies").

¹³⁴ See Young, *supra* note 66, at 43.

¹³⁵ See *id.*; Moriarty, *supra* note 127, at 2340 (arguing that exemption categories under NEPA need to be narrowed).

resources, and is unlikely to eliminate the issue of overbroad application of exemptions. Requiring notice provides a much more efficient alternative.

In a challenge to the validity of a CEQA exemption, a court would determine whether an exemption is facially invalid under the statute.¹³⁶ To answer this inquiry, the court would evaluate whether the regulation is within the agency's authority,¹³⁷ considering that the Legislature passed CEQA to provide the fullest environmental protection possible.¹³⁸ To be considered improper, a CEQA exemption must apply to a category of projects that generally could significantly affect the environment.¹³⁹ This type of challenge would likely strike down some poorly drafted exemptions.¹⁴⁰ But, since CEQA exemptions are often written to encompass a wide-range of projects, it would be difficult to show that an exemption was aimed at a class of projects likely to significantly affect the environment.¹⁴¹

NEPA exemptions are generally more specific, and therefore potentially easier to strike down under this theory.¹⁴² However, establishing standing in these types of cases is incredibly difficult.¹⁴³ The U.S. Supreme Court recently examined procedural concerns related to NEPA exemptions in *Summers v. Earth Institute*.¹⁴⁴ In *Summers*, environmental groups challenged the lack of procedural requirements for NEPA categorical exemptions for fire-rehabilitation activities on areas less than 4,200 acres and salvage-timber sales of 250 acres or

¹³⁶ See, e.g., *Communities for a Better Env't v. Cal. Res. Agency*, 126 Cal. Rptr. 2d 441, 446 (Ct. App. 2002) (at issue was "whether the subject Guidelines, which public agencies must follow to implement CEQA, facially violate CEQA statutes and case law").

¹³⁷ See CAL. GOVT. CODE § 11342.2 (2009). This section provides that "[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." See also *Henning v. Div. of Occupational Safety & Health*, 268 Cal. Rptr. 476, 481 (Ct. App. 1990).

¹³⁸ *Communities for a Better Env't*, 126 Cal. Rptr. 2d at 449 (citing *Laurel Heights* and other cases) ("the 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language").

¹³⁹ See *id.* at 462-64 (finding that infill categorical exemption was valid because projects generally did not significantly affect the environment).

¹⁴⁰ Drafting issues occur within other exemptions. For example, one exemption from the definition of project problematically used the wrong disjunctive. When examining this, the court stated that "[t]his blanket exclusion cuts too broad a swath; in an Alice-In-Wonderland kind of way, it could arguably be stretched to encompass the very approval of the project. Even the proponent of this Guideline recognizes the impermissibly broad nature of this measure" *Id.* at 461.

¹⁴¹ See discussion *supra* Part II.A (discussing exemptions that could be interpreted too broadly).

¹⁴² See discussion *supra* Part II.D (discussing types of Forest Service categorical exemptions).

¹⁴³ See *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009) (finding that environmental groups lacked standing to challenge environmental regulations for procedural defect without an affidavit showing that the application of the regulations to specific projects threatened imminent and concrete harm to their members).

¹⁴⁴ See *id.* at 1151.

less.¹⁴⁵ This challenge failed on standing grounds, demonstrating that a legislative change to procedural requirements, especially for NEPA, may be easier to obtain than a judicially mandated change.

While a judicial approach could eliminate facially invalid exemptions,¹⁴⁶ it will not eliminate the problem of broad application of valid categorical exemptions.¹⁴⁷ Many exemptions will still contain ambiguous terms that can be interpreted too broadly.¹⁴⁸

Therefore additional notice is a better method for providing a check on the application of exemptions. Plus, as the Environmental Protection Agency (EPA) has recognized, “[m]eaningful public participation is based on the proposition that people should have a say in decisions which affect their lives in a significant way.”¹⁴⁹ To effectively accomplish this, the process must “[s]eek out and facilitate the involvement of those potentially affected.”¹⁵⁰ Additional notice would not only involve the community, it could also lead to better, more thoughtful decisions.¹⁵¹

III. PROPOSAL FOR NOTICE FOR CERTAIN EXEMPTION DECISIONS

This proposal to provide notice for certain exemption decisions includes three elements: definitions of which types of projects fall under the notice requirement, methods to ensure notice is accessible and understandable for communities, and requirements for the information contained in the notice. These three elements are necessary to ensure that adequate notice is provided to community members about projects that may concern them.

¹⁴⁵ *Id.* at 1142-43.

¹⁴⁶ To be invalid, an exemption would have to apply to a class of projects that generally significantly effects the environment. *See, e.g.,* Downey v. Crabtree, 100 F.3d 662, 666 (9th Cir. 1996) (regulations are evaluated under Chevron 2-step analysis). *See also* Communities for a Better Env't. v. Cal. Res. Agency, 126 Cal. Rptr. 2d 441, 446 (Ct. App. 2002) (at issue was “whether the subject Guidelines, which public agencies must follow to implement CEQA, facially violate CEQA statutes and case law”).

¹⁴⁷ CEQA exemptions are supposed to be narrowly interpreted. As one court noted: “a term [in an exemption] that does not have a clearly established meaning . . . should not be so broadly interpreted so to include a class of businesses that will not normally satisfy the statutory requirements for a categorical exemption.” *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, 1192-93 (Cal. Ct. App. 1997).

¹⁴⁸ *See* discussion *supra* Part II.A (many problems with CEQA exemptions are in the application of the exemptions).

¹⁴⁹ *See* U.S. ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES 55 (1998), available at http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf.

¹⁵⁰ *See id.* at 54.

¹⁵¹ *See* Young, *supra* note 66, at 40 (“Public input also offers the agency an opportunity to understand a community's values so it can better seek to avoid, minimize, or mitigate impacts from agency decisions”).

A. Notice Should be Required for Projects that Could Impact Communities

A community would receive notice of exempted projects that could impact the environment.¹⁵² Limiting notice requirements to potentially problematic projects makes sense because information about all exempted projects would inundate a community with futile information and would create a larger administrative burden than necessary.

Under California law, many projects can be potentially subject to CEQA. This includes projects that are unlikely to concern a local community such as educational or training programs requiring no physical changes.¹⁵³ CEQA exemptions, therefore, play an important role by preserving administrative resources for projects which could potentially harm the environment.¹⁵⁴ This goal, however, is not meant to sacrifice the ability of the public to participate in decisions that may negatively impact their environment.¹⁵⁵ To balance between a local community's need for notice of significant projects and preservation of administrative resources, the proposal for notice of exemption decisions should only include projects that could potentially increase pollution or have other environmental impacts.

The categories of projects that require notice will need to be clearly defined to minimize opposition. CEQA legislation that is perceived to lengthen, complicate, or introduce ambiguities into the process will also likely be challenged by the business community.¹⁵⁶ From a business perspective, uncertainties in regulatory requirements are often costly for businesses which value predictability.¹⁵⁷ There also may be a concern that increasing the breadth of the notice provisions will lead to more litigation.¹⁵⁸ These thresholds also need to be established in such a way that project designers cannot circumvent

¹⁵² See *id.* at 43 ("agencies should not apply a CE (spell out categorical exemption) without providing an opportunity for public comment if there is significant disagreement over whether the CE should apply").

¹⁵³ See CAL. CODE REGS. tit. 14, § 15322 (2009) (exempting the "adoption, alteration, or termination of educational or training programs which involve no physical alteration in the area affected").

¹⁵⁴ See generally Moriarty, *supra* note 127 (categorical exemptions are meant to preserve agency resources).

¹⁵⁵ See discussion *supra* Part II (discussing the importance of public participation under CEQA and NEPA).

¹⁵⁶ See Hon. Barry Goode, *A Legislative Approach to the Protection of Sacred Sites*, 10 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 169, 174 (2004) (noting that the business community typically challenges CEQA legislation that lengthens, complicates or introduces potentially contentious issues into the CEQA process).

¹⁵⁷ See John Watts, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 ECOLOGY L.Q. 213, 216 (1995) ("CEQA's primary burden on business is not the direct cost of EIRs . . . but instead the uncertainty that the statute engenders. Businesses often do not know how long EIR review will take . . .").

¹⁵⁸ See Selmi, *supra* note 70, at 955 ("there appears to be a relationship between the breadth of the SEPA's coverage and the amount of litigation that the SEPA generates").

the notice requirements.¹⁵⁹

Some areas already require notice for certain types of exemption decisions. In San Francisco, notice is required for exemption determinations involving “historical resources,” “any demolition of an existing structure,” historical resource restoration, and in-fill development projects.¹⁶⁰ This ordinance provides an example of how to define the categories of projects requiring additional notice.¹⁶¹

Here, the focus of additional notice requirements should be on the project’s use and creation of hazardous waste, air pollution, water discharges, traffic, and noise. Communities would receive notice of any exempted projects: (i) that increase hazardous materials usage or creation by more than a certain volume such as fifty gallons; (ii) increase air emissions by a certain amount (such as more than 50 pounds per year of all hazardous air pollutant); or (iii) increase water discharges or spill potential of hazardous materials to a local waterway.¹⁶²

Additionally, communities would be given notice of projects being done at industrial facilities or plants that are required to be capitalized.¹⁶³ Projects that are capitalized are material projects that generally increase productivity of a facility.¹⁶⁴ Industrial facilities like landfills and power plants are already more likely to impact the environment than other facilities due to the nature of their business.¹⁶⁵ At such facilities, there is often a direct link between increased productivity and increased pollution.¹⁶⁶ Thus, there is generally a correlation

¹⁵⁹ See Watts, *supra* note 157, at 245 (discussing how projects in states with thresholds are “frequently designed so as to just barely avoid the threshold for review.”).

¹⁶⁰ See S.F., CAL., ADMIN. CODE (2001) (providing that “[w]ritten determinations of categorical exemptions for these types of projects shall be posted in the offices of the Planning Department and shall be mailed to any individuals or organizations that have previously requested such notice in writing”).

¹⁶¹ See, e.g., *id.* (proposing that “[t]o determine if the application of a CE may be controversial [and public comment should be provided], an agency should examine the record of public input in previously proposed actions that were similar and analyze the extent of disagreement over possible environmental effects”).

¹⁶² The particular trigger values should depend on the type of industries in the area. For example, emitting one ton of mercury in the air will likely be seen as more harmful than emitting one ton of carbon monoxide.

¹⁶³ See, e.g., IRS.gov, Cost Segregation Audit Technique Guide – Chapter 6.1 Uniform Capitalization, available at <http://www.irs.gov/businesses/article/0,,id=134361,00.html> (last visited Nov. 11, 2009) (describing capitalization requirements).

¹⁶⁴ See, e.g., U.S. Env’tl. Prot. Agency, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, Emissions Factors & AP-42, <http://www.epa.gov/ttnchie1/ap42/> (last visited Oct. 18, 2009) (many emissions factors are directly tied to production).

¹⁶⁵ This was recognized by the *Azusa* court which found that the definition of facilities in categorical exemptions should not extend to class of businesses that normally would have a significant effect on the environment. See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, 1192-93 (Ct. App. 1997).

¹⁶⁶ See, e.g., TheFreeDictionary.com, <http://legal-dictionary.thefreedictionary.com/Capital+expenditures> (last visited Nov. 13, 2009) (capitalization linked to increases in production); U.S. Env’tl. Prot. Agency, *supra* note 164 (many emissions factors

between the capitalization of a project and the increased potential environmental impact to the community.¹⁶⁷

In addition to providing pollution-based and cost-based thresholds, certain communities may also be concerned with projects that impact natural resources. To accommodate these and other concerns, the categories of exempted projects requiring additional notice should be publicly available, preferably on each agency's website. Then, the public would have an opportunity to petition the agency to require notice for other types of projects since different communities have different priorities. After all, local community members have the best knowledge of what impacts concern them.¹⁶⁸ Thus, communities should be provided an opportunity to designate the types of projects they want notice of to address their specific concerns.

This narrowly tailored proposal, which requires notice for only potentially harmful projects, has a greater likelihood of being enacting that a broad notice requirement. As demonstrated by the California Legislature's recent actions, the focus of current legislation has been on streamlining the CEQA process, not increasing the requirements.¹⁶⁹ This focus is partly a result of the budget shortfall and other resource related concerns.¹⁷⁰ Therefore, legislation that achieves a balance between protecting the community and not making CEQA implementation too onerous will be better received.¹⁷¹

B. Notices Should be Accessible and Requirements Should be Easy to Implement

A limited requirement for additional notice could accommodate the concerns of overbroad application of the exemptions while alleviating the concerns of additional administrative burdens.¹⁷² The notice provisions need to achieve a balance between predictability and comprehensiveness.¹⁷³

The internet can facilitate administration of many of these new notice requirements. Initially, interested community members register over the internet for notice of exempted projects in the specific neighborhoods that they are

are directly tied to production).

¹⁶⁷ *Id.*

¹⁶⁸ See discussion *supra* Part II.C (describing why involvement of the local community is beneficial to decision-making).

¹⁶⁹ See, e.g., S.B. 375, 2008 Leg. Sess. (Cal. 2008) (focused on streamlining CEQA considerations).

¹⁷⁰ See, e.g., Judy Lin, *Deal Reached to Close California's \$26 Billion Budget Deficit*, ASSOCIATED PRESS (July 20, 2009).

¹⁷¹ See ECCLESTON, *supra* note 125, at 132 (describing criticisms of having more procedural requirements).

¹⁷² See ECCLESTON, *supra* note 125, at 132 (advocating additional procedural requirements for some controversial exemption decisions).

¹⁷³ See Selmi, *supra* note 70, at 962 (stating that predictability and comprehensiveness "clash on the issue of crafting the appropriate threshold").

interested in.¹⁷⁴ The local agency maintains this list electronically. Then, when an exempted project falls under the notice requirements, the notice is automatically sent via e-mail to the list of interested parties. The agency also posts a reference on its website so interested individuals not on the mailing list also have access to the notice information. This electronic process is similar to notices currently given by other California agencies, which work well in practice.¹⁷⁵ This process is also consistent with the encouragement agencies are given to post things on the internet.¹⁷⁶ In addition to the electronic notice, the notice requirements will include a process by which interested community members can receive notice by mail, in different languages and view posted information in the community.¹⁷⁷

C. Notice Should Describe the Project and Related Environmental Information

The notice under this proposal does not have to be as detailed as a negative declaration or an environmental impact report, but it needs to be understandable to the public.¹⁷⁸ Some of the exemption notices provided by federal agencies put as much administrative burden on an agency as a full assessment.¹⁷⁹ Similarly, some critics think notice requirements defeat the purpose of having exemptions, which are supposed to require less paperwork.¹⁸⁰ This proposal, however, requires much less paperwork than either a negative declaration or an environmental impact report.

Nevertheless, an exemption notice will be required to clearly define the project. In particular, an exemption notice should demonstrate that the agency considered the entire project. A project includes the “whole of an action” that may result in either a direct or reasonably foreseeable indirect change in the environment.¹⁸¹ The public should be assured that the agency did not divide a

¹⁷⁴ This could be organized by particular zip codes.

¹⁷⁵ See, e.g., California Energy Commission, Hot Topics, <http://www.energy.ca.gov> (last visited Oct. 18, 2009) (providing notice to interested community members for each project that is evaluated).

¹⁷⁶ See, e.g., S.F., CAL. ADMIN CODE § 67.29-2 (1999) (encouraging agencies to make as much information as possible available on the internet).

¹⁷⁷ See *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 Env'tl. L. Rep. 20,357, 366,045 (Cal. App. Dep't Super. Ct. 1991) (finding that lack of translation precluded meaningful public involvement under CEQA for community where 95% of the residents are Latino).

¹⁷⁸ Documents that are not easy to understand have presented problems. See David S. Mattern, *Reader-Friendly Environmental Documents: Opportunity or Oxymoron?*, 39 ENVTL. LAW. RPTR. 10,624, 10,624 (2009) (“[t]he public, agencies, and NEPA practitioners agree that most documents are difficult to understand and hard to use”).

¹⁷⁹ See Moriarty, *supra* note 127, at 2325.

¹⁸⁰ ECCLESTON, *supra* note 125, at 132.

¹⁸¹ See CAL. CODE REGS. tit. 14, § 15378(a) (2009). See also *id.* § 15062(a) (an entire project needs to be considered).

project into smaller projects to avoid environmental review.¹⁸²

In addition, an exemption notice needs to describe generally the potential air, water, and hazardous waste impacts, and why notice is required by the proposed notice requirement. Finally, the notice should give clear information related to the location of the projects and information as to how decisions can be appealed. Some of this information could be filled out on a standard exemption form generated by the agency. Requiring this basic information for the notice is necessary to enable community members to review whether or not there is an issue with the application of the exemption.

CONCLUSION

Agencies are currently not required to give notice of decision to exempt projects from CEQA. The dearth of requirements means that exemption decisions are currently largely unchecked and communities have no way to ensure that significant projects undergo environmental review. To remedy this problem, CEQA exemption decisions that apply to projects that could potentially increase pollution over a certain threshold, are capitalized at industrial facilities, or cause other environmental impacts should have notice requirements. These additional notice requirements will fill CEQA's notice requirement gap by providing a check on potentially erroneous decisions and allowing greater public participation in decision-making.

¹⁸² See, e.g., *McQueen v. Bd. of Directors of Mid-Peninsula Reg'l Open Space Dist.*, 202 Cal. App. 3d 1136, 1144 (Ct. App. 1988) (finding that the agency had too narrowly defined the project); *Orinda Ass'n v. Bd. of Supervisors*, 182 Cal. App. 3d 1145, 1171-72 (Ct. App. 1986).