November 12, 2024

Honorable Mary J. Greenwood, Administrative Presiding Justice
Honorable Patricia Bamattre-Manoukian, Associate Justice
Honorable Charles E. Wilson, Associate Justice
California Court of Appeal
Sixth Appellate District
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113

RE: Request for Publication – *Working Families of Monterey County v. King City Planning Commission* (Case No. H051232)

Dear Justices Greenwood, Bamattre-Manoukian, and Wilson:

Pursuant to California Rules of Court, rule 8.1120(a), the Rural County Representatives of California (RCRC)[1] and the California State Association of Counties (CSAC)[2] hereby jointly request that the Court of Appeal order its opinion in the above-captioned case be published.

[1] The Rural County Representatives of California (RCRC) is a forty-member county service organization that champions policies on behalf of California's rural counties. Founded in 1972, RCRC works with its membership to advocate on behalf of rural issues at the state and federal levels. The core of RCRC's mission is to improve the ability of small, rural California county government to provide services by reducing the burden of state and federal mandates and promoting a greater understanding among policy makers about the unique challenges that face California's small population counties. The RCRC Board of Directors is comprised of one member of the Board of Supervisors from each of its forty member counties.

[2] The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The instant decision provides important clarification regarding several aspects of the CEQA "Class 32" categorical exemption for "in-fill development."[3] As the decision notes, the CEQA Guidelines do not define the key terms used in this section, i.e., “in-fill development” and “surrounded by urban uses” – thus making uncertainty and dispute virtually inevitable. Since "CEQA does not apply to projects that are...categorically exempt,"[4] the stakes for this dispute are high. Moreover, the Class 32 exemption "is broader than most categorical exemptions"[5] and particularly versatile, applying to everything from neighborhood grocery stores (like that at issue here), much needed housing projects,[6] and even small-town courthouses.[7] The need for clarity is therefore especially keen.

Settling the question of *where* the "in-fill" exemption may be applied is critical not only to provide certainty for lead agencies and the public, but also to achieve the "[r]eduction of sprawl"[8] that is the underlying purpose of this section. If limited as argued by the petitioners in this case, the exemption would apply only in the densest urban areas, making it significantly more difficult for smaller and rural cities to provide housing, public facilities, and economic development – and removing the incentive for rural communities to locate projects on infill sites. This court's conclusion that the exemption is *not* thus limited, and that the exemption may be applied in *any location consistent with its plain terms*, would allow smaller cities to proceed with beneficial infill projects with confidence and certainty – which will remain elusive if this decision is unpublished.

The near certainty that this issue will recur, remaining unsettled absent published appellate guidance, is demonstrated by the fact that virtually identical questions were raised during the regulatory process that led to enactment of the exemption for "in-fill development projects." As originally proposed, this exemption contained *precisely the limitation argued by petitioners here*, requiring that "[t]he development occurs in an urbanized area as defined by this chapter.”[9] This locational requirement was

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[3] (Cal. Code Regs., tit. 14, § 15332.) All further undesignated references are to the CEQA Guidelines, California Code of Regulations, title 14.

[4] (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 510.)

[5] (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 128, overruled in part on other grounds in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.)

[6] (See Nassiri v. City of Lafayette (2024) 103 Cal.App.5th 910.)

[7] (See, e.g., Administrative Officer of the Courts, *Notice of Exemption, New Madera Courthouse for the Superior Court of California, County of Madera*, available at https://ceqanet.opr.ca.gov/2008108014.)

[8] (Opn. at p. 14.)

[9] (Natural Resources Agency, *Proposed Text of Changes to the CEQA Guidelines* (Oct. 10, 1997).)

subsequently modified to the current language ("[t]he proposed development occurs within city limits on a project site substantially surrounded by urban uses") during the notice-and-comment process prior to adoption.[10] In the Final Statement of Reasons for these regulations, the Resources Agency explained the rationale for this change in response to the following comment from rural Tulare County:

> "The term 'in-fill development' needs to be defined and that definition should include a limit on the magnitude of in-fill development for compliance with this exemption. Tulare County could not use this section, as currently proposed, since none of the county's unincorporated communities have a population of 50,000."[11]

To which the Agency responded:

> "The term 'in-fill' is not intended to carry a separate specific definition in this context. Rather, it is intended as a label for development which meets the specific requirements of this section (subdivisions (a)· through (e)). In response to concerns raised by Commentor and others, 'urbanized area' will be replaced with 'within city limits on a project site substantially surrounded by urban uses.'"[12]

The Resources Agency further articulated the purpose for this exemption – and the necessity of applying it *specifically to rural cities* – in response to comments asserting that the proposed categorical exemption conflicted with existing statutory exemptions for certain types of infill development, such as Public Resources Code section 21080.7:

> "The problem with section 21080.7, from the policy standpoint or preserving agricultural land and reducing urban sprawl, which is the intent of proposed section 15333, is its reliance on the phrase, 'urbanized area.' This is defined as a population base of 50,000 or more. However, while the danger of loss of farmland occurs in areas surrounding Stockton, Fresno, and Sacramento, all areas meeting the required population figure; it also threatens towns like Lathrop, Galt, and Ripon, areas not meeting the population requirement and thus not

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[10] (Natural Resources Agency, *Revised Text in Response to Public Comments* (May 15, 1998). Both of these documents are available at <https://web.archive.org/web/20001210000100/http://ceres.ca.gov/topic/env_law/ceqa/rev/proposed.html>)

[11] Attachment "A," p. 16. (Natural Resources Agency, *Rulemaking File, Amendments to the Guidelines For Implementation of the California Environmental Quality Act (CEQA)*, Volume II, Tab 21 ("Summaries and Responses to Public Comments Received, sorted by Proposed Guideline Changes Section Numbers (October- December 1997)"). This document is cross-referenced at Volume VII, Tab 32 as "Final Statement of Reasons, Summaries/Responses to comments (Oct - Dec 1997)." The portions of this document pertaining to "SECTION 15333: In-Fill Development Projects" are attached hereto as Attachment "A."

[12] *Ibid.* The Resources Agency reiterated the admonition that "[t]he term "in-fill" is not intended to carry a separate specific definition in this context. Rather, it is intended as a label for development which meets the specific requirements of this section (subdivisions (a) through (e))" several times throughout the FSOR. (See, e.g., Attachment "A," pp. 13, 16, 26, 28.)

subject to the exemption. Thus, there is no incentive under the statutory exemption to encourage infill development in the smaller towns which dominate the farming areas of California as a whole and the Central Valley in particular."[13]

Notwithstanding this extensive regulatory history, and the Resources Agency's conscious policy choices, King City was nonetheless obligated to litigate this matter to the appellate level (a process that consumed nearly two and a half years), as will other agencies without publication of this court's guidance.

In addition to clarifying the basic geographic reach of the Class 32 exemption, the instant decision also provides valuable interpretation of Section 15332's requirement that that the project site must be "substantially surrounded by urban uses." After rejecting the argument that "urban uses," as used here, has the same meaning as "*qualified* urban uses" defined in Public Resources Code section 21072, the instant decision proceeds to elaborate upon the explanation of this term provided in *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249.

The *Banker's Hill* court drew an analogy to the Community Redevelopment Law, and described urban uses as "of, relating to, characteristic of, or taking place in a city...constituting or including and centered on a city...of, relating to, or concerned with an urban and specifically a densely populated area...belonging or having relation to buildings that are characteristic of cities."[14] The instant decision, more fully informed by "the intent of the administrative agency that issued Guidelines," expands upon this description, making it clear that "relating to...a *densely populated area*" is not an indispensable requisite for "urban uses" under Section 15332, and that "urban uses" may *also* consist of the types of development characteristic of small towns, such as the Sheriff's Department, vacant lot, and cemetery in this case.[15] This is exceedingly valuable clarification, which, given CEQA's litigious nature, must inevitably be re-litigated someday if this court's resolution remains unpublished.

For all of these reasons, the instant decision meets several of the standards for publication. It "[a]dvances a new interpretation" of Section 15332; applies this section's "existing rule of law to a set of facts significantly different from those stated in published opinions"; "modifies" and "explains" the "rule of law" set forth in *Banker's Hill*; and manifestly "[i]nvolves a legal issue of continuing public interest."[16]

Finally, this decision also invokes a rule of law that has all too often been overlooked in the last thirty years. The Legislature's admonition that CEQA should not

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[13] Attachment "A," pp. 23-24. (It is also worth noting that this "in-fill" exemption was originally requested by the California Farm Bureau (see Attachment "A," p. 21), thus further arguing against any myopic focus on dense urban areas.)

[14] (*Banker's Hill, supra,* 139 Cal.App.4th at p. 270.)

[15] (Opn. at p. 18, fn, 10.)

[16] (California Rules of Court, rule 8.1105(c)(2), (3), (4), (6).)

be interpreted "in a manner which imposes procedural or substantive requirements beyond those explicitly stated"[17] was enacted in 1993. However, as the bipartisan Little Hoover Commission[18] recently noted, CEQA has nonetheless "essentially evolved its own body of common law."[19] To counteract this trend, the Commission has recommended "strongly reaffirm[ing] the language in 21083.1 that courts should in the future defer to the procedural and substantive requirements established in statute and Guidelines." [20]

The instant decision joins a small but growing number of recent opinions that have heeded this necessity.[21] Continued publication of such opinions is a necessary curative in light of the vast number of other cases leaning perhaps more heavily (and with less balance) into adages such as “[t]he foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”[22] This further supports publishing the instant decision.

Accordingly, the opinion in this matter meets the criteria for publication set forth in Rule 8.1120, and we respectfully request that it be ordered published. Thank you for your consideration.

Respectfully submitted,

ARTHUR J. WYLENE, SBN 222792

cc: Service List

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[17] (Pub. Resources Code, § 21083.1.)

[18] The Milton Marks “Little Hoover” Commission on California State Government Organization and Economy is a statutory body charged with (among other things) assisting "in making the operation of all state departments, agencies, and instrumentalities, and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives." (See Gov. Code, §§ 8501 et seq.)

[19] (Little Hoover Com., *CEQA: Targeted Reforms for California’s Core Environmental Law* (May 2024) p. 16, available at <https://lhc.ca.gov/wp-content/uploads/Report279.pdf>)

[20] *Ibid.*

[21] (See, e.g., *Sunflower Alliance v. Department of Conservation* (2024) 105 Cal.App.5th 771, 790; *Westside Los Angeles Neighbors Network v. City of Los Angeles* (2024) 104 Cal.App.5th 223, 237.)

[22] (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2023) 98 Cal.App.5th 1176, 1200.)

ATTACHMENT “A”

The Resources Agency
Rulemaking File

Amendments to the Guidelines For Implementation of the California Environmental Quality Act (CEQA)

Augmented Table of Contents

The documents listed immediately below were previously submitted to OAL on September 11, 1998 (Regulatory Action No. 98-0911-06) and October 26, 1998. They are hereby incorporated by reference as part of the rulemaking file for this resubmittal.

Volume I

11.	List of Commentors and Requests for Language (December 1997)
12.	Proposed Amendments to Revised Text in Response to Public Comments: May 15, 1998
13.	15-Day Notice of Availability of Modified Text
14.	Statement of Mailing Notice: May 15, 1998
15.	Mailing Lists for May 1998
16.	Transcript of Public Hearing: June 11, 1998
17.	List of Commentors and Requests for Language (June 1998)
18.	Notice of Extension of Comment Period Deadline from June 11 to June 18, 1998, and addition of second Public Hearing
19.	Mailing List for Notice of Comment Period Extension and second Public Hearing
20.	Transcript of Public Hearing: June 18, 1998

Volume II

21.	Summaries and Responses to Public Comments Received, sorted by Proposed Guideline Changes Section Numbers (October - December 1997)
22.	Appendix A Commentors Appendix B Commentors

Volume III

23.	Index of Commentors
24.	Text of Public Comments received (October - December 1997) sorted by last name of Commentor (A through K)

Volume IV

25. Index of Commentors

26. Text of Public Comments received (October - December 1997) sorted by last name of Commentor (L through Z)

Volume V

27. Summaries and Responses to Public Comments Received, sorted by Proposed Guideline Changes Section Numbers (May - June 1998)

Volume VI

28. Index of Commentors

29. Text of Public Comments received (May - June 1998) sorted by last name of Commentor (A through Z)

Volume VII

30. Fiscal Impact Disclosures / Form 399

31. Updated Informative Digest

FINAL STATEMENT OF REASONS

32. Summaries/Responses to comments (Oct - Dec 1997)

33. Summaries/Responses to comments (May - June 1998)

34. Local Agency/School Mandate Determination

35. Alternatives Determination

36. Update of Initial Statement of Reasons

37. Documents Incorporated by Reference
    a. CA Agricultural Land Evaluation and Site Assessment Model
    b. DOI Standards for Treatment of Historic Properties
    c. Uniform Building Code Table 18-1-B

Additional Documents Included in This Submittal

37. Documents Incorporated by Reference
    c. Uniform Building Code Table 18-1-B

38. Statement of Secretary Wheeler before the Senate Environmental Quality Committee (12/2/97)

Additional Documents Included In This Submittal

39. Section 15332 (in-fill Development Projects)
    a. 15-Day Notice
    b. Modified Text
    c. Mailing list for October 1998
    d. Statement of Mailing Notice: October 30, 1998
    e. Text of Public Comments received (Oct - Nov 1998)
    f. Summaries/Responses to comments (Oct - Nov 1998)

CERTIFICATION

I, Matthew D. Francois, Assistant General Counsel of the Resources Agency, swear under penalty of perjury, that this rulemaking file pertaining to the California Environmental Quality Act (CEQA) Guidelines,Title 14, California Code of Regulations, is complete and accurate, and that the record was closed on September 11, 1998. This rulemaking file was re-opened and was closed again on October 26, 1998. This rulemaking file was re-opened and was closed again on December 16, 1998.

This document was executed on December 16, 1998 in Sacramento, California.

Signed:

Matthew D. Francois
Assistant General Counsel
California Resources Agency

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:	
RESOURCES AGENCY	NOTICE OF APPROVAL IN PART/ DISAPPROVAL IN PART OF REGULATORY ACTION (Gov. Code, Sec. 11349.3)
REGULATORY ACTION: Title 14 California Code of Regulations Adopt 15064.5, 15064.7, 15073.5, 15097, 15126.2, 15126.4, 15126.6, 15186, 15283, 15284, 15285, 15330, 15331, 15332, Appendix J	OAL File No. 98-0911-06 S

SUMMARY OF REGULATORY ACTION

This rulemaking action revises the California Environmental Quality Act (CEQA) guidelines on objectives and criterial for the orderly evaluation of projects and the preparation of documents required for CEQA compliance. The proposed regulatory action is approved except for the adoption of section 15332, which is severed and disapproved.

REASON FOR DECISION

All legal requirements applicable to the proposed regulatory action were met except:

(See Page 2)

Additional Sections

Filenumber: 98-0911-06

Additional Sections:

Amended section: 15003, 15004, 15041, 15045, 15060, 15061, 15062, 15063, 15064, 15065, 15073.5, 15075, 15085, 15086, 15088.5, 15091, 15093, 15107, 15111, 15120, 15124, 15125, 15126, 15130, 15152, 15162, 15164, 15183, 15201, 15202, 15204, 15205, 15206, 15269, 15276, 15300.2, 15301, 15303, 15304, 15316, 15325, 15378, Appendix G, Appendix J, Appendix L; Repeal Appendix I, Appendix K

OAL File No. 98-0911-06

REASONS FOR DECISION

The required procedure was not followed.

A detailed decision explaining the reasons for the disapproval of this regulatory filing will be sent to you within seven (7) calendar days of the date of this letter. (Gov. Code, Sec. 11349.3(b).)

Enclosed is the agency's copy of the regulations.

DATE: 10/26/98

MICHAEL MCNAMER
SENIOR COUNSEL

for: EDWARD G. HEIDIG
DIRECTOR

Original: Douglas P. Wheeler, Secretary
cc: Matt Francois

REGULAR

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD 400 (REV 3-92) FMC

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER	PREVIOUS REGULATORY ACTION NUMBER
		98-0911-06S		

98 SEP 11 PM 4:50

OFFICE OF ADMINISTRATIVE LAW

For use by Office of Administrative Law (OAL) only

98 OCT 26 PM 4:50

NOTICE | REGULATIONS

AGENCY: Resources Agency

AGENCY FILE NUMBER (If any):

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER
☐ Notice re Proposed Regulatory Action ☐ Other		

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn	97 #41-Z	10-10-97

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics-related)

SECTIONS AFFECTED	
	ADOPT: See Attachment A
	AMEND: See Attachment A
TITLE(S): Title 14	REPEAL: See Attachment A

2. TYPE OF FILING

☒ Regular Rulemaking (Gov. Code, § 11346) ☐ Resubmittal ☐ Emergency (Gov. Code, § 11346.1(b)) ☐ Resubmittal of disapproved or withdrawn emergency filing

☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Government Code §§ 11346.4 - 11346.8 prior to, or within 120 days of, the effective date of the regulations listed above.

☐ Print Only ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, § 100) ☐ Other (specify) _____

3. DATE(S) OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §§ 44 and 45)

May 15, 1998

4. EFFECTIVE DATE OF REGULATORY CHANGES (Gov. Code § 11346.2) Pub.Res.Code Sec. 21087

☐ Effective 30th day after filing with Secretary of State ☒ Effective on filing with Secretary of State ☐ Effective other (Specify)

5. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

☐ Department of Finance (Form STD. 399) ☐ Fair Political Practices Commission ☐ State Fire Marshal

☐ Other (Specify)

6. CONTACT PERSON	TELEPHONE NUMBER
Matt Francois, Asst General Counsel, CA Resources Agency	(916)653-5656

7. *I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.*

SIGNATURE OF AGENCY HEAD OR DESIGNEE	DATE
Maureen Gorsen	9/10/98

TYPED NAME AND TITLE OF SIGNATORY: Maureen Gorsen, General Counsel

Attachment A

1997 - 98 CEQA Rulemaking Guidelines
Sections Affected

AMENDED

15003
15004
15041
15045
15060
15061
15062
15063
15064
15065
15073.5
15075
15085
15086
15088.5
15091
15093
15107
15111
15120
15124
15125
15126
15130
15152
15162
15164
15183
15201
15202
15204
15205
15206
15269
15276
15300.2
15301
15303
15304
15316
15325
15378
Appendix G
Appendix J (relettered I)
Appendix L (relettered K)

NEW

15064.5
15064.7
15073.5
15097
15126.2
15126.4
15126.6
15186
15283
15284
15285
15330
15331
15332
Appendix J

REPEAL

Appendix I
Appendix K

The Resources Agency

Pete Wilson
Governor

Douglas P. Wheeler
Secretary

of California

California Conservation Corps • Department of Boating and Waterways • Department of Conservation
Department of Fish and Game • Department of Forestry & Fire Protection • Department of Parks & Recreation • Department of Water Resources

MEMORANDUM

To: **Office of Administrative Law**

From: **Maureen F. Gorsen, General Counsel**
California Resources Agency

Date: **September 10, 1998**

Subj: **CEQA Revision Rulemaking File**

I am pleased to transmit the final adopted text and supporting rulemaking file for the Proposed Amendments to the State CEQA Guidelines which were noticed on October 10, 1997. This seven volume file includes all the pertinent versions of proposed text, all public comments, and other assorted requirements under the Administrative Procedure Act.

Please note that it is the intent of the Resources Agency that each proposed regulation change be severable. If, for whatever reason, the Office of Administrative Law disapproves a particular proposed amendment to a section or subsection, all other sections and subsections that are acceptable should nevertheless be deposited with the secretary of State to take effect as provided for by law.

If you have any questions regarding this rulemaking file and its contents, please do not hesitate to contact me, or Assistant General Counsel Matt Francois, for assistance. Both of us can be reached at 653-5656.

Thank you for your assistance.

The Resources Agency 1416 Ninth Street, Suite 1311 Sacramento, CA 95814 (916) 653-5656 FAX (916) 653-8102
http://ceres.ca.gov/cra/

STATE OF CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD 400 (REV 3-92) FMC

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER	PREVIOUS REGULATORY ACTION NUMBER
				98-0911-06

For use by Office of Administrative Law (OAL) only

98 DEC 16 PM 4:26

OFFICE OF ADMINISTRATIVE LAW

NOTICE REGULATIONS

AGENCY: CA Resources Agency

AGENCY FILE NUMBER (If any):

A. PUBLICATION OF NOTICE *(Complete for publication in Notice Register)*

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER
☐ Notice re Proposed Regulatory Action ☐ Other		

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS *(Complete when submitting regulations)*

1. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) *(Including title 26, if toxics-related)*

SECTIONS AFFECTED	
	ADOPT: Section 15332
	AMEND:
TITLE(S): Title 14	REPEAL:

2. TYPE OF FILING

☐ Regular Rulemaking (Gov. Code, § 11346) ☒ Resubmittal ☐ Emergency (Gov. Code, § 11346.1(b)) ☐ Resubmittal of disapproved or withdrawn emergency filing

☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Government Code §§ 11346.4 - 11346.8 prior to, or within 120 days of, the effective date of the regulations listed above.

☐ Print Only ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, § 100) ☐ Other (specify) _____

3. DATE(S) OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE *(Cal. Code Regs. title 1, §§ 44 and 45)*

October 30, 1998

4. EFFECTIVE DATE OF REGULATORY CHANGES *(Gov. Code § 11346.2)* Public Resources Code §21087

☐ Effective 30th day after filing with Secretary of State ☒ Effective on filing with Secretary of State ☐ Effective other *(Specify)*

5. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

☐ Department of Finance (Form STD. 399) ☐ Fair Political Practices Commission ☐ State Fire Marshal

☐ Other (Specify) _____

6. CONTACT PERSON	TELEPHONE NUMBER
Matt Francois, Assistant General Counsel, CA Resources Agency	(916)653-5656

7

I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE	DATE
	12/16/98

TYPED NAME AND TITLE OF SIGNATORY: Maureen F. Gorsen, General Counsel, CA Resources Agency

SECTION 15333: In-Fill Development Projects

Brigit Barnes et al. - CEQA Guidelines Task Force
Bart Doyle - City of Sierra Madre

Summary:

An in-fill projects exemption makes sense, but it should not be burdened with an extensive list of qualifications and conditions. The existing exceptions in Section 15300.2 will apply when there are significant cumulative impacts, significant impacts due to unusual circumstances, etc. Subdivision (d) should be deleted and additional conditions should not be added.

Response:

Commentors' suggestion must be declined. Although Agency agrees there is a redundancy between subsection (d) and 15300.2, it appears to be necessary to alleviate commentor's concerns. To only require zoning consistency, no general plan amendment, and an urbanized area would not support the finding that such activity, as a class, will not result in a significant effect. Agency disagrees that the current requirements are either extensive or burdensome.

Hal Barton - Town of Apple Valley

Summary:

This new section makes a lot of sense but is very vague and subject to interpretation. There should be a definition for "in-fill."

Response:

Agency acknowledges Commentor's support. The term "in-fill" is not intended to carry a separate specific definition in this context. Rather, it is intended as a label for development which meets the specific requirements of this section (subdivisions (a) through (e)).

Bob Berman - Nichols / Berman

Summary:

This exemption is overly broad and will be misused. Although urban sprawl is offensive, it cannot be stated categorically that projects of this type will not have significant adverse environmental impacts.

SECTION 15333: In-Fill Development Projects

Response:

Agency disagrees. Public Resources Code §21084 authorizes the Secretary of the Resources Agency to prepare lists of classes of projects which have been determined not to have a significant effect on the environment and hence be exempt from CEQA. As with all the current categorical exemptions, for example, new construction of small structures (15303) or minor additions to schools (15314), the Secretary defines a subset of projects with conditions that as a class do not have a significant effect on the environment. Similarly, in proposed revision 15333, the Secretary is defining a small subset of infill development projects which not have, by virtue of meeting the conditions set forth in this section have a significant effect on the environment. This is consistent with statute and existing guidelines.

Debra Bowen - Assembly Natural Resources Committee

Summary:

This exemption exceeds the scope permitted by statute, which currently limits the exception of in-fill projects to those involving the construction of housing or neighborhood-scale commercial facilities. This section fails to reflect the policy determination of the Legislature that certain types of in-fill be encouraged, but not others.

Response:

Agency disagrees. The mere fact that a statute contains a particular type of in-fill exemption does not justify the conclusion that the Legislature was therefore opposed to any other exemptions within the same general topic. Had the sections referred to by the Commentor included restrictive language that those were to be the only in-fill exemptions, then such a conclusion would be justified. There is nothing in the language of the statute cited by the Commentor which places such limitations.

Also, application of categorical exemptions, unlike statutory exemptions, are not absolute. Section 15300.2 of the Guidelines trumps the use of this or any categorical exemption if there is a possibility of a significant effect due to unusual circumstances, or the project is located in a particularly sensitive environment or scenic or historical resources are impacted, to name a few. Again, bills considering exemptions are distinct from the findings that §21084 authorizes the Secretary to make.

See also responses to Berman, *supra*, and Patton et al., *infra*.

SECTION 15333: In-Fill Development Projects

Ann Broadwell - CA Pipe Trades Council et al.

Summary:

This exemption would allow significant impacts on all other aspects of the environment, including water quality, endangered species and wetlands. The inclusion of this exemption is based on a policy decision by the Secretary for Resources to foster in-fill development, where this decision belongs to the Legislature alone. There is no authority for adding this exemption.

Response:

Agency disagrees that there is no authority for adding this exemption. See response to Berman, *supra*. The application of categorical exemptions, unlike statutory exemptions, are not absolute. Section 15300.2 of the Guidelines trumps the use of this or any categorical exemption if there is a possibility of a significant effect due to unusual circumstances, or the project is located in a particularly sensitive environment or scenic or historical resources are impacted, to name a few.

While the Agency does not believe that as currently proposed and defined such projects could have an impact on water quality, endangered species or wetlands (unlikely that such impacts would occur in an urbanized areas zoned for such in-fill projects), Agency will add these conditions to subsections (c) and (d) to make it clear that if there are such resources impacted, this exemption would not apply.

Fred Buderi - City of Sacramento, Office of Environmental Affairs

Summary:

This section will be very helpful for projects in urbanized areas, where many issues are less-than-significant, but not otherwise exempt under current provisions. It may be helpful to change the reference in subdivision (d) from "traffic, noise or air effects" to "no significant environmental effects" to ensure that no other impacts are missed in the initial screening of the project's effects.

Response:

Agency agrees but that is the effect of §15300.2. Also, due to the comments of so many others who have concerns about particular resources, it appears necessary to list the impacts by resource type so as to eliminate concerns and any confusion about the application of this exemption.

SECTION 15333: In-Fill Development Projects

Bart Doyle - City of Sierra Madre

Summary:

Commentor writes that this section and sections 15301 and 15332 would be extremely helpful increasing the likelihood that his city would be able to "take care of these projects."

Response:

Agency acknowledges and thanks commentor for his support.

George Finney - County of Tulare, Resource Management Agency

Summary:

1. The term "in-fill development" needs to be defined and that definition should include a limit on the magnitude of in-fill development for compliance with this exemption. Tulare County could not use this section, as currently proposed, since none of the county's unincorporated communities have a population of 50,000.

2. Subdivision (d) seems to suggest that counties or cities with non-attainment status for any air quality standards are automatically excepted from using this exemption.

3. Why are conditions limited to no significant traffic, noise, or air quality impacts? Such impacts in other areas (water quality, public services, increased runoff) are just as critical and should also be considered.

Response:

1. The term "in-fill" is not intended to carry a separate specific definition in this context. Rather, it is intended as a label for development which meets the specific requirements of this section (subdivisions (a) through (e)). In response to concerns raised by Commentor and others, 'urbanized area' will be replaced with 'within city limits on a project site substantially surrounded by urban uses.'

2. Agency disagrees that this is an automatic conclusion. Lead agencies would continue to have to examine the specific impacts of the particular project before making that determination.

SECTION 15333: In-Fill Development Projects

3. Agency has addressed this with proposed revisions. See response to Broadwell, *supra*.

Ranjit Gill - Lahontan Regional Water Quality Control Board

Summary:

This section should also limit exemptions for "in-fill development" to projects which do not have potentially significant water quality impacts.

Response:

Agency has addressed this with proposed revisions. See response to Broadwell, *supra*.

Norman E. Hill

Summary:

To support a finding that the projects covered by this section would never have a significant effect on the environment, the following subdivision should be added:

> (e) The project would not be located on a site contaminated with toxic substances.

Response:

Agency disagrees that this provision is necessary. This overall proposal includes an amendment to add a new subdivision (e) to Section 15300.2, to reflect Public Resources Code §21084(c) which prohibits the use of a categorical exemption for any project located on a site which is on a list of hazardous materials/waste sites compiled pursuant to Government Code Section 65962.5. This exception will, therefore, preclude the use of this, or any other, categorical exemption from sites which are determined to constitute a public risk.

Utilization of this language is preferable to the language suggested by the Commentor, which leaves a large definitional gap as to what constitutes "contaminated with toxic substances." Clearly, there must be an exception for such conditions, but only where there is true public risk involved, not where someone opposed to the project argues against applying the exemption because, for example, a single can of paint or motor oil was spilled on a vacant lot. Placing the restriction in

section 15300.2 ensures that it applies to all categorical exemptions and defining the restriction by referencing the Cortese List (Government Code Section 65962.5) ensures statutory consistency.

Julie Horenstein

Summary:

This section allows for a very broad interpretation of in-fill that could lead to a loss of important wildlife corridors and other sensitive habitats with no review or mitigation.

Response:

Agency disagrees. This exemption could not legally be applied if the project had such effects because of the conditions contained in 15300.2. Nevertheless, Agency is adding the qualifier that the project site has no value, or only de minimis value, as habitat for endangered, rare or threatened species.

Lori Hubbart - California Native Plant Society

Summary:

As Class 33 is not included as a 15300 class subject to review of local condition, this will enable any in-fill to ignore residual ecological values inside a city, and opens up a very vague definition of what constitutes in-fill for cities with very broad city limits. The language for this section is far too vague.

Response:

Agency disagrees that this section is too vague. Regardless of the territorial boundaries of a city, this section only applies to project sites substantially surrounded by urban uses. See responses to Berman, Broadwell, Horenstein.

Todd Juvinall

Summary:

There must be more guarantees about zoning: this section doesn't spell out in detail what the Agency has in mind or what law is being implemented. A developer should have reasonable expectations that he may develop his property to the specifications of that zoning district. Government should not be permitted to come in later and change the zoning ordinance to cut the number of units to a lower number. If not, then the

state gives no protection under CEQA and zoning laws to the property owner to allow him to build the units necessary to supply affordable housing.

Response:

Agency appreciates Commentor's observations of some of the perplexing issues that are involved in land use determinations in California. He is correct that current zoning practices sometimes result in inequities regarding individual owners. Unfortunately, these comments involve issues beyond the scope of this section and this rulemaking. They will, however, be maintained for review during the preparation of future rulemaking projects.

John Larson / Curtis Alling - Association of Environmental Professionals

Summary:

Although streamlining CEQA for urban in-fill projects that do not cause significant effects is appropriate, this proposed exemption is too broad and stretches past the authority of the statute in that it is not clear significant effects would normally be avoided for an in-fill project meeting the proposed definition. The definition in this section should include the safeguard qualifications in Public Resources Code Section 21080.14.

Response:

See response to Berman regarding differences between statutory and categorical exemptions. Notwithstanding these differences, Agency notes that many of the safeguards contained in §21080.14 are contained in 15300.2 and others have been added pursuant to public comment.

Debra Man - Metropolitan Water District of Southern California

Summary:

The following subdivision should be added:

"(e) There are no significant impacts to existing infrastructure."

Response:

Agency has made a change to address commentor's concern by adding that the requirement that the project be "adequately served by all required utilities and

services."

Jim Moose - Remy, Thomas & Moose

Summary:

The current proposal must be adjusted to be quite a bit tighter. The following changes would result in an exemption that might survive legal scrutiny:

> Class 33 consists of projects characterized as in-fill development meeting the conditions described in this section.
>
> (a) The project is consistent with the applicable general plan designation and all applicable general plan policies, as well as with the applicable zoning designation and regulations.
>
> (b) ~~No general plan amendment is required.~~
>
> ~~(c)~~ The proposed development ~~occurs~~ would occur in an urbanized area as defined by ~~this chapter~~ section 15387 of these Guidelines.
>
> (c) The project site consists of no more than three acres, and has no value, or only de minimis value, as habitat for wildlife or native plants, and is bounded on at least two sides by existing urban uses or other intense development.
>
> (d) ~~There are no~~ Approval of the project clearly would not result in any significant effects relating to traffic, noise, ~~or~~ air quality, biological resources, historical or archaeological resources ~~impacts~~.
>
> (e) The site is, or can be, adequately served by all required utilities and services.
>
> (f) The project approval will be subject to all applicable standard conditions of approval or mitigation measures normally required for the land use in question.

Response:

Agency has added those suggested additions that will add clarity to the class of projects contemplated by this categorical exemption. Subsection (f) is unnecessary as other land use laws are unaffected by a CEQA exemption. The acreage amounts

in subsection (c) are arbitrary. However, to respond to this concern, Agency will make amendments requiring that the development occur within city limits on a project site substantially surrounded by urban uses. Although any infill project offering habitat values would not be eligible for this exemption, pursuant to 15300.2, enough commentors have raised this possibility as a concern that it appears necessary to add this qualifier to the section itself.

Tara Mueller et al. - Environmental Law Foundation

Summary:

This exemption is overbroad and could apply to projects that are not truly in-fill development. The definition of "urbanized area" could permit a project on an undeveloped parcel adjacent to a densely populated area to proceed without any environmental review, thus affecting endemic species and habitat remnants.

Response:

Agency has made revisions to address this concern. See responses to Berman, Broadwell, Horenstein.

Gary Patton - Planning and Conservation League (12/1 letter)
Byron Sher - Senate Environmental Quality Committee

Summary:

1. How will the Secretary for Resources find that this broad expansion of categorical exemptions do not have a significant effect on the environment?

2. Who requested this change?

3. Does the revision comply with the APA?

4. This section conflicts with Public Resources Code Sections 21084(a), 21080.7, 21080.10(c), 21080.14 (restricting application of in-fill projects); and 21083.3 (restricting application of projects consistent with zoning or community plan).

Response:

1. See response to Berman.

2. This section was requested by the California Farm Bureau.

3. The Agency has made every effort to comply with the APA throughout the rulemaking process and is confident that such compliance has been achieved.

4. Agency disagrees that there is any conflict. There is, with regard to *some* of the sections cited, an overlap of terms and descriptions, but this overlap in no way translates into incompatibility or conflict. Those sections do not restrict the ability of the Agency to establish a new categorical exemption and, significant for our purposes, they do not contain any provision stating that a categorical exemption for infill is prohibited. Furthermore, it is not uncommon to have some overlap between statutory and categorical exemptions. For example, Public Resources Code §21080(b)(3) exempts projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed in an area proclaimed as an emergency. 14 CCR §15302 allows for the replacement or reconstruction of existing structures or facilities on the same site having substantially the same purpose and capacity. Public Resources Code §§21080(b)(6) creates a statutory exemption for certain activities regarding thermal power plants. 14 CCR §§15328 and 15329 create categorical exemptions for hydroelectric facilities and cogeneration equipment, respectively. Public Resources Code §21080.18 exempts the closing of any primary or secondary school if the associated physical changes are categorically exempt. 14 CCR §15314 exempts minor additions to schools that do not increase capacity by more than 25%.

Public Resources Code §21084(a) requires that the guidelines include, "a list of classes of projects, which have been determined not to have a significant effect on the environment and which shall be exempt from this division." In adopting categorical exemptions, the Secretary of the Agency is required to make a finding that a particular listed class of projects does not have a significant effect on the environment.

The provisions of proposed section 15333, substantially amended to reflect the concerns raised by public comments, adequately allows the Secretary to make such a finding for this exemption. For example, as amended, this exemption only applies if: 1) the project is consistent with the general plan and zoning requirements, 2) the proposed development occurs within city limits on a project site substantially surrounded by urban uses, 3) the site has no value as habitat for endangered, threatened, or rare species, 4) approval of the project will not result in any significant effects related to traffic, noise, air quality or water quality, and 5) the site can be adequately served by existing utilities and infrastructure. As illustrated above, the enumerated factors restrict the application of this exemption and in so doing, create a class of activities for

which the Secretary can make the requisite finding of Public Resources Code §21084(a). Further, like all categorical exemptions, this exemption would not apply, pursuant to 14 CCR §15300.2(c), if there is a "reasonable possibility that the activity will have a significant effect on the environment."

Public Resources Code 21083.3 is a tiering-type provision, allowing for 'limited environmental review' for a development project when a prior EIR has been certified for the zoning or community/general plan with which the project is consistent. Section 21083.3 is not a statutory exemption from CEQA nor does it pertain specifically to infill, and thus, does not stand for the proposition for which it is cited by Commentor. Similarly, Section 21080.10(c), although a statutory exemption from CEQA, does not pertain to infill development and does not support Commentor's argument. To the contrary, the section exempts lower-income residential housing for agricultural employees. Nevertheless, proposed section 15333 is consistent with one conditional provision of that section which requires that if the agricultural employee housing project is in an "urbanized area," then it must be adjacent, on at least 2 side to land that is developed. Proposed section 15333 goes even further than this irrelevant statutory exemption by requiring that the proposed development be "substantially surrounded by urban uses."

Public Resources Code §21080.7 exempts projects involving the construction of housing or neighborhood commercial facilities in an urbanized area if: 1) the project is consistent with a legally-adopted specific plan, which has been the subject of a detailed EIR, 2) the lead agency requires adoption of the previously specified mitigation measures or states overriding considerations, and 3) the lead agency files a notice of decision with the county clerk. The intent underlying section 21080.7, like section 21083.3, is to avoid duplicative and unnecessary environmental review given the Legislative mandate to tier whenever feasible. (Public Resources Code §21093). Thus, section 21080.7 is not inconsistent or otherwise incompatible with proposed section 15333 nor does it evidence an intent to preempt exemption of infill development through the Guidelines.

The problem with section 21080.7, from the policy standpoint or preserving agricultural land and reducing urban sprawl, which is the intent of proposed section 15333, is its reliance on the phrase, "urbanized area." This is defined as a population base of 50,000 or more. However, while the danger of loss of farmland occurs in areas surrounding Stockton, Fresno, and Sacramento, all areas meeting the required population figure; it also threatens towns like Lathrop, Galt, and Ripon, areas not meeting the population requirement and thus not subject to the exemption. Thus, there is no incentive

under the statutory exemption to encourage infill development in the smaller towns which dominate the farming areas of California as a whole and the Central Valley in particular. This is yet another example of how the proposed categorical exemption can be distinguished from the statutory exemption and further evidence that the two are not in conflict.

Public Resources Code §21080.14 exempts a very narrow type of project from CEQA. It consists of lower-income, multi-family residential housing in an urbanized area (defined as more than 1,000 persons per square mile) which: 1) is consistent with general plan or specific plan, 2) is consistent with zoning designation, 3) is an infill site (previously developed for urban uses or substantially surrounded by previously developed sites, 3) is less than 5 acres, 4) can be adequately served by utilities, 5) has no value as wildlife habitat, 6) is not included on the Cortese hazardous waste site list, 7) is free from significant hazardous contaminants, and 8) does not significantly impact any historical resource.

With the exception of the acreage limitation, which was just increased last year from 3 acres to 5 acres, proposed section 15333 or section 15300.2 contains all of the above restrictions. The only difference between the two sections is that the purpose of the statutory exemption is to encourage the development of low-income, multi-family residential housing in urban areas. The categorical exemption, on the other hand, is aimed at conserving agricultural land, a significant source of revenue, employment and prosperity to the State while at the same time encouraging orderly urban development by conditionally exempting all development occurring within city limits and substantially surrounded by urban uses.

According to practitioners and others involved in CEQA practice, this statutory exemption is of little practical value given the plethora of restrictions attached to its use. The result is that developers look elsewhere other than urban, previously developed areas to develop. Those areas usually happen to be agricultural lands, open space, etc at the fringe of the urban limits where land is plentiful and cheap. Proposed section 15333 attempts to prevent that from occurring by encouraging development in previously developed areas, with restrictions to ensure that the Secretary can make the requisite finding of no significant effect, but not as many restrictions as contained in statute to ensure practical application.

Government Code §11349(d) defines 'consistency' as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." As illustrated above, proposed section 15333 is

entirely consistent with Public Resources Code §§21084(a), 21080.7, 21080.10(c), 21080.14, and 21083.3

See also response to Berman, Bowen and Broadwell.

Pete Price - California League of Conservation Voters

Summary:

This section is lacking in precision and should either be deleted or amended to clarify the scope of the exemption. Currently, in-fill is not defined, no guidance is provided regarding traffic, noise, or air quality impacts, and the proposal assumes that conformity with existing plans constitutes "no significant effect."

Response:

See responses to Berman, Barton, Broadwell.

With respect to Commentor's assertion that mere conformity with existing plans constitutes, "no significant effect," the language of the proposal, even prior to amendment, does not lend itself to such an interpretation.

As amended, this exemption only applies if: 1) the project is consistent with the general plan and zoning requirements, 2) the proposed development occurs within city limits on a project site substantially surrounded by urban uses, 3) the site has no value as habitat for endangered, threatened, or rare species, 4) approval of the project will not result in any significant effects related to traffic, noise, air quality or water quality, and 5) the site can be adequately served by existing utilities and infrastructure. As illustrated above, the enumerated factors restrict the application of this exemption and in so doing, create a class of activities for which the Secretary can make the requisite finding of Public Resources Code §21084(a). Likewise, like all categorical exemptions, this exemption would not apply, pursuant to 14 CCR §15300.2(c), if there is a "reasonable possibility that the activity will have a significant effect on the environment." Thus, contrary to Commentor's assertions, this language does not allow mere consistency with a planning document to exempt a project from CEQA; consistency is only one factor.

Andrew Schiffrin - County of Santa Cruz

Summary:

1. The language of this proposal is too broad. In-fill development of any size

would be permitted, without consideration of site-specific issues such as rare and endangered species, scenic resources, water quality, etc.

2. There is no definition of "in-fill" provided. This will generate conflict and confusion.

3. The CEQA statute contains exemptions for certain types of in-fill projects. Adding this section could result in problems since categorical exemptions have exceptions but statutory exemptions do not.

Response:

1. See response to Broadwell.

2. Agency disagrees that confusion will result. The term "in-fill" is not intended to carry a separate specific definition in this context. Rather, it is intended as a label for development which meets the specific requirements of this section (subdivisions (a) through (e)).

3. Agency disagrees that this poses a problem. In many instances there are categorical exemptions which have some overlap with statutory exemptions. This issue is easily dealt with, however, since any project which meets the requirements of a statutory exemption will be reviewed pursuant to that exemption, not a categorical exemption of the Guidelines. This is the case pursuant to common rules of statutory construction that statute prevails over regulation. Application of this rule of construction precludes any problem based on the fact that categorical exemptions have exceptions, since the exceptions would only be considered if there is no statutory exemption category to which the project fits.

Karin Schwab - County of Sacramento, Office of the County Counsel

Summary:

Subdivision (d) is inconsistent with Public Resources Code Section 21084(a). It should be expanded to include any other areas where potentially significant impacts can occur, such as water quality, drainage, and water supply. The section should state:

> There are not significant impacts, including but not limited to traffic, noise, air quality, water supply or quality or drainage.

SECTION 15333: In-Fill Development Projects

Response:

Agency has added language to address commentor's concerns. The project must be adequately served by existing utilities (including water supply) and must not impact water quality.

Dan Silver - Endangered Habitats League

Summary:

This exemption is overly broad and may permit an undeveloped, environmentally sensitive portion of a jurisdiction to entirely escape CEQA review if an adjacent portion of the jurisdiction were densely populated. The proposal also does not take into account impacts to water quality, community character, public facilities, and so on.

Response:

Agency has made revisions to address commentor's concerns. See responses to Broadwell, Finney, Man, and Moose.

Bob Vice - California Farm Bureau Federation

Summary:

The CFBF supports the establishment of this categorical exemption, which will encourage in-fill development and discourage urban sprawl.

Response:

Agency acknowledges Commentor's support.

J. William Yeates - Mountain Lion Foundation

Summary:

"In-fill" is undefined and is a very subjective term and this overly broad section will invite misuse. If an in-fill project can meet the criteria in subdivisions (a) through (d), it is a likely candidate for a negative declaration, but should not be excluded from the public participation that CEQA provides.

Response:

SECTION 15333: In-Fill Development Projects

The term "in-fill" is not intended to carry a separate specific definition in this context. Rather, it is intended as a label for development which meets the specific requirements of this section (subdivisions (a) through (e)). By definition, projects which meet those criteria will not have a significant effect on the environment.

Michael H. Zischke - Landels, Ripley & Diamond

Summary:

Commentor disagrees with the comments provided by Patton and Sher.

1. This exemption is consistent with Public Resources Code Section 21084 and supports a finding by the Secretary.

2. Public Resources Code Sections 21080.7, 21080.10(c), 21080.14 and 21083.3 are all statutory exemptions. They do not restrict the ability of the Agency to establish a new categorical exemption and they do not contain any provision specifically stating that a categorical exemption for in-fill is prohibited. Furthermore, it is not uncommon to have some overlap between statutory and categorical exemptions.

Response:

1. Agency agrees.

2. Agency concurs with this view and agrees that there is no conflict.