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VIA EMAIL AND U.S. MAIL

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Re: **Pattern of Inaccurate Characterizations of CEQA's Standards and Requirements**

Dear Honorable Members of the Humboldt County Board of Supervisors and Director Ford:

On behalf of Northcoast Environmental Center ("NEC") and Citizens for a Sustainable Humboldt ("CSH"), we respectfully submit the following general comments with the intention of fostering improved adherence to and compliance with established standards and mandatory requirements of the California Environmental Quality Act ("CEQA").[1] Over the course of several recent Planning Commission and Board of Supervisor meetings, where proposed large development projects have been considered for approval, NEC and CSH members have observed repeated inaccurate characterizations of CEQA's standards and requirements. The inaccurate characterizations – advanced by planning staff, project applicants' counsel, and, occasionally, even by Commissioners and Supervisors – have tended to:

- downplay the important procedural and substantive differences between an Environmental Impact Report ("EIR") and a Mitigated Negative Declaration ("MND");

[1] Public Resources Code ("PRC") §§ 21000, et seq.; CEQA Guidelines, 14 CCR §§ 15000, et seq. The 2021 CEQA statute and CEQA Guidelines are available to download at: https://www.califaep.org/statute_and_guidelines.php.

- portray the "fair argument" test under CEQA, which establishes the low threshold for requiring an EIR, as a higher burden of proof for project challengers than it actually is under the statute and controlling caselaw;

- advance a double standard, where County planning staff and project applicants are permitted to present absolute conclusions dismissing the potential for significant environmental impacts that are nothing more than unsubstantiated opinion while at the same time staff and applicant's criticize substantiated comments from the public, other agencies, and County planners concerning potentially significant impacts that may be caused by proposed projects as lacking sufficient evidentiary and expert support; and

- imply that County decision-makers have discretion to decide to prepare an MND instead of an EIR based on practical considerations, such as whether more in-depth environmental impact analysis would change the outcome, rather than on the required factual and legal basis.

The above inaccurate characterizations appear to be based on several fundamental misunderstandings of the CEQA statute and CEQA Guidelines and their application to discretionary project approvals. NEC and CSH submit the following general comments with the hope of improving understanding of CEQA's standards and requirements as they apply to important land use decisions with substantial environmental implications. NEC and CSH seek to inform decision-makers and the public about CEQA's substantive and procedural requirements in order to foster improved public participation and help ensure decisions with major long-term implications for the environment are based on an accurate understanding of these important legal concepts.

At the most recent Planning Commission meeting on Thursday, April 22, 2021, in response to a question from Commissioner Noah Levy concerning the criteria the Planning Department uses when determining whether an MND rather than an EIR should be prepared, Planning Director John Ford made several inaccurate statements concerning CEQA's requirements for EIRs and MNDs.[2] For example, Director Ford falsely claimed that the two types of documents "do very much the same thing," provide essentially the "same analysis," and the level of study is "very similar."[3] The primary distinguishing feature between the two documents, according to the Director, is that, with an EIR, the identified potentially significant impacts do not all have to be mitigated to less-than-significant levels – for impacts that are not fully mitigated, the lead agency can make "findings of overriding considerations" and approve the project anyway. In addition to falsely equating an MND and an EIR, the Planning Director did not mention that, even with an EIR, all feasible mitigation measures must be adopted

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[2] See video of Planning Commission meeting for April 22, 2021, hearing re Arcata Land Company, LLC, Conditional Use Permit (PLN-12255-CUP), at hour mark 2:03 to 2:10, available at: http://humboldt.granicus.com/MediaPlayer.php?view_id=5&clip_id=1489.

[3] *See id.* at approximately 2:07, 2:09, 2:10 marks of the video.

before a lead agency can adopt a Statement of Overriding Considerations. Also, by omitting any mention of the "fair argument" standard – CEQA's "low threshold requirement for preparing an EIR,"[4] the Planning Director side-stepped the Commissioner's direct question on the criteria used by staff to determine whether an EIR should be prepared. We address the implications of each of these problematic issues below.

The explanation provided by the Director in response to Commissioner Levy's question is unresponsive, inaccurate, and potentially misleading in several respects. For example, the Director's statements (1) do not address the Commissioner's question of what criteria the Planning Department uses to determine whether an EIR, as opposed to an MND, is required (see video at 2:03 mark) and (2) inaccurately characterize the substantive requirements for both types of CEQA documents as equivalent, when they most assuredly are not.

With respect to the first point above, the Director did not acknowledge that, pursuant to the mandatory language of the CEQA statute and CEQA Guidelines, an MND is only allowed when the Initial Study demonstrates with substantial evidence that, after incorporating mitigation measures, a proposed project will "clearly" not cause "any significant effect on the environment."[5] In contrast, an EIR is required when there is a fair argument, based on substantial evidence, that a project "may" cause one or more potentially significant impacts.[6] In other words, when an MND is prepared, the burden is on the lead agency (here the County) to demonstrate with supporting evidence and transparent analysis that, with incorporated mitigation measures and project design changes, there is no possibility that the proposed project may cause significant impacts. If commenters present any substantial evidence supporting a fair argument that the project may cause significant impacts, then an EIR is required – even if there is also substantial evidence that the project may not cause significant

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[4] *See Sierra Club v. California Dept. of Forestry & Fire Protection* (2007) 150 Cal. App. 4th 370, 380, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84 and citing *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309–310.

[5] *See* PRC, §§ 21064.5, 21080(c); *see* CEQA Guidelines, §§ 15070 and 15369.5; *see also* Exhibit A: Excerpts from Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (11th ed. 2007), pp. 249-256, 262-263, 312-313, 329.

*Note: While the Guide to CEQA has not been republished since 2007, this painstakingly thorough treatise on the substantive and procedural requirements of CEQA remains an authoritative reference resource, repeatedly cited by appellate courts, concerning California's most important environmental statute. (*See, e.g., RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201, 1207, 1211, quoting Guide to CEQA; *see also Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139, same; *see also California Clean Energy Committee v. City of San Jose* (2013) 220 Cal.App.4th 1325, 1336, fn. 3, same.) The thoughtful explanations in the Guide to CEQA concerning CEQA's general structure and requirements remain relevant and informative. However, all citations to the statute and to caselaw in this treatise should be double-checked to ensure accurate and up-to-date information.

[6] *See id.* at p. 329; *see also*, e.g., *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320, citing *No Oil, supra*, 13 Cal.3d at p. 75 and *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504-505.

impacts. An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.[7] According to the Guide to CEQA, "credible expert testimony that a project may have a significant impact, even if contradicted, is generally dispositive and under such circumstances an EIR must be prepared. [Citation.] Indeed, an EIR is required precisely in order to resolve the dispute among experts."[8]

The Director's conspicuous omission of any reference to the "fair argument" standard is potentially misleading to both the decision-makers and to the public because it ignores altogether the central threshold question placed directly at issue in Commissioner Levy's question. Unfortunately, the pattern of mischaracterizing CEQA's standards and requirements goes deeper and further back. Several weeks ago, a project applicant's attorney went further by actually misrepresenting the "fair argument" standard when defending the Planning Commission's approval of a large commercial cannabis project in remote McCann.[9] During that meeting, counsel for the applicant quoted non-controlling dicta in an outlying appellate court decision as support for his argument that, under the "fair argument" test, project challengers must present substantial evidence showing that a project "will" have a significant impact on the environment.[10] As the undersigned pointed out at the time and again after the hearing, this characterization of the applicable standard is inconsistent with the language of the CEQA statute, the CEQA Guidelines, and controlling caselaw.[11] The applicant's characterization of the standard would improperly shift the burden to project opponents to analyze a proposed project's impacts. No one from the County – not planning staff or county counsel – corrected this blatant mischaracterization of a central legal principle.[12] On the contrary, planning staff's

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[7] *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318.

[8] *See* Exh. A – Guide to CEQA, p. 262.

[9] *See* video of Board of Supervisors meeting on March 9, 2021, concerning the Rolling Meadow Ranch appeal, hour mark: 4:59; available at: http://humboldt.granicus.com/MediaPlayer.php?view_id=5&clip_id=1479, accessed April 27, 2021.

[10] *See id.* at approximately 5:00 hour mark; stating "Under the fair argument standard, an environmental impact report is required if there is substantial evidence that a project will have a significant effect on the environment, even if there is also substantial evidence to the contrary", emphasis in the original, quoting *Friends of the Sierra R.R. v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 661 [holding transfer or land to tribe not a "project" under CEQA], citing CEQA Guidelines, § 15064(f)(1) [guideline provision using the word "may"].

[11] *See* Public Resources Code, §§ 21064.5, 21080(c)(1)-(2), 21080(d), 21082.2; *see also* CEQA Guidelines, §§ 15002(f), 15002(k), 15063, 15064(b)(1), 15064(f), 15064(g); *see also, e.g., Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310 ["The test is whether 'it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact"], emphasis added, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75. The undersigned sent a letter to counsel for the applicant, the Planning Director, and County Counsel the day after the appeal hearing, requesting correction of this mischaracterization.

[12] During the appeal hearing, Director Ford did address the "fair argument" test but only insofar as to claim that the substantial evidence cited by appellants and other commenters, including CDFW, concerning the project's potential to cause significant impacts, was not sufficiently substantial to meet the "fair argument" test. *See id.* at hour mark: 5:08 – 5:09.

internally inconsistent characterizations of (1) the expert opinion and agency comments supporting project challenger's arguments in support of an EIR as insufficient and (2) unsupported conclusions by planning staff and unqualified third parties (e.g., a well driller) as sufficient reveal a blatant double-standard that is inconsistent with CEQA's definition of "substantial evidence." These instances where the "fair argument" standard has been disregarded, misrepresented, and/or misapplied have the potential to mislead the public and undermine sound decision making.

With respect to the second point, contrary to the Planning Director's characterization of the MNDs and EIRs providing the "same analysis," CEQA imposes heightened substantive requirements for an EIR that do not apply to an MND. These requirements, specific to an EIR, tend to result in a much more robust analysis of environmental impacts and a more comprehensive consideration of the ways those impacts can be reduced through mitigation or avoided through alternatives and project design changes.

For example, the CEQA statute and CEQA Guidelines provide that an EIR must provide an analysis of project alternatives that can avoid or reduce a project's potentially significant impacts.[13] An MND need not address alternatives to a proposed project. As a consequence, decision makers have no opportunity to consider a project alternative for approval, rather than the project as proposed by the applicant. MND's constrain the opportunities for impact minimization and avoidance.

As an illustration, if an EIR had been prepared for the Rolling Meadow Ranch project, as opposed to the adopted MND, an analysis of a reasonable range of feasible project alternatives would have been required. County decision-makers could have considered this range of project alternatives for approval – such feasible alternatives could have included (as suggested by Supervisor Madrone on March 9th) a fully sun-grown, in the ground, cannabis cultivation project alternative with improved road access for fire safety and increased rainwater catchment and seasonal groundwater pumping forbearance – an alternative that, in connection with natural cycles, is seasonally closed during the winter when the McCann Bridge on the Eel River is submerged.

Further, under Public Resources Code, section 21081, when an EIR has been prepared, the lead agency is required to make specific findings of fact that are not required when an MND is the operative CEQA document.[14] This is the area where the Board has some discretion and limited latitude to find that overriding considerations make a project worth approving, despite its unavoidable significant impacts. But in order to make this finding, the board must first do all

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[13] PRC sections 21002.1(a), 21061, and 21153, and CEQA Guidelines, sections 15082, 15083, 15121, 15124, 15126, 15126.6; *see also* Exh. A – Guide to CEQA, pp. 413, 494-495.

[14] *See* PRC, § 21081; CEQA Guidelines, § 15093; *see also* Exh. A – Guide to CEQA, p. 411.

it feasibly can to mitigate and avoid the significant impact.[15] The Planning Director's recent explanation of "findings of significant impacts" suggested that, when proceeding with an EIR, the lead agency may have less of a responsibility to fully mitigate impacts than when adopting an MND, and this is simply not the case. With either document, the lead agency has a mandatory duty to adopt feasible mitigation measures for every identified significant environmental impact.

Preparing an EIR is an iterative multi-step process, where the lead agency (or an applicant's consultant with staff direction) conducts preliminary review or prepares an initial study to determine the potential for significant environmental impacts, conducts scoping in consultation with responsible and trustee agencies, and prepares a draft EIR covering a number of mandatory issues.[16] Public and responsible agencies are provided an opportunity to comment on the draft EIR, and, pursuant to Public Resources Code, section 21091(d)(2), the lead agency is required to respond to public and agency comments and revise the analysis, if necessary, in a final EIR.[17] In contrast, the lead agency is not required to respond to public and agency comments on an MND. The practical result of this requirement, where the lead agency is required to answer – in real time – for its Draft EIR analysis, is that the Final EIR is typically both more thorough in its initial evaluation of potentially significant environmental impacts and, through a process of disclosure, comments, responses, and revisions, is better grounded in factual and scientific information.

NEC and CSH acknowledge that, for smaller projects located in already developed areas, an MND may be sufficient to provide the appropriate level of impact analysis. With these projects, it is more likely that the Initial Study can determine, after completion of a thorough investigation in an Initial Study, that "clearly" the project will not cause any significant environmental impacts. However, for larger projects and projects proposed for undeveloped "greenfield" sites in remote areas of the County, an EIR may be necessary to fully analyze the project's potentially significant impacts and identify feasible mitigation measures and alternatives that can minimize and avoid impacts. This is especially true for projects that have garnered significant public controversy over clearly legitimate factually-grounded concerns. No matter which CEQA document is prepared for individual projects, it is incumbent on County

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[15] *See King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 852 ["'Even when a project's benefits outweigh its unmitigated effects, agencies are still required to implement all mitigation measures unless those measures are truly infeasible.' [Citation] Stated another way, 'if the County were to approve a project that did not include a feasible mitigation measure, such approval would amount to an abuse of discretion'"], quoting *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 525-526.

[16] *See* CEQA Guidelines, §§ 15060, 15063, 15064, 15080-15097 [EIR Process], 15120- 15132 [EIR Contents]; *see also* Exh. A – Guide to CEQA, pp. 329, 413.

[17] *See* PRC, §§ 21091(d)(2), 21092.5; CEQA Guidelines, § 15088, 15088.5(f); *see also* Exh. A – Guide to CEQA, p. 371-374, 411.

decision makers to ensure that the appropriate level of analysis is performed, based on sound investigation of the facts and faithful application of the correct legal standards.

NEC and CSH appreciate the opportunity to provide these general comments to County planning staff and to the County's elected decision-makers. We sincerely hope that the explanations and clarifications herein – supported by the attached treatise experts and citations to the CEQA statute, CEQA Guidelines, and caselaw – provide helpful information that will lead to improved public participation, more robust environmental review for projects that have the potential to cause significant environmental impacts, and sound decision-making.

Please contract us if you have any questions, concerns, or other responses to the issues raised in these general comments.

Very truly yours,

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