

ENVIRONMENTAL PRACTICE FORUM: “TIERING” VS “WITHIN THE SCOPE”

PRESENTED BY:

CORI RESHA

NOVEMBER 22, 2016

CEQA STREAMLINING PROVISIONS

- ▶ Public Resources Section (PRC) Section 21093
 - EIRs shall be tiered whenever feasible
 - Benefits of tiering:
 - Avoids repetitive discussions in successive documents
 - Helps lead agency focus on issues ripe for discussion at each level of environmental review

- ▶ PRC Section 21094
 - Tiering applies to later projects that are consistent with the program, plan, policy, or ordinance for which an EIR was prepared and

CEQA STREAMLINING PROVISIONS

▶ Guidelines Section 15152 – Tiering

- ““Tiering” refers to using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and negative declarations on narrower projects; ... ; and concentrating the later EIR or negative declaration solely on the issues specific to the later project.”
- Various types of EIRs that may be used include, but are not limited to, general plan EIR, program EIR, master EIR.

CEQA STREAMLINING PROVISIONS

▶ Guidelines Section 15168 – Program EIR

- A program EIR is an EIR prepared on a series of related actions that can be characterized as one large project
- Later activities must be evaluated in the light of the program EIR to determine whether an additional environmental document must be prepared
- No new CEQA document required, except as Sections 15162-15164 apply (pursuant to PRC Section 21166)

- An activity may be “within the scope” of the program EIR; no new

TERMINOLOGY

- ▶ Tiering – “**capital-T Tiering**” – regulatory term, as in 15152 (avoid use of plain meaning of tiering, “small t”)
- ▶ Finding a later project to be within the scope of the program EIR – cites to 15168
- ▶ So what’s the difference?
 - Utility of Tiering (be precise!) was limited by the *CBE* case (2002)
 - Later projects within the scope of a program EIR
 - No new CEQA document required, except as Sections 15162-15164 apply (pursuant to PRC Section 21166)
 - Checklist should be used to document determination
 - Feasible mitigation measures must be incorporated into

CASE LAW

- ▶ *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 89 (“CBE”)
 - Invalidated a section of 15152 that identified when a first-tier document had adequately addressed an impact such that the agency did not need to revisit the impact in the second-tier document.
 - Court directed that a statement of overriding considerations needed to be adopted again for each later project when tiering under Section 15152.

CASE LAW

- ▶ *Friends of the College of San Mateo v. San Mateo County* (2016) 1 Cal.5th 937 (“*San Mateo*”)
 - Confirmed streamlining opportunity provided by a program EIR when the later activity is within the scope of the project covered by the program EIR.
 - If a later project is not within the scope of the program EIR project, it is not reviewed under Section 21166’s deferential standard of review, but is vulnerable to the fair argument standard.

EXAMPLES

- ▶ Ascent Memo to Metropolitan Water District
 - Provides client guidance regarding CEQA review for later projects under MWD's program EIR
 - Provides discussion of legal vulnerabilities of using Section 15152, and greater defensibility of using Section 15168.
 - [P:\2013\13010043.01 - MWD - On-Call Environmental\4_Deliverables in progress\On-Call Environmental Review Memos\Post-PEIR Analysis\MWD_Post-PEIR Guidance Memo_10.20.16.docx](#)

EXAMPLES

► University of California

- Section 2.1.4 of the UC CEQA Handbook includes guidance for using program EIRs
 - “If the proposed project may have one or more new significant effects that were not considered in a Program EIR, or which may be substantially worse than identified in a Program EIR, but some impacts were adequately analyzed, a Tiered EIR should be prepared, as described in *CEQA Guidelines Section 15152(f)*.”
- Section 2.8 includes detailed guidance for later documents
 - Generally refers to both 15152 and 15168, but provides specific guidance from 15152
 - http://www.ucop.edu/ceqa-handbook/chapter_02/2.8.html

EXAMPLES

- ▶ UC Davis routinely tiers EIRs and MNDs from their 2003 Long Range Development Plan EIR
 - “[T]his 2003 LRDP EIR is a First Tier/Program EIR that evaluates the effects of the entire LRDP at a program level.”
 - “[S]ubsequent projects should be examined in light of the Program EIR to determine whether additional environmental documentation must be prepared.”
 - “The subsequent documents may also rely on the Program EIR, as appropriate, for general discussions and for the analysis and cumulative impacts, but would be tiered to allow the subsequent documents to focus on more project- and site-specific impacts.”
 - http://sustainability.ucdavis.edu/progress/commitment/environmental_review/lrdp_eir.html

EXAMPLES

▶ UC Davis

- Later project documents:
 - http://sustainability.ucdavis.edu/progress/commitment/environmental_review/current_projects.html
 - King Hall Renovation and Expansion – IS/MND
 - Cited to 15152 and 15168
 - http://sustainability.ucdavis.edu/local_resources/docs/onlinedocs/kinghall/kinghall_is_nd.pdf
 - Veterinary Medicine 3B – Focused EIR
 - Cited to 15152 and 15168
 - http://sustainability.ucdavis.edu/local_resources/docs/onlinedocs/vetmed_3b/vm3bdeir.pdf

EXAMPLES

▶ City of Rancho Cordova

- General Plan EIR certified in June 2009
 - Many CEQA documents rely on the program EIR under 15168
 - Target –IS/MND
<http://www.cityofranhocordova.org/home/showdocument?id=1400>
 - American Family Entertainment Center – IS/MND
<http://www.cityofranhocordova.org/home/showdocument?id=8741>

▶ Los Angeles Unified School District

- Program EIR for the School Upgrade Program certified in November 2015
 - Panama Street K-8 Charter School IS/MND cites to 15152 and 15168 -
http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/domain/135/pdf%20files/OCS_MND-Initial_Study.pdf

PRACTICE POINTERS

- ▶ If dealing with a later activity after a Program EIR, use 15168
- ▶ Incorporate the program EIR by reference, and be sure to identify where the program EIR can be reviewed
- ▶ Be precise with terminology – do not use the “t” word unless you are referring to the Section 15152 process
- ▶ Summarize the program EIR conclusions and mitigations in later documents

THANK YOU!