

CEQA
Partnership Issue Paper

Prepared In Partnership by

California Integrated Waste Management Board Staff

Local Enforcement Agency Representatives

Contents

Introduction

History

Next Steps

LEA as Lead Agency

Am I Lead Agency?

What is my role and what are my tasks?

LEA as Responsible Agency

CIWMB as Responsible Agency When LEA is Lead Agency

Other Issues

If LEA as Responsible Agency isn't performing as expected, would the CIWMB assume the lead?

Environmental Justice

Age of CEQA Document

Inconsistency

Future issues

Additional Issues from Work Group Meeting not explored

Thresholds

Introduction

This paper is part of a joint effort between LEA and CIWMB staff to clarify how the current CEQA process is conducted relative to solid waste facilities permits. The goal of this paper is to show the two differing perspectives on the CEQA process, as they were at the time the paper was completed, from both the LEA and CIWMB view. This paper will show where the viewpoints agree as well as where opinions differ. The paper is intended to provide clarity on the current practices.

History

In August 2003 the Partnership 2000 workgroup met to prioritize CEQA issues. The top three issues included:

- CIWMB application of the CEQA process beyond Board's scope, role, responsibility and authority
- Need for increased consistency in application of permit process
- Need for communication/coordination between LEAs and CIWMB in the permit process

During the 2004 LEA/CIWMB Conference the CEQA workgroup decided to supplement existing CEQA guidance previously provided in Board sponsored trainings and in the Permit Toolbox and fill in additional information. It was agreed that the supplements should be some hard and fast rules that LEAs and Board staff could use to make decisions regarding the CEQA process as well as to describe the role of the LEA when acting as a lead agency and the Board as a responsible agency. There was also a decision to examine the possibility of drafting thresholds to be used when reviewing solid waste facility projects.

The work group met in September 2004 to continue the draft outline on rules, roles and thresholds associated with CEQA.

In addition to the partnership work group additional efforts focusing on CEQA are in place. These include:

- Additions to the Permit Toolbox
- CEQA Training offered by the CIWMB in the Spring of 2005
- Comprehensive examination of the Board's CEQA responsibilities in all areas

CEQA Information

The following information was captured during several CIWMB/LEA Partnership meetings on CEQA. This document focuses on three main topics:

1. LEA as Lead Agency
 - Am I Lead Agency?
 - What is my role and what are my tasks?
2. CIWMB as Responsible Agency When LEA is Lead Agency
3. Other Issues
 - If LEA as Responsible Agency isn't performing as required by law, would the CIWMB assume the lead?
 - Environmental Justice
 - Age of CEQA Document
 - Inconsistency
 - Future issues

1. LEA Deciding if it needs to be Lead Agency

Am I Lead Agency? Scenarios where an LEA might be Lead Agency. [CEQA Guidelines section 15051 describes how to identify the Lead Agency.]

1. The permit is the first approval for the activity.
2. No other public agency or decision-making body (Board of Supervisors, City Council) is carrying out the project or making an approval that requires CEQA review.
3. Per CEQA Guideline Section 15162, if the LEA is presented with information in the context of a, b, and c, below, and the LEA finds that additional documentation is required there has been a substantial change in the project, or which results in new significant effects or severity of effects the LEA may determine to become lead agency.
 - a. There has been a change in circumstances under which the project is being undertaken which results in new significant effects or severity of effects
 - b. New information is made available which shows the following
 - i. One or more significant effect identified that were not previously discussed (including or not limited to regional and cumulative impacts)
 - ii. Mitigation measures are not feasible
 - iii. Mitigation measures or alternatives were not discussed that would reduce significant impactsThe LEA should consult with the previous lead agency to determine if based on the issues presented in any new information provided have or have not already been addressed in the existing documentation developed by the previous lead agency
3. Per CEQA Guideline Section 15052(a) the LEA shall become Lead Agency if the following have occurred:
 - a. The lead agency did not prepare any environmental documentation for the project, and the statute of limitations for challenging the lead agency's action has expired

- b. The lead agency prepared environmental documents for the project, but the following conditions occur:
 - i. A subsequent EIR is required per Guidelines section 15162
 - ii. The lead agency granted final approval of the project, and
 - iii. The statute of limitations for challenging the lead agency's action under CEQA has expired
- c. The lead agency prepared inadequate documentation without consulting with the responsible agency and the statute of limitations for challenging the lead agency's action has elapsed.

So Now I'm Lead Agency. What is my role and what are my tasks?

1. If the LEA as a lead agency prepares a draft EIR or ND, it should be noticed and circulated (locally and statewide) for review and comment. All comments should be considered. A final document should be developed and adopted or certified, and all required findings should be made.
 - a. When an LEA, as the lead agency, prepares an EIR for a proposed project, the EIR must analyze all potentially significant environmental impacts. The EIR cannot have unsupported conclusions. Every conclusion must be supported by sufficient analysis. If the LEA needs information from a responsible agency, but the responsible agency is not cooperating, the LEA can request help from CIWMB staff and/or the State Clearing House. In addition, the LEA can hire consultants that have the expertise the LEA needs to prepare the EIR. The LEA can charge the project applicant a reasonable fee to pay for the LEA's cost to prepare the EIR.
2. In some cases, an LEA may wish to notice and circulate a document prepared by another agency prior to utilizing it for the permit. Occasionally, an LEA may choose to complete or correct the CEQA process carried out by another public agency when it considered a project. (for example, if the environmental document was not noticed or circulated adequately). New noticing and circulation of a document is a way to determine if there may be ~~is~~ new information that may require additional documentation to be developed pursuant to Section 15162. This may be an alternative to preparing a new CEQA document or an alternative to litigation against the original lead agency. If the LEA does not correct the flaws in the notice and circulation process, Board staff will consider whether it needs to do so or whether another action is necessary.
3. The LEA can take the time required to complete the CEQA process pursuant to Guidelines 15111.
4. When considering issuing a permit the LEA must keep in mind PRC 44012. When issuing or revising any solid waste facilities permit, the enforcement agency shall ensure that primary consideration is given to protecting public health and safety and preventing environmental damage, and that the long-term protection of the environment is the guiding criterion, and that any terms and conditions of the solid waste facilities permit are consistent with subdivision (e) of Section 43209 and this division. Any Lead Agency must review all aspects of potential environmental impact.

5. A complete project description should be developed that takes into account as appropriate growth and predictable future changes. The whole of the project should be considered.
6. Consult early and often. Consultation should be with local and state agencies as well as other interested parties. It can be done through meetings or through requests for review of documents, draft or otherwise. The Permit Toolbox has information on topics that should be thought through relative to environmental review checklists, permit, and operating and design elements.
<http://www.ciwmb.ca.gov/PermitToolbox/CheckItems/CEQA/default.htm#Guidelines>
7. If after consultation the LEA determines that the contemplated project is adequately considered in a previously adopted environmental document, or an Exemption is appropriate, then the LEA will complete the Exemption “process” and include in the finding as stated in T27, 21650f(7) or find that the proposed permit is consistent and supported by the existing CEQA analysis when the permit is sent to the Board. The LEA should consider filing a Notice of Exemption or Notice of Determination with Governor’s Office of Planning and Research (OPR, State Clearinghouse) and the County Recorder when they forward the proposed permit to the Board.
 - a. In all cases the CIWMB, as a Responsible Agency must make its own determination whether the project is supported by existing documentation or exempt. If the CIWMB staff disagrees with the LEA on the finding, the following steps will be taken.
 - i. CIWMB will initiate discussion with the LEA to resolve differences within the time constraints of the permit process. This would include technical and legal assistance on how the Board could comply with CEQA requirements.
 - ii. If the issues cannot be resolved, CIWMB staff may take appropriate actions, including taking the permit to the Board with a recommendation on how the Board should comply with the CEQA requirements or taking legal action where necessary to preserve the Board’s entitlements as a responsible agency.
 - iii. CIWMB’s recommendation alternative actions that CIWMB staff might recommend could include assisting the LEA to comply with CEQA, suing the Lead Agency, completing a CEQA document, or taking no additional steps.
8. When the LEA is the lead agency they need to fully comply with all the CEQA requirements prior to sending a proposed permit to the Board for concurrence. The LEAs should consult with their legal counsel to determine how all the requirements (CEQA and permit process requirement) can be best achieved.

2. LEA as Responsible Agency [Also applicable to CIWMB as Responsible Agency]

Consultation

When acting as a Responsible Agency, the LEA will utilize environmental analyses and documentation prepared by the Lead Agency in its decision making process. To ensure adequacy of these documents under CEQA, the LEA is given the opportunity to affect the

scope and contents of the analysis by providing consultation to the Lead Agency. *CEQA Guidelines Section 15096(b)*

The LEA should designate representatives to attend scoping meetings. § 15096(c)

When consultation is requested by the Lead Agency, the LEA should review the Notice of Early Consultation (NOEC) or NOP for the proposed project and provide the Lead Agency with specific detail about the scope and content of the environmental information. Comments should be related to the LEA's area of statutory authority and expertise relative to the design and operation of the solid waste facility or operation. Comments also should be made in order to disclose information necessary for the LEA to make their approval over the portion of the project related to the permitting and enforcement of the proposed project. If an EIR is to be prepared and consultation is not requested, the LEA can ask for a consultation meeting. The LEA must respond to an NOP within 30 days. §§ 15063(g), 15082(b) and 15082(c)

Providing Comments

As a Responsible Agency, the LEA has an additional opportunity to affect the quality of the analysis provided in an environmental document by reviewing and commenting on proposed or draft documents.

When a Mitigated Negative Declaration (MND) or Negative Declaration (ND) is being prepared, the LEA can comment on the proposed document. Comments need to be returned to the Lead Agency within the indicated review period. MNDs and NDs do not provide an opportunity for a response to comments. Therefore, if the LEA disagrees with the level of detail necessary for the processing of a SWFP, the LEA must indicate where the document is deficient and offer inclusions to be incorporated/amended into the final document. If the LEA disagrees with the proposal to prepare a MND or ND, the significant effects which would result from the project must be identified and a recommendation made to modify the project, incorporate mitigation measures, or prepare an EIR.

If an Environmental Impact Report (EIR) is being prepared, the LEA should respond within the indicated review period. Comments should speak to the scope and content of the EIR germane to the LEA's responsibilities. Comments on a draft EIR should focus on the completeness of the project description and proposed project alternatives, as well as the completeness, inconsistencies and/or correctness of the environmental analysis and technical appendices in the EIR. The comments should offer additional information, mitigation measures or alternatives that should be included. The LEA may determine that they have the broad expertise relative to solid waste management and may choose to provide comments based on their expertise.

Use of a Lead Agency's Document

The LEA shall consider the Lead Agency's EIR, MND or ND prior to acting upon or issuing the SWFP. The Responsible Agency shall certify that it reviewed and considered the information contained in the EIR, MND or ND. §§ 15050(b) and 15096(a)

If the LEA finds the document prepared by the Lead Agency is inadequate for its use as a Responsible Agency, the LEA must either:

- Be deemed to have waived any objection to the adequacy of the EIR, MND, or ND;
- Prepare a subsequent EIR, ND, MND if permitted under § 15162; or
- Assume the Lead Agency role as provided by § 15052(a) (3). *§ 15096(e) This, of course, also applies to CIWMB as a Responsible Agency and should be noted above where this report talks about the Board completing the CEQA documentation a Lead Agency prepared.*
- Take the issue to court if the statute of limitations has not run (typically, 30 days from the filing of a Notice of Determination);

If the document is deemed to be adequate, the LEA must consider the environmental effects of the project as shown in the EIR, ND or MND prior to making a decision on the project. *§ 15096(f)*

If an EIR was developed, the LEA shall not issue a Permit to a project as proposed if any feasible alternative or feasible mitigation measures within its powers would substantially lessen or avoid any significant effect. *§ 15096(g)*

The LEA needs to make the written findings required by §§ 15091 and 15093. *§ 15096(h)*

After the LEA approves the project (issues the permit) a Notice of Determination may be filed with the County Clerk and the State Clearinghouse. *§15096(i)*

3. Additional Points relative to CIWMB as Responsible Agency

1. CIWMB staff wants to be at the table early with the Lead Agency, formally or informally, in scoping meetings and in consultation.
2. CIWMB staff will provide comments on all aspects of the project and project impacts. This is done to ensure that all potential issues are identified and have an opportunity to be resolved. Most issues can be linked to some aspect of the design or operation of the facility. CIWMB staff will defer to agencies with higher level of expertise on the issue. For example, while CIWMB might flag air or water issues in its comments in a scoping session or on a draft EIR, final determinations on air quality or water quality issues will be deferred to the air district and regional board respectively to make final determination relative to the issue discussed in the comments and will not pursue the issue further
3. The Board as Responsible Agency, must make the same findings as a Lead Agency when granting approval of the project in the form of permit concurrence (Guidelines Section 15096 h). If any impact remains significant after mitigation, the Board must adopt a Statement of Overriding Considerations in order for the project to be approved.
4. Relative to issues identified during the CEQA process:

- a. If all the issues identified by CIWMB staff have been addressed in the Lead Agency's CEQA record then the staff will recommend the document be used to support the Board's ability to concur in the proposed permit that identifies the project.
- b. If some issues remain, CIWMB staff will continue to work with the Lead Agency to find resolution. If the Lead Agency is an LEA, CIWMB staff and the LEA may wish to take the issue through the Board's Management eventually to the Executive Director and should have legal staff present during discussions to find resolution. If discussion with the Lead Agency does not result in resolution, CIWMB staff will need to find an alternative way to resolve remaining issues. CIWMB staff will only pursue issues that remain that are within their purview and not entirely within another agencies oversight

Find resolution through direct discussions with the applicant and or other responsible party. The applicant may wish to waive time in order to complete the discussions

- i. If the findings in 15162 or 15052 can be made, prepare additional documentation. (The costs of preparing additional CEQA documentation may be imposed on the project applicant.)
- ii. Bring the permit to the Board with recommendations including i and iii above as well as recommend reviewing the LEA performance with respect to the CEQA requirements.
- iii. Sue the Lead Agency after consultation with CIWMB Legal office, P&E Deputy Director, and the CIWMB Executive Director.

3. Thresholds

Will be added at a later date

Phase II – EAC may want to write a resolution on one or more of the following:

- Inconsistency between projects/Inconsistency on the same project with different staff – Differing comments from multiple staff, at different times – Phase II
- Scope: CIWMB should only provide comments on issues it has purview on. - See roles
- Timing: What happens if CIWMB comments early on in process and Responsible Agency with expertise in the subject matter? Considers that the Lead adequately addressed them, but then CIWMB makes same comments much later when Board is taking discretionary action on permit? Does CIWMB internal process need to be reviewed? I.e., at end either sue or say nothing?