BOARD OF FORESTRY AND FIRE PROTECTION
P.O. Box 944246
SACRAMENTO, CA 94244-2460
(916) 653-8007
Website: www.bof.fire.ca.gov

ANSWERS TO FREQUENTLY ASKED QUESTIONS RELATING TO THE PROGRAM EIR FOR THE CALIFORNIA VEGETATION TREATMENT PROGRAM[1]

Question # 1: What is the CalVTP and how will it be implemented?

Answer: Approved by the California Board of Forestry and Fire Protection (Board) on December 30, 2019, the California Vegetation Treatment Program (CalVTP) is a statewide program by which public agencies, including the California Department of Forestry and Fire Protection (CAL FIRE), through a series of individual projects, will undertake to perform vegetation treatment activities for the purposes of wildfire prevention. These individual projects will occur throughout those portions of the State Responsibility Area (SRA)[2] that make up the "*treatable landscape*."

"Vegetation treatment" consists of a variety of activities intended to strategically modify portions of the landscape in order to reduce losses from, and improve resiliency to, wildfire. Examples include prescribed burning, mechanical treatment, manual treatment, prescribed herbivory, and the use of herbicides. The treatable landscape includes approximately 20.3 million acres within the 31 million-acre SRA.[3]

Efforts by public agencies, including CAL FIRE, will contribute to the achievement of the ambitious statewide goal of annually treating vegetation on as many as 500,000 acres of non-federal lands, consistent with Executive Order (EO) B-52-18,

[1] This document should not be understood to constitute legal advice from the Board of Forestry and Fire Protection to recipients and readers of the document. Rather, the document is only intended to provide general legal guidance, which should be supplemented by specific legal advice from attorneys for agencies interested in using the Cal VTP Final Program EIR (FPEIR) in undertaking their own vegetation treatment projects. An Appendix to this document contains a far more detailed set of answers written for attorneys. Even that Appendix, however, is not intended to constitute legal advice, but rather is intended to educate and guide attorneys as they formulate their own legal advice for their clients.

[2] The SRA consists of the areas within California in which the State has the primary financial responsibility for preventing and suppressing wildfires.

[3] Figure 2-1 on page 2-5 of the FPEIR is a graphic showing the treatable landscape.

signed in May 2018 by former Governor Jerry Brown. While CAL FIRE is expected to undertake a significant number of vegetation treatment activities through the CalVTP, public agencies other than CAL FIRE will also help achieve this larger statewide goal by undertaking their own individual vegetation treatment projects.

Question # 2: How will projects implementing the CalVTP achieve compliance with environmental review requirements?

Answer: On the same date on which the Board approved the CalVTP, the Board also certified a related Final Program Environmental Impact Report (FPEIR) prepared pursuant to the California Environmental Quality Act (CEQA).[4] The FPEIR can be used by public agencies undertaking vegetation treatment within the SRA treatable landscape. The FPEIR includes a long list of such agencies, which include, but are not limited to, state agencies such as the CAL FIRE, California Department of Fish and Wildlife and the California Department of Parks and Recreation, cities, counties, water and irrigation districts, conservation districts, park and open space districts, conservation agencies, community service districts, utility districts, flood control districts, water agencies, transportation authorities, cemetery districts, and airport districts.[5] This list is not exclusive, however.

As a *Program EIR*, the FPEIR is intended to provide broad CEQA coverage for individual projects consistent with the analysis and mitigation strategies set forth in the document. Depending on their circumstances, the agencies undertaking such projects may be able to proceed without any additional formal environmental review beyond the FPEIR itself. These agencies may be able to rely solely on the FPEIR if they (i) complete project-specific analyses (PSAs) showing that their projects' impacts are all covered by the FPEIR and (ii) commit to carry out all of the applicable "standard project requirements" (SPRs) and mitigation requirements set forth in the FPEIR.

Even where such sole reliance on the FPEIR is not possible, agencies carrying out individual treatment projects may still be able to build on the analysis, SPRs, and mitigation found in the FPEIR in preparing their own project-specific negative declarations (NDs), mitigated negative declarations (MNDs), or EIRs. Furthermore, the proponents of other projects, such as those occurring partly within but partly outside of the SRA treatable landscape, may achieve a different kind of CEQA streamlining by

[4] See https://bof.fire.ca.gov/projects-and-programs/calvtp/peir-certification/

[5] See FPEIR, pp. 1-16 – 1-18.

incorporating by reference relevant portions of the analysis from the FPEIR into the acting agencies' own project-specific CEQA documents. Under this last set of circumstances, information from the FPEIR will assist the agencies in identifying environmental information pertinent to their independent CEQA analyses.

Question # 3: Does the CEQA lawsuit challenging the CalVTP preclude agencies from relying on the FPEIR to prepare PSAs or to prepare site-specific NDs, MNDs, or EIRs in reliance on the FPEIR?

***Answer*:** The Cal VTP Program EIR is currently subject to pending CEQA litigation filed in San Diego Superior Court in early 2020 by two environmental organizations. (See California Chaparral Institute and the Endangered Habitats League v. California State Board of Forestry and Fire Protection and California Department of Forestry and Fire Protection. [San Diego County Superior Court No. 37-2020-00005203-CU-TT-CTL].) The Board took great care to ensure that the FPEIR is as legally defensible as possible by hiring an industry-leading environmental consulting firm to prepare the document and by retaining respected outside CEQA counsel to work closely with that consulting firm. The Board is therefore confident that it will ultimately prevail in the pending litigation. Even so, the Board recognizes that litigation is inherently uncertain, and that it is impossible to predict litigation outcomes with total certainty.

Importantly, the mere filing of CEQA litigation over an EIR does not render an approved project inoperative. In general, projects approved after the certification of a final EIR may proceed towards implementation despite pending litigation unless and until either a court enjoins the project or the highest court to address the merits of the litigation finds the final EIR to be legally defective. The petitioners in the above-referenced litigation have not sought any injunctive relief against the Board, which is treating the FPEIR as operative, as are local and state agencies that are currently relying upon the FPEIR for subsequent projects.

Notably, moreover, CEQA actually *requires* that agencies that could use the FPEIR to treat the document being legally adequate unless and until the highest court to review the document finds it inadequate. If the San Diego Superior Court or Court of Appeal were to impose an injunction or stay against the Board with respect to the FPEIR (which has not happened and is not anticipated), any approval by another agency of a vegetation treatment project based on the FPEIR would be only conditional, and would only spring to life if and when the FPEIR were determined to be adequate. In the absence of any such injunctive relief, agencies may approve treatment projects without any conditionality. Such approvals would be effective immediately. The agencies would be proceeding at their own risk, however, in that an ultimate determination that the FPEIR is

inadequate could possibly create problems with the project approval. These potential problems are discussed below.

Question # 4: What would happen to a vegetation treatment project approved based on a Project Specific Analysis based on the FPEIR if the final court to review the FPEIR ultimately concludes that the FPEIR does not comply with CEQA?

Question # 5: Would the individual project approval automatically be considered invalid?

Question # 6: What would happen if the treatment project was being implemented or had already been completed before the issuance of a final judicial determination on the FPEIR?

***Answers to Questions # 4, 5, and 6*:** If, at the end of the pending litigation over the FPEIR, a court were to find one or more legal defects in the document, the court would have to fashion a remedy pursuant to CEQA. What that remedy would entail, however, would be a function of the nature of the problems identified with the FPEIR.

CEQA remedies can take many forms. Particularly where courts find multiple flaws in EIRs, the courts frequently order respondent agencies to set aside their decisions in whole. In such situations, all project approvals must be vacated. In other instances, though, and particularly where the flaws in an EIR are very limited, courts can allow one or more project approvals to stand while suspending other "project activities." Finally, in extraordinary circumstances, a court may exercise its inherent power to preserve the status quo and leave all project approval intact despite a court's inability to make the "severance findings" normally required by CEQA.

In short, it is impossible to predict the kind and extent of the remedy that might be imposed should the ultimate court reviewing the Board's FPEIR find that the document does not fully comply with CEQA. The range of possibilities includes (i) full invalidation of all of the Board's VTP- and CEQA-related approvals, (ii) invalidation of only a portion of the Board's EIR certification resolution combined with a prospective suspension of physical activities reliant on the FPEIR, and (iii) leaving the approvals in place under the court's inherent power to preserve the status quo in light of the overriding importance of vegetation management in the current era of catastrophic wildfires.

A key question for agencies considering vegetation treatment activities within the SRA treatable landscape is whether, in light of the uncertainty regarding any remedy that might ultimately be imposed in the pending litigation over the PFEIR, the agencies feel comfortable preparing a PSA or in otherwise directly relying on the FPEIR for some

impact analysis while supplementing such analysis with additional site-specific analysis in a project-specific ND, MND, or EIR.

In this context, it is important to note that no reported CEQA precedent has ever held that, where a lead agency's program EIR is held to be invalid, all subsequent approvals by other agencies based on the program EIR automatically self-destruct by operation of law. Thus, it appears that, if an agency completes a PSA, approves a vegetation project at a point in time when the FPEIR is still presumed to be legally adequate, and survives the CEQA statute of limitations without any legal challenge, the agency's project-specific approval should remain intact, even if the FPEIR is subsequently found to be deficient.

Another factor for agencies contemplating the use of the FPEIR to consider is the possibility that, after an approved vegetation treatment project is fully implemented, any legal challenge to the project may become moot. The courts have sometimes found that "a project's completion" or the "substantial completion" of a project "moots requests to set aside or rescind resolutions authorizing the project."

In light of all of the legal and factual factors discussed above, agencies contemplating vegetation treatment projects must make up their own minds regarding whether to prepare PSAs or otherwise directly rely on the FPEIR while litigation against the FPEIR remains pending. In doing so, the Board strongly suggests that such agencies consult their own legal counsel.

Question # 7: Does the pending litigation over the FPEIR create legal risks for agencies that, instead of choosing to prepare a PSA or to directly rely on the FPEIR for some impact analyses in their project-specific NDs, MNDs, or EIRs, choose instead rely on the FPEIR only to the extent of incorporating by reference some of the information in the FPEIR?

Question # 8: If the FPEIR were to be finally adjudged to be legally inadequate, would the fact that a stand-alone ND, MND, or EIR for a treatment project incorporated FPEIR material make the stand-alone document invalid as well?

Answers to Questions #7 and 8: Agencies contemplating vegetation treatment projects have the option of incorporating information from the FPEIR by reference. Indeed, the FPEIR could be a very useful background document for such agencies. Such a use of the FPEIR would be "most appropriate for … long, descriptive, or technical materials that provide general background but do not contribute directly to the analysis at hand." The FPEIR includes a huge amount of such potentially useful information. Any agency

choosing to incorporate such information, however, should be sure to follow the applicable rules in the CEQA Guidelines. These rules require making the FPEIR available for inspection, noting its state identification number, and explaining the incorporated material in a way that adequately summarizes the information for the reader.

In the Board's view, the use of information incorporated from the FPEIR should not subject the incorporating agency to any legal peril, despite the pending litigation over the FPEIR. Rather, the incorporated information would just constitute "substantial evidence" supporting the background technical discussions within otherwise wholly independent stand-alone NDs, MNDs, or EIRs. It is very unlikely that any successful legal challenge to the FPEIR would involve a court's denigration of the background scientific and technical information included within the FPEIR.

APPENDIX:
DETAILED ANSWERS TO FREQUENTLY ASKED QUESTIONS RELATING TO THE PROGRAM EIR FOR THE CALIFORNIA VEGETATION TREATMENT PROGRAM[6]

Question # 1: What is the CalVTP and how will it be implemented?

Answer: Approved by the California Board of Forestry and Fire Protection (Board) on December 30, 2019, the California Vegetation Treatment Program (CalVTP) is a statewide program by which public agencies, including the California Department of Forestry and Fire Protection (CAL FIRE), through a series of individual projects, will undertake to perform vegetation treatment activities for the purposes of wildfire prevention. These individual projects will occur throughout those portions of the State Responsibility Area (SRA)[7] that make up the "*treatable landscape*." Public agency efforts will contribute to the achievement of the ambitious statewide goal of annually treating vegetation on as many as 500,000 acres of non-federal lands, consistent with Executive Order (EO) B-52-18, signed in May 2018 by former Governor Jerry Brown. While CAL FIRE is expected to undertake a significant number of vegetation treatment activities through the CalVTP, public agencies other than CAL FIRE will also help achieve this larger statewide goal by undertaking their own individual vegetation treatment projects.

"Vegetation treatment" consists of a variety of activities intended to strategically modify portions of the landscape in order to reduce losses from, and improve resiliency to, wildfire. Examples include the following: (i) *prescribed burning*, including both (a) "broadcast burning" to reduce fuels or to restore fire resiliency in target fire-adapted plant communities and (b) "pile burning" of vegetative materials placed in piles after initial vegetation treatment through means other than burning; (ii) *mechanical treatment* involving the use of motorized equipment to cut, uproot, crush/compact, or chop existing vegetation; (iii) *manual treatment* involving the use of hand tools and hand-operated power tools to cut, clear, or prune herbaceous or woody species; (iv) *prescribed*

[6] Despite the numerous citations to legal authority and the length of the legal analysis found herein, this document should not be understood to constitute legal advice from the Board of Forestry and Fire Protection to recipients and readers of the document. Rather, though written for attorneys, this Appendix is only intended to assist recipient attorneys as they formulate their own legal advice for their clients.

[7] The SRA consists of the areas within California in which the State has the primary financial responsibility for preventing and suppressing wildfires.

herbivory involving the use of domestic livestock to reduce target plant populations; and (v) the application of *herbicides* designed to inhibit growth of target plant species.

Question # 2: How will projects implementing the CalVTP achieve compliance with environmental review requirements?

Answer: On the same date on which the Board approved the CalVTP, the Board also certified a related Final Program Environmental Impact Report (FPEIR).[8] Prepared pursuant to the California Environmental Quality Act (CEQA),[9] the FPEIR comprehensively addresses the anticipated environmental effects of vegetation treatment activities that might be conducted anywhere within the SRA "treatable landscape." This treatable landscape includes approximately 20.3 million acres within the 31 million-acre SRA.[10] The FPEIR can be used by public agencies undertaking vegetation treatment within the SRA treatable landscape.

Because of the pressing statewide need to undertake vegetation treatment rapidly in the face of an ongoing and worsening wildfires driven by climate change and other factors, the Board, acting as a CEQA lead agency,[11] prepared the FPEIR with the goal of providing streamlined CEQA review for public agencies considering vegetation treatment activities within the treatable landscape. Such other agencies include, but are not limited to, state agencies such as CAL FIRE, the California Department of Fish and Wildlife and the California Department of Parks and Recreation, cities, counties, water and irrigation districts, conservation districts, park and open space districts, conservation agencies, community service districts, utility districts, flood control districts, water agencies, transportation authorities, cemetery districts, and airport districts. The FPEIR includes a long list of such "responsible agencies"[12] that could use the document in order to

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[8] See https://bof.fire.ca.gov/projects-and-programs/calvtp/peir-certification/

[9] See Pub. Resources Code, § 21000 et seq.; see also Cal. Code Regs., tit. 14, § 15000 et seq. (CEQA Guidelines).

[10] Figure 2-1 on page 2-5 of the FPEIR is a graphic showing the treatable landscape.

[11] "'Lead agency' means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." (Pub. Resources Code, § 21067.)

[12] "'Responsible agency" means a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." (Pub. Resources Code, § 21069.)

implement treatment projects consistent with the CalVTP.[13] This list is not exclusive, however. Given the size and breadth of California and the hundreds of agencies around the State, the Board could not, as a practical matter, identify each and every agency that owned or controlled property within the treatable landscape.

As a *Program EIR*,[14] the FPEIR is intended to provide broad CEQA coverage for individual projects consistent with the analysis and mitigation strategies set forth in the document. Depending on their circumstances, the agencies undertaking such projects may be able to proceed without any additional formal environmental review beyond the FPEIR itself. These agencies may be able to rely solely on the FPEIR if they (i) complete project-specific analyses (PSAs) showing that their projects' impacts are all covered by the FPEIR and (ii) commit to carry out all of the applicable "standard project requirements" (SPRs) and mitigation requirements set forth in the FPEIR. Even where such sole reliance on the FPEIR is not possible, agencies carrying out individual treatment projects may still be able to build on the analysis, SPRs, and mitigation found in the FPEIR in preparing their own project-specific negative declarations (NDs),[15] mitigated negative declarations (MNDs),[16] or EIRs. Furthermore, the proponents of other projects, such as those occurring partly within but partly outside of the SRA treatable landscape, may achieve a different kind of CEQA streamlining by incorporating by reference relevant portions of the analysis from the FPEIR into the acting agencies' own project-specific CEQA documents.[17] Under this last set of circumstances, information from the FPEIR will assist the agencies in identifying environmental information

[13] See FPEIR, pp. 1-16 – 1-18.

[14] See CEQA Guidelines, § 15168.

[15] "'Negative declaration' means a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." (Pub. Resources Code, § 21064.)

[16] "'Mitigated negative declaration' means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (Pub. Resources Code, § 21064.5)

[17] See CEQA Guidelines, § 15150.

pertinent to their independent CEQA analyses. More details on all of these options are provided immediately below.

Appendix PD-3 of the FPEIR is a template and checklist for the preparation of PSAs that agencies conducting vegetation treatment projects within the SRA treatable landscape can use to determine whether their proposals are "*within the scope*" of the overall program addressed in the FPEIR. Such a determination is authorized by the CEQA Guidelines under appropriate circumstances. "Whether a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record. Factors that an agency may consider in making that determination include, but are not limited to, consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and covered infrastructure, as described in the program EIR."[18]

Where an agency pursuing a vegetation treatment project within the SRA treatable landscape is able, through the preparation of a PSA, to determine that the analysis, mitigation measures, and SPRs within the FPEIR adequately address the environmental effects of the proposed project, "the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required."[19] Notably, the courts have upheld the preparation and use of program EIRs for precisely this purpose: to allow for implementation of individual projects within the program without the need for additional site-specific CEQA documents such as NDs, MNDs, or EIRs.[20]

Where the proponent of an individual project within the treatable landscape cannot make a "within the scope finding," the proponent's individual CEQA document can use the FPEIR to focus the new analysis "to permit discussion solely of new effects which had not been considered before."[21] Where any new impacts would clearly be less than

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[18] CEQA Guidelines, § 15168, subd. (c)(2).

[19] *Ibid.*

[20] See, e.g., *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 234-240 (court upholds program EIR for fish stocking and fish hatchery programs: "[g]iven the nature and statewide scope of the project and the consistency of its impacts across the state, the analysis is adequate to serve as a program EIR that also operates as a project EIR").

[21] CEQA Guidelines, § 15168, subd. (d)(3).

significant even without mitigation, an ND would be appropriate. Where a proposal would involve new potentially significant effects or a substantial increase in the severity of a significant effect identified in the FPEIR, an MND would be available if mitigation measures accepted by the proponent would clearly mitigate such impacts to less than significant levels. If a new or substantially more severe significant effect could not be clearly mitigated to less than significant, an EIR would be prepared that would focus on the new or substantially more severe significant impact(s).

Question # 3: Does the CEQA lawsuit challenging the CalVTP preclude agencies from relying on the FPEIR to prepare PSAs or to prepare site-specific NDs, MNDs, or EIRs in reliance on the FPEIR?

***Answer*:** The Cal VTP Program EIR is currently subject to pending CEQA litigation filed in San Diego Superior Court in early 2020 by two environmental organizations. (See California Chaparral Institute and the Endangered Habitats League v. California State Board of Forestry and Fire Protection and California Department of Forestry and Fire Protection. [San Diego County Superior Court No. 37-2020-00005203-CU-TT-CTL].) The Board took great care to ensure that the FPEIR is as legally defensible as possible by hiring an industry-leading environmental consulting firm to prepare the document and by retaining respected outside CEQA counsel to work closely with that consulting firm. The Board is therefore confident that it will ultimately prevail in the pending litigation. Even so, the Board recognizes that litigation is inherently uncertain, and that it is impossible to predict litigation outcomes with total certainty. The Board therefore brings to the attention of agencies considering vegetation treatment projects the statutory provisions and legal principles discussed below.

The mere filing of CEQA litigation over an EIR does not render an approved project inoperative. In general, projects approved after the certification of a final EIR may proceed towards implementation despite pending litigation unless and until either a court enjoins the project or the highest court to address the merits of the litigation finds the final EIR to be legally defective. The petitioners in the above-referenced litigation have not sought any injunctive relief against the Board, which is treating the FPEIR as operative, as are local and state agencies that are currently relying upon the FPEIR for subsequent projects.

Notably, CEQA includes a specific statute instructing responsible agencies to treat EIRs and negative declarations as legally adequate even while such documents are subject to pending legal challenges against lead agencies. As summarized in the CEQA

Guidelines, the operative CEQA statute[22] provides that "[a] final EIR prepared by a Lead Agency … *shall be conclusively presumed to comply with CEQA* for purposes of use by Responsible Agencies … unless one of the following conditions occurs: (a) The EIR … is finally adjudged in a legal proceeding not to comply with the requirements of CEQA, or (b) A subsequent EIR is made necessary by Section 15162 of these Guidelines." [23] In this context, "finally adjudged" means adjudged by the last court to consider the EIR, which would normally be either a California Court of Appeal or the California Supreme Court. Sometimes, of course, a superior court might issue a judgment requiring an agency to set aside its EIR without the agency appealing. Under this scenario, the superior court judgment would be the last word on the subject.

The operative CEQA statute addresses two different scenarios: one in which no injunctive relief is imposed on the lead agency; and another in which an injunction or stay has been imposed. In the first situation, the responsible agency *shall* treat the EIR as being legally adequate and shall take action on the project (i.e., approve or deny it) subject to any statutory timetable.[24] The recipient of the approval may then proceed at its own risk pending completion of the CEQA litigation against the lead agency.[25] Under the second situation, the responsible agency shall also assume that the lead agency's EIR complies with CEQA, but may only issue a "conditional approval" that will not take legal effect unless and until there is a final judicial determination that the EIR is adequate.[26]

In short, the pendency of CEQA litigation over the Cal VTP FPEIR does not preclude either the Board or other public agencies from relying on the document. Indeed, CEQA actually *requires* that such agencies treat the FPEIR as being legally adequate unless and until the highest court to review the document finds it inadequate. If the San

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[22] Pub. Resources Code, § 21167.3.

[23] CEQA Guidelines, § 15231 (italics added).

[24] The statute specifically references the Permit Streamlining Act (PSA) (Gov. Code, § 65950 et seq.), which requires that certain kinds of private development projects be considered within particular time frames. (See *Landi v. County of Monterey* (1983) 139 Cal.App.3d 934, 935-937 [the PSA applies only to projects requiring quasi-adjudicatory approvals from agencies, and not to projects requiring quasi-legislative approvals].) Case law is clear, though, that the requirement that responsible agencies treat lead agencies' EIRs as adequate despite pending CEQA litigation applies generally to all CEQA projects and not just to "development projects" subject to the PSA. (*City of Redding v. Shasta County Local Agency Formation Com.* (1989) 209 Cal.App.3d 1169, 1178-1179.)

[25] Pub. Resources Code, § 21167.3, subd. (b).

[26] *Id*., subd. (a).

Diego Superior Court or Court of Appeal were to impose an injunction or stay against the Board with respect to the FPEIR (which has not happened and is not anticipated), any approval by another agency of a vegetation treatment project based on the FPEIR would be only conditional, and would only spring to life if and when the FPEIR were determined to be adequate. In the absence of any such injunctive relief, agencies may approve treatment projects without any conditionality. Such approvals would be effective immediately. The agencies would be proceeding at their own risk, however, in that an ultimate determination that the FPEIR is inadequate could possibly create problems with the project approval. These potential problems are discussed below.

Question # 4: What would happen to a vegetation treatment project approved based on a Project Specific Analysis based on the FPEIR if the final court to review the FPEIR ultimately concludes that the FPEIR does not comply with CEQA?

Question # 5: Would the individual project approval automatically be considered invalid?

Question # 6: What would happen if the treatment project was being implemented or had already been completed before the issuance of a final judicial determination on the FPEIR?

***Answers to Questions # 4, 5 and 6*:** If, at the end of the pending litigation over the FPEIR, a court were to find one or more legal defects in the document, the court would have to fashion a remedy pursuant to CEQA. What that remedy would entail, however, would be a function of the nature of the problems identified with the FPEIR. Many different scenarios are possible.

Under CEQA, "[t]he mechanism through which the remedy or remedies are implemented is a peremptory writ of mandate."[27] Through such a writ, a court may order a respondent agency to do one or more of the following: "(1) to void, *in whole or in part*, a determination, finding or decision, (2) to 'suspend any or all specific project activity or activities' if certain conditions exist, or (3) to take specific action necessary to bring the determination, finding or decision tainted by the CEQA violation into compliance with CEQA."[28] Importantly, the court writ and order "shall include *only* those mandates which are necessary to achieve compliance with [CEQA] and only those specific project

[27] *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 756 (*POET I*).

[28] *Id*. at p. 757 (italics added). See also *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 288 (*Preserve Wild Santee*).

activities in noncompliance with [CEQA]." [29] "Thus, if the court finds that it will not prejudice full compliance with CEQA to leave some projects approvals in place, it *must* leave them unaffected."[30]

A court, however, must make certain findings – so-called "severance findings" – before it can invalidate one or more "project activities" (e.g., project approvals) while leaving one or more other project activities in place. "Severance and a limited order are appropriate when the 'court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with [CEQA], and (3) the court has not found the remainder of the project to be in noncompliance with [CEQA].'"[31]

Where these findings can be made, CEQA "'expressly authorize[s] the court to fashion a remedy that permits some part of the project to go forward while an agency seeks to remedy its CEQA violations. In other words, the issuance of a writ need not always halt all work on a project.'"[32]

As the preceding discussion makes clear, CEQA remedies can take many forms. Particularly where courts find multiple flaws in EIRs, the courts frequently order respondent agencies to set aside their decisions in whole.[33] In such situations, all project approvals must be vacated. In other instances, though, and particularly where the flaws in an EIR are very limited, courts can allow one or more project approvals to stand while suspending other "project activities." For example, in a major CEQA precedent on remedies issued in 2017, the Court of Appeal upheld a peremptory writ of mandate in which, after the California Supreme Court had found problems with an EIR for permits for a major land development project, the trial court had decertified only *portions* of resolution certifying the Final EIR while leaving the project permit and plan approvals

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[29] Pub. Resource Code, § 21168.9, subd. (b) (italics added).

[30] *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2017) 17 Cal.App.5th 1245, 1255 (*CBD III*).

[31] *POET I*, *supra*, 218 Cal.App.4th at p. 758, quoting Pub. Resource Code, § 21168.9, subd. (b).

[32] *San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist. of Southern California* (2001) 89 Cal.App.4th 1097, 1104–1105, quoting Remy et al., Guide to the California Environmental Quality Act (10th ed. 1999), p. 647. See also *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1181 (the mandate to narrowly tailor CEQA remedies is not limited to only "relatively minor matters of noncompliance with CEQA")

[33] See, e.g., *King and Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 896 (*KG Farms*) and *Preserve Wild Santee, supra*, 210 Cal.App.4th at pp. 288-289.

intact. In that case, the appellate court upheld the trial court's writ and severance findings in part because the writ also suspended all physical activities associated with the project during the period in which the EIR was to be fixed. "By suspending all project activity that 'could result in an adverse change or alteration to the physical environment,' the entire project was effectively put on hold. The trial court thus ensured that the status quo would be preserved for the department to reanalyze the parts of the EIR found inadequate."[34]

Finally, in extraordinary circumstances, a court may exercise its inherent power to preserve the status quo and leave all project approval intact despite a court's inability to make the "severance findings" normally required by CEQA.[35] For example, the Court of Appeal invoked such judicial authority in choosing to leave intact the 2010 Low Carbon Fuel Standards (LCFS) regulations adopted by the California Air Resources Board (ARB) despite CEQA violations made by ARB during the process in which the regulations were adopted. The court concluded "that the environment will be given greater protection if the LCFS regulations are allowed to remain operative pending ARB's compliance with CEQA. Specifically, the emissions of greenhouse gases will be less if the LCFS regulations are allowed to remain in effect, rather than being suspended."[36]

Although the discussion above addresses the CEQA remedies statute as it has existed since the Legislature made amendments in 1993, it is worth noting that the California Supreme Court, in applying the earlier version of the statute, allowed existing project approvals for a University of California at San Francisco (UCSF) medical research facility to remain intact while a respondent agency fixed its CEQA violations going forward.[37] The court there concluded that "[r]equiring the University to cease existing laboratory operations at the Laurel Heights facility and to move them to other sites … would seriously disrupt ongoing scientific research and perhaps cause the

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[34] *CBD III*, *supra*, 17 Cal.App.5th at pp. 1257-1258. See also *Golden Gate Land Holdings LLC v. East Bay Regional Park District* (2013) 215 Cal.App.4th 353, 369–370.

[35] *POET I*, *supra*, 218 Cal.App.4th at p. 761; see also *KG Farms*, *supra*, 45 Cal.App.5th at pp. 897-898.

[36] *POET I*, *supra*, 218 Cal.App.4th at p. 763.

[37] *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 423-425 (*Laurel Heights I*); see also *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1428, 1455-1456 (jail expansion project allowed to proceed while CEQA deficiencies were remedied).

University to lose important faculty members and research funds." [38] The court added that "UCSF's research is designed to improve the state of medical knowledge and thus improve and even save lives. We are especially reluctant to interfere unnecessarily with such a salutary enterprise."[39]

In light of all of the foregoing, it is impossible to predict the kind and extent of the remedy that might be imposed should the ultimate court reviewing the Board's FPEIR find that the document does not fully comply with CEQA. The range of possibilities includes (i) full invalidation of all of the Board's VTP- and CEQA-related approvals, (ii) invalidation of only a portion of the Board's EIR certification resolution combined with a prospective suspension of physical activities reliant on the FPEIR, and (iii) leaving the approvals in place under the court's inherent power to preserve the status quo in light of the overriding importance of vegetation management in the current era of catastrophic wildfires.

A key question for agencies considering vegetation treatment activities within the SRA treatable landscape is whether, in light of the uncertainty regarding any remedy that might ultimately be imposed in the pending litigation over the PFEIR, the agencies feel comfortable preparing a PSA or in otherwise directly relying on the FPEIR for some impact analysis while supplementing such analysis with additional site-specific analysis in a project-specific ND, MND, or EIR.

In this context, it is important to note that no reported CEQA precedent has ever held that, where a lead agency's program EIR is held to be invalid, all subsequent approvals by other agencies based on the program EIR automatically self-destruct by operation of law. Rather, the Board's outside CEQA counsel believe that PSAs would only be vulnerable to invalidation if the vegetation treatment projects based on the PSAs were subject to timely filed CEQA litigation that was still ongoing at the time the FPEIR was finally adjudged to be inadequate. Otherwise, a court would lack the jurisdiction over the PSA-preparing agency needed to impose a remedy on that agency. One basis for the view of the Board's counsel on this issue is the fact that, in general, an environmental document is presumed to be legally adequate where the CEQA statute of limitations has run without the filing of any legal challenge.[40]

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[38] *Laurel Heights I*, *supra*, 47 Cal.3d at p. 424.

[39] *Ibid.*

[40] See Pub. Resources Code, § 21167.2 (where statutes of limitations run, EIRs are "conclusively presumed to comply with [CEQA] … for purposes of its use by responsible agencies" unless supplemental environmental review is required); *Snarled Traffic Obstructs Progress v. City &*

The California Supreme Court has been emphatic that the passage of the CEQA statute of limitations without any challenge translates into an unimpeachable CEQA document. CEQA "is sensitive to the particular need for finality and certainty in land use planning decisions. Accordingly, the Act provides 'unusually short' limitations periods … after which persons may no longer mount legal challenges, however meritorious, to actions taken under the Act's auspices."[41] CEQA thus "mandates that [an] EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR. This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment."[42] These principles suggest that, if a PSA-based approval of a vegetation treatment program is not timely challenged in court, the approval should stand, regardless of the ultimate legal fate of the FPEIR.

The leading case on point – in which reliance on a "lower tier" EIR was found to be invalid because the agency had relied on a "higher tier" EIR – involved a scenario in which the agency that had prepared the lower tier EIR was in CEQA litigation at the time the higher tier document was found to be deficient. There, the decision by the Third District Court of Appeal, in one case, to invalidate a program EIR (also called a "first tier" EIR) led the Second District Court of Appeal, in another case, to invalidate a "third tier" EIR that had substantially relied on the flawed program EIR. Importantly, the latter court addressed the extent to which the third tier EIR had actually relied on the earlier document, implying that invalidation of the third tier EIR might not have been automatic if the reliance had been minimal.[43]

County of San Francisco (1999) 74 Cal.App.4th 793, 797 (this same presumption applies to negative declarations).

[41] *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 488; see also *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 51 ("[o]bviously, the rationale of the statutory scheme is to avoid delay and achieve prompt resolution of CEQA claims") (quoting *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 189 Cal.App.3d 498, 504.

[42] *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 36 Cal.4th 1112, 1129 (*Laurel Heights II*).

[43] *Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1383-1387.

In light of this precedent and the views of the Board's CEQA counsel, it seems likely that, if an agency completes a PSA, approves a vegetation project at a point in time when the FPEIR is still presumed to be legally adequate,[44] and survives the CEQA statute of limitations without any legal challenge, the agency's project-specific approval should remain intact, even if the FPEIR is subsequently found to be deficient.

Another factor for agencies contemplating the use of the FPEIR to consider is the possibility that, after an approved vegetation treatment project is fully implemented, any legal challenge to the project may become moot. Where a CEQA petitioner chooses not to seek injunctive relief or fails in an attempt to obtain such relief, the fact that project is implemented while litigation is pending sometimes renders the legal issues in contention moot.[45] Moot cases are those "'in which an actual controversy did exist, but, by the passage of time or a change in circumstances, ceased to exist.'"[46] The "pivotal question in determining if a case is moot is … whether the court can grant the plaintiff any effectual relief. If events have made such relief impracticable, the controversy has become 'overripe' and is therefore moot[.]"[47] The courts have sometimes found that "a project's completion" or the "substantial completion" of a project "moots requests to set aside or rescind resolutions authorizing the project."[48]

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[44] See Evid. Code, § 664 ("[i]t is presumed that official duty has been regularly performed"). See also *Bus Riders Union v. Los Angeles County Metropolitan Transportation Agency* (2009) 179 Cal.App.4th 101, 108 ("'[a]ll presumptions of law are in favor of the good faith of public officials'") and *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1385.

[45] See, e.g., *Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714 [268 Cal.Rptr.3d 653, 660] (*Parkford*) (Court of Appeal dismissed appeal where trial court upheld project approvals after denying injunctive relief, thereby allowing completion of project construction).

[46] *Parkford*, *supra*, 268 Cal.Rptr.3d at p. 660, quoting *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573 (*Wilson*).

[47] *Parkford*, *supra*, 268 Cal.Rptr.3d at p. 660], quoting *Wilson*, *supra*, 191 Cal.App.4th at p. 1574.

[48] *Wilson*, *supra*, 191 Cal.App.4th at pp. 1576-1577; see also *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, 378–379 (cutting down of trees for first phase of project rendered moot a request for a writ of mandate to compel preparation of an EIR for that phase); and *Roscoe v. Goodale* (1951) 105 Cal.App.2d 271, 273 (completion of improvements to sewage and water system rendered moot the petitioner's request to rescind a city council resolution under which work was carried out).

In light of all of the legal and factual factors discussed above, agencies contemplating vegetation treatment projects must make up their own minds regarding whether to prepare PSAs or otherwise directly rely on the FPEIR while litigation against the FPEIR remains pending. In doing so, the Board strongly suggests that such agencies consult their own legal counsel. The Board also offers the following suggestions regarding factors to consider.

First, as noted above, the Board believes that the FPEIR is very defensible, having been prepared by expert consultants with oversight from respected CEQA counsel. Second, as also noted earlier, the FPEIR is currently presumed by law to be legally adequate, and the San Diego County Superior Court has not been asked to issue any sort of injunction or stay. (The Board, of course, would vigorously oppose any such request.) Thus, individual agency approvals granted based on PSAs relying on the FPEIR would be perfectly legal and not conditional, though the approving agencies would proceed at their own risk. Third, if the FPEIR litigation is finally resolved only after a decision from the Fourth District Court of Appeal or from the California Supreme Court, a final adjudication on the adequacy of the FPEIR might not occur until the year 2022, 2023, or even later.[49] Agencies preparing PSAs in 2020 or 2021 might complete their vegetation treatment projects before there is a final decision on the FPEIR. Fourth, if the last court to consider the FPEIR were to find it to be inadequate, the court's remedy could be either broad or comparatively narrow, depending on the nature and extent of any flaws the court might find. A narrow remedy might not implicate every approval based on a PSA. Fifth, some vegetation treatment projects are more controversial than others. Proposals with widespread community support are less likely to end up in court than proposals strongly opposed by vocal and active stakeholders within communities. Sixth and finally, communities facing the serious risk of catastrophic wildfires due to massive fuel loads in surrounding forests or other fuel-rich habitats could save substantial amounts of time by preparing PSAs in lieu of individual CEQA documents subject to mandatory public review requirements.

[49] In one recent high-profile CEQA case, *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, the California Supreme Court took more four years after accepting the case before issuing its decision. In December 2018, the high court found fault with a decision of the Fresno County Board of Supervisors that was made in February 2011 and first challenged in the Fresno County Superior Court in March 2011.

Question # 7: Does the pending litigation over the FPEIR create legal risks for agencies that, instead of choosing to prepare a PSA or to directly rely on the FPEIR for some impact analyses in their project-specific NDs, MNDs, or EIRs, choose instead rely on the FPEIR only to the extent of incorporating by reference some of the information in the FPEIR?

Question # 8*: *If the FPEIR were to be finally adjudged to be legally inadequate, would the fact that a stand-alone ND, MND, or EIR for a treatment project incorporated FPEIR material make the stand-alone document invalid as well?

Answers to Questions #7 and 8: The CEQA Guidelines authorize agencies, in preparing environmental documents, to use "incorporation by reference" as a means of reducing the size of those documents, though special rules must be followed. "An EIR or Negative Declaration may incorporate by reference all or portions of another document which is a matter of public record or is generally available to the public. Where all or part of another document is incorporated by reference, the incorporated language shall be considered to be set forth in full as part of the text of the EIR or Negative Declaration.[50]

"Incorporation by reference is most appropriate for including long, descriptive, or technical materials that provide general background but do not contribute directly to the analysis at hand."[51] Examples of material that may properly be incorporated by reference include the following: (1) a description of a proposed project's environmental setting from another EIR; (2) an air pollution control agency's description of air pollution problems concerning a process involved in the project; and (3) a description of the city or county general plan applicable to the project's location.[52]

All documents whose contents are incorporated by reference shall be made available for public inspection at a public place or public building. At a minimum, such documents must be available at the lead agency's office in the county in which the proposed project would be carried out, or, if no such location exists, in one or more public buildings such as county offices or public libraries. The incorporating EIR or negative declaration shall state where such inspection can be undertaken.[53]

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[50] CEQA Guidelines, § 15150, subd. (a).

[51] *Id*., subd. (f).

[52] *Id*., subd. (e).

[53] *Id*., subd. (b). See also *Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1601-1602 (incorporated documents need not be circulated with an EIR, as long as they are available for public inspection).

The incorporating EIR, ND, or MND must describe its relationship with the incorporated portion of the referenced documents. Where possible, the incorporating document must briefly summarize the incorporated materials. Where no such summary is possible, the relevant data or information must at least be briefly described.[54] Where the referenced document has previously been reviewed through the state review system, the summary or description must include the document's state identification number. [55]

As these principles and rules make clear, agencies contemplating vegetation treatment projects have the option of incorporating information from the FPEIR by reference. Indeed, the FPEIR could be a very useful background document for such agencies. As noted above, however, such a use of the FPEIR would be "most appropriate for … long, descriptive, or technical materials that provide general background but do not contribute directly to the analysis at hand." The FPEIR includes a huge amount of such potentially useful information. Any agency choosing to incorporate such information should be sure to follow the rules set forth above, such as making the FPEIR available for inspection, noting its state identification number, and explaining the incorporated material in a way that adequately summarizes the information for the reader.

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[54] CEQA Guidelines, § 15150, subd. (d). See also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 443 (when an EIR incorporates an EIR performed for an earlier project, "it must give the reader a … road map to the information it intends to convey"); *Emmington v. Solano County Redevelopment Agency* (1987) 195 Cal.App.3d 491, 501–503 (when relying on existing environmental documentation, at a very minimum, the lead agency should compile "all the relevant environmental data into a single format report, [to] facilitate both public input and the decisionmaking process[ ]"); *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego* (1992) 10 Cal.App.4th 712, 742 (court upholds EIR in which certain documents were "referenced in the record, but their full text was not included therein"; court noted that the petitioner failed "to show that the references to this omitted text did not accurately depict the substance of the omitted material"); *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 877 (court upholds the growth-inducing impact analysis in an EIR for a water agency's proposed water diversion; the EIR had incorporated by reference the discussions of growth-related impacts from other EIRs prepared for the city and county general plans in the water agency's service area); *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 539–540 (in response to petitioner's claim that an EIR contained just "one, vague and conclusory sentence" on a particular topic, court notes that more detailed information had been incorporated by reference).

[55] CEQA Guidelines, § 15150, subd. (d).

In the Board's view, the use of information incorporated from the FPEIR should not subject the incorporating agency to any legal peril, despite the pending litigation over the FPEIR. Rather, the incorporated information would just constitute "substantial evidence" supporting the background technical discussions within otherwise wholly independent stand-alone NDs, MNDs, or EIRs. It is very unlikely that any successful legal challenge to the FPEIR would involve a court's denigration of the background scientific and technical information included within the FPEIR. Rather, the most common challenges to EIRs involve attacks on mandatory CEQA requirements involving such things as project descriptions, impact analyses, mitigation measures, project alternatives, and the like. Scientific and technical discussions of such subjects as the biological resources found in a particular region are seldom the focus of judicial scrutiny.

In short, if the FPEIR were found wanting, it would be very unlikely that a party could later successfully attack a stand-alone CEQA document for an individual treatment project solely on the ground that the agency author had incorporated background technical information from the FPEIR into its stand-alone document. An obvious defense would be that the incorporated information was substantial evidence and was likely the best information available on the topic at issue at the time of incorporation.