Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA

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The California Environmental Quality Act (CEQA)\(^1\) is perhaps the foremost symbol of California's strong environmental laws. However, CEQA has come under severe attack, primarily for the burdens it imposes on business.\(^2\) Controversy surrounds CEQA because it affects all activities that require state or local government discretionary permits, ranging from real estate projects throughout California, to industrial plant modifications in cities, to logging in rural areas, to projects concerning landfills and highways.\(^3\) Under CEQA, any such projects having "potentially significant effects" on the environment require preparation of environmental impact reports (EIRs).\(^4\)

CEQA's primary burden on business is not the direct cost of EIRs (which, after all, average only about $40,000 each, according to a recent estimate),\(^5\) but instead the uncertainty that the statute engenders.\(^6\) Businesses often do not know how long EIR review will take, whether unusually extensive mitigation measures will be necessary, or

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3. See discussion *infra* part I.A.
4. **CAL. PUB. RES. CODE** § 21080(d) (West Supp. 1995); see discussion *infra* part I.B.
5. See *infra* note 73 and accompanying text. One study has estimated that the total cost of EIR document preparation represented less than 0.01% (or less than one part in ten thousand) of the total value of new construction in 1990. JOHN D. LANDIS ET AL., *FIXING CEQA: OPTIONS AND OPPORTUNITIES FOR REFORMING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT* ch. 3 (forthcoming 1995) (draft on file at the Ecology Law Quarterly) [hereinafter *FIXING CEQA*]. *Fixing CEQA* represents the first comprehensive and impartial assessment of CEQA in over a decade. The authors conducted a mail survey of CEQA practices, gaining the response of 70.6% of California municipal planning departments. *Id.* at ch. 4. This quantitative data was supplemented by indepth interviews that explored CEQA practices in 14 carefully selected jurisdictions. *Id.* at ch. 5. The author is deeply indebted to professors Landis and Olshansky and their co-authors for their work, which provides a necessary foundation for discussion of any specific CEQA tool such as thresholds of significance.
6. See *infra* text accompanying notes 144-52.
whether litigation will result. An important part of CEQA folklore is the "horror stories" of projects gone awry. Although these stories only rarely reflect reality, they have enduring appeal because a business cannot be sure whether its project might become material for the next anecdote.\(^7\)

Despite these procedural uncertainties, two recent surveys of planning practitioners suggest that CEQA is basically sound.\(^8\) CEQA has been rated highly for each of its major functions: information disclosure, effective mitigation of environmental impacts, and increased public participation in decisionmaking.\(^9\) These CEQA functions can provide an important check on the temptation for financially strapped local governments automatically to approve revenue-generating projects. Planning practitioners have criticized CEQA, however, because CEQA focuses environmental review on localized concerns such as neighborhood traffic and the density of subdivisions.\(^10\) This local focus comes at the expense of larger scale environmental problems, such as air quality, species habitat, and regional traffic congestion.

This comment contends that reform measures can reduce CEQA's procedural uncertainties, yet still retain the statute's genuine strengths and increase its effectiveness in dealing with larger scale environmental problems.\(^11\) One very useful proposal is publication of manuals containing substantive "best practice" standards for CEQA. These manuals would outline approaches to controversial CEQA practices, such as scoping procedures for EIRs, cumulative impact analysis and mitigation, and recirculation of EIRs.\(^12\) Another potential reform is community planning through specific plans covering neighborhood-sized areas.\(^13\) Some localities have successfully used specific plans to formulate advance plans to address environmental priorities and reduce the need for CEQA analysis over individual

\(^7\) See infra text accompanying notes 147-49; FixING CEQA, supra note 5, at ch. 6.

\(^8\) See discussion infra part I.F.

\(^9\) See infra text accompanying notes 137-43. CEQA's goals and purposes are listed in both the statute and the regulations implementing CEQA. CAL. PUB. RES. CODE §§ 21000-21001 (West 1986); CAL. CODE REGS. tit. 14, § 15002(a) (1994).

\(^10\) See infra text accompanying notes 153-56.

\(^11\) See FixING CEQA, supra note 5, at ch. 6 (contending that the same measures that will make CEQA fairer will make it work better at protecting the environment).

\(^12\) Id. The Governor's Office of Planning and Research would publish these manuals. Id.

\(^13\) In California, planning agencies in all counties and cities must develop a "general plan," which sets out a comprehensive plan for physical development. CAL. GOV'T CODE § 65300 (West Supp. 1995). These government entities may also elect to develop "specific plans" describing the systematic implementation of the general plan. Id. § 65450 (West Supp. 1995). Such specific plans may cover either all or part of the area described in the general plan. Id.
projects. Other reforms could address cumulative impact analysis and mitigation by clarifying the procedures required and by improving funding for strategies that address regional impacts.

This comment focuses on the role of thresholds of significance and other standardized review processes as one part of this package of reform measures. As described in Part I, under CEQA agencies must determine whether a project poses “potentially significant effects” at two important stages in the CEQA process: during the initial study and after the final EIR has been drafted. However, CEQA provides very little guidance as to when projects present potentially significant effects.

Implementation of thresholds and other tools could facilitate this significance determination. Thresholds can supply formal criteria to aid decisionmaking, make CEQA more predictable, and increase its effectiveness in addressing larger scale problems. Furthermore, thresholds can enhance the quality of decisionmaking by incorporating local information available from general or specific plans and other background studies.

There are two basic types of thresholds: quantitative and qualitative. Quantitative thresholds are fixed criteria that automatically indicate an effect is significant if some number, such as vehicle trips per day or pounds of air emissions, is exceeded. In contrast, qualitative thresholds are more general criteria that often standardize evaluative procedures but preserve staff discretion to make significance determinations within the framework of those procedures.

Thresholds of significance primarily come into play in CEQA’s initial study process, when the government entity must make an initial determination of whether a project has any potentially significant effects on the environment that trigger preparation of an EIR. The combination of thresholds and standard mitigation measures can be

14. For example, the city of Rancho Cucamonga has had great success in using specific plans to reduce the amount of review necessary for individual projects. Fixing CEQA, supra note 5, at ch. 5.

15. Fixing CEQA especially emphasizes the need to mitigate cumulative impacts that cross local boundaries. Id. at ch. 6. The authors of Fixing CEQA recommend funding an increased, up-front role for state and regional agencies in local planning processes. Id. At the same time, they want to discourage frequent “late hits” by these agencies—comments raising new issues late in the CEQA proceedings for an individual project. Id. The authors also recommend either increasing the role of detailed “alternatives analyses” at the plan level, or abandoning the analyses in the case of private-sector projects; alternatives analysis should be done well or not at all. Id.

For a discussion of possible approaches to addressing cumulative impacts, see discussion infra part VI.A.4.

16. See discussion infra part I.A-B.

17. See discussion infra part I.E.

especially effective in making the initial study process more predictable. Adoption of this combination can help developers plan their projects knowing which impacts will be significant and what mitigation measures they must include. Furthermore, standard mitigation measures can help communities achieve major environmental goals such as the preservation of sufficient wetlands, coastal, or other habitat within their borders.

Standardized processes also may be helpful when EIRs are prepared. Here, thresholds can help agencies sort out which effects are genuinely significant. This sharpened analysis can both streamline the often bloated EIRs and more effectively determine the significance of effects and the necessity of mitigation measures.

Part II compares the CEQA process to that of other state environmental policy acts (SEPA's). Other SEPA's provide possible models of many tools for standardizing review, including thresholds, standard conditions of approval, and standardized mitigation measures. In particular, this part explains how other states' formal initial study criteria could be useful in California.

Part III is an introduction to thresholds of significance. These thresholds have generated increasing interest statewide. By one estimate, 13% of California municipalities use local thresholds of significance to assist in significance determinations. The Governor's Office of Planning and Research recently developed a guide for local governments interested in developing thresholds. Additionally, the Resources Agency solicited comments concerning thresholds in its 1994 notice concerning possible revisions to the CEQA Guidelines (Guidelines).

19. Landis and his coauthors of Fixing CEQA also recommend that local governments should adopt thresholds of significance and standardized mitigation measures. Fixing CEQA, supra note 5, at ch. 6. Thresholds and standard mitigation measures can be critical tools to increase certainty and predictability. Id.

20. Id. at ch. 4. Professor Robert B. Olshansky distributed a CEQA survey to planning directors of all 455 cities and 58 counties in California. Id. at app. 2; Robert B. Olshansky, The California Environmental Quality Act and Local Planning, PLAN. & PUB. POL'Y, Spring 1993, at 1, 3-4 [hereinafter Olshansky, CEQA and Local Planning]. The survey's 70% response rate suggests that its results should be fairly accurate. See Olshansky, CEQA and Local Planning, supra, at 2.


Other indications of interest in thresholds include a Regional Workshop on Thresholds of Significance held by the Los Angeles Chapter of the Association of Environmental Professionals on June 19, 1992 at the UCLA Faculty Center. One planner commented that over the last few years, it seems that at every CEQA workshop or conference there is
The comment suggests that thresholds of significance should be developed, but at the local level. This recommendation is based on both the great variation between California municipalities and the political reality of local control over land use. Therefore, the comment primarily addresses local CEQA practices and the use of thresholds at the municipal level.\textsuperscript{23}

The heart of the comment, parts IV and V, discusses the advantages and disadvantages of thresholds and offers recommendations for threshold design. Qualitative thresholds are inexpensive and easy to adopt, can help to focus debate, and offer a measure of more consistent and predictable review. However, quantitative thresholds offer much greater possibilities for reducing CEQA's uncertainty, especially when used in conjunction with standard mitigation measures. Furthermore, quantitative thresholds offer great promise to integrate CEQA review into local planning.

Along with their advantages, quantitative thresholds also have major weaknesses. They can be difficult and expensive to develop. Moreover, they can rob planners of discretion, thereby forcing preparation of EIRs if a single impact is unavoidably significant, even in cases where the flexible mitigated negative declaration (MND) process would have obtained all feasible mitigation measures.

The comment recommends that communities pursue two different strategies for the adoption of thresholds, taking into account the differences between quantitative and qualitative thresholds. The first and most significant recommendation is that, as part of their next general plan update, communities should develop two or three quantitative or detailed qualitative thresholds for their biggest growth concerns over the next five to ten years. Ideally, these thresholds would be adopted as part of a comprehensive or selected general plan update, or a specific plan process.\textsuperscript{24} The plans can create a means for addressing pressing environmental problems, while the thresholds and standard mitigation measures can provide implementation tools. For example, thresholds for the conversion of agricultural land can be designed to discourage general plan amendments within intended agricultural preserves and to encourage development on other agricultural soils. Adopting thresholds as part of a general or specific plan update not only increases planning possibilities, but costs localities always "an encouraging plea for some kind of thresholds of significance." Telephone Interview with Mark Tomich, Principal Planner, City of Irvine (May 4, 1993).

\textsuperscript{23} There are some types of impacts for which thresholds can be developed at the regional or state level. For example, regional air districts can set appropriate thresholds for a single air basin; and the state is developing an optional agricultural resources threshold. \textit{See infra} part VI.A-B.

\textsuperscript{24} For a discussion of California statutory requirements for general and specific plans, \textit{see supra} note 13.
much less, because they do not need to undertake separate data collection efforts or hold separate public hearings for the development of their thresholds. Focusing efforts on two or three major growth issues will also minimize costs.

The second recommendation is that communities develop qualitative thresholds for the majority of environmental impacts. These thresholds would be simple definitions of the relevant subissues and the procedures for determining their level of significance. The keystone for this more clearly defined review process should be locally adapted variants of the checklist of environmental impacts for the initial study, which is provided in Appendix I of the CEQA Guidelines.25 Consolidating thresholds for most impacts into one accessible document should demystify the initial study process, thereby focusing debate and providing for more predictable review. Communities should also adopt a standard conditions of approval manual26 to increase the predictability of the process.

Part VI presents case studies illustrating how agencies can design detailed thresholds and standard mitigation measures for their most pressing environmental concerns. These case studies discuss thresholds for air quality, agricultural lands, and biological resources. Although each impact involves its own unique considerations, the case studies suggest four principles for designing quantitative and detailed qualitative thresholds. Such thresholds should be flexible to administer, balanced in their regulatory effect, simple and comprehensible, and explicitly related to general plan consistency where feasible.

First, the evaluative criteria should be flexible. This issue is most important for quantitative thresholds, since qualitative thresholds necessarily allow for some professional judgment. This comment recommends that quantitative thresholds frequently should be "scaled" in order to strike a balance between achieving consistency and retaining flexibility. Under such a scheme, discretion is added to a system of thresholds by allowing planners to determine whether projects that fall within a designated range of a threshold—perhaps 30%—would require an EIR.27 In these close cases, site-specific factors could be factored into the planner’s decision. Furthermore, with scaling, developers and staff could bargain for mutual benefit, trading the streamlined review of MNDs for impressive mitigation measures that benefit the environment. Additionally, scaling would address environmental-

26. Santa Barbara County employs a standard conditions of approval manual. For a more indepth discussion, see infra part IV.A.2.a.
27. For an example of how scaled thresholds are used in Florida, see discussion infra part II.C.1.a.
ists' concerns that developers might design their projects to slip just under a single, fixed threshold. Finally, scaling would increase predictability by eliminating discretion outside the designated range.

Second, thresholds should be balanced between appropriate regulation and streamlining. Besides listing which types of impacts are presumed to be significant, thresholds should also indicate impacts that are presumed insignificant. For example, biological thresholds should identify certain types of habitat, such as nonnative grassland, where impacts of a certain size are presumed to be insignificant. Third, thresholds should be designed to be as simple and as comprehensible as possible for the public and applicants. Finally, threshold criteria should be based at least in part on general plan consistency whenever feasible. This step will help integrate CEQA review with the planning process and emphasize the role of the general plan in addressing cumulative impacts.

In summary, a package of CEQA reforms can both increase the predictability of the process and improve efforts at comprehensive land use planning and addressing cumulative environmental problems. Especially when adopted with standard mitigation measures, thresholds of significance represent an important part of this package.

I
AN OVERVIEW OF CEQA AND ITS PROCEDURES FOR DETERMINING SIGNIFICANCE

Patterned after the National Environmental Policy Act (NEPA), CEQA requires state and local agencies to consider the effects of their actions on the environment. The statute has several purposes, including public disclosure and public participation, informed decisionmaking, and environmental protection. Although the 1994 California Legislature saw passage of sixteen bills that affected CEQA, most of these bills were relatively minor. Briefly,
CEQA involves a three-step process for evaluating any state or local government discretionary action:

1. the determination of whether the action is a "project" covered by CEQA or is exempt from CEQA;\(^3\)

2. if the action falls under CEQA, an "initial study" process, which includes an initial determination as to whether the project may have a "significant effect" on the environment that will trigger the preparation of an EIR;\(^3\)

3. if an EIR is required, the preparation and approval of the EIR, including a second determination as to whether any impacts are significant and, if so, whether mitigation measures are feasible.\(^3\)

This process thus involves two points where significance determinations are made: (1) during the initial study, when potentially significant impacts require preparation of an EIR, and (2) upon completion of the EIR, when findings must be made to identify feasible mitigation measures for each significant impact identified in the EIR. Both significance determinations rely on the same vague and highly flexible CEQA significance criteria.\(^3\) However, courts review the two significance determinations with different legal standards and give more deference to the agency's decision after the agency completes the EIR process.\(^3\)

A. Determination of Whether an Activity Is a "Project" Under CEQA

An agency must first determine if a proposed activity falls within CEQA's considerable scope. Shortly after then-Governor Ronald

CEQA Reform: Changes to Legal Challenge Requirements, Master EIRs Await Governor's Signature, 1994 Cal. Env't Daily (BNA), at d3 (Sept. 23, 1994).

As of March 1995, no detailed CEQA legislation had been introduced for the current legislative session, although proposals fundamentally to overhaul the statute are expected. Todd Woody, Following in Newt's Footsteps: When It Comes to Environmental Bills, the California Legislature Is Taking Its Cue from Republicans' Contract With America, Recorder, Mar. 14, 1995, at 1.


33. See CAL. PUB. RES. CODE § 21081 (West Supp. 1995). Once a "significant effect" has been identified in the EIR, an agency must mitigate or avoid the effect unless: (1) another agency has exclusive responsibility, or (2) specific considerations make mitigation infeasible. Id.; CAL. CODE REGS. tit. 14, § 15091 (1994). If a significant unavoidable effect remains, the agency must find that overriding social, economic, or other benefits outweigh the significant effect on the environment. CAL. PUB. RES. CODE § 21081(b).

For a description of aspects of "environmental impacts" that must be addressed by an EIR, see CAL. CODE REGS. tit 14, § 15126(a) (1994).

34. See discussion infra part I.B-C.

35. See discussion infra part I.D.
Reagan signed CEQA into law in 1970, the California Supreme Court found that the legislature had intended a broad application for the statute. The court in *Friends of Mammoth v. Board of Supervisors* found that CEQA "projects" include not only publicly funded or public sector undertakings, but also private activities that required a discretionary approval.\textsuperscript{36} Thus, unlike NEPA,\textsuperscript{37} CEQA applies to private projects, unless they require ministerial permits.\textsuperscript{38} There are very few exceptions to the basic rule that all discretionary governmental activities are projects. Exceptions include proposals for legislation by the state legislature,\textsuperscript{39} continuing administrative and maintenance activities,\textsuperscript{40} certain school boundary adjustments, and other minor activities.\textsuperscript{41}

A few activities, although projects, are exempt from CEQA. There are two different types of exemptions: statutory exemptions, adopted by the legislature,\textsuperscript{42} and categorical exemptions,\textsuperscript{43} which are adopted by the California Resources Agency\textsuperscript{44} and are listed in the Guidelines implementing CEQA.\textsuperscript{45} However, exemptions are limited and rarely apply. For example, no exemption exists if a private project involves more than a small apartment structure, one single family unit in a rural area, or three such units in an urban area.\textsuperscript{46} CEQA also does not require review where "it can be seen with certainty that there

\begin{itemize}
\item \textsuperscript{36} See 502 P.2d 1049, 1056 (Cal. 1972).
\item \textsuperscript{37} See, e.g., Gettysburg Battlefield Preservation Ass’n v. Gettysburg College, 799 F. Supp. 1571, 1577-78 (M.D. Pa. 1992) (indicating that private actions are not constrained under NEPA absent involvement of “major” federal action or continuing agency involvement).
\item \textsuperscript{39} Cal. Code Regs. tit. 14, § 15378(b)(2) (1994).
\item \textsuperscript{40} See, e.g., Cal. Code Pub. Res. § 21080(b).
\item \textsuperscript{41} Michael H. Remy et al., *Guide to the California Environmental Quality Act* 46-47 (1995).
\item \textsuperscript{43} See id. § 21084(a) (West Supp. 1995). Even if a project is categorically exempt, the agency must determine whether the exemption is negated by certain factors, such as unusual circumstances, an environmentally sensitive site, or significant cumulative impacts.
\item \textsuperscript{44} Cal. Code Regs. tit. 14, § 15300.2 (1994).
\item \textsuperscript{45} The Office of Planning and Research is responsible for preparing and developing the CEQA Guidelines (Guidelines), while the Resources Agency must certify and adopt the Guidelines. Cal. Pub. Res. Code § 21083 (West 1986).
\item \textsuperscript{46} Cal. Code Regs. tit. 14, §§ 15300-15387 (1994).
\end{itemize}

The Guidelines embody the statute, the case law interpreting CEQA, and additional directions on the preparation of EIRs consistent with legislative and judicial authority. Remy et al., *supra* note 41, at 7. The California Supreme Court has stated that, at a minimum, courts should afford great weight to the Guidelines. Laurel Heights Improvement Ass’n v. Regents of the Univ. of Cal., 764 P.2d 278, 282 n.2 (Cal. 1988). Some courts of appeal decisions have treated the Guidelines as equivalent to administrative regulations, while other cases have treated them as slightly less authoritative. Remy et al., *supra* note 41, at 7.
is no possibility" that a project will cause significant environmental effects. However, given the limits of categorical and statutory exemptions, and the broad definition of "project," most developments are covered by CEQA.

**B. Significance Determinations During the Initial Study**

1. **Overview of the Initial Study Process**

   Once an agency determines that a project is covered by CEQA, the agency almost always prepares an initial study. The purpose of this study is to determine whether the project will require an EIR or whether a negative declaration or mitigated negative declaration will be sufficient. This inquiry is based on whether any of the project's impacts on the environment are "potentially significant." If there is a "fair argument" that any effects are potentially significant, the agency must prepare an EIR. For just a few effects, such as cumulative effects, there is a mandatory finding of significance. If there are no potentially significant effects, a negative declaration will be appropriate.

   Initial studies vary considerably in complexity and length, depending on whether the agency intends to prepare an EIR, a negative declaration, or a mitigated negative declaration. If the agency expects that an EIR will be necessary, the initial study may be shorter, as more thorough analysis will occur in the EIR. However, if a project does not require an EIR, the lead agency relies heavily on the initial study to justify its negative declaration. Thus, the initial study typically represents the entire legal support for the decision not to prepare an EIR.

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47. *Id.* § 15061(b)(3).
48. *Id.* § 15002(k)(2) (1994).
49. See *id.* § 15063(c) (1994). If a project clearly requires an EIR, the initial study may be omitted. *Id.* § 15063(a) (1994).
50. *Id.* § 15070 (1994).
51. See discussion infra part I.D.1.
52. CAL. CODE REGS. tit. 14, § 15065 (1994). For example, the lead agency shall find a significant effect where "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." *Id.* § 15065(b). One of the more important mandatory findings of significance is for "cumulatively considerable" or significant effects. *Id.* § 15065(c).
53. Telephone Interview with Tim Haddad, Environmental Planning Coordinator, Marin County (Apr. 7, 1993).
54. The agency generally attaches a cover sheet to the initial study indicating that a negative declaration will be prepared. *Id.* Before an agency adopts either a basic or "mitigated" negative declaration, it must provide notice of its intended action to members of the public and interested local, state, and federal agencies. CAL. CODE REGS. tit. 14, § 15073 (1994). If an applicant revises a project in response to comments on a proposed negative declaration, it is unclear whether the modified negative declaration must be recirculated for additional public review. *REMY ET AL., supra* note 41, at 122.
There are two different types of negative declarations. If a project as proposed does not have potentially significant environmental effects, a basic negative declaration is appropriate. In contrast, an MND is prepared if an applicant revises a project to mitigate any effects that would otherwise trigger preparation of an EIR. CEQA requires MNDs when projects include revisions that "would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur."

When agencies gather and coordinate information on a project's environmental impacts for the initial study, they generally use variants of a checklist in the CEQA Guidelines. This checklist, Appendix I, aids the initial study process by providing a list of nearly eighty questions about different environmental impacts. Each impact is assigned a standard impact level, such as "potentially significant impact," "less than significant impact," or "no impact." All of these answers must be explained or at least must "disclose the data or evidence upon which the person(s) conducting the study relied." Besides determining whether an EIR is required, the initial study checklist provides information for decisions not to prepare an EIR or assists EIR preparation by highlighting potentially significant effects. For a simple negative declaration, the findings on the checklist frequently do not need highly detailed explanations and therefore tend to be short. In contrast, initial studies for many MNDs can run from 30 to 100 pages.

The initial study plays a central role in the CEQA process. It is important in part because its checklist can facilitate environmental assessment early in the design of a project and can enable project appli-
cants to modify their projects to avoid significant effects. More importantly, the initial study provides a means of choosing between EIRs and MNDs for projects with potentially significant impacts. Some estimates indicate that MNDs account for almost half of all the projects subject to CEQA, while EIRs represent only a small fraction—4 to 6% of the total. Basic negative declarations comprise the remainder.

2. Comparison of Environmental Impact Reports and Mitigated Negative Declarations

The choice between environmental impact reports and MNDs is important because they are two very different assessment methods, each with major benefits and drawbacks. EIRs offer several significant advantages. First, while MNDs often involve close study of a project's major impacts, EIRs offer more consistently thorough review. EIRs offer several significant advantages. Second, EIRs require much more extensive public participation and input from other agencies, which can be useful in framing the analysis of a project's major impacts. Third, EIRs, unlike MNDs, require analysis of project alternatives, so that many larger projects may need to undertake

64. See Cal. Code Regs. tit. 14, § 15063(c).

65. A survey conducted by the Association of Bay Area Governments (ABAG) found that about 46% of the project applications subject to CEQA resulted in mitigated negative declarations. Association of Bay Area Gov'ts, Overview of ABAG's CEQA Survey Results 4 (1991) (unpublished) [hereinafter ABAG CEQA Survey]. Olshansky's survey suggested that MNDs represented an average of 45% of the projects. See Olshansky, CEQA and Local Planning, supra note 20, at 3-4.

66. Jurisdictions responding to the Olshansky survey prepared a mean of 3.6 EIRs out of 87 projects, see Fixing CEQA, supra note 5, at app. 2, while jurisdictions participating in the ABAG survey prepared 4 EIRs on average out of 65 projects, see ABAG CEQA Survey, supra note 65, at 4. Discrepancies between results of the two surveys fall well within the standard deviations of the survey data. See Fixing CEQA, supra note 5, at app. 2.

67. See Fixing CEQA, supra note 5, at app. 2; ABAG CEQA Survey, supra note 65, at 4.

68. Like EIRs, MNDs often attach extensive studies of the critical issues, prepared by independent entities. As noted in the text, MNDs of 30 to 100 pages are quite common. See Telephone Interview with Tim Haddad, supra note 53. In comparison, CEQA recommends that EIRs be less than 150 pages for ordinary projects and less than 300 pages for projects of unusual complexity or regional significance. Cal. Code Regs. tit. 14, § 15141 (1994). Most EIRs exceed the page limits, with many running at hundreds to even more than one thousand pages in length. Interview with Kelley Taber, Private Planning Consultant, in Sacramento, Cal. (May 1, 1995).

69. Unlike MNDs, EIRs require agencies to respond in writing to the public comments they receive. See Cal. Pub. Res. Code § 21092.5(a) (West Supp. 1995). Furthermore, EIRs require formal issuance of a Notice of Preparation to all agencies with jurisdiction over the resources a project might affect. Id. § 21080.4(a) (West Supp. 1995); Cal. Code Regs. tit. 14, § 15082 (1994).

analysis of both onsite and offsite alternatives that would avoid or reduce impacts.  

A somewhat illusory advantage of EIRs is that they incorporate less biased information because independent consultants frequently prepare them. If agencies in fact based MNDs on information provided by the project sponsor, EIRs might be superior in their content. However, independent consultants are typically hired to perform appropriate studies for the critical issues in an MND. Thus, both EIRs and MNDs often rely on information prepared by independent consultants.

MNDs, by comparison, have substantial advantages in cost and timeliness. First, preparation of EIRs probably is much more expensive than preparation of MNDs. In 1990, the average cost of preparing an EIR was $38,124. Second, and probably more important, there is less delay and uncertainty associated with MNDs. Although CEQA and the Permit Streamlining Act require the completion of EIRs within one year after the project application is deemed complete, this deadline has proven difficult to administer for a wide variety of reasons. As a result, developers preparing EIRs must risk denial of their projects at the end of a review process that can take one to two years or longer, although many EIRs are completed in six months. In contrast, agencies must adopt negative declarations within 105 days from the date the application is deemed complete.

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71. See Remy et al., supra note 41, at 213-14.
73. Fixing CEQA, supra note 5, at chs. 4, 6. To calculate average EIR costs, Landis and Olshansky asked respondents to estimate the total cost of EIR preparation in their jurisdiction and the total number of EIRs prepared. The resulting "average" EIR cost therefore is a composite covering all types of jurisdictions. Within the median jurisdiction, the average cost for an EIR was $47,333. Id. at ch. 4.
75. Agencies have considerable flexibility in determining when the one-year period has begun. Fixing CEQA, supra note 5, at ch. 2. Additionally, interpretation of the interaction between the Permit Streamlining Act and CEQA is very complex. Id. Furthermore, a court has held that Government Code § 65950 does not apply to legislative activities such as general plan amendments and zoning changes. Landi v. County of Monterey, 189 Cal. Rptr. 55, 57 (Ct. App. 1983).
76. Fixing CEQA, supra note 5, at ch. 6.
77. Cal. Pub. Res. Code §§ 21100.2, 21151.5. This deadline can be effectively extended if an agency finds that an application is incomplete. See id. § 21100.2 (West Supp. 1995).
A third advantage of MNDs is that they are often highly effective in incorporating mitigation measures from developers. This process is advantageous to agencies for two reasons. First, agencies need not identify independent legal authority to impose each requirement, as is required in the EIR process. Second, the project proponent has considerable incentive to agree to mitigation measures because he knows that the agency could otherwise require an EIR. Of course, the effectiveness of the MND mitigation measures depends on the intensity of agencies' determination to engage in hard bargaining for the environment. That determination varies considerably by jurisdiction and may disappear completely for revenue-generating commercial projects. Thus, localities cannot rely on MNDs alone to obtain other than minor or routine mitigation measures from revenue-generating projects.

In summary, MNDs offer considerable time and cost savings over EIRs and in many circumstances are effective at mitigating project impacts. However, MNDs have drawbacks compared to EIRs: they draw on less detailed study, public input, and procedural safeguards, which makes their preparation susceptible to manipulation.

The importance of the choice between EIRs and MNDs highlights the fact that the initial study process is central to CEQA. However, most state and local agencies do not use standardized processes, such as thresholds, for determining the significance of effects in their initial study determinations. Standardized processes can greatly improve the efficiency and predictability of the initial study. Developers can incorporate measures into their projects to expedite the process, while the public can better understand the bases for decisions. Standardized processes can also ensure that initial studies focus on the major environmental values that a community has expressed in its general plan. In short, all of the initial study functions can be facilitated by well-designed standardized processes—especially thresholds of significance.

79. Several planners identified the city's ability to require an EIR as a trump card in negotiating MNDs. Fixing CEQA, supra note 5, at app. 3.
80. Professor John D. Landis, Remarks at the Environmental Spirit: Past, Present & Prospects (Apr. 14, 1995). Studies of "fiscal zoning" demonstrate that commercial projects, particularly retail, tend to have a net positive effect on local revenues when their service needs are deducted from their tax contributions. See Bill Fulton & Morris Newman, Up the Down Economy, PLAN., Feb. 1994, at 26, 27. Most residential projects, in contrast, tend to have a net negative effect, primarily by increasing the need for schools. See id. at 27-28. Consequently, in the post-Proposition 13 financial environment for California municipalities, new commercial development often may represent a proposition that is very difficult to turn down.
81. See infra text accompanying note 264.
C. Significance Determinations upon EIR Completion

The second significance determination occurs after completion of the EIR. EIRs have been called "environmental 'alarm bell[s]'" that warn of threatened effects on the environment before it is too late. As appropriate for the "heart of CEQA," the EIR receives extensive public review. Once the lead agency decides to prepare an EIR, it must send a Notice of Preparation to each agency with discretionary or trustee responsibility over the project. Comments submitted by other agencies and the public on the Notice of Preparation can assist the lead agency in determining the scope of the EIR. The lead agency then prepares a draft EIR and circulates it to the public for at least thirty days from the date of public notice. After the public submits comments, the agency must summarize and respond to all of them. If the agency adds significant new information to the draft EIR, it must recirculate the revised document before approving a final EIR.

Following the completion of the EIR, the agency must make findings as to which effects are significant. This process is critical because once an agency determines that a project has one or more significant effects, the agency must implement CEQA's "action-forcing" provisions. Unlike CEQA's federal counterpart, NEPA, which is an "essentially procedural" statute, CEQA imposes substantive duties on agencies. Where projects have significant effects on the environment,

83. The required contents of EIRs prepared by state agencies are discussed in CAL. PUB. RES. CODE §§ 21100, 21100.1 (West Supp. 1995); CAL. CODE REGS. tit. 14, §§ 15120-15132 (1994). Although § 21100 and § 21100.1 explicitly pertain to state agencies, these standards have also been applied to local government entities. CAL. PUB. RES. CODE § 21150 (West 1986).
84. Yorty, 108 Cal. Rptr. at 388.
86. Id. § 15082(a)-(b) (1994).
87. Id. § 15087(c) (1994). When a state agency is the lead agency or responsible agency for an EIR, the draft must be circulated for at least 45 days. Id. This is longer than the period of circulation a negative declaration usually receives. Basic negative declarations require at least 20 days of review, while negative declarations that have state agencies as the lead agency must be circulated for at least 30 days. Id. § 15073 (1994).
88. Id. § 15088 (1994).
89. CAL. PUB. RES. CODE § 21092.1 (West 1986).
agencies must implement feasible mitigation measures or alternatives for each significant effect. The agency must make one of the following findings for each of these effects: (1) changes in the project will mitigate or avoid the effect’s significance; (2) another agency has exclusive responsibility for mitigation measures; or (3) specific economic, legal, social, technological, or other considerations make infeasible the mitigation measures or project alternatives identified in the EIR. Where the lead agency finds that mitigation measures are infeasible under the third option, the agency must find that the specific legal, social, economic, or other benefits outweigh the significant effect on the environment. The lead agency reserves ultimate authority to make these findings, which must be supported by substantial evidence in the record. Thus, the determination that an effect is significant forces an agency either to incorporate mitigation measures into a project, or publicly to elevate other considerations over the environmental issues at stake through the EIR process.

Thresholds of significance can also help facilitate agencies’ significance determinations at this stage of the CEQA process. The CEQA Guidelines state that an EIR “shall identify and focus on the significant environmental effects of the proposed project.” Despite this directive, many think that EIRs tend to be excessively lengthy and overly expensive documents that should provide more useful and focused analysis. Furthermore, EIRs frequently continue to avoid the ultimately required significance determination by describing effects as merely “possibly significant” or “potentially significant.” While it is true that EIRs are only a nonbinding information source for agencies, the “potentially significant” language in EIRs can confuse both agencies and the public. Thresholds of significance can improve EIRs by allowing them to provide a clearer analysis of the issues, to standardize the determination of which impacts are significant, and to make tentative significance determinations for use by the agency.

93. CAL. PUB. RES. CODE § 21081(b) (West Supp. 1995).
94. Id. § 21082.2 (West Supp. 1995).
95. Id.; CAL. CODE REGS. tit. 14, § 15091(b). In some cases public agencies request that EIRs not contain determinations of significance, so as not to prejudice their prerogative to reach the ultimate findings on this subject. Karna J. Peters, CEQA Thresholds of Significance, at 3, in A REGIONAL WORKSHOP ON THRESHOLDS OF SIGNIFICANCE (L.A. Chapter of Envtl. Professionals, L.A., Cal.), June 19, 1992.
97. See, e.g., Telephone Interview with Tim Haddad, supra note 53.
98. Peters, supra note 95, at 3.
D. Standards of Review for Significance Determinations

Although an agency's significance determinations for both the initial study and the EIR must be supported by "substantial evidence," these criteria are analyzed differently in the two stages. While CEQA mandates that an initial study must consider whether there "may" be a significant effect, an EIR only discusses effects that "will" significantly affect the environment. These varying approaches stem from different legal standards of review for agency decisions at the two stages.

Courts review agencies' initial study decisions under the "fair argument" standard of review. This standard requires an agency to prepare an EIR if there is a fair argument that a project will cause a significant effect. The court gives little deference to agency decisions at the initial study stage, so there is a low threshold for requiring preparation of an EIR.

In contrast, courts review agencies' post-EIR significance determinations more deferentially. The test for an agency's EIR analysis is the substantial evidence test. Courts require only that substantial evidence in light of the whole record support the agency's significance determination, which makes the determination difficult to challenge.

1. The Fair Argument Test for Initial Study Significance Determinations

The fair argument test was articulated by the California Supreme Court in *No Oil, Inc. v. City of Los Angeles.* The court interpreted CEQA to require preparation of an EIR if there was a "fair argument" that significant effects would result from a project. The California Supreme Court stated that the standard was embodied in California Public Resources Code § 21168.5 and is defined as "prejudicial abuse of discretion," where "[a]buse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by 'substantial evidence.'" Id. (quoting CAL. PUB. RES. CODE § 21168.5 (West 1986)).

100. See id. § 21080(c) (West 1986); CAL. CODE REGS. tit. 14, § 15070(a) (1994). Negative declarations are only prepared when there is no "substantial evidence" that a project may have a significant effect on the environment.
105. Id. at 70. The First District Court of Appeal later refined the appropriate test as "whether substantial evidence supported the agency's conclusion as to whether the prescribed 'fair argument' [for the preparation of an EIR] could be made." Friends of "B" St. v. City of Hayward, 165 Cal. Rptr. 514, 523 (Ct. App. 1980). The legislature subsequently codified this "fair argument" test as the official standard for agency significance determinations. 1983 Cal. Stat. 872 (codified at CAL. PUB. RES. CODE § 21080(c)(1) (West Supp. 1995)).
tially, the court ruled that CEQA should not be construed to allow an agency to make its own decision in a doubtful case without studying the relevant data. 106 This stringent reading reflected the court's prior finding that the legislature had fundamentally intended CEQA "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." 107

Prior to the 1993 amendments, CEQA stated that agencies were required to prepare an EIR if there existed "substantial evidence" that a project may have a significant impact on the environment. 108 As applied to this language, under the fair argument test courts generally reached their own determination of whether the required substantial evidence existed, rather than relying on the agency's judgment. 109 As stated in a 1992 case: "[T]he question is one of law, i.e., 'the sufficiency of the evidence to support a fair argument.'" 110 Under this interpretation, agencies do not receive the deference they ordinarily receive in factual determinations. If a court found substantial evidence in light of the whole record that there may be a significant environmental effect, an EIR had to be prepared. 111

In 1993, the legislature altered the amount of support required for these significance determinations from the previous "substantial evidence" to "substantial evidence in light of the whole record." 112 Although the courts have not yet construed the new phrase, many observers believe that the new language does not significantly depart from the old standard. 113

2. The Substantial Evidence Test for EIR-Based Significance Determinations

After an agency has prepared an EIR, courts give the EIR the traditional deference agencies enjoy in administrative law. 114 This is because the fair argument standard that applies to early termination...
of environmental review of doubtful cases does not apply once an agency has gathered more data and done more analysis. Courts will uphold EIRs' conclusions as to whether significant effects will occur if "substantial evidence in light of the whole record" supports the conclusions.115 Judicial deference in reviewing completed EIRs is further indicated by section 15151 of the CEQA Guidelines: "The courts have looked not for perfection, but for adequacy, completeness, and a good faith effort at full disclosure."116 Courts have rarely rejected EIRs based on their analysis of significant effects.117

E. Evaluation of Existing Criteria for Significance Determinations

A survey of CEQA's criteria for significance determinations reveals much room for improvement. CEQA provides only limited guidance as to when a potential impact on the environment is "significant." The statute defines a "significant effect on the environment" as a "substantial, or potentially substantial, adverse change" in physical conditions.118 Although the Guidelines include two appendices, G and I, that apply this definition to individual scenarios, in most cases the appendices are no more specific than the general regulatory descriptions; significance results if an impact is "substantial," "major," or "large" with respect to indicated resources.119

The statute retains flexibility in defining significance in order to tailor significance determinations to individual circumstances. Thus, CEQA Guidelines section 15064(b) states: "an ironclad definition of significant effect is not possible because the significance of an activity may vary with the setting. For example, an activity that may not be significant in an urban area may be significant in a rural area."120

115. Id. The substantial evidence test under CEQA applies to agency determinations made after a hearing where evidence is presented in accordance with the provisions of § 1094.5 of the California Code of Civil Procedure. Id. For agency determinations made without such a hearing, CEQA applies the "prejudicial abuse of discretion test." Id. § 21168.5 (West 1986). Many courts have held that the two standards embody essentially the same deferential standard of review. See, e.g., Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 764 P.2d 278, 283 n.5 (Cal. 1988). The only difference between the two standards involves litigants' ability to supplement the administrative record. Remy et al., supra note 41, at 292-93.


119. Id. at div. 6, ch. 3, apps. G, I (1994). Examples of significant effects include those which "[s]ubstantially degrade water quality," "[e]xpose people or structures to major geologic hazards," or "[e]ncourage activities which result in the use of large amounts of fuel, water, or energy." Id. at div. 6, ch. 3, app. G.

120. Id. § 15064(b) (1994). CEQA also includes "mandatory findings of significance," which are defined even more generally than Appendices G and I in order to retain flexibility. See id. § 15065(b) (1994).
While flexibility is a laudable goal, minor changes in CEQA's current significance criteria could greatly improve the CEQA process.

1. Integration of Appendices G and I

CEQA's significance criteria are primarily derived from Appendices G and I of the CEQA Guidelines. Appendix I, the initial study checklist, is organized by resource topic. Appendix G presents, in apparently random order, twenty-six scenarios where a "project will normally have a significant effect on the environment." Thus, these two appendices have different formats and emphasize different aspects of the same issue. One example of their disparate treatment of specific impacts is that, while Appendix G indicates a project is normally significant if it will "conflict with adopted environmental plans and goals of the community where it is located," Appendix I does not directly evaluate a project's consistency with adopted planning goals.

Rewriting and integrating Appendices I and G could clarify the relevant issues for project proponents and lead agencies. The combined appendix would need to be general and flexible to allow for statewide implementation. Local or state agencies could then build on the integrated appendices to provide more localized qualitative thresholds or even quantitative thresholds.

2. Consistency with Preexisting Environmental Standards

While most scenarios in Appendices G and I are flexibly defined in terms of "substantial" or "major" impacts, a few scenarios are based on national, state, or local standards. For example, projects have significant effects if they "violate any ambient air quality standard," "reach published national, state, or local standards relating to solid waste or litter control," or "conflict with adopted environmental plans and goals of the community where [they are] located." Similarly, Guidelines section 15064(i) provides: "If an air emission or water discharge meets the existing standard for a particular pollutant, the lead agency may presume that the emission or discharge of the pollutant will not be a significant effect on the environment." This section contains the caveat that: "If other information is presented suggesting that the emission or discharge may cause a significant effect, the lead agency shall evaluate the effect and decide whether it

121. Id. at div. 6, ch. 3, app. G.
122. Id.
123. See id. at div. 6, ch. 3, app. I.
124. Id. at div. 6, ch. 3, app. G.
125. Id. § 15064(i) (1994).
may be significant.”126 Thus, consistency with an air or water quality standard does not prove an effect is insignificant, but instead establishes a rebuttable presumption of validity.

There are other categories of impacts where the appendices could define impacts in terms of existing environmental standards, but fail to do so. For example, Appendix G examines noise impacts in terms of whether a project will expose people to substantial noise levels or increase existing noise levels.127 These checklist entries could also ask whether a project will violate applicable local, state, or federal noise standards.

3. Locally Adopted Thresholds

CEQA permits localities to adopt flexible thresholds of significance voluntarily. This approach can help resolve the statute's ambiguity as to which standards agencies should use in determining whether impacts are significant. Local thresholds are implicitly authorized by Public Resources Code section 21082, which states: “All public agencies shall adopt . . . objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports and negative declarations.”128 The Guidelines state: “The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data.”129 The “scientific and factual data” mentioned by the Guidelines could include thresholds that are factually and analytically well supported. A prime opportunity to develop such thresholds occurs in the general plan process, which already requires study and analysis.130 Appendix G also implicitly ratifies thresholds by establishing a presumption of significance for projects that conflict with the adopted plans.131

The Guidelines also caution that absolute definitions of significant effect do not account for the fact that effects will vary with the setting.132 Communities using thresholds should respect the Guidelines' admonition, because the fair argument standard of review reduces deference to decision-makers.133 Thresholds either should be flexible enough to accommodate variations in the setting or, where

126. Id.
127. See id. at div. 6, ch. 3, app. G.
132. Id. § 15064(b).
133. See discussion supra part I.D.1.
possible, should use criteria that are uniform within a jurisdiction, such as pounds of pollutant per day.

F. Practitioner Assessments of CEQA's Strengths and Weaknesses

Two recent surveys of planning practitioners provide assessments of CEQA that are relevant to the adoption of thresholds. First, the planners who implement CEQA daily expressed a considerable level of satisfaction with the statute. These positive reviews suggest that a radical overhaul of the statute is not necessary. However, the surveys also suggest that uncertainty and fear of litigation frequently drive the EIR process. Furthermore, many of the practitioners believed that CEQA tends to emphasize neighborhood concerns over larger scale environmental problems that require comprehensive planning. Thresholds of significance could both reduce uncertainty and improve the implementation of comprehensive plans.

In 1991, professor Robert Olshansky of the University of Illinois first mailed surveys to the planning directors of all of California's cities and counties.134 After several followup efforts, 355 recipients replied to the Olshansky survey for a 70.9% response rate and a final sample fairly representative of the state as a whole.135 That same year, the Association of Bay Area Governments (ABAG) also conducted a major CEQA survey. The ABAG survey included private as well as public practitioners, but only covered those within the nine-county Bay Area.136

The planners responding to the Olshansky survey gave CEQA a generally positive review,137 despite the recent controversy over the statute.138 Respondents generally agreed with this statement: "Overall, I am glad that CEQA exists."139 Significantly, over 80% of re-

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135. Id. at 2. Olshansky found no systematic differences between the respondents and the nonrespondents in terms of city population, 1985-1990 growth, mean income, urban/rural location, or location within the state. Id. Of the 355 responses, planning directors or community development directors completed 48.3%, principal or senior planners 19.7%, environmental review officers 5.4%, and other planning staff 26.6%. Id.

136. ABAG CEQA Survey, supra note 65, at 1. ABAG received 126 responses from planning directors, city and county attorneys, and private planning practitioners (primarily consultants) in late 1990 and early 1991. Id.

137. Respondents to the Olshansky survey were asked to rate a series of statements on a scale of one to five, where one equaled “strong agreement” and five equaled “strong disagreement.” Olshansky, CEQA and Local Planning, supra note 20, at 3-4.

138. See COUNCIL ON CAL. COMPETITIVENESS, supra note 2, at 37-39.

139. The average response to this question was 2.0, which represents clear agreement. See Olshansky, CEQA and Local Planning, supra note 20, at 3. For a discussion of the response rankings, see supra note 137. Olshansky also left space for more lengthy comments, which he had expected people would use to unload their frustrations with CEQA.
spondents believed that CEQA thoroughly evaluates environmental impacts and provides effective mitigation measures for them.\textsuperscript{140} Almost 75\% of respondents believed that CEQA successfully informs the public of environmental impacts and coordinates agency review of projects.\textsuperscript{141} In general, planners also gave high ratings to CEQA's disclosure functions,\textsuperscript{142} while giving more mixed but still positive marks to CEQA's broader procedural functions.\textsuperscript{143}

Despite generally positive reviews, the statute's uncertainty and a fear of litigation weigh heavily on the minds of practitioners. In the ABAG survey, 54\% of the public and private respondents believed that legal defensibility, rather than the disclosure of environmental information, drives preparation of EIRs fairly often or most of the time.\textsuperscript{144} In actuality, CEQA litigation is extremely rare, occurring in less than 1\% of all projects.\textsuperscript{145} Furthermore, Olshansky and his colleagues found that the typical EIR is neither highly expensive nor excessively time-consuming.\textsuperscript{146} However, fear of CEQA litigation is closely related to the fear of "CEQA horror stories" where atypical projects get caught up in seemingly unending multiyear reviews.\textsuperscript{147} Olshansky closely studied CEQA practices in fourteen jurisdictions\textsuperscript{148} and found that CEQA horror stories could result from a number of different factors. These factors include the possibility that project opponents could threaten or actually file litigation, federal or state agencies could disagree with the lead agency, or new information could become available after the draft EIR had been released for review.\textsuperscript{149}

The uncertainty over CEQA reviews and the fear of litigation affect how applicants approach all CEQA projects, including the vast majority of projects that ultimately do not result in litigation or multi-

\textsuperscript{140.} Fixing CEQA, supra note 5, at ch. 4.
\textsuperscript{141.} Id.
\textsuperscript{142.} Specifically, planners supported CEQA's "technical" functions, such as the quality of its analysis and its ability to inform the public. See Olshansky, CEQA and Local Planning, supra note 20, at 3.
\textsuperscript{143.} Id. CEQA's broader procedural functions include efforts to hold local governing bodies accountable for their decisions, to coordinate public agency review, and to encourage citizen participation. Id.
\textsuperscript{144.} ABAG CEQA Survey, supra note 65, at 2.
\textsuperscript{145.} Olshansky found that only one out of every 281 documents filed under CEQA eventually resulted in a lawsuit, which is 1.3 suits per jurisdiction over five years. Olshansky, CEQA and Local Planning, supra note 20, at 3. ABAG also found that less than 1\% of projects under CEQA resulted in litigation. Gary Binger & Janet McBride, CEQA at Twenty-One, W. Crry, Aug. 1991, at 14, 15 [hereinafter CEQA at Twenty-One].
\textsuperscript{146.} Fixing CEQA, supra note 5, at ch. 6.
\textsuperscript{147.} Id.
\textsuperscript{148.} Id. at ch. 5.
\textsuperscript{149.} Id. at ch. 6.
year reviews. One long-time practitioner emphasized the prevalence of what he regards as "paranoia" over CEQA litigation.\textsuperscript{150} In his view, project proponents, in order to defend against possible litigation, take costly and time-consuming measures that may add little information to EIRs. One possible explanation for inclusion of unnecessary measures is that practitioners may want to ensure legal defensibility. Legal standards for compliance are unclear; it is therefore uncertain what measures would be sufficient to withstand a court challenge.\textsuperscript{151} Planners share these concerns over defensibility: their worries are reflected in the popularity of a survey proposal to "[p]rovide greater specificity in the statutes regarding definitions/requirements (i.e. definition of significant impact, requirements for alternatives analysis)." Nearly 80\% of respondents agreed strongly or in part with this proposal, which received considerably more support than five other suggested reform possibilities.\textsuperscript{152}

Besides the uncertainty over the outcomes of CEQA reviews, the surveys explored other areas for improvement that could be partly addressed by thresholds. According to the Olshansky survey, CEQA to some degree encourages not-in-my-back-yard (NIMBY) syndrome and incremental planning antithetical to a comprehensive approach.\textsuperscript{153} Two-thirds of survey respondents agreed that: "CEQA has given too much power to NIMBYs."\textsuperscript{154} Furthermore, in contrast to the generally positive reviews of the statute, the majority of planners agreed that: "CEQA encourages incremental, project-by-project planning."\textsuperscript{155} CEQA's emphasis on site-specific mitigation measures that accommodate the concerns of neighbors can lead to such environmentally damaging practices as lower density zoning, wide streets, and the banning of buses on residential streets.\textsuperscript{156}

In summary, while practitioners are basically happy with CEQA, there are two areas where thresholds would be useful: reducing uncertainty and refocusing review on larger scale environmental problems.

\textsuperscript{150} Telephone Interview with Tim Haddad, \textit{supra} note 53.

\textsuperscript{151} Id.

\textsuperscript{152} ABAG CEQA Survey, \textit{supra} note 65, at 6. Thirty-eight percent of respondents strongly agreed with this proposal, 42\% agreed somewhat, 14\% disagreed, and 6\% had no opinion. \textit{Id.}

Another proposal, to expand the breadth of categorical exemptions, was regarded favorably by 66\% of respondents. Other proposals that received a bare majority of support included requiring some form of binding dispute arbitration and upgrading the official status of the CEQA Guidelines to that of regulations. A majority of planning consultants opposed proposals to relax or exempt CEQA requirements for projects consistent with general plans or relax requirements for projects within established growth boundaries. \textit{Id.} at 6-7.

\textsuperscript{153} See Olshansky, \textit{CEQA and Local Planning}, \textit{supra} note 20, at 2.

\textsuperscript{154} \textit{Fixing CEQA, supra} note 5, at ch. 4.

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} Olshansky, \textit{CEQA and Local Planning, supra} note 20, at 2.
II
STANDARDIZED REVIEW PROCESSES: OTHER STATES' MODELS FOR ENVIRONMENTAL POLICY LAWS AND THRESHOLD DETERMINATIONS

Sixteen other states besides California have "little NEPA" statutes, which employ a variety of standardized processes. While only two states, Minnesota and Massachusetts, have extensively employed standardized thresholds of significance, California can learn from their experience. Additionally, states have used other promising tools in the initial study process, including designation of sensitive areas for closer study, detailed initial study checklists, and presumptions of "insignificant effect" for impacts that fall below established pollution standards.

A. General Comparison of CEQA and Other State Environmental Policy Acts

In many respects, CEQA's basic structure is similar to that of the sixteen other state environmental policy acts requiring preparation of environmental impact statements (EISs). Like California, most other states' laws require consideration of significant adverse impacts, cumulative impacts, and growth-inducing impacts, and allow preparation of programmatic EISs or similar documents. Most other SEPA's require scoping prior to EIS preparation, like CEQA, and some even go so far as to require centralized review of the completed EIS. While CEQA's requirement that agencies consider offsite as well as onsite alternatives has been controversial, almost half of the SEPA's include a similar provision. Furthermore, CEQA's alternatives requirement is less stringent than seven state statutes (and

157. Although California calls these documents environmental impact reports (EIRs), the most commonly used term is "environmental impact statement," the term used by NEPA. See FIXING CEQA, supra note 5, at ch. 3. Therefore, in the section of this comment comparing state statutes, the term "EIS" will be used.
158. See id.
159. See id.
160. In Citizens of Goleta Valley v. Bd. of Supervisors, the California Supreme Court ruled that decisions whether or not to analyze alternatives—including offsite alternatives—should be governed by a "rule of reason." 801 P. 2d 1161, 1168 (Cal. 1990). For a discussion of the facts of this case and the historical context of controversy over offsite alternatives, see generally Timothy A Tosta et al., Environmental Review After Goleta, 21 Sw. U. L. Rev. 1079 (1992).
161. Among these states, New York requires consideration of offsite alternatives for public but not private projects, and Washington requires supporters of private projects to consider offsite alternatives only when seeking rezoning or comprehensive plan amendment. FIXING CEQA, supra note 5, at ch. 3.
Implementation of CEQA differs from most other states' experiences in three major respects. First, and most importantly, California has a high volume of SEPA activity. California is either first or close to first in the number of EISs and initial studies prepared and the amount of litigation filed. Second, CEQA and five other SEPA's require agencies to make mandatory findings that they have incorporated feasible alternatives or mitigation measures into a project. As discussed above, one of CEQA's aspects that planners consider most effective is its provision of site-specific mitigation measures. The majority of other SEPA's is, like their namesake, "purely procedural," requiring agencies merely to consider the environmental documents prepared. CEQA's third distinctive feature is that it requires consideration of cumulative impacts for a broad range of projects. Most other states require consideration of cumulative impacts, but only New York and Washington require analysis for all "reasonably foreseeable" private projects. Furthermore, in neither of these states does this standard cover as broad a range of projects as in California. CEQA requires consideration of not only projects under construction, but also those not yet approved and undergoing environmental review and other foreseeable projects.

162. See id.
163. See MINNESOTA CTR. FOR ENVTL. ADVOCACY, PAPERWORK OR PROTECTION? 23 (1993) [hereinafter PAPERWORK OR PROTECTION?]. "Environmental assessment" (EA) is a commonly used term for what California calls the initial study. However, initial study will be used primarily throughout part II.
164. See id. at 59. Although California has some of the highest litigation rates over environmental impact statements and draft environmental impact statements, the actual rate is perhaps lower than expected: approximately one lawsuit per every 354 CEQA reviews. FIXING CEQA, supra note 5, at ch. 4.
165. These states are Massachusetts, Minnesota, New York, and South Dakota, as well as the District of Columbia. See PAPERWORK OR PROTECTION?, supra note 163, at 38. New York actually requires that agencies choose the best alternative and mitigate ("consistent with social, economic and other essential considerations"). Id. at 39. Minnesota requires denial of projects where there is a "feasible and prudent" environmentally superior alternative. Id. Neither Minnesota's nor New York's state environmental policy act (SEPA) has been implemented in as far reaching a manner as suggested by the language of the statutes. Id. In addition to the six states with mandatory findings provisions, Washington State allows lead agencies to deny projects on such grounds, at the agencies' option. Id. at 37.
166. See supra note 140 and accompanying text.
167. See FIXING CEQA, supra note 5, at ch. 3. All little NEPA's require at least the consideration of mitigation measures. Id.
168. See id.
169. Id.
170. A full explanation of this complex issue is beyond the scope of this comment. For a more detailed treatment, see id.
B. Comparison of State Environmental Policy Acts’ Processes for Initial Studies and Determinations of Need for an Environmental Impact Statement

California has an unusually high volume of SEPA activity. California prepared at least 1278 EISs and 23,740 initial studies in 1990,171 which is far more than other states.172 Furthermore, with an estimated seventy CEQA lawsuits per year, California is second only to

The one important respect in which CEQA is less stringent than a number of SEPA’s is in the area of socioeconomic impacts. About half of the states, not including California, require consideration of these impacts. Id. A minority of little NEPA’s also require some form of cost-benefit analysis. Id.

In California, the CEQA Guidelines state that “[e]conomic and social changes resulting from a project shall not be treated as significant effects on the environment.” Cal. Code Regs. tit. 14 § 15064(f) (1994). However, such impacts are not completely excluded from CEQA analysis. Economic and social changes can be used to assess the effects of other physical changes, id. § 15064(f), and can be used in assessing feasibility of alternatives and mitigations, Cal. Pub. Res. Code § 21081(b) (West Supp. 1995).

171. California data represent totals from the Olshansky survey. Fixing CEQA, supra note 5, at ch. 4. Respondents provided data for jurisdictions covering 80.8% of California’s population. This group probably prepared a higher proportion of the state’s EIRs and negative declarations because many of the nonrespondent jurisdictions were from more remote areas of the state experiencing less development pressure. Id. The totals also do not include information on CEQA EIR, initial study, and litigation activity by state agencies and special districts. However, these probably represent only a small proportion of the local agency totals, largely because state agencies issue fewer permits for projects covered by CEQA and partly because many state agencies are exempt from EIR and initial study requirements under CEQA’s certified programs. See Cal. Pub. Res. Code § 21080.5(c) (West Supp. 1995).

172. Data for other states is available for 1992. States can be divided based on whether, like California, their SEPA’s apply to local government approval of private sector projects (category 1) or whether they do not (category 2).

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<tr>
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<tr>
<td>Wisconsin</td>
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</table>

* Minnesota’s annual average for 1990-1992 was 5.6.
** Connecticut’s annual average for 1990-1992 was 3.
ND = no data available

Paperwork or Protection?, supra note 163, at 16, 23; Fixing CEQA, supra note 5, at ch. 3.
New York in SEPA litigation. Although differences in growth activity and the severity of environmental problems make it difficult to compare states, California clearly is among the top states in SEPA activity, particularly in numbers of initial studies and EISs prepared.

Two aspects of the CEQA process combine to help explain California's higher number of initial studies. First, California, like only six other jurisdictions, requires SEPA review for private sector projects requiring local government permits. Private sector projects probably generate the sizeable majority of SEPA activity in all of these states. Second, CEQA lacks standardized thresholds for the preparation of an initial study. Standardized thresholds allow many projects that are below the thresholds to proceed with less scrutiny. Without such thresholds, many more projects are subject to an initial study.

The combination of subjecting private activity to SEPA review and failing to use standardized thresholds at the initial study stage appears to generate high levels of SEPA activity. The only states that (1) require EISs for private projects that need local permits and (2) do not have standardized thresholds for triggering initial studies are Cali-

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173. See Fixing CEQA, supra note 5, at ch. 3. New York saw an estimated total of 400 lawsuits from 1988-1992; respondents to the Olshansky surveys provided a cumulative estimate of a total of CEQA 353 lawsuits from 1985-1990. Id. Significantly fewer lawsuits were filed in other states. Id.

174. In the 1980's, California experienced the largest ten-year population surge of any state in the nation. 30 Million Californians, WASH. POST, May 17, 1990, at A23. The southern part of the state—including the metropolitan areas of Los Angeles-Riverside-Orange County, San Diego, and Bakerfield—is home to nearly 60% of its residents. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1993 STATISTICAL ABSTRACT OF THE UNITED STATES 41 (113th ed. 1993). Arguably this metropolitan area has the worst environmental problems of any in the country, especially with regard to issues such as air pollution, see 40 C.F.R. § 81.305 (1994), traffic congestion, and endangered species, see Marla Cone, Protected Status Rarely Rescues Dying Species, L.A. TIMES (Orange County final ed.), Sept. 8, 1991, at A1, A22. Factoring these problems into a uniform standard of environmental quality is not feasible.

175. Fixing CEQA, supra note 5, at ch. 3.

176. This may be inferred from the fact that the states with the greatest scope for their SEPA's—as indicated by their numbers of initial studies or Findings of No Significant Impact (FONSI's) (California, New York, and Washington)—are all states whose SEPA's cover private projects that require local government approvals. See id. at chs. 3, 4.

177. See id. at ch. 4.

178. Id. at ch. 3.
California, Washington, and New York.\textsuperscript{179} Instead, these three states exclude projects from the initial study process solely on the basis of limited categories of "exempt" actions.\textsuperscript{180} Perhaps not surprisingly, California, Washington, and New York are the states that have unusually high totals of initial studies.\textsuperscript{181}

California's low legal threshold for EIS preparation also contributes to its high level of EIS activity. California, like about half of the SEPA states, requires EISs for actions that "may significantly affect" the environment.\textsuperscript{182} Other states have higher legal thresholds for EIS preparation. Washington, for example, requires EISs only for actions that "significantly affect" the environment.\textsuperscript{183} A small group of states borrows NEPA's requirement that actions be "major" before an EIS is required.\textsuperscript{184}

One aspect of CEQA that may reduce EIS activity is the use of mitigated negative declarations. New York and Washington are the other two states that use this tool frequently.\textsuperscript{185} Planners from several other states also believe that it would be useful to have MNDs available.\textsuperscript{186} When used appropriately, MNDs can effectively reduce environmental impacts without the expense and delay associated with EISs.

C. Standardized Review Processes in Other States and Under the National Environmental Policy Act

1. Thresholds of Significance

The major lesson from other states' use of thresholds is that flexibility is necessary for their success, particularly where there is a high volume of development applications. California can perhaps learn the most from Florida's scales thresholds for state review of large-scale subdivision projects. Scaled thresholds provide a feasible means of

\textsuperscript{179} Id. at chs. 3, 4.

\textsuperscript{180} California has both statutory and administratively determined "categorical" exemptions. See supra notes 39-47 and accompanying text. One CEQA reform proposal has been to expand the range of possible exemptions. See Notice of Solicitation of Comments on Proposed Revisions to the CEQA Guidelines, 94 Cal. Regulatory Notice Reg. 1558 (1994).

\textsuperscript{181} Fixing CEQA, supra note 5, at ch. 3. While New York technically has standardized thresholds for initial studies, in practice "unlisted actions" beneath those thresholds must also conduct initial studies. Telephone Interview with John Stallmer, Chief of Environmental Management, Division of Regulatory Affairs, New York Department of Environmental Conservation (Oct. 1993).

\textsuperscript{182} See PAPERWORK OR PROTECTION?, supra note 163, at 19.

\textsuperscript{183} See id. Washington's inclusion in this group may partially explain why Washington has a lower proportion of EIRs to initial studies than California.

\textsuperscript{184} See id. (listing Indiana, Minnesota, Montana, and Wisconsin as states requiring EISs only for "major" actions).

\textsuperscript{185} See id.

\textsuperscript{186} Id. at 20.
increasing certainty while retaining flexibility. This section also examines SEPA's from the only two states that regularly use thresholds for EISs: Massachusetts and Minnesota.187

a. Florida's Scaled Thresholds

Standardized thresholds are used in Vermont's, Florida's, and Maine's non-SEPA statutes, which provide centralized state review of large-scale subdivision projects. These states have relied on acreage-based or area-based thresholds that are much simpler than those used in Massachusetts and Minnesota.188 One drawback to this approach is that where a single threshold is dominant for a particular project, projects are frequently designed so as to just barely avoid the threshold for review. Thus, Maine's twenty-acre threshold for state review has encouraged a proliferation of subdivisions in the 19 to 19.9 acre range.189

Florida originally tried to avoid this problem by making its thresholds a presumptive but not conclusive trigger for the state Development of Regional Impact (DRI) review.190 However, the quantity of information that the state Department of Community Affairs needed to make a decision rendered the preliminary evaluation as to whether DRI review was required nearly as complex as the full-scale review itself.191 In order to address this problem, 1985 amendments to the program created a "band of presumption" between 80% and 120% of the threshold levels.192 Under the new system, any development below 80% or above 120% of the thresholds would be, respectively, automatically exempt from or automatically subject to DRI review.193 For any development whose impact was between 80% and 100% of the relevant threshold, the burden of proof would be on the

187. Five states, including California, have mandatory EIR thresholds for narrow categories of potentially hazardous projects, such as incinerators, solid waste facilities, and power plants. Id. at 10.

188. Thomas R. McKeon, Comment, State Regulation of Subdivisions: Defining the Boundary Between State and Local Land Use Jurisdiction in Vermont, Maine and Florida, 19 B.C. ENVTL. AFF. L. REV. 385, 421 (1991). Vermont's thresholds combine land-based standards and "person-based" standards by requiring review for any person who subdivides 10 or more lots over a five-year period within a certain area. Id.

For a discussion of the use of thresholds of significance in Massachusetts and Minnesota, see infra part II.C.1.

189. McKeon, supra note 188, at 406-07. Massachusetts and Minnesota have also reported encountering projects designed to evade thresholds. See PAPERWORK OR PROTECTION?, supra note 163, at 9.

190. McKeon, supra note 188, at 414. Florida's Development of Regional Impact Review is part of the Environmental Land and Water Management Act, originally passed in 1972. See id. at 410-11.

191. See id. at 414.

192. Id.; see FLA. STAT. ANN. § 380.06(2)(d) (West 1988).

193. McKeon, supra note 188, at 414.
state to show the need for review.\textsuperscript{194} Similarly, for any development between 100\% and 120\% of the relevant threshold, the burden would rest on the project proponent to show why review was inappropriate.\textsuperscript{195}

The DRI review evaluates projects from fourteen land use categories in terms of one to three criteria per category. For example, the category "retail development" is evaluated in thresholds of either 400,000 square feet, 40 acres of land, or 2500 parking spaces.\textsuperscript{196} Only if a project is below 80\% of the thresholds in all relevant categories is it automatically exempt from review.\textsuperscript{197} For residential development, which is evaluated solely in terms of number of dwelling units, Florida provides staggered thresholds.\textsuperscript{198} In the least populated counties, the threshold (250 units) is only a small fraction of what it is in Miami's populous Dade County (3000 units).\textsuperscript{199} The DRI program also allows a 50\% upward adjustment for commercial projects and a 100\% upward adjustment for multiuse projects in central business districts.\textsuperscript{200}

According to a planner who administers the program, the band of presumption system has been both predictable for developers and easy to administer for staff.\textsuperscript{201} Although 1993 legislation will eventually phase out centralized DRI review of new subdivisions and transfer authority to local governments, the DRI program will continue for "grandfathered" projects.\textsuperscript{202}

However, several problems with the DRI system gained attention during debates on the program's future. As a result, the 1993 legislative amendments directed the Department of Community Affairs to pay more attention to the "character" and "location" of the grandfathered projects in the applicable thresholds.\textsuperscript{203} The Department of Community Affairs is planning to develop staggered thresh-

\textsuperscript{194} See Telephone Interview with Marina Gonzalez-Pennington, Community Program Administrator, Development of Regional Impact Section, Florida Department of Community Affairs (Jan. 24, 1994).
\textsuperscript{195} Id.
\textsuperscript{196} FLA. ADMIN. CODE ANN. r. 28-24.031 (1989).
\textsuperscript{197} See McKeon, supra note 188, at 414.
\textsuperscript{198} Id. at 415.
\textsuperscript{199} See id. at 415 n.263.
\textsuperscript{200} There are also provisions allowing government agencies to petition for increases or decreases of up to 50\% in the thresholds for all or part of a local government's jurisdiction. See FLA. STAT. ANN. § 380.06(3)(c) (West 1988).
\textsuperscript{201} See Telephone Interview with Marina Gonzalez-Pennington, supra note 194.
\textsuperscript{202} FLA.-STAT. ANN. § 380.06(27) (West Supp. 1995); Telephone Interview with Marina Gonzalez-Pennington, supra note 194. The legislation effectively transferred responsibility for regionally significant projects from the state Development of Regional Impact program to the intergovernmental coordination element of local governments. Telephone Interview with Marina Gonzalez-Pennington, supra note 194.
\textsuperscript{203} Telephone Interview with Marina Gonzalez-Pennington, supra note 194.
olds, with lower standards for projects that are near a resource or in an environmentally sensitive area.\textsuperscript{204}

Another problem with the DRI program was that numerous projects inappropriately escaped review or were forced to undergo such review.\textsuperscript{205} One proposed reform would have expanded the band of presumption from 80\% to 120\% to a range of 50\% to 150\%.\textsuperscript{206} In many cases, the band from 80\% to 120\% proved too limited, because projects in excess of 120\% of the standard might not need review, while projects under 80\% of the standard might merit review.\textsuperscript{207} This idea was proposed as DRI was being phased out, so the proposal was not enacted.\textsuperscript{208}

California might find a simplified version of Florida’s scaled thresholds useful. While Florida’s DRI program involves only one or two evaluative criteria for each project, CEQA considers numerous possible environmental impacts. To avoid excessive administrative complexity and to make CEQA as comprehensible as possible to the applicant and the public, California might wish to simplify Florida’s band of presumption system somewhat. Furthermore, because CEQA review involves so many different impacts, scaling is less necessary to screen for projects designed to slip just below all the possible thresholds. However, California could use scaling to preserve some flexibility for quantitative thresholds. Projects within perhaps 30\% of the thresholds might or might not require an EIS depending on the adequacy of their mitigation measures and other factors. This approach would preserve much of the consistency and predictability of thresholds without robbing planners of the discretion to consider site-specific factors in close cases. Furthermore, this approach would give developers incentives to provide mitigation measures in order to avoid the necessity of an EIS in projects close to the thresholds. Some California localities already use a more formal system of scaled thresholds for noise impacts.\textsuperscript{209}

\textbf{b. Massachusetts}

The Massachusetts Environmental Policy Act (MEPA), which applies to state projects and private projects needing state permits, has successfully implemented the most comprehensive set of EIS thresholds of any SEPA.\textsuperscript{210} There are two keys to the success of MEPA’s

\begin{itemize}
\item \textsuperscript{204} Id.
\item \textsuperscript{205} See id.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} See id.
\item \textsuperscript{209} See, e.g., CITY OF MOUNTAIN VIEW, CAL., CEQA GUIDELINES 79 (1992) [hereinafter MOUNTAIN VIEW, CEQA GUIDELINES].
\item \textsuperscript{210} See PAPERWORK OR PROTECTION?, supra note 163, at 10.
\end{itemize}
thresholds: (1) they are flexible, and (2) seven planners in a single agency administer MEPA review of all projects,211 which helps ensure consistent and effective review.

MEPA attains flexibility by combining specific thresholds with discretion to add to or remove requirements from an EIS. MEPA lists thirty-two impacts that automatically require an EIS.212 These impacts include "[c]onstruction of 350 or more new residential units," or "[a]ny project . . . generating 3000 or more vehicle trips per day."213 Although these thresholds are very specific, the Secretary of Environmental Affairs has the discretion to require an EIS where appropriate, even if a project's impacts fall below the prescribed levels.214 This discretion has been exercised often enough to provide for no less than 22.5% of the state's EISs.215 The decision to require discretionary EISs is based on analysis in Environmental Notification Forms, the state's equivalent of initial studies.216

At the same time, MEPA also provides the Secretary with the discretion to waive any requirement within the regulations.217 The Secretary uses this discretion in two different ways. First, the Executive Office of Environmental Affairs might not require an EIS even if a project exceeds the thresholds. For example, a 600,000 square foot automated warehouse might have no significant impacts even though it exceeds the threshold of 500,000 square feet of nonresidential space.218 Second, the waiver authority frequently gives the Secretary leverage for negotiation. MEPA specifies that the Secretary's authority to require studies in an EIS is limited to the subject matter of the state permit.219 Thus, if a project exceeded the traffic threshold but the applicant only needed a sewer permit, by statute the Secretary could only require the consideration of water impacts in an EIS. However, in these circumstances the Secretary might strike a bargain: if the applicant mitigates the traffic problems, the Secretary will waive the need for an EIS if there are no serious sewer issues.220

211. Telephone Interview with Dick Foster, Environmental Analyst, Executive Office of Environmental Affairs (Feb. 18, 1994). Mr. Foster's agency is responsible for MEPA review. Id.
213. Id. § 11.25(18)-(19).
214. Telephone Interview with Dick Foster, supra note 211.
215. See PAPERWORK OR PROTECTION?, supra note 163, at 23.
216. Telephone Interview with Dick Foster, supra note 211.
217. Id.; MASS. GEN. LAWS ANN. ch. 30, § 62A (West 1992) ("[W]ithin 30 days . . . the secretary . . . shall issue a certificate stating whether an environmental impact report is required.").
218. Telephone Interview with Dick Foster, supra note 211.
219. See MASS. GEN. LAWS ANN. ch. 30, § 62A.
220. Telephone Interview with Dick Foster, supra note 211.
According to those who implement it, MEPA’s thresholds have been highly successful. Recent minor statutory amendments have not touched the thresholds, except to add new categories. Massachusetts’ experience suggests that thresholds can provide both effective environmental mitigations and streamlined review, even in cases where thresholds do not automatically require an EIS, but instead provide a bargaining chip for agencies. While CEQA prevents California from directly adopting Massachusetts’ model, California can design its thresholds to emphasize flexibility where it is most appropriate.

c. Minnesota

In contrast to Massachusetts, Minnesota achieves a low number of EISs by using an extensive initial study process followed by very high, fixed thresholds for preparation of EISs. This results in few EISs; only one EIS was required in 1992 (compared to Massachusetts’ sixty-nine). Minnesota can establish high EIS thresholds in part because its initial study process is very thorough. Minnesota requires public agencies to respond to public comments in response to its equivalent to the initial study, the Environmental Assessment Worksheet. Another important factor in Minnesota’s low EIS total is the paucity of occasions where agencies exercised their discretion to require an EIS for projects that fell below the thresholds. Discretionary EISs represent only 1.4% of Minnesota’s total initial studies.

Minnesota’s thresholds are staggered according to the sensitivity of a project’s location. For example, residential development requires an EIS if it exceeds (1) 100 unattached or 150 attached units in a sewered unincorporated area, (2) 400 unattached or 600 attached units if inconsistent with the comprehensive plan or outside the seven-county Twin Cities area, or (3) 1000 unattached or 1500 attached units within the Twin Cities area. The state has not established EIS threshold criteria for some impacts such as air quality, agricultural

221. Id.
222. CEQA lacks either an EIR waiver provision at the agencies’ discretion or the centralized review structure that would hold one agency accountable for administering such waivers. See Paperwork or Protection?, supra note 163, at 23.
223. One possible means of achieving flexibility within the strictures of CEQA is adoption of “scaled” thresholds like those used in Florida. For a more detailed discussion, see supra part II.C.1.a.
224. Fixing CEQA, supra note 5, at ch. 3.
226. Paperwork or Protection?, supra note 163, at 23.
land conversion, and historical places.\textsuperscript{228} Minnesota's experience illustrates that relatively high thresholds can reduce the number of EISs.

d. The National Environmental Policy Act

Some federal agencies have adopted specific thresholds under the National Environmental Policy Act regulations. While the Council on Environmental Quality's NEPA regulations provide only very general significance criteria, the regulations direct federal agencies to develop their own implementing criteria.\textsuperscript{229} The Council on Environmental Quality defines significance in terms of a range of factors of "context" and "intensity."\textsuperscript{230} An agency's implementing procedures should include:

Specific criteria for and identification of those typical classes of action:
(i) Which normally do require environmental impact statements. (ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions . . . ). (iii) Which normally require environmental assessments but not necessarily environmental impact statements.\textsuperscript{231}

Several federal agencies have adopted quantitative or other specific threshold criteria under this directive.\textsuperscript{232}

2. Initial Study Checklists

Six states have well-developed checklist forms for initial studies.\textsuperscript{233} These forms present an organized format for evaluating the significance of a project's range of possible environmental impacts (e.g., automobile trip generation and disruptions to species habitat).

Initial study checklists vary greatly in how specifically they describe impacts' levels of significance. At one extreme, Washington simply asks applicants to describe impacts, without giving any standards for what is significant.\textsuperscript{234} California is only minimally more specific, indicating that impacts will be significant if they "substantially" or "significantly" affect specified resource categories.\textsuperscript{235} Minnesota's

\textsuperscript{228} Id. at 42, 52-53. Since Minnesota requires few EIRs on a discretionary basis, presumably impacts in these categories rarely require an EIR. See supra text accompanying note 226.

\textsuperscript{229} 40 C.F.R. §§ 1501.3(a), 1507.3(a) (1994).

\textsuperscript{230} Id. § 1508.27 (1994).

\textsuperscript{231} Id. § 1507.3(b)(2) (1994).


\textsuperscript{233} See PAPERWORK OR PROTECTION?, supra note 163, at 13.

\textsuperscript{234} WASH. ADMIN. CODE § 197-11-960 (1993).

\textsuperscript{235} See discussion supra part I.E.
Environmental Assessment Worksheet is at the other extreme, indicating quantified threshold criteria for a wide range of impacts.\textsuperscript{236}

New York's checklist provides an intermediate model. The checklist contains both quantitative and qualitative impacts.\textsuperscript{237} For example, one impact is described as the conversion of more than 10 acres of agricultural land, or 2.5 acres in an Agricultural District; another impact is described as effects on threatened or endangered species.\textsuperscript{238}

The quantified criteria on New York's initial study checklist are not fixed thresholds; instead, they are simply "a tickler to get you to think."\textsuperscript{239} The New York State Environmental Quality Review Act (SEQR) emphasizes flexibility, based on the philosophy that what is significant in one place is not necessarily significant in another.\textsuperscript{240} In order to allow for more site-sensitive thresholds, SEQR authorizes local adoption of variants of the state checklist.\textsuperscript{241}

The SEQR checklist also is noteworthy in expressly providing for MNDs. Potential impacts are not only evaluated in terms of magnitude, but also in terms of whether an impact can be mitigated by a change in the project.\textsuperscript{242} This approach also makes the MND process more accessible to the reviewing public.

California should provide increased guidance in its initial study checklist, based in part on the flexible New York model. Even where there are no quantitative thresholds, revised qualitative thresholds can provide clearer definitions of possible impacts and subissues concerning the impacts. This will help focus debate and can enable developers to plan mitigation measures in advance.

3. Thresholds for Expanded Initial Studies

Thresholds can also be used to indicate that further study is necessary. New York has a system for distinguishing when projects need expanded initial studies. New York divides actions into "type I," "type II," and "unlisted" actions.\textsuperscript{243} Type II actions are minor types of projects that are exempt from state environmental policy act re-
For all other projects, the critical question is whether they are type I actions, which require the use of a detailed environmental assessment form, or unlisted actions, which can use a shorter form. Type I actions include plan changes, zoning changes involving twenty-five acres or more, projects in agricultural zones or adjacent to parks or open space, and large projects (defined in terms of community size and the presence or absence of facilities).

New York's systematic attempt at creating two different initial study processes for projects of varying size may be too ambitious. Apparently, most unlisted projects as well as type I actions use the expanded form, possibly because using a single form for all projects may be more convenient. However, the concept of thresholds for expanded initial studies may be useful for selected environmental impacts, such as traffic or biological resources. In fact, some California localities use such thresholds for traffic impacts. Such thresholds can standardize the initial study process while reserving to staff judgment the often complex significance determination.

Another type of thresholds determines whether an initial study is even necessary. At least five states have developed these thresholds, with the most detailed criteria established by Massachusetts, Minnesota, and Wisconsin. Yet California's adoption of such a system could be a substantial departure from existing practices that require initial studies for all "projects." Furthermore, thresholds for the preparation of an initial study would only benefit the smallest projects, which are at the least risk from excessively lengthy CEQA reviews. Therefore, California will probably not want to adopt thresholds for initial studies.

4. Designation of Sensitive Areas

Another evaluative tool is designation of sensitive areas that require close study of potential impacts to threatened resources.
Washington's SEPA has a provision for county designation of Environmentally Sensitive Areas (ESA's). ESA's might be designated because they contain characteristics such as unstable soils, steep slopes, unusual or unique plants or animals, wetlands, or floodplains. Washington's SEPA further provides: "The location and extent of all environmentally sensitive areas shall be clearly indicated on a map." In Washington, projects within ESA's cannot claim many of the state's categorical exemptions and must prepare an EIS if they exceed a certain threshold.

Only a minority of Washington's counties have formally designated ESA's, but over half have implemented informal ESA's outside of SEPA or have similar provisions generally mapping sensitive areas. The most common ESA-type ordinances have been for wetlands, critical wildlife habitats, flood hazard areas, and unstable soils. In a survey of staff from counties that have developed some type of sensitive area policy, over three-quarters believed that the ordinances were either very or moderately effective.

One problem with sensitive area designations is that maps indicating development restraints can be highly controversial. Even if landowners are not imminently planning development, they do not like to see maps identifying their properties as potentially subject to resource limitations. Because maps can be so politically controversial, this comment does not recommend using this tool in California.

5. Presumptions of Validity: Impacts That Fall Below Established Pollution Standards

Many states apply the presumption that if a project meets certain pollution standards for a resource, any impacts on that resource are

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253. Id. § 197-11-908(1).
254. Id.
255. Id. § 197-11-908(2).
257. Of 39 counties, only 8 have adopted formal Environmentally Sensitive Areas (ESA's), while 12 have implemented similar informal provisions. Id. at 65, 67. The counties with informal provisions have much higher population densities than those with formal ESA's, id. at 68, which suggests that they may be too busy processing development applications to meet SEPA's formal requirement of mapping "the location and extent of all environmentally sensitive areas." Not surprisingly, the counties that adopted no ESA policies at all had the lowest average population densities. Id.
258. Id.
259. Six thought their ESA-type ordinances were very effective, 10 thought they were moderately effective, 4 thought they were not very effective, 1 thought they were not effective at all, and 5 discreetly expressed no opinion. Id. at 65.
insignificant. However, California could incorporate an additional presumption of validity for some cumulative impacts. Small projects that have only cumulatively significant impacts should be able to undergo a simplified review process by using mitigation measures provided under other legal authorities.

D. Applicability of Standardized Review Processes to California

The only two states that have extensively used standardized thresholds of significance—Massachusetts and Minnesota—have SEPA statutes very different from CEQA. Thus, absent major changes in CEQA, California for the most part cannot simply adopt other states’ models for thresholds of significance.

However, California may be able to develop a threshold system that draws upon characteristics of some of its sister states’ other strategies. Most notably, California should consider using a simplified version of Florida’s scaled thresholds for quantitative thresholds under CEQA. This approach could achieve much of the consistency and predictability of quantitative thresholds, but at the same time, would allow flexibility for the consideration of project-specific factors and/or the negotiation of solidly mitigated MNDs in close cases. A second CEQA tool could be thresholds for expanded initial studies, which could standardize the review process while leaving the often complex significance decision to staff judgment. Additionally, California agencies could provide clearer definitions of issues and subissues in localized initial study checklists. Finally, other states’ presumptions of insignificance from compliance with pollution standards may be particularly useful in California for small projects with only cumulatively significant impacts. These projects would be able to attain certainty of compliance without preparing EISs, as long as they adopted appropriate standard mitigation measures.

III

INTRODUCTION TO THRESHOLDS

As of 1990, 13% of California cities and 18% of California counties used standardized thresholds of significance. As interest in thresholds increases, much discussion over them concerns the relative merits of qualitative versus quantitative evaluative criteria. This
part describes these two types of thresholds, summarizes their advantages and disadvantages, and recommends the adoption of thresholds for most impacts at the local rather than the state or regional level.

In general, thresholds supplement the state guidelines for evaluating significant effects. The thresholds supply formalized criteria based on local data and local values. There are two basic types of thresholds. Quantitative thresholds involve formulas that calculate whether a project will exceed a numerical total so as to indicate a significant effect. These thresholds can represent either fixed determinants of significance or guidelines that localities may choose to follow in deciding whether an impact is significant. Qualitative criteria typically define the components of an issue and standardize evaluative procedures, but preserve staff discretion within the framework of those procedures. This comment recommends that communities adopt qualitative thresholds for most impacts and invest in a few well-designed quantitative thresholds for their most important environmental issues.

The process by which thresholds are adopted is also important. Jurisdictions must balance the desire for public participation and for legislative approval of thresholds against the desire to avoid political controversy and reduce the costs of developing thresholds. Most jurisdictions that have developed thresholds so far have done so at the staff level, often after planning departments have solicited public input.266 Most thresholds have not been adopted as part of general plan updates, or otherwise formally ratified by local legislative bodies.267

A. Quantitative and Qualitative Thresholds: A Summary of Advantages and Disadvantages

Quantitative thresholds are most feasible where a single quantifiable factor can measure impacts. For example, air quality thresholds can rely on the quantity of emissions for regionally significant criteria pollutants. It is also possible, although less common, to develop quantitative thresholds based on several different inputs. For example, the significance of traffic impacts can be determined by trip generation rates and their impact on quantitative volume to capacity ratios.268

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266. E.g., Telephone Interview with Tom Oberbauer, Regional Planner, County of San Diego Department of Planning and Land Use (Apr. 6, 1993); Telephone Interview with Joe Malone, Associate Planner, City of San Diego (May 6, 1993); Telephone Interview with Bruce Smith, Manager of General Plan Section, Planning Division, Resource Management Agency, Ventura County (Apr. 26, 1993) [hereinafter Telephone Interview II with Bruce Smith]; Telephone Interview with Mark Tomich, supra note 22 (city of Irvine); Facsimile from Jan Hubbell, State Resources Agency (May 19, 1993) (on file with the Ecology Law Quarterly).

267. See infra note 452.

268. See, e.g., MOUNTAIN VIEW, CEQA GUIDELINES, supra note 209, at 85.
many cases, quantitative thresholds can retain flexibility through attached qualitative thresholds. Significance for this impact can also be indicated by qualitative criteria such as poor traffic design features, including dangerous intersections, narrow width of roads, or sharp curves.

Most jurisdictions that use thresholds have developed quantitative criteria only for readily quantifiable impacts, such as air quality, traffic, or noise.\(^{269}\) Even in these cases, the thresholds generally do not implement comprehensive plans for addressing large-scale environmental problems. In most cases, the levels established have not reflected studies of the tolerable impacts associated with predictable development activity. Instead, quantitative thresholds have served more to standardize procedures than to integrate CEQA review into a comprehensive planning process.

On the other hand, qualitative thresholds are appropriate where the significance determination is intensely site-specific, as with impacts on biological and visual resources. While qualitative thresholds typically leave the ultimate significance determination to the judgment of planning staff, the thresholds do define the issues that the staff must consider and specify which procedures to follow in making the determination. For example, Ventura County’s biological resources threshold defines terms such as wetland habitat, coastal habitat, migration corridor, locally important species, and locally important community.\(^{270}\) The threshold then provides procedures by which qualified biologists make the significance determinations.\(^{271}\) To date, the majority of jurisdictions that use thresholds have developed general qualitative thresholds for most impacts.\(^{272}\)

\(^{269}\) See, e.g., id. at 62, 77, 86; SAN DIEGO COUNTY, GUIDELINES FOR CEQA, supra note 72, at 115, 119; PLANNING DEP’T, CITY OF SAN DIEGO, SIGNIFICANCE DETERMINATION GUIDELINES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 5, 41, 55 (1991) [hereinafter CITY OF SAN DIEGO, SIGNIFICANCE GUIDELINES].

The leading exceptions to this limited use of quantitative thresholds are Santa Barbara County and the Tahoe Regional Planning Agency. Santa Barbara County’s detailed qualitative or scientific criteria include agricultural resources, biological resources, groundwater impacts, and cultural resources. SANTA BARBARA COUNTY, THRESHOLDS, supra note 72, at 18, 100, 123. The Tahoe Regional Planning Commission has also laid out explicit numerical standards for water quality, soil conservation, vegetation preservation, and wildlife. TAHOE REGIONAL PLANNING AGENCY, EXHIBIT A, RES. NO. 82-11, RESOLUTION OF THE GOVERNING BODY OF THE TAHOE REGIONAL PLANNING AGENCY ADOPTING ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES FOR THE LAKE TAHOE REGION 3, 8 (1990).

Ventura County also has developed detailed thresholds for a few impacts such as agricultural resources. VENTURA COUNTY, INITIAL STUDY ASSSESSMENT GUIDELINES 7-1 to 7-2 (1992) [hereinafter VENTURA COUNTY, INITIAL STUDY GUIDELINES].

\(^{270}\) VENTURA COUNTY, INITIAL STUDY GUIDELINES, supra note 269, at 6-2.

\(^{271}\) Id. at 6-4 to 6-8; see discussion infra part VI.C.2.

\(^{272}\) See, e.g., SAN DIEGO COUNTY, GUIDELINES FOR CEQA, supra note 72, at 82-234; MOUNTAIN VIEW, CEQA GUIDELINES, supra note 209, at 55-93; SANTA BARBARA
Quantitative thresholds offer many advantages over qualitative thresholds. By substituting numbers for more idiosyncratic human judgment, they can provide more predictable and consistent review. They can also help achieve integration of CEQA into general and specific planning efforts, which is important for achieving long-term environmental goals. In addition, quantitative thresholds can increase legal certainty for both significance determinations in EIRs and negative declarations on small-to-moderate-sized projects. However, quantitative thresholds also can be expensive and, if not designed correctly, politically contentious and unduly rigid.

In contrast, qualitative thresholds still offer some advantages over quantitative thresholds. They are much cheaper to develop than quantitative thresholds, and lack significant drawbacks in implementation. However, qualitative thresholds also are less effective in achieving more consistent review and better implementation of comprehensive plans.

This comment recommends that communities pursue two different strategies for thresholds in order to draw on the different advantages of qualitative and quantitative criteria. Most important, localities should invest in selected general plan updates or specific plans necessary to develop a few quantitative thresholds and/or standard mitigation measures for their most important planning issues. These thresholds will provide more predictable and consistent review for these difficult issues and will make CEQA a tool to achieve long-term planning goals. In many cases, quantitative thresholds can retain some appropriate flexibility if they are adopted in scaled form.

In a second strategy, localities should adopt qualitative thresholds for most other environmental issues. These thresholds should be accompanied by a revised initial study checklist that reflects a community’s own definition of the effects to be considered. These efforts will cost little, can help focus debate, and will provide a measure of more consistent review. Adoption of a standard conditions of approval manual in conjunction with qualitative thresholds offers increased potential for fairer and more consistent review. For some rural locali-

COUNTY, THRESHOLDS, supra note 72; Telephone Interview with Glen Adamick, Assistant Planner, City of Santa Clarita (May 10, 1993).

273. See discussion infra part V.
274. See discussion infra part IV.
275. See discussion supra part II.C.1.a. Projects within perhaps 30% of the thresholds may or may not require an EIR, depending on factors such as project-specific analysis and the adequacy of mitigation measures.
276. For a discussion of Santa Barbara County's Standard Conditions of Approval Manual, see infra part IV.A.2.a.
ties experiencing little development pressure, there may be too few development applications to justify the preparation of thresholds. 277

B. Recommended Adoption of Thresholds at the Local Level

Realistically, California municipalities are only likely to accept thresholds if they have authority to set them. 278 Not only do city councils and boards of supervisors jealously guard their control over land use, but localities also have different environmental conditions and different tolerance levels for significant impacts. While the number of local variables is too large to discuss comprehensively, two important factors are the local political environment and the volume of development applications.

Neighboring counties can have very different political climates. The influence of the local political landscape is reflected in Santa Barbara County’s ability to develop the state’s strongest and most widely circulated thresholds. 279 In contrast, Ann Hix, Principal Planner with the city of San Diego, observes that her department has kept its thresholds as primarily a staff tool and out of the public eye, unlike Santa Barbara County, because: “I see Santa Barbara as being in Northern California, and we’re in Southern California. I wouldn’t want to have to take my thresholds before the City Council.” 280 In order to prevent its thresholds from becoming a major political issue, San Diego’s Planning Department does not publicize them too much. 281

The volume of development applications received also affects the stringency of thresholds. One Ventura County planning official commented that his jurisdiction has been able to set a lower threshold for air quality impacts than the adjoining South Coast Air Quality Management District (SCAQMD) because Ventura’s slower pace of develop-

277. The jurisdictions that use thresholds tend to be about twice as large and prepare about twice as many draft EIRs as those that do not. Fixing CEQA, supra note 5, at ch. 4. The average 1990 population of jurisdictions that used thresholds was 119,777; the average population of the group that did not was 58,371. Id. Similarly, jurisdictions that used thresholds prepared an average of 6.7 draft EIRs in 1990, while those without prepared an average of 3.1 draft EIRs. Id. Also, the jurisdictions with thresholds tended to have slightly newer general plans than the others. The median city or county that used thresholds had last updated its general plan in 1986; the median city or county that did not use thresholds had last updated its general plan in 1984. Id.

278. A possible exception would be impacts that are both relatively noncontroversial and readily evaluated in a standard manner across a region or the whole state. An example would be noise impacts, which are largely evaluated in terms of federal standards already. See, e.g., San Diego County, Guidelines for CEQA, supra note 72, at 121.

279. See Fixing CEQA, supra note 5, at ch. 5.

280. Telephone Interview with Ann Hix, Principal Planner, City of San Diego (May 6, 1993).

281. Id.
opment allows the staff to analyze closely a wider range of projects.\textsuperscript{282} This view was corroborated by local cities’ rebellion against the SCAQMD’s attempt to require a review process that would have imposed increased administrative burdens on them.\textsuperscript{283} The point is not that the SCAQMD’s thresholds are necessarily too high (they are, after all, based on the federal Clean Air Act), but simply that administrative factors constrain local options in setting and using thresholds.

Three California municipalities have had particularly notable experience with thresholds: Santa Barbara County, Ventura County, and the City of Mountain View. A decade old, and arguably the best known, Santa Barbara County's thresholds represent one of only two efforts to set quantitative or scientific criteria for the majority of the most controversial impacts.\textsuperscript{284} (The other effort is by the Tahoe Regional Planning Agency.)\textsuperscript{285} Yet, like the Tahoe Regional Planning Agency, Santa Barbara County does not represent a model that can be replicated feasibly by other California municipalities. At the time it developed its thresholds in the 1980's, Santa Barbara County differed from many current localities in two important respects: politically, in its strong slow-growth orientation, and financially, in the resources it was able to devote to detailed planning efforts.\textsuperscript{286}

Adopted in 1992 as part of the city’s general plan update, Mountain View’s thresholds have won awards from the Northern California chapter and the entire state’s chapter of the American Planning Association.\textsuperscript{287} Both Mountain View’s and, for the most part, Ventura County’s thresholds (also adopted in 1992)\textsuperscript{288} emphasize clear and consistent procedures for evaluating possible impacts rather than detailed substantive criteria.\textsuperscript{289} Mountain View, however, is over 90% built out, and consequently faces very different environmental issues than do rapidly growing municipalities.\textsuperscript{290} Ventura County has more

\begin{itemize}
  \item \textsuperscript{282} Telephone Interview II with Bruce Smith, \textit{supra} note 266.
  \item \textsuperscript{283} The South Coast Air Quality Management District’s (SCAQMD’s) formal approach to thresholds for cumulative impacts met with resistance. For example, after only seven months, formal thresholds for cumulative thresholds were replaced by an ad hoc approach. \textit{See discussion infra part V.B.5.b.}\textsuperscript{284}
  \item \textsuperscript{284} \textit{See generally} \textit{Santa Barbara County, Thresholds, supra} note 72.
  \item \textsuperscript{285} \textit{Tahoe Regional Planning Agency, supra} note 269.
  \item \textsuperscript{286} \textit{See infra} text accompanying notes 439-41; \textit{see supra} text accompanying note 280.
  \item \textsuperscript{287} Telephone Interview with Brad Eckhardt, Associate Planner, City of Mountain View (Jan. 9, 1994). The awards were for the environmental review aspect of planning implementation. The city’s thresholds were also in the running for a national American Planning Association award, as of early 1994. \textit{Id.}\textsuperscript{288}
  \item \textsuperscript{288} \textit{Ventura County, Initial Study Guidelines, supra} note 269.
  \item \textsuperscript{289} \textit{See infra} part IV.A.1.a.
  \item \textsuperscript{290} Telephone Interview with Brad Eckhardt, \textit{supra} note 287. For example, the city’s remaining critical habitat, its bay wetlands, is not currently facing development pressures, and consequently the city faces conservation issues that are very different from those of other localities.
\end{itemize}
developable land and more significant long-term issues, but has experienced little growth since the adoption of its thresholds.\textsuperscript{291} Although no one municipality has developed the perfect model, much can be learned from the thresholds developed by these and other communities.

IV
QUALITATIVE THRESHOLDS

A. Advantages of Qualitative Thresholds

1. More Consistent and Predictable Review in the Initial Study

Without thresholds or established guidelines, the CEQA process is highly unpredictable, and this uncertainty is especially evident in the initial study stage. As one planner remarked, reviewers just end up saying, "I feel [this impact] is significant."\textsuperscript{292} The development community is especially affected by the lack of certainty. As one developer remarked, "I want to know what the rules are."\textsuperscript{293} Localities are more likely to assign initial study review to the current planners who oversee other aspects of projects, rather than concentrating all review with one or two CEQA coordinators.\textsuperscript{294} Consequently, in the absence of clear guidelines, a project’s fate can vary widely depending on the personal history and biases of the staff member involved. For example, one staff member in Santa Barbara fought a personal war against riparian and other impacts, requiring an EIR in a great many cases. In the development community, this planner soon became known as Conan the Riparian.\textsuperscript{295}

Thresholds can save everyone considerable frustration with this process. Ninety-six percent of planners who have used them vouch that thresholds ensure more consistent project review.\textsuperscript{296} A more predictable review process alleviates uncertainty in general. Developers working with greater certainty can more confidently cost out their

\textsuperscript{291} See infra text accompanying notes 575-76.

\textsuperscript{292} Telephone Interview with Nancy Ormandy, Environmental Review Manager, Sacramento Metropolitan Air Pollution Control District (May 7, 1993). Although currently the Environmental Review Manager for the Sacramento Air Pollution Control District, Ormandy worked for a local planning department for 12 years. \textit{Id.}

\textsuperscript{293} Telephone Interview with Elaine Freeman, Urban Strategies (Nov. 10, 1993). Freeman is a principal at Urban Strategies, a development consulting firm. \textit{Id.} She previously worked for six years as the vice president of Land Development at Griffin Homes, and served as the executive director of the local chapter of the Building Industry Association in Ventura County. \textit{Id.}

\textsuperscript{294} \textit{FIXING CEQA, supra} note 5, at app. 2; see, e.g., Telephone Interview with Brian Crawford, Senior Planner, Marin County (Feb. 15, 1994).

\textsuperscript{295} Telephone Interview with John Martin, Owner, Montecito Estates (Oct. 27, 1993).

\textsuperscript{296} \textit{FIXING CEQA, supra} note 5, at app. 2. This percentage represents 44 of the 46 respondents who used thresholds.
projects and required mitigation measures in advance of submitting project applications.\textsuperscript{297} Thresholds make planners' jobs easier by providing clear standards to apply in significance determinations.\textsuperscript{298} This clarity can reduce pressure on staff from developers,\textsuperscript{299} lessen disputes and inconsistencies among planning staff,\textsuperscript{300} and provide private EIR consultants with clear indications of community concerns as to significance.\textsuperscript{301} Thresholds provide a framework for a dialogue among the public, planning staff, and project applicants over controversial issues. This dialogue can prevent public misunderstanding that fosters mistrust and diminishes chances for informative debate.\textsuperscript{302} Moreover, thresholds provide the general public and environmentalists with greater assurance that the informal mitigated negative declaration process reflects public concerns.

Although quantitative thresholds provide for the most consistent review, qualitative thresholds can help achieve consistency by clarifying some of the most confusing steps in the CEQA process.\textsuperscript{303} Specifically, qualitative thresholds can provide guidance as to whether impacts are significant and what constitutes substantial evidence. In response to a question asking whether there was significant uncertainty in their jurisdictions over the identification of impacts as significant, 67\% of respondents to the ABAG survey answered "yes" or "sometimes."\textsuperscript{304} An equal proportion of respondents indicated that

\begin{itemize}
  \item Alternatives analysis 72\%
  \item Cumulative impact requirements 71\%
  \item Recirculation requirements when there is new information or a project is amended 70\%
  \item Thresholds for identifying an impact as “significant” 67\%
  \item What constitutes “substantial evidence” 67\%
  \item Mitigation monitoring 61\%
\end{itemize}

\textsuperscript{297} Telephone Interview with Elaine Freeman, \textit{supra} note 293.
\textsuperscript{298} Telephone Interview with Brad Eckhardt, \textit{supra} note 287; see also \textit{Fixing CEQA}, \textit{supra} note 5, at ch. 6. In Mountain View, one staff member argues that the thresholds are intended more for planners than for anyone else. Telephone Interview with Brad Eckhardt, \textit{supra}.
\textsuperscript{299} Telephone Interview with Brad Eckhardt, \textit{supra} note 287.
\textsuperscript{300} In Mountain View, there previously had been one planner who did not believe a certain supplemental report to the initial study was necessary, contrary to the views of his colleagues. \textit{Id}.
\textsuperscript{301} For example, one planner interviewed believed that thresholds' principle advantage is the opportunity for more consistent EIRs. Telephone Interview with Ann Hix, \textit{supra} note 280.
\textsuperscript{302} Telephone Interview II with Bruce Smith, \textit{supra} note 266.
\textsuperscript{303} Because 96\% of planners found that thresholds increased review consistency, communities with predominantly qualitative thresholds must have been included in this positive finding. \textit{See supra} note 296 and accompanying text.
\textsuperscript{304} \textit{ABAG CEQA Survey}, \textit{supra} note 65, at 2. Respondents were also asked whether there was significant uncertainty for other specified CEQA practices. Most respondents also answered "yes" or "sometimes" in the areas listed below (the third possible answer was "no"):

\begin{itemize}
  \item Alternatives analysis 72\%
  \item Cumulative impact requirements 71\%
  \item Recirculation requirements when there is new information or a project is amended 70\%
  \item Thresholds for identifying an impact as “significant” 67\%
  \item What constitutes “substantial evidence” 67\%
  \item Mitigation monitoring 61\%
\end{itemize}
“what constitutes ‘substantial evidence’” was a cause of uncertainty or disagreement.305

Furthermore, thresholds affect a substantial portion of CEQA’s administrative workload: the initial study and the preparation of MNDs. Because very few projects actually result in EIRs, the initial study evaluation of all projects consumes much of the time involved in CEQA review.306 Moreover, 50% of CEQA projects become MNDs.307 Thresholds can also facilitate significance determinations in EIRs. Thus, thresholds can improve the central elements of the CEQA process.308

a. Case Study of Consistency: Ventura County’s Initial Study Guidelines

Ventura County’s Initial Study Guidelines are an example of well-drafted quantitative thresholds that help provide consistent review of CEQA applications. First, the guidelines begin with a checklist for the initial study, in which each entry matches the issues defined by the thresholds.309 This provides procedural clarity. Second, the guidelines do not use evaluative criteria—which are often fairly general—to focus environmental review. Instead they clearly define each impact and the relevant issues and establish detailed procedures to determine significance. This qualitative approach provides consistency and facilitates early environmental review, yet has not generated the political controversy or required the same degree of inhouse technical expertise as Santa Barbara County’s thresholds.310 County staff believe that Ventura County’s thresholds have been a major success so far during their short life.311

The beginning point of Ventura County’s process is the new checklist. Bruce Smith, the manager of the county’s General Plan Section, contends that the old checklist based on the CEQA Guide-
lines appendices created confusion for both the preparer and the public because it included multiple items and run-on sentences for many entries, failed to define many terms, and lacked any systematic process for evaluating cumulative effects. Smith found that even a modification of the checklist routinely generated poorly documented and incomplete explanations for its entries.

Smith devised a new checklist whose single issue entries, clearly defined terms, and references to general plan goals and policies should help ensure consistent and predictable review. The checklist is easy for the preparer and the public to read because each entry simply consists of one or two words. A general issue like agricultural resources is separated into distinct entries for soils, water, air quality/microclimate, pests/diseases, and land use incompatibility. The thresholds indicate procedures for ascertaining impacts for each of these clearly defined issues and subissues, both at the project level and cumulatively. If the preparer is uncertain, procedures provided under the thresholds suggest how to resolve the uncertainty. For the benefit of the preparer and the public, items on the checklist are supplemented by definitions of each impact and its component issues and a separate list referencing relevant general plan goals and policies. This reference to the general plan can help frame CEQA analysis and debate in the plan's terms.

Ventura County's thresholds are qualitative with some exceptions. Each threshold contains the same format: a succinct definition of the issue and any key terms, a set of criteria for evaluating the impact, and a methodology for conducting the evaluation. For example, biological resources, a complex threshold, begins with an extensive set of definitions. The threshold then sets general qualitative criteria for evaluating impacts to each defined subject. The greatest

312. Id.
313. Id.
314. See Ventura County, Initial Study Guidelines, supra note 269, at ii-1 to ii-2; Telephone Interview II with Bruce Smith, supra note 266.
315. Ventura County, Initial Study Guidelines, supra note 269, at 7-1 to 7-11.
316. The city of Mountain View references background sources in the general plan on the actual checklist rather than on an attached document. Mountain View, CEQA Guidelines, supra note 209, at 29-34. Mountain View's approach may make the link to the general plan even clearer.
317. A few of the exceptions are air quality, traffic, and agricultural resources. Ventura County, Initial Study Guidelines, supra note 269, at chs. 3, 7, 21.
318. These include definitions of endangered, threatened, rare, and candidate species; wetland and coastal habitat; migration corridors; and locally important species and communities. Id. at 6-1 to 6-2.
319. Two examples of the threshold criteria are provided:

Migration Corridor: A significant impact to a migration corridor would result if a project would substantially interfere with the use of said area by fish or wildlife. This could occur through elimination of native vegetation, erection of physical
detail is in the methodology, which specifically indicates when a preliminary assessment is enough, what a consultant's study must include, and what procedures are appropriate for further review and consultation with other agencies. The biological resources threshold also includes a list of approved consultants, a model contract, and the scope of consultants' studies. The standardization of definitions and procedures ensures that comparable projects are treated alike.

2. **Pairing Thresholds with Standard Mitigation Measures or Conditions of Approval: Increased Predictability for the Process**

Communities can facilitate CEQA review by combining thresholds with standard approval conditions. While developers often like standard conditions of approval, municipalities frequently provide only general conditions (e.g., "observe the building code"). Instead, if communities put together an accessible menu of more detailed conditions of approval (essentially standard mitigation measures), developers would be better able to anticipate and facilitate community review by incorporating these measures into their projects' design. With clear thresholds, applicants can determine early in the process which of the standard mitigation measures they need to adopt. Localities in return can count on applicants' adoption of feasible, legally enforceable measures with monitoring measures written into them. These improvements can especially benefit the MND process.

Many standard conditions of approval involve relatively noncontroversial matters, such as specifications for fencing to separate residential development from agricultural land or wetlands. A more detailed example is provided by standard mitigation measures for tree replacement ratios. Different planners' requested ratios can vary from as much as 1:1 to 10:1 for a given tree type, but developers prefer to know in advance the number of trees they will need to

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barriers, or intimidation of fish or wildlife via noise, light, development, or increased human presence.

**Locally Important Species/Communities:** Since this group of species/communities is so diverse, significance must be made by a qualified biologist on a case-by-case basis.

*Id.* at 6-4.

320. See, e.g., Telephone Interview with John Martin, *supra* note 295; Telephone Interview with Elaine Freeman, *supra* note 293.

321. While some large developers know in advance the conditions of approval a community uses, many other developers are not so well informed. Telephone Interview with John Martin, *supra* note 295.

322. Another benefit of standard mitigation measures is that they can prevent cities from bidding each other down over individual projects in efforts to attract commercial uses that have net positive fiscal effects. See *Fixing CEQA*, *supra* note 5, at app. 3.

323. Telephone Interview with Brian Crawford, *supra* note 294.
Localities can easily adopt thresholds that define these straightforward mitigations.

In more controversial areas such as habitat replacement, standard mitigation measures can be negotiated in advance as part of the general plan process. This provides a means of protecting valued resources while affording a more predictable process for developers. Although they ultimately were not adopted, the habitat mitigation ratios in the 1992 draft version of Santa Barbara County's biological resources threshold provide an example of this approach.

Recent takings cases suggest that mitigation must be tailored for specific projects where a standard formula is not representative. Thus, where mitigation requirements may be controversial, agencies should provide some type of variance procedure that developers can use where appropriate. One type of standard mitigation measure presents an applicant with a choice of options that can be customized to the needs of a particular project. For example, many air districts have recently attempted to make mitigation measures more accessible to developers by quantifying the emission reductions achievable by particular mitigation strategies. From a menu of options, developers can select measures that will offset the increased emissions attributable to their project. Other standard air quality mitigation measures for cumulative impacts could be available for applicants who wished to mitigate potential cumulative air quality impacts in order to decrease the chances of litigation and increase the legal certainty of their projects.

a. Case Study: Santa Barbara County's Standard Conditions of Approval Manual

Santa Barbara County's Standard Conditions of Approval and Standard Mitigation Measures Manual (Manual) is a useful prototype of this type of threshold. The body of the Manual contains 212 legally enforceable conditions of permit approval that provide a menu from which applicants can select options adequate to offset potential impacts of their projects. For example, the Manual outlines specifications for fencing or buffer zones that are sufficient to protect adjacent sensitive habitats or agricultural lands. Even for an indefinite im-

324. Telephone Interview with John Martin, supra note 295.
325. See infra note 583 and accompanying text.
326. See discussion infra part VI.C.1.
328. See infra notes 515-19 and accompanying text.
329. RESOURCE MANAGEMENT DEP'T, SANTA BARBARA COUNTY, STANDARD CONDITIONS OF APPROVAL AND STANDARD MITIGATION MEASURES 5-76 (1992) [hereinafter SANTA BARBARA COUNTY, STANDARDS].
330. Id. at 18-19, 26.
pact such as aesthetics, the Manual indicates some conditions for materials, colors, and height.\textsuperscript{331} This highly regarded document includes numerous measures that other localities could easily adapt to their needs.

An important feature of the Manual is that each condition of approval includes a section on mitigation monitoring.\textsuperscript{332} The administering staff’s attention is directed to these instructions, which are incorporated into the text of the conditions and italicized.\textsuperscript{333} These instructions alert staff to any necessary procedures before approving the conditions and offer directions for customizing the conditions where appropriate.\textsuperscript{334}

Not surprisingly, when a somewhat shorter version of this extensive Manual first came out in September 1990, it raised some concern among developers.\textsuperscript{335} However, after a successful public relations campaign, the county persuaded developers that the document was intended to help them.\textsuperscript{336} The Manual facilitates MNDs, and most MNDs require only a few out of the numerous conditions of approval available.\textsuperscript{337}

Applicants often design some of the conditions into their projects. Benito Packing, a proposed vegetable packing and storage facility that would generate considerable truck traffic, submitted a project application that drew heavily from the Manual’s menu of choices for a transportation demand management program.\textsuperscript{338} This use of the Manual not only facilitated environmental review, but allowed the applicant to have a greater voice in the design of its own mitigation program.

While environmentalists have worried that a process incorporating standard mitigation measures would overlook site-specific mitigation requirements, this problem has not occurred in Santa Barbara County. The standard language is customized to address distinctive features of each project in both EIRs and many of the complex negative declarations.\textsuperscript{339} As author of the Manual and former manager of the county’s compliance program, Elise Dale developed measures to ensure that mitigations would be customized.\textsuperscript{340} While worrying over

\textsuperscript{331} Id. at 16-17, 26.
\textsuperscript{332} Telephone Interview with Elise Dale, Planning Procedures Analyst, Santa Barbara County (May 10, 1993).
\textsuperscript{333} Id.
\textsuperscript{334} Id.
\textsuperscript{335} Id.
\textsuperscript{336} Id.
\textsuperscript{337} Id.
\textsuperscript{338} Id.
\textsuperscript{339} Id.
\textsuperscript{340} Id.
the inappropriate use of the standard language, she gave this problem a name, "lazy brain syndrome." To fight its onset, Dale wrote comments to staff in the text of the conditions. These comments are stylized in italic, which appears in a brightly contrasting color on the county computer screens. Frequent managerial feedback also helps ward off lazy brain syndrome, although it does remain a problem.

Dale believes that the conditions of the Manual have both improved the effectiveness of the mitigation monitoring program and provided administrative advantages to the staff. The county attorney has reviewed the Manual and concluded that its language is legally enforceable. Monitoring provisions cannot be accidentally omitted at the drafting stage, or overlooked later because they were buried in some other text. The standard conditions reflect the general plan and the thresholds, and they represent a thoughtful approach to what is feasible. A major administrative benefit is that mitigation measures imposed by other departments are written in a fixed form that is acceptable to them. The compliance staff had previously misunderstood interdepartmental requests in a number of instances. The staff also saves time that would have been spent rewriting mitigation measures.

While Santa Barbara County's Standard Conditions of Approval Manual has made CEQA review in Santa Barbara County fairer and more predictable, it is not necessarily faster or less expensive. In large part, however, this is attributable to the county's strong slow growth orientation, which would affect the project review process irrespective of CEQA's structure. In other, more pro-growth jurisdictions, the combination of thresholds and standard conditions of approval would be more likely to result in a faster as well as a fairer and more predictable review process.

341. The requirement that communities monitor required mitigation measures was added to CEQA in 1988. 1988 Cal. Stat. 1232 (codified at CAL. PUB. RES. CODE § 21081.6 (West Supp. 1995)).

342. Telephone Interview with Elise Dale, supra note 332. As an additional advantage, the Manual has helped the county achieve a very low incidence of noncompliance with its mitigation monitoring program. For each project with other than the most simple conditions of approval, a compliance planner holds an onsite preconstruction meeting with the project applicant and the contractors involved. If the clearly written requirements in the conditions are not subsequently met, the county withholds major permits, such as building permits or a certificate of occupancy. For a very few of the largest projects, the county requires the applicant to hire a consultant to monitor the success of the mitigation measures. Id.

343. FIXING CEQA, supra note 5, at ch. 5.

344. However, this slow growth position is expected to change because a pro-growth majority was recently elected. See infra note 439 and accompanying text.

345. See Telephone Interview with Barton Doyle, Real Estate Associate, Brobeck, Phleger & Harrison (May 12, 1993) (taking the view that the local political culture concerning growth is the primary factor driving the review process).
B. Disadvantages of Qualitative Thresholds

Qualitative thresholds' principal drawback is that they will do little to improve the consistency and predictability of review if they provide only general criteria for evaluating an impact. One example is a threshold for scenic areas, described as "a physical area or feature that is visually or aesthetically pleasing." Even precisely defined qualitative criteria and detailed procedures for evaluating impacts do not reduce uncertainty as much as quantitative thresholds.

In other respects, qualitative thresholds have few major disadvantages. Furthermore, they lack many of the disadvantages that quantitative thresholds pose. Most important, they are quite inexpensive. Because they simply define terms and standardize procedures, in many cases they require little more than writing down what the majority of staff are already doing. Furthermore, many of the definitions and procedures are not dependent on local data, so qualitative thresholds can be borrowed from other jurisdictions. The city of Mountain View developed a set of mostly qualitative thresholds with limited staff investment and few additional costs.

Qualitative thresholds also avoid other difficulties that may result from the use of quantitative criteria. Because they do not impose substantive requirements on projects, qualitative thresholds often do not create major political controversy. Finally, they avoid inappropriate rigidities by allowing staff and legislative bodies to retain discretion to make the ultimate significance determination.

V QUANTITATIVE THRESHOLDS AND STANDARDIZED MITIGATION MEASURES

A. Advantages of Quantitative Thresholds

1. Integrating CEQA into Effective Comprehensive Planning

Although the EIR process should consider local planning priorities, the two often conflict. The case-by-case nature of EIR review does a good job of examining specific local concerns, but may not adequately consider larger planning issues. For example, a review that emphasizes neighborhood concerns, such as effects on local traffic

346. Ventura County, Initial Study Guidelines, supra note 269, at 8b-1.
347. Telephone Interview with Brad Eckhardt, supra note 287.
348. Telephone Interview with Stephen Gerhardt, CEQA Coordinator, Culver City (May 5, 1993) [hereinafter Telephone Interview III with Stephen Gerhardt].
349. Id.
350. Telephone Interview with Brad Eckhardt, supra note 287; see also infra text accompanying notes 428-30.
351. See Telephone Interview with Brad Eckhardt, supra note 287.
density (which receive a great deal of public attention and probably are easily described and mitigated), may result in a recommendation of lower residential densities, in direct contradiction to a planning goal aimed at reducing sprawl by promoting high residential densities.

Case-by-case review is also ill equipped to consider cumulative effects such as reductions in air quality and loss of species habitat. Cumulative impact analysis can effectively require EIR preparation for projects whose effects on the environment are relatively insignificant. This problem can be illustrated by the issue of air quality in nonattainment areas. Nearly any project will contribute to the violation of air standards, thereby potentially triggering EIR preparation, even if a project's only environmental impact is a relatively small contribution to air pollution. Also, any such required EIRs would serve little purpose, because project-specific mitigations frequently cannot address these cumulative impacts, which are essentially regional problems.

Quantitative thresholds have great potential to make CEQA into an instrument for supporting comprehensive plans, rather than a force for project-by-project review, by focusing CEQA review on the environmental priorities in a general or specific plan. Moreover, these thresholds can be especially effective at integrating CEQA into comprehensive plans when they are quantified and combined with standard mitigation measures. They could be set at reduced levels for projects inconsistent with general or specific plans. More expensive analysis and more stringent mitigation performance standards could be required for these projects. At the same time, higher quantified thresholds could expedite CEQA review for mid-sized projects that are consistent with existing plans.

Communities do not need comprehensive general plan updates in order to develop thresholds or standard mitigation measures designed to achieve planning goals. Comprehensive general plan updates often cannot provide a useful guide for project-level environmental review, because general plans cover too large an area and take too long and cost too much to revise. Specific redevelopment or area plans are much more manageable. For example, if a community wants to preserve agricultural or biological resources within a certain undevel-

352. See Fixing CEQA, supra note 5, at ch. 5.
354. Fixing CEQA, supra note 5, at app. 3.
355. See Telephone Interview with Ann Hix, supra note 280.
356. See Telephone Interview with Brian Crawford, supra note 294; Telephone Interview with Elaine Freeman, supra note 293; Fixing CEQA, supra note 5, at app. 3.
357. See Fixing CEQA, supra note 5, at ch. 6.
oped portion of the jurisdiction, the locality can adopt a specific plan for that area, as well as simply update the relevant element of the general plan. Additionally, the costs of specific plans can frequently be recovered from area landowners, and this is an important criterion in an era of fiscal austerity. Selected updates of portions of the general plan are also much less expensive.

Santa Barbara County has recently been moving toward a model where its thresholds relate to policies in specific or area plans, or in general plan updates for its small coastal communities. The Deputy Director of the county’s planning department, Al McCurdy, views thresholds as complementary to tiering. When a project is tiered, CEQA review for individual, site-specific projects incorporates analysis from EIRs that already have been developed for the governing specific or general plans. The plan-level analysis takes care of cumulative impacts, while thresholds relate project-level analysis to the policies in the plans.

Quantitative thresholds can coordinate CEQA with comprehensive planning efforts for air quality, loss of agricultural lands, and biological resources. Detailed case studies of such efforts are given in a later portion of this comment; consequently, the planning benefits of quantitative thresholds are only briefly outlined here. One planning benefit is that where CEQA review duplicates comprehensive planning efforts or other environmental laws, thresholds can be structured to expedite CEQA review. Second, while thresholds can streamline CEQA compliance where appropriate, they also can focus CEQA review on the major environmental problems identified in a plan. A third planning benefit of carefully structured thresholds is

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359. Id. § 65456 (West Supp. 1995).
360. Fixing CEQA, supra note 5, at ch. 5. Three coastal communities within the county that have been experiencing growth pressure (Montecito, Summerland, and Goleta) have recently updated their general plans to protect their long-term quality of life. Id.
361. Id.
363. See Fixing CEQA, supra note 5, at ch. 5.
364. See discussion infra part VI.
365. For example, thresholds of significance for regional air pollutants can be high enough to reduce CEQA scrutiny for smaller projects, because other legal authorities enable air districts to require the most effective mitigation measures for even the smallest projects. In the case of agricultural development, CEQA thresholds can be relatively high for agricultural lands that a general or specific plan has already designated for development. Similarly, evaluative criteria can provide lower mitigation ratios or give less priority to undeveloped land of less habitat value. See discussion infra part VI.
366. For example, agricultural thresholds can indicate that even small projects must receive CEQA review in desired agricultural preserves or areas with the highest quality soils. Alternatively, biological evaluative criteria can place a priority on protecting certain habitats or can develop habitat mitigation or preservation ratios that ensure a certain amount of habitat will be saved. See infra part VI.B-C.
their ability to heighten scrutiny of projects inconsistent with general or specific plans.\textsuperscript{367}

Although quantitative thresholds can help a locality plan for cumulative problems, they often will not resolve legal uncertainty over when cumulative impacts are significant under CEQA.\textsuperscript{368} Such impacts are particularly problematic because, as in the case of air emissions, every project will have some cumulative impact, no matter how small the individual project's contribution to the problem. Moreover, separate thresholds of significance for cumulative impacts are likely to be administratively unworkable.\textsuperscript{369} Consequently, the solution for cumulative impacts lies elsewhere.

2. More Consistent and Predictable Review

Especially when adopted in conjunction with standard mitigation measures, quantitative thresholds of significance can increase the consistency and predictability of project review. Because quantitative thresholds reduce or eliminate reliance on staff judgment, they are much more predictable than qualitative thresholds. An example of quantitative thresholds in combination with standard mitigation measures is discussed below with respect to air quality impacts.\textsuperscript{370}

3. Increased Legal Certainty for Significance Determinations in Environmental Impact Reports and Negative Declarations

Quantitative thresholds offer increased legal certainty for certain aspects of the CEQA process. They will most often add increased certainty to significance determinations in EIRs. If an EIR concludes that an impact is insignificant based on threshold criteria and there is no compelling project-specific information to the contrary, the EIR will not be vulnerable to an opponent's claims that an impact is significant based on competing interpretations of the data. Because EIRs already receive a deferential standard of review,\textsuperscript{371} thresholds should in most cases serve mainly as added security.\textsuperscript{372}

Thresholds' fixed criteria for significance determinations in EIRs will not always benefit the applicant. Where a developer might otherwise have been able to pressure an agency to find an impact insignificant,

\textsuperscript{367} For example, goals in an air quality maintenance plan may depend on predictions of population growth. Under such a plan, all projects that increase population growth beyond the predictions can be deemed cumulatively significant. See infra part V.B.5.c.

\textsuperscript{368} See discussion infra part V.B.5.a.

\textsuperscript{369} See discussion infra part V.B.5.b.

\textsuperscript{370} See discussion infra part VI.A.

\textsuperscript{371} See discussion supra part I.D.2.

\textsuperscript{372} Furthermore, if EIR preparers feel more secure in the legal defensibility of the EIR, they may feel comfortable improving the focus of EIRs' analyses and decreasing the documents' length.
cant, thresholds’ removal of discretion will reduce such questionable significance determinations. Even if the threshold level is subject to interpretation, the agency will probably receive the deference typically accorded to agencies’ reading of their own plans.373

A more controversial aspect of thresholds is their potential to increase the legal certainty for some negative declarations (i.e., determinations at the initial study stage). Although there is little case law on the subject, several factors suggest that plausible, well-supported quantified thresholds would provide certainty for applicants and agencies adopting negative declarations in reliance on the thresholds. Perhaps most importantly, courts’ traditional deference to legislative judgments and technical decisions should induce deference to agency policies concerning what degree of impact is significant. For example, the South Coast Air Quality Management District’s thresholds and CEQA manual have been used to persuade project opponents that a controversial project complied with CEQA requirements for air quality, possibly because of the increased legal certainty the threshold provided.374 The caution here is that courts have required EIRs where opponents of negative declarations have pointed to substantial and overlooked evidence of significant effects.375 Agencies whose thresholds are inappropriately quantified or inflexible may have difficulty convincing judges that they have accounted for all substantial evidence of an adverse effect.376

One recent CEQA case indicates that thresholds may raise the standard for challenging a finding of insignificance during the initial study stage. Citizen Action To Serve All Students v. Thornley377 decided whether an EIR was required for “marginal cases” where there was “disagreement[ ] between experts” or “serious public controversy” over a project’s environmental effects, as provided in CEQA Guidelines section 15064(h).378 The city of Hayward’s traffic significance threshold helped persuade the court that the testimony of the

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373. See discussion supra part I.D.2.
374. See Telephone Interview with Connie Day, Local Government CEQA Program Supervisor, South Coast Air Quality Management District (Jan. 17, 1995) [hereinafter Telephone Interview II with Connie Day]. This project was the Eagle Mountain Project. When opponents were shown that the project complied with the SCAQMD’s CEQA Manual and thresholds, they ceased to contest the project’s air quality analysis. Id.
376. This analysis assumes that qualitative thresholds alone will not substantially increase projects’ legal defensibility. If thresholds merely define the criteria to apply or indicate the procedures for analysis, discretionary decisions remain. In these cases, the terms of the threshold itself do not exclude opponents’ contrary interpretations of the evidence.
378. Id. at 88; see CAL. CODE REGS. tit. 14, § 15064(h) (1994).
project opponents’ traffic expert was not sufficient to create a marginal case. The weight that the court gave to the thresholds is unclear, because the court also considered a fifty-four-page traffic study and the opposition’s use of CEQA for nonenvironmental purposes. Nevertheless, the court stated: “No intersection would suffer a 10 percent increase in delay, which the City of Hayward would consider ‘significant.’” Hayward’s significance threshold appears to have at least partially altered the terms of the debate.

Under NEPA, courts have directly upheld findings of no significant impact that were based on thresholds. For example, in Birmingham Realty Co. v. General Services Administration, the court held that the General Services Administration’s (GSA’s) procurement of 16,000 square feet of occupiable space did not require an EIS. The GSA had promulgated regulations whereby acquisition of 20,000 square feet or less in structures substantially completed prior to the solicitation offers required no environmental impact statement.

Moreover, several NEPA cases have upheld findings of no significant impact based on federal noise thresholds. One would expect noise thresholds to receive deference because they address a highly technical and standardized impact. It must be emphasized, however, that NEPA litigation is merely generally predictive of courts’ response to thresholds under CEQA; the arbitrary and capricious standard of review for EIS preparation under NEPA is much more deferential than CEQA’s fair argument test.

CEQA’s 1993 amendments may have strengthened thresholds’ utility in increasing legal certainty by reinforcing court decisions that held that unsubstantiated lay people’s testimony cannot be considered in deciding whether or not to prepare an EIR. Prior to these amendments, case law already indicated that lay testimony unsupported by facts did not rise to the level of substantial evidence. The amend-

379. Citizen Action To Serve All Students, 272 Cal. Rptr. at 88-90.
380. Id. at 88.
382. Id. at 1383.
383. See, e.g., Seattle Community Council Fed’n v. Federal Aviation Admin., 961 F.2d 829, 833 (9th Cir. 1992); Monarch Chem. Works, Inc. v. Thone, 604 F.2d 1083, 1089 (8th Cir. 1979).
384. See Greenpeace Action v. Franklin, 14 F.3d 1324, 1331 (9th Cir. 1992) (applying arbitrary and capricious standard of review to a factual determination concerning NEPA EIS preparation); North Buck Head Civic Ass’n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990) (applying arbitrary and capricious standard).
385. The fair argument test eliminates the traditional deference given to decisionmakers. See discussion supra part I.D.1.
386. See Perley v. County of Calaveras, 187 Cal. Rptr. 53, 61 (Ct. App. 1982) (holding that “fears and ... desires” of project opponents are insufficient); Leonoff v. Monterey County Bd. of Supervisors, 272 Cal. Rptr. 372, 380 (Ct. App. 1990) (finding that “[u]nsubstantiated opinions, concerns, and suspicions about a project” do not constitute
ments demonstrate that the "substantial evidence in light of the whole record" of potentially significant environmental effects necessary to trigger an EIR requires objective data and well-developed arguments. The legislation also stated:

Argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment, is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

Therefore, where an agency finds that an EIR is unnecessary based on a threshold of significance supported by solid evidence, the agency can proceed confidently despite citizen intuitions to the contrary.

CEQA also provides for deference to thresholds that are based on agencies' reasonable forecasts of future conditions, even if there are equally credible contrary forecasts. CEQA Guidelines section 15144 states: "Drafting an EIR or preparing a negative declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." Although the more deferential substantial evidence standard of review is generally applied only to EIRs, this section explicitly applies its reasonableness standard to "preparing a negative declaration."

Consistent with this provision of the Guidelines, the case law generally defers to agency projections. In San Francisco Ecology Center v. City & County of San Francisco, the court upheld agency projections of future passenger use of the San Francisco International Air-

substantial evidence); Ass'n for Protection of Envtl. Values v. City of Ukiah, 3 Cal. Rptr. 2d 488, 497 (Ct. App. 1991) (stating that "hearsay statements" and "[m]ere uncorroborated opinion or rumor" are insufficient); Lucas Valley Homeowners Ass'n v. County of Marin, 284 Cal. Rptr. 427, 442 (Ct. App. 1991) (holding that a "modicum of potential discomfort" for nearby residents does not constitute a significant effect).

By contrast, in one of the rare cases where courts accepted "lay testimony" as substantial evidence, the local agency's case was relatively weak due to its record of lax enforcement of existing standards. Oro Fino Gold Mining Corp. v. County of El Dorado, 274 Cal. Rptr. 720, 726 (Ct. App. 1990) (admitting citizen testimony about the noise of past gold mining operations where the county had not vigorously monitored or enforced its noise standards).

387. CAL. PUB. RES. CODE §§ 21080(d), 21082.2(d) (West Supp. 1995).
388. Id. §§ 21080(e), 21082.2(e) (West Supp. 1995).
389. An agency relying on thresholds could also argue the converse of the court's conclusion in Sundstrom v. County of Mendocino, 248 Cal. Rptr. 352 (Ct. App. 1988). In that case, the court found that: "Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." Id. at 362. The converse of this argument would suggest that well-supported thresholds would lend logical plausibility to a narrower range of inferences.
SIGNIFICANCE THRESHOLDS FOR CEQA

PORT AGAINST OPPONENTS' OBJECTIONS. However, where agencies have failed to make reasonable efforts to forecast effects, courts have overturned EIRs.

In sum, well-supported thresholds of significance may make it harder for opponents to create a marginal case where disagreement among experts or substantial environmental controversy requires the preparation of an EIR. A threshold of significance supported by scientific evidence or other solid data may well be upheld unless environmentalists raise contrary arguments that are supported by equally solid data or evidence. Barbara Shelton, Supervising Planner at Santa Barbara County's Department of Planning and Development, believes that thresholds provide the county and project applicants with a measure of certainty in decisions not to prepare an EIR. Shelton notes that the initial study is backed up by the discussion of significance in the thresholds document, and the thresholds clearly indicate what the jurisdiction considers to be significant.

One CEQA practitioner suggested that thresholds' criteria for significance effectively provide localities and project applicants with a rebuttable presumption of validity. This rebuttable presumption would be consistent with CEQA Guidelines section 15064, which defers to air and water quality standards and agency decisions supported by scientific and other factual data, as long as they are applied flexibly to accommodate variable circumstances. A fair argument still can rebut a threshold, but its analysis must be equally well documented.

Although thresholds should give greater certainty to some negative declarations, there are four reasons why this should not cause worry. First, thresholds that inappropriately ignore local variations in environmental conditions could be quite vulnerable to legal attack. Courts have overturned negative declarations where experts provided substantial evidence that a project could have a significant effect.

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392. See, e.g., Citizens To Preserve the Ojai v. County of Ventura, 222 Cal. Rptr. 247, 253 (Ct. App. 1985) (invalidating an EIR for failure to analyze the cumulative onshore air quality impacts from proposed offshore oil platforms).
393. See Telephone Interview with Barbara Shelton, Supervising Planner, Santa Barbara County Planning and Development Department (Apr. 23, 1993).
394. Id.
395. Interview with Christine Sproul, Deputy Attorney General, Land Law Section, California Office of the Attorney General (Mar. 22, 1993). Christine Sproul was also assistant secretary for Legal Affairs at the Resources Agency from 1985-1993, where she was responsible for the CEQA Guidelines. Id.
397. In City of Carmel-by-the-Sea v. Board of Supervisors, several experts disputed the extent and significance of the potential wetlands impacts of the proposed project. 227 Cal. Rptr. 899 (Ct. App. 1986). The court found that "[t]he very uncertainty created by the conflicting assertions made by the parties ... underscores the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation." Id. at
Such decisions suggest that a winning case can be created for preparing an EIR if substantial evidence is presented that raises uncertainty over whether a well-supported threshold applies to the particular circumstances.

Second, many of the thresholds that are most quantifiable (e.g., air quality, noise, and infrastructure provisions) are not likely to be set at high levels due to political considerations. Instead, they are likely to be based on common legal standards,\textsuperscript{398} citizen input,\textsuperscript{399} or technical considerations.\textsuperscript{400} One possible exception that could be abused is thresholds for conversion of agricultural lands. However, because many communities have successfully avoided EIRs for large farmland projects even in the absence of thresholds,\textsuperscript{401} pro-growth communities are more likely to decline to adopt thresholds for farmland conversion, rather than set thresholds at excessively high levels.

Third, the best candidates for quantified thresholds are impacts that can be adequately described based on a single factor; such impacts would therefore be standard across variations in setting. Thus, the most likely candidates for quantified thresholds, by their very nature, are less subject to abuse. To the contrary, standardized thresholds therefore represent a step toward the more coherent, generalized approach needed to solve the environmental problems involved.\textsuperscript{402} In particular, a threshold's connection to the general plan can provide solutions to otherwise intractable environmental problems, such as regional air quality or loss of agricultural lands.

Finally, even where thresholds of significance allow projects to escape preparation of EIRs, only small-to-medium-sized projects will benefit. The largest, most damaging projects will need EIRs in any


In Brentwood Ass'n for No Drilling v. City of Los Angeles, the court required an EIR for Chevron's proposed single exploratory core hole, despite 27 permit conditions and a considerable track record of cases without environmental damage. 184 Cal. Rptr. 664, 666-67, 671-72 (Ct. App. 1982). The court found that there was substantial evidence of possible traffic, noise, and seismic effects. \textit{Id.}

398. Many jurisdictions that are setting air quality thresholds are basing them on a common legal standard: the thresholds for requiring best available control technology (BACT) requirements under the California Clean Air Act amendments of 1992. Ventura County, an exception to this rule, has set its thresholds far below the BACT standard. See \textit{infra} note 532 and accompanying text.

399. Transportation thresholds are hard for a pro-growth legislative body to abuse, because citizens will likely demand to be heard on projects that increase local traffic levels.

400. Other quantifiable thresholds such as noise and infrastructure services are probably based more on technical than political considerations.

401. See \textit{infra} note 550 and accompanying text.

402. For a related discussion of the role of quantitative thresholds in comprehensive planning, see \textit{supra} part V.A.1.
case, because they almost inevitably will exceed the thresholds for at least some impacts.

B. Potential Disadvantages of Quantitative Thresholds

There are four principal objections to quantitative thresholds. First, these thresholds can be much less effective in resolving some issues than case-by-case analysis and professional discretion. Second, the cost of developing thresholds can be quite high. Third, any advantages of consistency and predictability are potentially undercut by the adoption of different thresholds by different agencies. Finally, there is fear that thresholds will be subject to political resistance or political manipulation. This section discusses these objections.

1. The Case for Professional Discretion and the Benefits of Scaled Thresholds

Any attempt to institute thresholds must recognize that many planners have serious reservations about the concept. The majority of planners interviewed for this comment and another CEQA study is comfortable with the current ad hoc process for significance determinations and is skeptical of fixed and rigid thresholds of significance. Moreover, many planners are more comfortable with thresholds that indicate the need for extended initial studies rather than with thresholds that mandate final significance determinations.

a. Impracticability of Quantitative Thresholds for Individual Significance Determinations

Planners may prefer discretion over quantitative thresholds for a variety of reasons. For starters, many impacts are, by their nature, difficult to quantify. This can be true both for inherently abstract concerns, such as aesthetics, and for issues involving a complex range of factors, such as species habitat or agricultural resources.

Furthermore, even for impacts that can be quantified feasibly, the standards may vary with the setting. A balancing of competing factors appropriate for one project or one timeframe may be inappropriate

403. See Fixing CEQA, supra note 5, at ch. 5; Telephone Interview with Rolf Pendall, Co-author, U.C. Berkeley Study on CEQA (Oct. 28, 1993); Telephone Interview with Roman Gankin, Principal Planner, San Mateo County (Jan. 10, 1994). Roman Gankin has 19 years of experience as a CEQA coordinator. Telephone Interview with Roman Gankin, supra.

404. Out of 14 case study communities in the Landis report, only 2 used standardized thresholds regularly, and an additional community used them only for analysis of traffic impacts. However, 3 other communities used the standardized mitigation measure of conditions of approval. Fixing CEQA, supra note 5, at ch. 5.

405. See id.; Telephone Interview with Brad Eckhardt, supra note 287; Telephone Interview with Roman Gankin, supra note 403.
for other locations within a jurisdiction or for future projects. The city of Chico encountered this problem with storm drainage impacts. Chico has five drainage basins: two are full, two have some capacity remaining, and the last runs through Bidwell Park, which the citizenry has determined cannot be touched. In a situation of this complexity, establishing standard thresholds and standard mitigation measures for all storm drainage impacts would be extremely difficult. Additionally, even if multiple appropriate thresholds could be adopted, the trouble of administering them might outweigh their benefits.

The foregoing concerns do not necessarily apply to all environmental impacts. For example, although Chico’s planners decided not to use fixed thresholds for storm drainage impacts, they favored such thresholds for regional air quality and transportation impacts, which can be more readily quantified. Like many jurisdictions, Chico already uses regional air quality thresholds and has established general “level of service” standards for important roads based on the county’s congestion management plan.

In sum, for many site-specific impacts, fixed thresholds of significance can be expensive to develop, difficult and controversial to implement, and even then perhaps less than fully accurate. These drawbacks are especially important in a time of serious local budgetary constraints and staff cuts.

b. Inflexibility of Thresholds in Negotiating Mitigated Negative Declarations and Determining the Need for an Environmental Impact Report

Planners’ biggest worry about fixed quantitative thresholds is that these thresholds will trigger too many EIRs. EIRs, in comparison to MNDs, provide more public and agency participation, perhaps more reliable analysis, and the opportunity to consider project alter-

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406. Not only are urban-rural or district-by-district variations important, but in a highly urbanized location like San Mateo County, everything may depend on even small variations in the setting. See Telephone Interview with Roman Gankin, supra note 403.

407. Fixing CEQA, supra note 5, at ch. 5.

408. Id.

409. Id. “Level of service” commonly describes a qualitative measure of collective traffic flow conditions on a roadway, including factors such as speed, delay, comfort, and freedom to change lanes. See, e.g., Ventura County, Initial Study Guidelines, supra note 269, at 21a-1.

410. Interview with John Landis, Professor of City and Regional Planning, College of Environmental Design, University of California, Berkeley, in Berkeley, Cal. (Oct. 19, 1993). Landis based his view on his study team’s interviews with planners from 12 cities and 2 counties. See, e.g., Fixing CEQA, supra note 5, at app. 3.
However, MNDs are much cheaper and quicker, and under many circumstances are effective in mitigating project impacts. Given the advantages of MNDs, many planners and developers believe MNDs are appropriate when a project has only one or two significant impacts and no site-specific problems or controversies. For these projects, an MND can easily include appropriate studies and require all feasible mitigation measures. However, if quantitative thresholds are fixed determinants of significance, only a single impact need exceed its threshold to require a full-blown, expensive, and time-consuming EIR. Why, the argument goes, should the system insist on this expense and uncertainty in these circumstances, particularly in cases where a project's only significant impacts largely reflect cumulative problems beyond the proponent's control?

For environmental impacts that are most amenable to quantified thresholds, the relative advantages of EIRs over MNDs are less applicable; there is less need for site-specific analysis or mitigations. Fixed thresholds for triggering EIRs will be used most often for readily quantifiable impacts such as regional air quality, which can be quantified as pounds per hour or tons per day of pollutant. The crucial fact about air quality is that it is a predominantly cumulative problem that is best addressed by plan-level rather than site-specific analyses. Thus, air quality maintenance plans already standardize many mitigations for regional criteria air pollutants. Moreover, to the extent that air quality problems are local (e.g., carbon monoxide emissions or air toxics), MNDs probably attach adequate studies addressing these concerns. Perhaps most important, alternatives analysis could add little, as any other onsite or offsite project built within the jurisdiction would have the same impacts on regional air quality. Thus, the opportunity for more extended analysis and debate in EIRs is unnecessary for this impact.

At the other extreme, situations where EIRs have advantages over MNDs are precisely those where quantitative thresholds are difficult to develop. Take, for example, biological resources, where EIRs

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411. See discussion supra part I.B.2.
412. For example, Santa Barbara County's approach to thresholds frequently results in MNDs when only one or two thresholds are slightly exceeded. See discussion infra part V.B.1.c. Santa Barbara County has attempted to gain some additional certainty from thresholds without constraining planners' discretion. FIXING CEQA, supra note 5, at ch. 5.
413. For example, if the single significant impact is a cumulative traffic impact on a congested arterial, the MND can conduct a traffic study and determine a mitigation measure scaled to the project's proportionate contribution to the problem.
414. See Telephone Interview with Ann Hix, supra note 280. Many developers with longstanding ties with a particular community also like the flexibility of not having thresholds. Like planners, they fear being pushed into an EIR where a MND could resolve the issues. Telephone Interview with Rolf Pendall, supra note 403.
415. For a detailed discussion of such mitigation measures, see infra part VI.A.1.
do offer significant advantages over MNDs. Here, offsite or onsite alternatives provided by EIRs can reduce project impacts, scoping by resource agencies can help frame the analysis, and public participation can inform the decision whether a project should be modified to reduce the impacts. However, unlike air quality, biological impacts are not readily quantified and therefore may be more conducive to qualitative thresholds.

Consequently, planners are rightly concerned that fixed thresholds of significance could require an inappropriately high number of EIRs. In contrast, the current system allowing planners discretion has many advantages in determining when EIRs are needed. Where appropriate, a discretionary approach will still result in EIRs, particularly if the projects generate considerable public controversy. A discretionary system will take account of the public's desire for input, which will translate into political pressure on the locality to require an EIR and perhaps encourage the developer to prepare an EIR to avoid litigation. Thus, to the extent possible, thresholds need to draw upon the advantages of MNDs by allowing continued discretion where the MND process' flexible bargaining can provide useful mitigations.

c. Retaining Flexibility Through Scaling

Perhaps the greatest drawback of quantitative thresholds is their possible inflexibility. One solution to this problem is to cast the thresholds as guidelines for determining significance rather than absolute indications of significance. Santa Barbara County, which has the state's most extensive set of thresholds, considers almost all of them as guidelines. Thus, exceeding one or two thresholds does not automatically require preparation of an EIR (except in the cases of coastal resources and groundwater supply or quality). At the same time, failure to exceed any thresholds does not guarantee a negative declaration. High-ranking staff ultimately make the determination of significance, based upon: (1) the severity of impacts, (2) the number of thresholds exceeded, and (3) the willingness of the project sponsor to mitigate environmental impacts. Under this system, an EIR may be required for one project that severely exceeds a single threshold without mitigation, but no EIR may be necessary for a project that slightly

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416. Alternatively, the thresholds might be set too high in order to avoid requiring unnecessary EIRs. In this case, agencies would lose some of their ability to require effective mitigations, and inappropriate MNDs would result.
417. For a discussion of MNDs and flexibility, see supra notes 78-79 and accompanying text.
418. FIXING CEQA, supra note 5, at ch. 5.
419. Id.
420. Id.
exceeds five thresholds. The trouble with Santa Barbara County's approach is that it lets back in much of the current boundless discretion in the significance determination. The question can become one of how many thresholds have to be exceeded and by how much to require an EIR. As one planner commented, this type of approach simply shifts CEQA's process from weighing individual impacts to weighing one category of impacts against another.

In order to achieve consistency and predictability, quantitative thresholds should either be fixed determinants or guidelines whose discretion is limited to a designated range. The most stressed resources, such as Santa Barbara County's groundwater and coastal resources, should be protected by absolute cutoffs. Where thresholds are merely significance guidelines, Florida's scaled thresholds provide a useful model for implementation. Under such a system, an agency might state that impacts less than 30% greater than a guideline quantity would be insignificant if certain standard mitigation measures were adopted. For example, in the case of traffic thresholds, slightly exceeding the standard would not be significant if the developer sponsored certain employer trip reduction measures. This approach would achieve the predictability of having thresholds but allow mutually beneficial negotiation for projects near the cutoff levels. Agencies could attain additional mitigations, while applicants could avoid the necessity of preparing an EIR.

An entirely distinct possibility is for jurisdictions to adopt quantitative thresholds that trigger expanded initial studies. Such thresholds are sometimes used for determining the need for more detailed traffic studies. These thresholds differ from quantitative thresholds of significance because they do not indicate when EIRs are or are not required. The benefits of thresholds for expanded initial study are much more like those of qualitative thresholds and offer a more predictable process for initial study review.

2. Cost

One of planners' concerns about thresholds is cost, including costs of developing thresholds, involving the public, and attaining agreement among decisionmakers. The cost to local governments

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421. Id.
422. Id.
423. Id.
424. See discussion supra part II.C.1.a.
425. Florida provided a 20% band around its threshold level, but many planners believed that this was insufficient. See supra text accompanying notes 205-08. A 30% band would provide greater flexibility, while still retaining substantial certainty.
426. See, e.g., SAN DIEGO COUNTY, GUIDELINES FOR CEQA, supra note 72, at 116.
427. FIXING CEQA, supra note 5, at app. 3.
can be considerable, but need not be so. If a locality adopts relatively simple thresholds during its general plan update, as the city of Mountain View did, the costs can be reasonable.

When Mountain View adopted thresholds as part of its 1992 general plan update, the city managed to avoid holding separate public hearings devoted entirely to thresholds. The thresholds were simply an agenda item during the ongoing plan update. Additionally, thresholds subsumed in a general plan do not require a high-profile decision by the local legislative body and consequently reduce potential controversy.

Also, the city of Mountain View reduced costs by "piggybacking" thresholds on the general plan update, for which costs were already being incurred. The plan update included background studies on major issues, and these studies provided information to support Mountain View's local variant of the initial study checklist and the development of threshold criteria. Consequently, development of Mountain View's thresholds required only limited staff time, plus the minimal expenses of $75 for a review of the thresholds' legal adequacy and $10 per copy for printing.

Even if a locality adopts thresholds as part of a general plan update, generating an extensive set of highly detailed criteria will usually be prohibitively expensive. Although Santa Barbara County developed its thresholds at the staff level, its successful experience probably is not transferrable to other California localities. Santa Barbara County was able to develop its thresholds at manageable expense because, in addition to its permitting and planning department, the county had a Department of Environmental Resources (DER) during the 1980's whose staff could handle all but the most technical issues. Most local planning staffs do not have such inhouse technical expertise and would have to pay six-digit consultant fees to develop thresholds of comparable detail. The city of Chico declined to follow the

428. Telephone Interview with Brad Eckhardt, supra note 287.
429. MOUNTAIN VIEW, CEQA GUIDELINES, supra note 209, at 29, 55-103.
430. Telephone Interview with Brad Eckhardt, supra note 287.
431. See Telephone Interview with Natasha Heifetz, Planner III, Santa Barbara County Planning and Development Department (Apr. 28, 1993). The Board of Supervisors recently eliminated the separate Division of Environmental Review, which had been the successor of the independent Department of Environmental Resources. Id.
432. Marin County, despite a comparably environmentalist citizenry and a similarly considerable tax base, never had the same department structure. Telephone Interview with Tim Haddad, supra note 53.

Ventura County's 1992 adoption of its Initial Study Guidelines proved somewhat less expensive than Santa Barbara County's effort. Unlike its neighbor's annual public workshops, Ventura's workshops were not that well attended, and the Initial Study Guidelines were adopted without much controversy. Even so, the process took two years and considerable staff time. Telephone Interview I with Bruce Smith, supra note 266.
Santa Barbara model, finding the documentation too thick, too cumbersome, and too complicated.433

Although an extensive set of detailed thresholds is expensive, precise thresholds can be established more economically for more readily quantifiable impacts such as air quality or transportation.434 Furthermore, if a general plan update focuses on major constraints to development, such as the need to provide habitat for a particular species, detailed thresholds for this limited issue can borrow from the general plan’s effort.435

3. Political Manipulation and Legislative Adoption

A frequently expressed concern about legislatively adopted thresholds is that they could be prone to political manipulation.436 There are two aspects to this concern: the fear that local legislatures will manipulate threshold levels,437 and the more subtle concern that the need for legislative approval of threshold updates will consume staff resources or delay needed changes.438

The first concern is that shifts in the majority position on growth among local boards of supervisors or city councils will lead to politically motivated revisions of thresholds. Such a shift recently occurred in Santa Barbara County, where a pro-growth majority was newly elected in 1992 and has been reviewing the stringent staff-developed thresholds.439 However, the presence of thresholds does not increase the role of politics in individual CEQA significance decisions, but merely focuses the controversy on the thresholds themselves. To a certain extent, the presence of thresholds may actually stabilize the standards that are applied to project review. Without thresholds, new legislative majorities could achieve their political agendas without the trouble of public revision.440

433. Telephone Interview with Brian Crawford, supra note 294.
434. Air quality thresholds can largely be borrowed from existing models with little more than a numerical adjustment, depending on the air basin’s air quality designation under the California Clean Air Act. Transportation thresholds can readily be based on general plan background studies without needing extensive site-specific studies as well.
435. For a discussion of Chico’s experience with meadowfoam, see infra text accompanying notes 585-87.
436. Telephone Interview with Natasha Heifetz, supra note 431; Telephone Interview with Brad Eckhardt, supra note 287.
437. See, e.g., Telephone Interview with Natasha Heifetz, supra note 431.
438. See, e.g., Telephone Interview with Ann Hix, supra note 280.
439. Telephone Interview with Elihu Gevirtz, Planner, Santa Barbara County Planning and Development Department (Jan. 18, 1995). Concerns about the politicizing of thresholds and their review have also been voiced by another planner in the Department. See Telephone Interview with Natasha Heifetz, supra note 431.
440. For a discussion of the possibility of overly high thresholds that are inappropriately used to gain additional legal certainty, see supra note 416 and accompanying text.
Concerns about political pressures to weaken thresholds are especially relevant given California’s recent economic climate. Thresholds look like another regulation, which is exactly what local governments do not need as they attempt to repair their tax base in a recession. Yet planners can develop strategies for avoiding potential political fallout. When the city of Mountain View adopted its thresholds during the recession in 1992, the city council’s main concern was to keep the thresholds simple. Planners believed that the threshold manual’s simplicity helped persuade the city attorney and the city council to adopt thresholds. Mountain View consequently limited its thresholds to the development of a local variant on the CEQA Guidelines Appendix I checklist and relatively straightforward qualitative criteria (excepting transportation and air quality). The state’s development of model threshold criteria could also deflect political heat from localities that follow the state’s lead. Additionally, planners can mount public relations campaigns to convince developers that thresholds are in the business community’s interest. Santa Barbara County successfully mounted such a campaign with its Standard Conditions of Approval Manual.

The second concern is that thresholds require annual or semianual amendments to remain current, and the need for legislative ratification could delay or even discourage these updates. For example, the city of San Diego recently altered its staff-developed traffic threshold to trigger significance at level of service D rather than level of service

441. See Telephone Interview with Stephen Gerhardt, CEQA Coordinator, Culver City (May 3, 1993) [hereinafter Telephone Interview II with Stephen Gerhardt].
442. See Telephone Interview with Brad Eckhardt, supra note 287.
443. See id.
444. Id.; see MOUNTAIN VIEW, CEQA GUIDELINES, supra note 209, at 55-93.
445. Telephone Interview with Elise Dale, supra note 332.
446. Telephone Interview with Elaine Freeman, supra note 293 (generally supporting thresholds because the worst thing for developers is to have no parameters specified going into a project, but instead have the parameters develop as the project progresses); Telephone Interview with Barton Doyle, supra note 345 (suggesting that developers he represents would like reasonable and clearly articulated thresholds that prevent excessive discretion at the staff level); Telephone Interview with John Martin, supra note 295 (stating that as a developer, he likes to know the ground rules in advance, although criticizing specific Santa Barbara County and Ventura County thresholds as too low); Telephone Interview with Nancy Ormandy, supra note 292 (discussing developers’ reactions to the increased certainty provided by the Sacramento Metropolitan Air Quality Management District’s (SMAQMD’s) air quality thresholds and indicating that the developers she represents will support thresholds that clearly set out the parameters for project review and allow them to pencil in costs in advance); Telephone Interview III with Stephen Gerhardt, supra note 348 (discussing developers’ desire for predictable and evenhanded treatment).
This change was mainly an effort to conform to prevailing traffic engineering standards. If the issue had required city council approval, however, the planning department might not even have attempted the change, given the planners' concerns about the politicizing of thresholds. Given that Santa Barbara County has found it useful to revise its thresholds every year or two, these types of political considerations would frequently affect the process.

A partial solution to this problem is for localities to allow staff-level modifications to the thresholds where the adjustments are minor administrative changes. Changes that are major or that represent a policy change would require legislative action. In this scenario, allowing the staff to make minor changes would not help San Diego's effort to change its minimum tolerated level of service on its roads. This is appropriate, because this standard reflects a general plan policy decision that the local legislative body should make.

While this comment recommends that thresholds be legislatively adopted as part of the general plan, most existing thresholds have been adopted at the staff level in accordance with planners' preferences. Quiet development of thresholds at the staff level allows planners to avoid fuss by suggesting that they are simply writing down what they would have done anyway. Ventura and Santa Barbara Counties' thresholds were among those developed in this manner, although Santa Barbara County's quantitative thresholds are currently

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447. Telephone Interview with Ann Hix, supra note 280.
448. Id.
449. Id.
450. Telephone Interview with Natasha Heifetz, supra note 431. The city of Mountain View intends to revise its 1992 thresholds annually. Telephone Interview with Brad Eckhardt, supra note 287.
451. Eckhardt supported this approach for Mountain View. Telephone Interview with Brad Eckhardt, supra note 287.
452. Among the thresholds adopted at the staff level are those of Ventura County, Santa Barbara County, the city of San Diego, the county of San Diego, and the city of Irvine. See supra note 266 and accompanying text. The city of Mountain View's thresholds were legislatively adopted as part of the city's general plan update. Telephone Interview with Brad Eckhardt, supra note 287; see MOUNTAIN VIEW, CEQA GUIDELINES, supra note 209 (adopting thresholds by legislative resolution). On the other hand, Santa Barbara is currently undergoing review and adoption of its staff-developed thresholds by the Board of Supervisors. Telephone Interview with Barbara Shelton, supra note 393. In the case of special-purpose agencies, the governing bodies of the Tahoe Regional Planning Agency and the South Coast Air Quality Management District have adopted their agencies' thresholds. See TAHOE REGIONAL PLANNING AGENCY, supra note 269, at 1-2; SOUTH COAST AIR QUALITY MANAGEMENT DIST., CEQA AIR QUALITY HANDBOOK 6-1 (1993) [hereinafter SCAQMD, CEQA MANUAL].
453. See Telephone Interview III with Stephen Gerhardt, supra note 348 ("The most successful thresholds have been adopted by staff just deciding to write down their rules.").
454. Telephone Interview II with Bruce Smith, supra note 266; see Telephone Interview with Jeff Harris, Former Deputy Director of Environmental Review, Santa Barbara County (Apr. 8, 1993).
being reviewed by the county board of supervisors.\textsuperscript{455} Despite the advantages of staff-level adoption, the benefits of linking CEQA review to general plan standards outweigh the difficulties of thresholds' legislative adoption.\textsuperscript{456} Where thresholds represent general plan revisions or a major change in standards, they belong in the political process to facilitate public discussion and scrutiny.

4. Confusion Over the Use of Different Standards by Different Agencies

Thresholds could potentially cause confusion where they address areas subject to review by multiple agencies that may disagree over what are appropriate threshold criteria.\textsuperscript{457} Conversely, well-designed threshold criteria could improve communication between the lead agency and other agencies. This issue is especially relevant in the context of Department of Fish and Game (DFG) review of biological impacts.\textsuperscript{458} Conflicts are highly likely because reductions in state aid to localities have soured many communities' view of the state, and the DFG is notoriously one of localities' least favorite agencies.\textsuperscript{459} The level of conflict will likely depend on the quality of a locality's existing relationship with the state agencies involved. Where the DFG disagrees with an agency's basic approach to growth, the DFG is unlikely to find biological thresholds consistent with the Fish and Game Code.\textsuperscript{460}

\textsuperscript{455} See supra text accompanying note 439.

\textsuperscript{456} As discussed above, it also can be argued that thresholds incorporating plan-level standards should be adopted as a matter of political accountability.

\textsuperscript{457} CEQA provides for four types of agencies according to their statutory functions. The "lead agency" certifies the environmental impact report and makes any necessary findings. \textsc{Cal. Code Regs.} tit. 14, §§ 15092, 15367 (1994). Other agencies that have discretionary approval power over a project, such as issuing permits, are "responsible agencies." \textit{Id.} § 15381 (1994). Responsible agencies can require supplemental environmental review if it is necessary. \textit{Id.} §§ 15163, 15164 (1994). Third, "trustee agencies" are those state agencies that have legal jurisdiction over natural resources that are held in trust for the people of California and that are affected by a project. \textit{Id.} § 15386 (1994). Trustee agencies must be consulted during the environmental review process. \textsc{Cal. Pub. Res. Code} § 21080.3(a). Finally, other agencies that do not issue project permits but nevertheless comment on areas within their expertise are known as commenting agencies. See \textit{id.} § 15044 (1994).

\textsuperscript{458} Telephone Interview with Tom Last, Senior Planner, Butte County (Feb. 7, 1994) ("Consistent thresholds between DFG and localities would be a big help for biological resources."); see Telephone Interview with Cliff Sellers, Planning Director, City of Chico (Jan. 25, 1994) ("Agencies like the Department of Fish and Game want to be free to respond to the politics of a particular case.").

\textsuperscript{459} See, e.g., Telephone Interview with Tom Last, supra note 458; Telephone Interview with Brian Crawford, supra note 294.

\textsuperscript{460} In the case of Chico, where the city and the DFG have a poor relationship, the DFG told Chico that its proposed negative declarations were inadequate. Telephone Interview with Brian Crawford, supra note 294. DFG opinions vary from region to region.
Thus, particularly in the case of biological resources impacts, localities will need to work with the relevant state agencies during the process of developing thresholds. For most impacts, however, relations with state agencies are not likely to be a significant problem in the development of thresholds. For example, localities are most likely to adopt their regional air district’s standard for air quality. For agricultural resources, the California Department of Conservation is developing a model threshold that many localities are likely to use if they adopt thresholds for this impact. Thus, conflicts over thresholds are not likely to be a widespread problem.

5. Thresholds for Cumulative Impacts: Not a Viable Option

In theory, thresholds of significance could include separate thresholds for cumulative impacts. The appropriate authorities could devise a strategy whereby most projects would apply mitigation measures to address cumulative problems, and projects that merely pose de minimis increases could safely be designated insignificant. In practice, however, localities have not implemented thresholds for cumulative impacts in this manner.

Although there has been uncertainty over the legal defensibility of setting de minimis increments, separate thresholds for cumulative impacts appear to have been blocked ultimately by the administrative and political problems they would create. In a system where jurisdictions process an average of sixty to eighty projects a year under CEQA but prepare only an average of four EIRs,461 fixed thresholds for cumulative impacts could require proportionally huge increases in the number of EIRs required. In particular, cumulative impact thresholds for air quality and traffic could require EIRs for many small-to-mid-sized developments. These EIRs would serve little purpose because project-specific mitigations frequently cannot address these cumulative impacts, which are essentially regional problems.462

a. Legal Status

The legal status of thresholds for cumulative impacts is unclear. The court in Kings County Farm Bureau v. City of Hanford stressed the importance of cumulative impacts analysis for EIRs, but also struck down the locality’s method for assessing those impacts.463 Under Kings County Farm Bureau, EIRs cannot use cumulative impact thresholds that are based on the proportion of a project’s contrib-

and from city to city. Id. Crawford moved from Chico’s Planning Department to Marin County’s department, which has a good relationship with the DFG. Id.
461. See discussion supra note 66.
462. See Telephone Interview with Ann Hix, supra note 280.
bution to a cumulative problem (e.g., a project's emissions are not
significant because they contribute only 0.1% of total NO_x emissions
within a certain area).\footnote{Id. at 662. In this case, the Farm Bureau and two citizens' organizations sought to set aside the city's approval of a proposed coal-fired generation plant, based on inadequacy of the EIR. \textit{Id.} at 653. The EIRs conclusion had managed to avoid a mandatory finding of significance for cumulative effects. \textit{Id.} at 661.} This type of threshold is based on the ratio
type theory, under which a project would not have a significant cumulative
impact when its incremental effects were “relatively minor when com-
pared with [those of] other sources” in the affected area.\footnote{See \textit{id.} at 662. The city and the proponent argued that a finding of significant cumulative impact could not be based solely on the fact that “expected future projects . . .
may, in combination, result in a substantial increase in PM_{10} or ozone precursor emissions.” \textit{Id.} at 661. The city and the proponent based their analysis on statutory language requiring a mandatory finding of significance where “the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” \textsc{Cal. Pub. Res. Code} § 21083 (West 1981). This language appears to consider not only the overall nature of the problem, but also the environmental effects of the project.} Because
CEQA describes cumulative impact analysis based on “collective sig-
nificance,”\footnote{The court stated that the ratio theory “allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling.” \textit{Kings County Farm Bureau,} 270 Cal. Rptr. at 662. The court criticized the ratio theory because under this approach “the greater the overall problem, the less significance a pro-
ject has in a cumulative impacts analysis.” \textit{Id.} For these reasons, “[t]he EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analy-
sis of the collective effect this and other sources will have upon air quality.” \textit{Id.}} the ratio theory is invalid because it focuses on individual
inputs, not the combined result.\footnote{66. The court stated that the ratio theory “allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling.” \textit{Kings County Farm Bureau,} 270 Cal. Rptr. at 662. The court criticized the ratio theory because under this approach “the greater the overall problem, the less significance a pro-
ject has in a cumulative impacts analysis.” \textit{Id.} For these reasons, “[t]he EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analy-
sis of the collective effect this and other sources will have upon air quality.” \textit{Id.}}

Although the \textit{Kings County Farm Bureau} court rejected the ratio
type theory, whether the courts would permit other types of thresholds for
cumulative impacts remains an open question. Under one interpreta-
tion, the decision would permit no \textit{de minimis} exemption to cumulative
impacts.\footnote{See Jennifer L. Hernandez, \textit{A Practitioner's Guide To Preparing Environmental Impact Reports After Kings County Farm Bureau} v. City of Hanford, \textsc{S.F. Barrister L.J.}, Dec. 1990, at 13, 14. This follows from the court's citation of the term “collectively signifi-
cant.” If the expected collective impact is of a certain scale, then the project's individual
collection is important as long as it even slightly aggravates “collectively significant”
impacts.} Under an alternative reading of the case, the court did
not absolutely rule out a \textit{de minimis} exemption, but it is uncertain
what types of \textit{de minimis} exemptions would be permissible.\footnote{469. In the court's words, such \textit{de minimis} exemptions might be based on “an analysis
of the collective effect this and other sources will have upon air quality [emphasis added].” \textit{See Kings County Farm Bureau,} 270 Cal. Rptr. at 662. This reading of the case depends on language in the statute and Guidelines indicating that “'cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with” other projects. \textsc{Cal. Pub. Res. Code} § 21083 (West 1986); Interview with Christine Sproul, \textit{supra} note 395. One leading commentator states that “the more severe existing environmental problems are, the lower the threshold for treating a project's cumu-
Not surprisingly, the planners who implement CEQA are also highly confused and frustrated about cumulative impacts analysis.\textsuperscript{470} One observer believes that the current state of cumulative impacts analysis under CEQA is "abysmal" and that general plans should supply additional direction.\textsuperscript{471} The manager of the advanced planning division in Ventura County expressed frustration about the arbitrariness of a process where legal requirements do not match administrative realities. He noted that even after fifty similar projects have been approved, the next project is still at risk if well-funded opponents advance a fair argument that the project has a significant cumulative impact on air quality.\textsuperscript{472}

Lacking clear standards, most planning departments bow to administrative and political pressures and generally excuse cumulative impact analysis at the project level through an ad hoc approach.\textsuperscript{473} In fact, one planner wrote language into his city's local thresholds about how incrementalism violates the intent of CEQA, but the city still followed an ad hoc approach to cumulative impacts.\textsuperscript{474} This ad hoc approach may result from pragmatism. One planner probably spoke for many when she indicated that cumulative impacts are a regional problem that cannot be solved at the level of individual projects: "Don't do an extra EIR [where one would not be required otherwise] if you can't mitigate the impacts anyway."\textsuperscript{475}

\textbf{b. Case Study: The Failure of the South Coast Air Quality Management District's Cumulative Impact Thresholds}

The South Coast Air Quality Management District's short-lived experiment with a formal strategy for cumulative impacts illustrates localities' resistance to anything other than an ad hoc approach. The

\textsuperscript{470} See Telephone Interview with Barbara Shelton, \textit{supra} note 393; Telephone Interview II with Bruce Smith, \textit{supra} note 266; Telephone Interview with Ann Hix, \textit{supra} note 280; Telephone Interview with Tom Oberbauer, \textit{supra} note 266.

\textsuperscript{471} Telephone Interview with Rolf Pendall, \textit{supra} note 403.

\textsuperscript{472} Id.

\textsuperscript{473} Telephone Interview with Ann Hix, \textit{supra} note 280 (city of San Diego); Telephone Interview with Tom Oberbauer, \textit{supra} note 266 (county of San Diego); Telephone Interview with Mark Tomich, \textit{supra} note 22 (city of Irvine); Telephone Interview with Barbara Shelton, \textit{supra} note 393 (Santa Barbara County). For example, the county of San Diego sometimes performs cumulative impact analyses on major general plan amendments or sometimes requires such an analysis when there are numerous projects in the same area. Telephone Interview with Tom Oberbauer, \textit{supra} note 266.

\textsuperscript{474} Telephone Interview with Mark Tomich, \textit{supra} note 22.

\textsuperscript{475} Telephone Interview with Ann Hix, \textit{supra} note 280.
SCAQMD’s plan for cumulative impacts analysis required extra efforts from planners in two respects. First, the plan required additional analysis and mitigation measures for significant general plan amendments and “unique” projects (e.g., major infrastructure such as highways, airports, and harbors). Second, and even more controversial, the SCAQMD plan established two different types of mitigation measures: one for projects consistent with general plans and another for proposals requiring significant amendments to the plans. This effectively required MNDs, at a minimum, for all projects. Even if developments could claim consistency with general plans and the absence of significant project-level impacts, they still needed to implement “standard mitigation measures” based on the cumulative impacts.

The SCAQMD could not convince its members to implement these complicated administrative requirements, even though they were arguably milder than the minimum legal requirements. After a major locality rejected the binding administrative requirement for required mitigations, the SCAQMD retreated. Seven months after it had developed its more ambitious approach, the SCAQMD issued a new handbook that left cumulative impacts analysis to local discretion.

c. Case Study: Ventura County’s Initial Study Guidelines

Ventura County’s successful Initial Study Guidelines are rare in that they include separate quantitative thresholds for cumulative impacts. Although the Ventura County model potentially limits the administrative burden by requiring consideration of cumulative impacts for only critical issues, including traffic, air quality, and convers-
sion of farmland, the relief afforded may be limited because these are the critical areas that concern cumulative impacts.

The stringency of the analysis of cumulative impacts is determined by whether or not a project is consistent with the general plan. The cumulative impacts considered are derived by adding the impacts of projects listed by the planning division. For projects that are consistent with the general plan, applicants must consider approved, proposed, and "reasonably foreseeable probable future" projects that are listed by the planning division if the listed projects are within a geographic area determined by the impact involved. In contrast, projects inconsistent with the general plan must consider a worst-case buildout model specified in the county's Initial Study Guidelines.

Although this procedure requires detailed initial studies, the administrative burdens imposed on agencies are limited because the procedure must be followed only in certain cases and applies only for a few critical issues. For example, the procedure limits significance determinations for traffic impacts to those where: (1) the project will generate 10% or more of the vehicle trips on a road segment or intersection, and (2) the cumulative impacts will degrade the intersection from an acceptable to an unacceptable level of service or will occur at an intersection that is already operating at an unacceptable level. Thus, cumulative analysis is required if a project will substantially contribute to traffic at a key juncture that is nearing but not yet above the level of service threshold. However, this lessening of the administrative burden comes at the risk that the fixed parameters may not cover all significant cumulative impacts.

VI

DESIGN OF DETAILED SUBSTANTIVE THRESHOLDS FOR SPECIFIC IMPACTS: CALIFORNIA CASE STUDIES AND RECOMMENDATIONS

This part examines specific examples of thresholds addressing regional air quality, agricultural lands, and biological resources.

old is set at the very low level of 2 pounds of criteria pollutants per day (the project-level threshold is 25 pounds). Projects also exceed the threshold if they cause population growth exceeding the AQMP's forecasts. Id.

483. Id. at 7-1 to 7-2.
484. Id. at v-1 to v-2.
485. Id. at v-1.
486. Id. at v-2.
487. See id. at 21a-1.
488. If the juncture already is at an unacceptable level of service, a proposal that would generate 10% of the traffic in the intersection also will have a significant impact at the project level. Id.
489. The term "biological resources" is used here to include endangered, threatened, and other species, as well as valued natural features such as oak forest or wetlands.
Although each impact involves unique considerations, the comment identifies four principles for the design of quantitative and detailed qualitative thresholds. They should be flexible to administer, balanced in their regulatory effect, simple and comprehensible, and explicitly related to general plan consistency where feasible.

Each of the impacts studied in this part is most effectively addressed through a different type of detailed threshold. Some impacts are best evaluated through quantitative thresholds calibrated according to a single factor. Regional air quality, for example, can be measured based on the number of pounds of pollutant emitted per day. In contrast, the significance of agricultural and biological resource impacts depends on a number of factors. For these types of impacts, communities need to decide whether significance determinations are so inherently site-specific that standard quantified thresholds are infeasible. This comment concludes that multifactor quantitative thresholds can be useful for agricultural impacts, but not biological resources. Biological impacts present the problem that "[a]n ironclad definition of significant effect is not possible because the significance of an activity may vary with the setting." For this impact, the predictability of the review process is best increased through standard mitigation ratios for habitat replacement. Thus, each of the three impacts involves a different type of threshold: single-factor quantitative thresholds for regional air quality, multifactor quantitative thresholds for agricultural resources, and procedural qualitative thresholds for biological resources.

Although these three types of thresholds are quite different, the design of all thresholds should reflect four basic principles. First, the evaluative criteria should be flexible. This issue is most important for quantitative thresholds, since qualitative thresholds necessarily allow for some professional judgment. Quantitative thresholds should be scaled; this allows staff to retain some discretion for projects within a certain percentage of the threshold level. In these close cases, scaled thresholds permit discretionary consideration of site-specific factors. Furthermore, developers and staff can bargain for mutual benefit, trading the streamlined review of MNDs for impressive mitigation measures that benefit the environment. For multifactor thresholds, scaling may be too complicated. Flexibility can be retained, however,

490. Agricultural factors can include soil classification, the compatibility of surrounding land, the availability of water, the resulting environment's suitability for crop production, general plan designation, and agricultural preserve potential. See, e.g., Ventura County, Initial Study Guidelines, supra note 269, at 7-1 to 7-11.

491. Some of these factors include acreage of habitat onsite, habitat quality, number of species present, and any fragmentation of habitat resulting from the proposed project. See, e.g., id. at ch. 6.

by designating the threshold level as a presumption rather than an absolute indication of significance.

Second, thresholds should be balanced between appropriate regulation and streamlining. Besides listing which types of impacts are presumed to be significant, thresholds should indicate impacts that are presumed to be insignificant. For example, biological thresholds should identify certain types of habitat, such as non-native grassland, where impacts of a certain size will not trigger any need to take action.

Third, quantitative thresholds should be as simple and as comprehensible as possible for the public and applicants. The city of Mountain View’s planners were able to persuade their city council and city attorney to adopt thresholds by keeping them simple. Moreover, simple regulations may be a political necessity in a period of slow economic growth. A contrary example is provided by Santa Barbara County’s draft biological resources threshold, which was substantially revised after it was released. The draft document included numerous significant regulations, including standard mitigation measures for habitat replacement and detailed threshold criteria. Despite this regulatory weight, one county planner believes that what doomed the document was more simple: its excessive length. Efforts to detail the threshold made the document approximately one-half inch thick. If the explanations for the standard habitat mitigation measures had been placed in an appendix, the document would have appeared much more accessible. The final threshold did contain substantial material in an attached appendix.

In sum, overly complex thresholds lose the potential benefits of creating a more predictable and publicly comprehensible review process and of focusing community debate on clearly defined issues. Although this concern may apply to all thresholds, multifactor thresholds are the most likely to become overly complex. Therefore, in

493. See Telephone Interview with Brad Eckhardt, supra note 287.
494. See discussion infra part VI.C.1.
495. Telephone Interview with Elihu Gevirtz, supra note 439.
496. Id.
497. The threshold also appears to have been overly ambitious and not politically balanced. See id.

The Santa Barbara County groundwater threshold also has come under attack for excessive complexity. Dan Gira, supervising planner at Santa Barbara County, believes that the threshold has helped the county conserve its groundwater resources. Telephone Interview with Dan Gira, Supervising Planner, Santa Barbara County Planning and Development Department (Apr. 13, 1993). Although the county held hearings on the proposed threshold prior to its adoption, developers felt they could not predict how it would work in practice even after they attended the hearings. Telephone Interview with John Martin, supra note 295. One developer spoke of “wild psychedelic formulas” that the county used in its threshold. Id. Although complexity may have been the scientifically appropriate response to hydrological impacts, a simpler threshold would be more palatable even if less accurate or fair to all parties.
many cases these multifactor thresholds should be defined as guidelines and should calculate significance based on just a few major factors. Because the thresholds will be guidelines, additional factors can be considered in close cases. The agricultural resources case study describes ways that multifactor thresholds can be designed to maximize comprehensibility.498

Fourth, threshold criteria should include a project's general plan consistency where feasible. For example, Ventura County has established much lower thresholds for conversion of agricultural soils to developed uses if the general plan designates the site for agriculture.499 Where the project site is already designated for residential use, the project is consistent with the general plan's strategy for conserving agricultural land, and much higher thresholds are appropriate.

In addition to these four principles, factors specific to each impact affect the design of thresholds. For example, regional air quality and agricultural thresholds are affected in different ways by relevant state or federal standards. Although scaled thresholds are generally helpful for single-factor quantitative thresholds, this tool appears to be legally infeasible for regional air quality impacts. The air districts have adopted fixed thresholds based on preexisting standards under the federal and state clean air acts.500 For agricultural lands, the state is developing an optional threshold modelled after the federal land evaluation and site assessment (LESA) system.501 Because of differences like these, the following case studies suggest that a broad range of factors relevant to an impact needs to be considered in designing appropriate thresholds.

A. Regional Air Quality

Local governments' efforts at developing thresholds can draw from the efforts of regional air pollution control districts. This section provides case studies of the efforts of the South Coast, Sacramento, and Ventura County air districts to adopt quantitative thresholds for regional air quality along with standardized mitigation measures. The combination of these measures has made the often contentious air quality review process more predictable and comprehensible to applicants. The comment endorses the South Coast and Sacramento district efforts to standardize thresholds for project-level impacts.

498. For agricultural resources in particular, this comment recommends a different approach. The state is adapting for California use a complex multifactor threshold that has been successful elsewhere. See discussion infra part VI.B.2.
499. See discussion infra part VI.B.3.
500. See infra text accompanying notes 510-11.
501. See discussion infra part VI.B.2.
On the other hand, for cumulative impacts, the South Coast Air Quality Management District has found that separate thresholds are neither administratively nor politically feasible. The comment accepts that standardized cumulative thresholds are not feasible, but recommends that a menu of mitigation measures for cumulatively significant impacts be developed. Under such a threshold system, projects whose impacts were cumulatively significant but otherwise insignificant could adopt some of these mitigation measures to avoid legal vulnerability. Thus, the menu of mitigation measures could obtain benefits for the environment, while reducing applicants’ exposure to litigation.

CEQA encourages the use of air quality thresholds by endorsing the use of other statutory standards in evaluating air quality impacts. Section 15064(i) of the CEQA Guidelines states:

If an air emission or water discharge meets the existing standard for a particular pollutant, the lead agency may presume that the emission or discharge of the pollutant will not be a significant effect on the environment. If other information is presented suggesting that the emission or discharge may cause a significant effect, the lead agency shall evaluate the effect and decide whether it may be significant.

This rebuttable presumption means that courts should uphold project-level thresholds if the thresholds bear a justifiable relationship to other air quality standards and if reasonable forecasts support the thresholds. The nature of regional air pollutants makes site-specific factors irrelevant to any challenge. At the same time, though, the thresholds must allow for the fact that a project will have a significant impact if it will cause a violation of an ambient air quality standard.

1. Case Study: The South Coast Air Quality Management District and the Sacramento Metropolitan Air Quality Management District Approaches

Several of California’s air pollution control districts have put together a combination of measures to standardize and expedite local

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502. See discussion supra part V.B.5.
504. See id. § 15144 (1994).
505. See Kings County Farm Bureau v. City of Hanford, 270 Cal. Rptr. 650, 660 (Ct. App. 1990) (holding a project's air quality impacts significant where the project would cause the first violation of the federal PM$_{10}$ standards in the Hanford area); see also CAL. CODE REGS. tit. 14, div. 6, ch. 3, app. G (1994) (stating that a project is normally significant if it will "violate any ambient air quality standard, contribute substantially to an existing or projected air quality violation, or expose sensitive receptors to substantial pollutant concentrations").

Other less specific standards for significance can be found in the Appendix I environmental checklist, which directs planning staff to evaluate, among other things, whether a project will create odors or any kind of climate changes. CAL. CODE REGS. tit. 14, div. 6, ch. 3, app. I (1994).
review of air quality impacts caused by residential and commercial projects’ generation of automobile trips. The package of measures includes two critical elements: (1) fixed thresholds for regional air pollutants emissions, and (2) lists of mitigation measures that quantify the emission reductions achieved by each mitigating action. In addition to providing more consistent and predictable review, this combination of measures is intended to inform applicants early in the review process of how significant their projects’ impacts will be and what mitigation measures would provide them with the most advantageous emission reductions.

This approach is typified by two metropolitan air quality management districts, the SCAQMD and the Sacramento Metropolitan Air Quality Management District (SMAQMD). Both the SCAQMD’s and the SMAQMD’s project-level thresholds gain legitimacy from their basis in statutory offset requirements for stationary sources. The SMAQMD’s threshold is based on the California Clean Air Act. Air districts that have adopted both standardized thresholds and quantified mitigation measures include the South Coast Air Quality Management District, the Ventura Air Pollution Control District, and the Sacramento Metropolitan Air Quality Management District. See SCAQMD, CEQA MANUAL, supra note 452, at 6-2, 6-3; SACRAMENTO METRO. AIR QUALITY MANAGEMENT DIST., AIR QUALITY THRESHOLDS OF SIGNIFICANCE i (1994) [hereinafter SMAQMD, THRESHOLDS]; AIR QUALITY PLANNING AND EVALUATION SECTION, VENTURA COUNTY AIR POLLUTION CONTROL DIST., APPENDIX G-91—GUIDELINES FOR THE PREPARATION OF AIR QUALITY IMPACT ANALYSES 2-2 to 2-3 (1989) [hereinafter VENTURA COUNTY, GUIDELINES FOR AIR QUALITY]. Other air districts that have adopted at least standardized thresholds include the Bay Area Air Quality Management District, the Monterey Air Pollution Control District, and the San Joaquin Air Pollution Control District (which is also in the rulemaking process as of this writing). Telephone Interview with Greg Tholen, Planner, Environmental Review, Sacramento Metropolitan Air Quality Management District (Jan. 31, 1994).

Air districts lack direct authority to impose their thresholds on most projects; cities and counties, as the permitting agencies, make their own significance determinations. See SCAQMD, CEQA MANUAL, supra 452, at 2-3. In practice, most localities follow their air districts’ guidance, although some cities in the South Coast Air Basin do not follow SCAQMD’s guidelines. See Telephone Interview II with Connie Day, supra note 374.

Of the four major criteria air pollutants generated by automobile trips, three pose health hazards based on their concentrations at the regional rather than the local level (nitrogen oxides (NOx), reactive organics (ROG), and respirable particulate matter (PM10)). Id. at 1-2. The thresholds do not generally address the fourth major criteria pollutant, carbon monoxide (CO), which poses health hazards based on its local concentrations. Id. at 1. Projects generally require CO screening analyses to see if they will exceed one-hour or eight-hour standards. Id. at 36. In most suburban locations, CO impacts are not likely to be significant. See id. at 38-39 (indicating low background CO values in Sacramento suburbs).

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Telephone Interview with Nancy Ormandy, supra note 292.

Telephone Interview with Greg Tholen, supra note 506. The best available control technology offsets are translated from the stationary source model of tons per year of criteria pollutants into pounds per day, which is in more workable terms for mobile sources. Id.
while the SCAQMD's is based on the federal act.\textsuperscript{511} The SMAQMD's threshold translates the auto emissions expected from 340 units of detached single-family housing, 500 units of apartments, or 145,000 square feet of general office development.\textsuperscript{512} The SCAQMD's thresholds for the South Coast Air Basin (unfortunately known as SCAB), and for the less polluted Southeast Desert Air Basin (SEDAB) are somewhat lower.\textsuperscript{513} Both the SCAQMD and the SMAQMD thresholds are fixed, allowing no discretion to the local planner for projects just above or below the thresholds.\textsuperscript{514}

To complement their air quality thresholds of significance, the SCAQMD and the SMAQMD have attempted to quantify emissions and potential emission reductions using the Mobile Assessment for Air Quality Impacts (MAAQI) model.\textsuperscript{515} The MAAQI model can estimate both the level of emissions a project is likely to generate and the "mitigation allowances" achievable by certain mitigation measures.\textsuperscript{516} This model is very easy for planners and developers to use. The SCAQMD offers three different methods for using the MAAQI model to calculate a project's emissions and the offset provided by mitigation allowances, depending on which party is doing the calculations. Developers can use simplified charts;\textsuperscript{517} local governments can

\begin{thebibliography}{1}
\bibitem{511} See SCAQMD, CEQA Manual, supra note 452, at 6-1; Telephone Interview with Greg Tholen, supra note 506.
\bibitem{512} SMAQMD, Thresholds, supra note 506, at A-3. The SMAQMD has set a threshold of 85 pounds per day for emissions of ROG and NO\textsubscript{x}. \textit{Id.} at 26. The SMAQMD also set a threshold of 275 pounds per day of PM\textsubscript{10}. \textit{Id.} This comment will focus on the ROG and NO\textsubscript{x} thresholds because they generally are more restrictive for most residential and general commercial development projects. The translation of this threshold to development size is based on models for standard trip generation. \textit{See id.} at A-3.
\bibitem{513} SCAB has a threshold of 55 pounds per day of ROG and NO\textsubscript{x}, while the SEDAB has a threshold of 75 pounds per day of ROG and NO\textsubscript{x}. \textit{See} SCAQMD, CEQA Manual, supra note 452, at 6-2, 6-3.
\bibitem{514} In its draft threshold, the SMAQMD provided for more detailed study of projects within 20% of the threshold, but the study was only intended to indicate more precisely the exact amount of a project's emissions, not to depart from the fixed threshold on account of any project-specific factors. SACRAMENTO METRO. AIR QUALITY MANAGEMENT DIST., DRAFT AIR QUALITY THRESHOLDS OF SIGNIFICANCE 33 (1994) (Workshop Draft from Jan. 28, 1994). This provision was eliminated from the final threshold.
\bibitem{515} This latter effort is based on the Mobile Assessment for Air Quality Impacts computer model developed by the SCAQMD. SCAQMD, CEQA Manual, supra note 452, at 9-5.
\bibitem{516} Air districts prefer to use the term "mitigation allowances" rather than "emission credits." Telephone Interview with Nancy Ormandy, supra note 292.
\bibitem{517} The SCAQMD's 1993 CEQA Handbook allows developers to estimate emissions for criteria pollutants based on the number of dwelling units for residential projects or based on the square footage for other uses. SCAQMD, CEQA Manual, supra note 452, at 9-27 to 9-28. An additional table provides a page-long methodology for calculating both
use the MAAQI model on IBM-compatible software; and EIR consultants are expected to calculate emissions using additional factors the MAAQI model lacks.

The SMAQMD’s Air Quality Thresholds of Significance Manual improved upon the accessibility of the SCAQMD model to project proponents through simplified worksheets and charts and enhanced documentation. Also, zoning authorities frequently send paperwork for major projects to the SMAQMD upon receipt, which can help identify major mitigation measures at the beginning of the review process. According to a planner at the SMAQMD, developers prefer earlier, more certain environmental review, especially when they can “cost out” mitigation measures in their financial analyses.

In sum, the SCAQMD’s and the SMAQMD’s packages of combined thresholds and quantified mitigation measures represent a sub-

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operational and construction emissions. Id. at 9-23. The process for estimating mitigation allowances is similarly straightforward. Based in part on the Mobile Assessment for Air Quality Impacts (MAAQI) model, the SCAQMD’s 1993 (amended) CEQA Handbook provides local governments and project applicants with charts offering procedures for estimating the emission reductions achievable for different types of projects during both construction and operation. Id. at 11-5, 11-13 to 11-33.

The most frequently referenced mitigation measure may be the one for operational emissions from residential development projects. This chart tells the curious that the most effective mitigation measure for housing developments is synchronized traffic lights on nearby streets (4.0% to 8.0% reduction in emissions), while including retail services within a subdivision or even an adjacent subdivision also can be effective (1.3% to 6.0% reduction in emissions for NOx, CO, and PM10, and slightly less for reactive organics). See id. at 11-18. Project proponents are directed to use the lowest estimate in a given range unless they have site-specific information that can support analysis and documentation. Id.

Local planners who know a project’s size and year of operation can use IBM-compatible software to estimate the automobile emissions the project is likely to generate, relying on countywide defaults for other inputs. See Telephone Interview II with Connie Day, supra note 374; SCAQMD, CEQA MANUAL, supra note 452, at 9-13 to 9-14. Additional inputs include trip rate, speed, and length; percent cold starts; and vehicle fleet mixes. SCAQMD, CEQA MANUAL, supra note 452, at 9-14. Local agencies have found the MAAQI model useful for checking applicants’ claims that certain mitigation measures have put them below the threshold. Telephone Interview II with Connie Day, supra note 374.

Consultants nevertheless may find MAAQI useful to determine whether additional studies are needed. See Telephone Interview II with Connie Day, supra note 374.

First, the SMAQMD created a simple ten-line worksheet for estimating a project’s long-term emissions and provided project proponents with instructions for completing the worksheet. SMAQMD, THRESHOLDS, supra note 506, at 27-32, apps. D, E. Second, the SMAQMD provided charts that indicate whether mitigation measures are of high, moderate, and low suitability for projects, based on the projects’ location and supporting infrastructure. Id. at E-2 to E-5. Finally, the SMAQMD provided a supporting document describing in prose the advantages and possible applications of different mitigation measures. SACRAMENTO METRO. AIR QUALITY MANAGEMENT DIST., MITIGATION RESOURCES HANDBOOK 1-2 (1995) [hereinafter SMAQMD, MITIGATION RESOURCES HANDBOOK].

Telephone Interview with Nancy Ormandy, supra note 292. The SCAQMD, in contrast, has had to reduce its role in reviewing local permits due to staff cutbacks. Telephone Interview II with Connie Day, supra note 374.

Telephone Interview with Nancy Ormandy, supra note 292.
stantial improvement in CEQA review of air quality impacts. The districts' approach is likely to make air quality review more consistent, more predictable and acceptable for developers, and more comprehensible to the public.

There are, however, two shortcomings to these approaches to review processes. The first potential problem is that unhelpful EIRs will be required. For most projects, mitigation measures can only achieve limited reductions in automobile trip generation. Projects that exceed the fixed thresholds by more than 10% to 15% will need to undergo the delay, uncertainty, and expense of EIRs with little possibility of environmental benefits from improved mitigation. In contrast, under the current ad hoc system, agencies can decline to require EIRs of questionable value for even moderately large projects, absent compelling project-specific circumstances.

The danger of requiring preparation of unhelpful EIRs under the SMAQMD's approach is minimized by the employment of fairly high thresholds. Standards are based on the state Clean Air Act best available control technology (BACT) offsets, and the fairly high threshold levels that result should not require too many new EIRs. The SMAQMD has consulted with local planning staff, and local planners believe the SMAQMD thresholds would not force the preparation of additional unnecessary EIRs. Perhaps most important, even if 300-unit residential developments would not previously have required an EIR for air quality (because they fall below the SMAQMD threshold of 340 units), such projects probably would require EIRs for other impacts such as traffic.

However, SCAB's lower thresholds may indeed result in more EIRs. SCAB's threshold is substantially lower than the SMAQMD's and translates to approximately 160 single-family units. Planners

523. For example, most projects that are neither mixed-use nor within one-quarter mile of a light rail stop can only choose among various mitigation measures that can reduce trip generation by 0.5% to 2.0% for each mitigation measure. See SMAQMD, Thresholds, supra note 506, at E-2 to E-4. The reduction factors are additive, and because a project may implement as many measures as possible, a project theoretically can achieve trip reductions of over 30%. See id. However, in reality most projects only can incorporate enough mitigation measures to achieve a trip reduction of 10% to 15%, if even that. Telephone Interview II with Connie Day, supra note 374.

524. See supra note 510 and accompanying text.

525. To give some perspective on this issue, the SMAQMD conducted several studies that indicated that a threshold of 50 pounds per day for ROG and NOx would capture 80% of all emissions from land development projects, and a threshold of 75 pounds per day would capture 60% of all emissions. The SMAQMD adopted a threshold of 85 pounds per day, which consequently captures less than 60% of emissions. Telephone Interview with Greg Tholen, supra note 506.

526. See id.

527. SCAQMD, CEQA Manual, supra note 452, at 6-10. This translates to 55 pounds per day each for ROG or NOx. Id. at 6-2.
from several cities have indicated they believe the SCAQMD thresholds are too low.\textsuperscript{528} However, SCAB has the worst air pollution in the country, so stronger, more expensive measures are necessary, and some conflict over thresholds is probably inevitable.

The second potential problem of the SCAQMD and the SMAQMD approaches is that they give local governments little leverage and developers little incentive to achieve the maximum mitigations for improved air quality. If a project falls beneath the necessarily high thresholds, no mitigation measures are required. On the other hand, if a project exceeds the thresholds by more than 10\% to 15\%, mitigation measures will be legally required but insufficient to dispense with an EIR.\textsuperscript{529} Thus, a developer has little incentive to take an expansive definition of what mitigation measures are feasible. The result is that this approach weakens one of CEQA's major strengths: the adoption of site-specific mitigation measures.

This second problem is significantly lessened by the fact that local governments can draw upon legal authorities other than CEQA for the imposition of air quality mitigation measures. For example, some air districts require employer trip reduction programs, which are much more effective than either subdivision-based carpool programs or site design strategies designed to increase pedestrian or bicycle use.\textsuperscript{530} Thus, air districts are arguably already implementing the most effective mitigation measures under other legal authorities.

However, the SMAQMD's Mitigation Resources Handbook lists six mitigation measures that only developers can provide: telecommunications, pedestrian measures, ancillary services (e.g., onsite retail for office projects), onsite amenities (such as bike racks or showers and pedestrian-friendly landscaping), preferential transit access, and transit stop amenities.\textsuperscript{531} If properly explained with examples in a handbook, many of these measures could be included in a project at relatively low cost and/or provide additional benefits as a marketing tool for developers. However, the SMAQMD and the SCAQMD approaches reward developers for including these mitigation measures only if their projects are just slightly under the threshold level. Thus,

\begin{itemize}
\item \textsuperscript{528} See Fixing CEQA, \textit{supra} note 5, at app. 3.
\item \textsuperscript{529} See \textit{supra} text accompanying note 523.
\item \textsuperscript{530} The relative efficacies can be inferred from the SCAQMD mitigation factors for on-road mobile source emissions. See SCAQMD, CEQA \textsc{Manual}, \textit{supra} note 452, at 11-18 to 11-22. Subdivision-based trip-reduction programs garner reductions of 0.1\% to 2.25\%, and programs encouraging bicycle or pedestrian travel yield 0.1\% to 0.8\% reductions. \textit{Id.} at 11-18. In comparison, office-based trip-reduction programs can give the developer reductions of as much as 30\%; the most effective methods include three-day work weeks and providing parking fee incentives for ridesharing. \textit{Id.} at 11-19 to 11-22.
\item \textsuperscript{531} SMAQMD, \textsc{Mitigation Resources Handbook}, \textit{supra} note 520, at app. E.
\end{itemize}
arguably the air districts' approaches are not as effective as possible in inducing developers to implement desirable mitigation measures.

2. Recommendations for Project-Level Air Quality Impacts Thresholds

The SCAQMD and the SMAQMD thresholds have two potential problems, as discussed above. First, they may inflexibly require EIRs for projects even if the projects only pose significant impacts on air quality and already have adopted all feasible mitigation measures. Second, they may provide insufficient incentives for developers to adopt mitigation measures. Scaling, if legally feasible, could address these potential difficulties. Staff could issue mitigated negative declarations where EIRs would be unhelpful and could give developers incentives to provide mitigation measures in close cases. However, the air districts have modelled their thresholds on federal or state legal standards for significance; these standards are fixed, so there is no room for air districts to introduce the flexibility of scaled thresholds.

Despite their limitations, the current thresholds still represent a substantial step forward. Many California air pollution control districts have come under heavy criticism, perhaps partly because developers, industry, or local citizens do not fully understand the districts' substantial regulatory efforts. Standardized thresholds and standardized mitigation measures can help make the CEQA air quality review process more predictable and acceptable for developers, and more understandable for the public.

3. Problematic Alternative: Ventura County's Buydown Fees

Consistent with its slow growth orientation, Ventura County has set a much lower and more controversial threshold than the adjacent SCAQMD or the SMAQMD. Ventura County's significance threshold corresponds to approximately 100 units of detached single-family housing or 50,000 square feet of office development in ozone nonattainment areas, if the project conforms to the Ventura County Air Quality Management Plan.

To avoid unhelpful EIRs and insufficient incentives for mitigation measures, the Ventura County Air Pollution Control District (APCD)

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532. One planning consultant indicated she thought the threshold was disturbingly low, especially in comparison to the much higher thresholds in the nearby SCAB and SEDAB, where air pollution problems were much more significant. Telephone Interview with Elaine Freeman, supra note 293.

533. See VENTURA COUNTY, GUIDELINES FOR AIR QUALITY, supra note 506, at 2-2 to 2-3. The pollutant levels are 25 pounds per day of ROG or NO\textsubscript{x}. See id. at 2-2 to 2-3, apps. B, C. The threshold is five pounds per day of ROG and NO\textsubscript{x} for projects within the Ojai Valley Clean Air Ordinance Area or the Ventura 1 Nongrowth area. Id. at 2-2. If the area does not conform to the plan, impacts are generally considered significant. Id. at 2-3.
has resorted to problematic "developer buydown fees." Once a project has incorporated all other feasible mitigation measures, it can gain further mitigation credits by paying a fee that, in turn, funds other efforts to reduce transportation emissions.\textsuperscript{534} Through an inevitably arbitrary process, the APCD calculated that in 1994 it cost approximately $3.66 per pound per day to reduce NO\textsubscript{x} emissions.\textsuperscript{535} Although CEQA requires mitigation for the life of a project, the APCD charges developers only for the cost of three years of mitigation, calculated at about $4000 per pound of pollutant reduction.\textsuperscript{536} Therefore, where the threshold of significance is 25 pounds per day, projects generating 50 pounds per day face a potential $100,000 offset fee, and projects generating 75 pounds per day (which is still below the SMAQMD threshold) face a potential $200,000 offset fee.

Not surprisingly, at these rates few developers voluntarily choose to pay the buydown fee in order to avoid an EIR.\textsuperscript{537} Furthermore, in the recession Ventura County's municipalities have been unwilling to levy such fees as conditions of approval on proposed projects.\textsuperscript{538} Overall, the buydown fee has had such little success that the Ventura County APCD is considering eliminating or sharply reducing it.\textsuperscript{539}

Although the controversy over Ventura County's buydown fee is partly due to the county's low air quality threshold of significance, there are more fundamental problems with the fee. The biggest problem is the perception that governments already charge California developers high fees that exceed developers' contributions to

\textsuperscript{534} Id. at 7-16 to 7-17.

\textsuperscript{535} Id. at 7-18. The Ventura County Air Pollution Control District (APCD) calculated these costs based on costs for Commuter Computer, the local ridesharing agency, to place a single new commuter in a ridesharing arrangement. This placement cost (a depressing $129 in 1988, for an expected life of 2.75 years) was then multiplied by the number of commuter placements necessary to reduce a pound of each pollutant. Id. at 7-17 to 7-18. The APCD used ridesharing as a model for calculating its buydown fees because, unlike public transit, "it has the potential of attracting up to 25% or more of commuter trips." Id. at 7-17. The APCD also noted that at approximately $3 per ton, ridesharing was cost-effective in comparison to stationary source measures. Id. at 7-17 to 7-19. The APCD based its fees on NO\textsubscript{x} emissions, which are cheaper than ROG reductions, based on the theory that some ROG reductions would necessarily follow. Telephone Interview with Chuck Thomas, Air Quality Specialist II, Planning and Evaluation Unit, Ventura County Air Pollution Control District (Nov. 4, 1993). At the time the Air Quality Guidelines were published in 1988, the county planned to use the higher cost per pound of NO\textsubscript{x} or ROG to reduce emissions. \textit{Ventura County, Guidelines for Air Quality}, supra note 506, at 7-19 to 7-20.

\textsuperscript{536} See \textit{Ventura County, Guidelines for Air Quality}, supra note 506, at 7-20; Telephone Interview with Chuck Thomas, supra note 535.

\textsuperscript{537} One developer (who shall remain unnamed) indicated that he believed the fee was "outrageous."

\textsuperscript{538} Telephone Interview with Chuck Thomas, supra note 535.

\textsuperscript{539} Id.
environmental and infrastructure problems. Additionally, air districts may receive great criticism for placing heavy demands on business during a recession. For these reasons, an expensive buydown fee—a naked cash requirement—is politically unpalatable.

4. Recommendations for Addressing Cumulatively Significant Air Quality Impacts

As shown by the failure of the SCAQMD's ambitious plan for cumulative impacts, air districts cannot require projects that fall below significance thresholds for cumulative effects to adopt mitigation measures. The return in air quality benefits simply may not be great enough to justify the administrative complexities and political costs. Furthermore, Ventura County's experience suggests that charging fees to "mitigate" impacts is problematic.

The air districts can, however, develop strategies to make it more likely that developers will implement the desired mitigations. If standards favored by the air districts can offer localities more legal certainty, localities may be more likely to adopt suggested mitigation standards and impose these upon developers. Currently, many air districts leave findings of cumulatively significant impacts to local discretion, as the SCAQMD has done. However, the legal validity of ad hoc approaches to cumulative impacts is uncertain after *Kings County Farm Bureau*.

As an alternative, air districts can establish procedures whereby adoption of one or two selections from a list of mitigation measures can reduce otherwise significant cumulative impacts to a level of insignificance. Actual examples of successful site plans would be highly useful for project proponents. More importantly, air districts could incorporate "safe harbor" rules, so that certain measures or combinations of measures would be presumed to reduce cumulative impacts, where present, to a level of insignificance. Developers might have considerable incentive to adopt such inexpensive and readily accessible mitigation measures in order to reduce their legal vulnerability. In

540. *Id.*
541. See discussion *supra* part V.B.5.b.
542. *Kings County Farm Bureau v. City of Hanford*, 270 Cal. Rptr. 650 (Ct. App. 1990). Alternatively, an air district can follow the SMAQMD's approach and find that a project has cumulatively significant impacts only if it is inconsistent with the air quality master plan. This approach still leaves an air district with some legal uncertainty, because it is not certain that a locality could defend against a challenge that a project that is consistent with the AQMP had a cumulatively significant impact. Over the long term, many AQMP's project continued decline in already unacceptable air quality.
543. An excellent example of such a list is in the SMAQMD Mitigation Resources Handbook, which describes such measures as telecommunications, onsite retail, pedestrian amenities, bicycle amenities, or other amenities. SMAQMD, *Mitigation Resources Handbook*, *supra* note 520.
addition, carefully selected and professionally presented mitigation measures could represent a great improvement over existing practices, because most local planners and EIR consultants are not air quality experts.\textsuperscript{544}

Another proposal for resolving uncertainty over cumulative air quality impacts involves the creation of a new environmental document, the Air Quality Override Certificate.\textsuperscript{545} Under this document, agencies could approve projects that only have significant cumulative air quality impacts, without requiring an EIR on that basis alone.\textsuperscript{546}

**B. Conversion of Agricultural Lands**

Thresholds are more difficult to develop for agricultural resources than for regional air quality. While air quality impacts can be measured in terms of the single factor of pounds of emissions per day, planners must consider numerous factors in determining the significance of impacts to agricultural lands. Nevertheless, this comment recommends that thresholds be implemented for agricultural impacts for two reasons. First, there is a proven successful model that can be adapted to California. The land evaluation and site assessment system, developed by the federal Soil Conservation Service, has been widely implemented with positive reviews. In a survey of local governments that use some form of land evaluation and site assessment, 79% of respondents felt that LESA "always" or "most of the time" distinguished reliably between land that should remain in agricultural use and land that should be converted to other uses.\textsuperscript{547} Second, CEQA's analysis of impacts to agricultural resources has been plagued with excessive discretion. Many projects with major agricul-

\textsuperscript{544} The author was engaged in review of EIR analyses of air quality impacts and proposed mitigation measures as a temporary planner with the Environmental Review Section of the Bay Area Air Quality Management District from April to August 1989. In the author's personal experience, many of the proposed air quality mitigation measures developed in individual EIRs were unlikely to be implemented and unlikely to reduce emissions even if they were implemented. Examples include proposed bus service to isolated low density suburban communities and proposed ridesharing arrangements organized through community associations of subdivisions.

\textsuperscript{545} Fixing CEQA, supra note 5, at ch. 6.

\textsuperscript{546} Id. Landis and Olshansky argue that the Air Quality Override Certificate is necessary because of the number of projects that would otherwise be legally vulnerable if they prepared negative declarations. Id. Landis and Olshansky propose charging a fee for the certificate to help resolve cumulative air quality problems. Id. This solution might be problematic, as discussed above with respect to Ventura County's buydown fees. See discussion supra part VI.A.3.

\textsuperscript{547} Robert E. Coughlin et al., The Status of State and Local LESA Programs, 49 J. SOIL & WATER CONSERVATION 6, 10 (1994). The 1991 study identified 138 local governments and 8 states using a land evaluation and site assessment (LESA) system. Id. at 8, 13 n.5. Besides "always" (11%) and "most of the time" (68%), 19% of the survey respondents replied that LESA was correct "not very often," and 2% reported that LESA results were "never" reliable. Id. at 10.
tural impacts have managed to avoid EIR review and have failed to implement appropriate mitigation measures.548

This part discusses two alternative approaches to agricultural resources thresholds. First, the state Department of Conservation is developing a threshold based on LESA, which municipalities may use at their discretion. Second, Ventura County currently uses a model that is simpler and involves fewer factors than LESA. Because LESA has proven very successful elsewhere, this comment endorses its use in California. The simpler framework of Ventura County's threshold additionally provides a model applicable to other multifactor thresholds that cannot draw on a widely accepted standard such as LESA.

1. Existing Analysis of Agricultural Resources Under CEQA

CEQA's vague significance thresholds for agriculture549 have proven unhelpful in practice. A study commissioned by the Department of Conservation indicates that 29% of projects that convert over 100 acres of agricultural land receive negative declarations.550 Moreover, when EIRs are prepared, they frequently provide insufficient analysis of the agricultural impacts or possible mitigation measures.551

2. State Efforts To Develop a Model Threshold Based on the Land Evaluation and Site Assessment Model

Under 1993 legislation, the state must prepare model criteria for conversion of agricultural lands for optional use by lead agen-

548. See infra note 550 and accompanying text.

549. CAL. CODE REGS. tit. 14, div. 6, ch. 3, apps. G, I (1994). Appendix G provides that projects are normally significant if they "[c]onvert prime agricultural land to non-agricultural use or impair the agricultural productivity of prime agricultural land." Id. at div. 6, ch. 3, app. G. Appendix I's checklist calls for evaluation of any proposal that will result in "impacts to soils or farmlands," or will "[affect] agricultural resources or operations." Id. at div. 6, ch. 3, app. I.

550. The study of state farmland conversion analyzed 348 different development projects from 1986 to 1988 that covered over 100 acres and that involved agriculture as a project issue. JONES & STOKES ASSOCs., THE IMPACTS OF FARMLAND CONVERSION IN CALIFORNIA 5-2 to 5-3 (1991). Of the 348 projects studied, 101 (29%) resulted in a negative declaration rather than an EIR. Id.

551. Id. at 5-4 to 5-8. Only some of the EIRs distinguished unique farmlands and lands of statewide or local importance, and very few classified the farmlands in terms of the state Farmland Mapping and Monitoring Program. Id. at 5-4 to 5-5. Seldom was there any mention of the impacts of new development on surrounding farms. Id. at 5-5. Furthermore, few of the EIRs indicated that their preparers had consulted with public agricultural agencies to develop information on agricultural impacts. Id. at 5-6. Mitigation measures were infrequent, because typically the loss of prime farmland was considered a significant unavoidable impact and other agricultural impacts were not discussed. Id. at 5-7. Those EIRs that did discuss mitigation measures included a wide range of proposals of varying degrees of feasibility. Id. Finally, cumulative and growth-inducing impacts were sketchy when discussed, and omitted cumulative totals of Williamson Act cancellations or cumulative impacts on production economics or crop types and acreage. Id. at 5-4 to 5-6. For a discussion of Williamson Act contracts, see infra note 563 and accompanying text.
Specifically, the California Department of Conservation must develop a state model land and site evaluation system for agriculture. The legislation covers agricultural land that is prime farmland, farmland of statewide importance, or unique farmland. The original measure, Senate Bill 850, includes findings that "[t]he conversion of agricultural lands to nonagricultural uses threatens the long-term health of the state’s agricultural industry," and CEQA "plays an important role in the preservation of agricultural lands." The optional agricultural threshold will be incorporated into CEQA as an amendment to Appendix G of the CEQA Guidelines.

Following the legislative mandate, an informal committee headed by the Department of Conservation (Department) is developing model criteria using the land evaluation and site assessment system. LESA was developed in 1981 to assist local planners in determining which land should remain in agriculture. A site’s agricultural suitability is determined by its total score under a multifactor point system, under which a higher score indicates that land is more amenable to agricultural use. Scoring is based on both a land evaluation factor,

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553. Id. § 21095(b).
554. Id. § 21060.1 (West Supp. 1995). The criteria for determining whether land is covered by the bill are “defined by the United States Department of Agriculture inventory and monitoring criteria, as modified for California.” Id.
555. 1993 Cal. Legis. Serv. 812 (West) (Senate Bill 850, §§ 1(c)-(d)).
556. Senate Bill 850 and its predecessor bills were vigorously opposed by the California Building Industry Association (BLA), and final passage of the bill required substantial compromise. Telephone Interview with Ken Trott, Manager, Land Conservation Unit Program, Department of Conservation (Jan. 19, 1994). A prior incarnation of Senate Bill 850 would have required mandatory adoption of state thresholds or default thresholds of 100 acres in the absence of local thresholds. This bill was Assembly Bill 1979, introduced by Assemblyman Rusty Areias in 1989. Jones & Stokes Assocs., supra note 550, at 7-1, 7-2.
557. Cal. Pub. Res. Code § 21095(a). The Resources Agency has the option of adopting a different methodology from the Conservation system. See id. § 21095(c) (West Supp. 1995). In practice, that is unlikely to happen; funding constraints make this a near impossibility.
558. Telephone Interview with Ken Trott, supra note 556. The committee includes representatives from the Department, the Governor’s Office of Planning and Research, and the Natural Resources Conservation Service (formerly the Federal Soil Conservation Service). Input has also been sought from the Building Industry Association, the American Farmland Trust, and the academic community. Telephone Interview with Charles Tyson, Soil Resource Specialist, Department of Conservation (Apr. 10, 1995).
which measures soil quality, and a site assessment factor, which addresses land use trends in the area.\footnote{561} As of April 1995, the Department had developed but not yet released draft factors for its LESA variant.\footnote{562} A site's maximum possible score will be 100 points, the majority of which will likely be based on site assessments. Site assessment will likely consider five criteria. The first three will be project size, water resource availability, and the land uses on surrounding and proximate properties. The fourth factor will consider whether there are any protected resource lands in the surrounding area, such as Williamson Act lands\footnote{563} or conservation or wildlife easements. Finally, the last factor will be a catch-all, tentatively labelled “constraints to agriculture.” This factor will consider inputs such as the cost of irrigation water, water quality, and groundwater overdrafting. Besides these site assessment factors, lands will also be scored on their soil quality, which will be measured by some form of hybrid between the Land Capability Rating developed by the United States Department of Agriculture and the Storie Index.\footnote{564}

The Department will determine how much weight to give to these various criteria by testing them on a large number of CEQA projects from 1990-1994 in eight geographically diverse counties.\footnote{565} The goal is to find a means of calibrating the weights assigned to the various factors which will correspond to the Department's assessment of the sites' agricultural value. Planned workshops in agricultural areas will seek public input on scoring options. One approach the Department is considering is scaled thresholds. If a project scored within a certain range, further site-specific examination would be required. The Department also plans to allow flexibility to modify the model based on local factors.\footnote{566} The assumption is that if municipalities are diligent enough to want to try the methodology, they will not want to undermine the Department's efforts by creating an irrational scoring system. So far, there have been encouraging signs of interest from California's agricultural counties. Kern County, which has routinely

\footnote{561} Id. at 83-86; Coughlin et al., supra note 547, at 10.  
\footnote{562} Telephone Interview with Charles Tyson, supra note 558.  
\footnote{564} Telephone Interview with Charles Tyson, supra note 558.  
\footnote{565} Id.  
\footnote{566} For example, measures of parcel size would need to be different in Kern and Sonoma Counties. Id.
approved many agricultural projects with negative declarations, has reacted very positively to the model.\footnote{Elsewhere in the state, Santa Barbara County has developed a CEQA threshold for agricultural resources that uses a multifactor point system like LESA, although it is not based on LESA. \textsc{Santa Barbara County, Thresholds, supra note 72, at 10-17.}}

3. \textit{Case Study: Ventura County's Initial Study Guidelines}

Ventura County has developed an alternative approach to agricultural resources thresholds. The multiple factors under the LESA model can be difficult to calibrate properly for a given area and can be daunting for the public and applicants to understand. In contrast, Ventura County's threshold is based on just two factors: soil classification under the Important Farmlands Inventory (IFI)\footnote{The Important Farmlands Inventory is established by the Soil Conservation Service of the United States Department of Agriculture. \textit{See} \textsc{7 C.F.R. §§ 657.1-.5 (1995).}} and general plan designation.\footnote{\textit{Ventura County, Initial Study Guidelines, supra note 269, at 7-1, 7-2, 7-6.}} Determining these two factors for a given site is relatively easy for both staff and applicants. Once the information is known, the two factors can be cross-indexed to find an acreage cutoff for significance. For example, where a project will convert soils of prime or statewide importance designated for agricultural use, the loss of five acres exceeds the project-level significance threshold.\footnote{\textit{Id.} at 7-1.} If the land is designated open space/rural, the loss of ten acres triggers the threshold.\footnote{\textit{Id.}} Finally, if the land is designated for other uses such as residential development, the threshold is twenty acres.\footnote{\textit{Id.} at 7-1.} There are separate lower thresholds for cumulative impacts, but these do not apply if the project is consistent with the general plan.\footnote{\textit{Id.} at 7-3 to 7-11.}

The threshold for loss of agricultural soils incorporates just two factors, but other relevant inputs are also considered. Ventura County has separate agricultural thresholds for water, air quality/microclimate, pests/diseases, and land use incompatibility.\footnote{Under the land use incompatibility threshold, impacts are potentially significant where residences would be within 400 feet of irrigated agriculture, within 200 feet of dry farming,} Its should be rec-
ognized that the county's agricultural thresholds have not been extensively tested since their adoption in 1992.\textsuperscript{575} Other land use policies have effectively discouraged development outside incorporated areas.\textsuperscript{576}

4. Recommendations

Because the land evaluation and site assessment model has been successful elsewhere, this comment endorses its use in California. The LESA model has a political advantage as well. Once the Resources Agency has adopted the model after a rulemaking process at the state level, localities can draw a measure of political cover for implementing a known quantity, rather than their own pioneering approaches. California's LESA variant should use scaled thresholds to allow for discretion in close cases.

The simpler framework of Ventura County's threshold provides a model for other multifactor thresholds that cannot draw on a widely accepted standard such as LESA. The public and applicants are much more likely to accept an approach where they can cross-index two or three factors and readily identify the threshold level. Where this model is followed, communities should make the threshold a guideline rather than an absolute barometer of significance. If the threshold is merely a guideline, other factors besides the two dominant factors can be considered in close cases. Furthermore, communities can require EIRs where appropriate if developers attempt to slide projects just below the threshold, as happened in Maine.\textsuperscript{577}

The Department of Conservation's draft LESA threshold does not consider the general plan designation of agricultural sites. The Department has determined to keep its model as simple as possible, emphasizing existing uses, soil types, and other physical data.\textsuperscript{578} However, this comment assumes that there would be considerable benefits and little added complexity from considering the general plan designa-
tion of agricultural sites. For projects that are consistent with general plans, few of the relative advantages of EIRs over MNDs appear to apply to the loss of agricultural soils. Soil types are already mapped, so EIRs are not needed to study the extent of site-specific impacts (in contrast to biological resources). In addition, EIRs cannot develop effective mitigation measures to compensate for the loss of agricultural soils. Finally, in many agricultural communities in the Central Valley, growth is inevitable and will affect agricultural land. Requiring EIRs to consider alternatives for every project in these communities would seem to be a waste of effort.

This analysis changes greatly where projects require general plan amendments. Here alternatives with lesser impacts may well be available, and EIRs could force decisionmakers to consider them. These projects occur in precisely the areas that have not been designated for development over the community's planning horizon and that could be preserved for agriculture. Furthermore, such projects threaten surrounding agricultural lands, as agricultural lands near subdivision development often descend into a "zone of impermanence." In these areas, owners anticipate sale of the land for development and may no longer make the investments necessary to maintain productivity, so that agricultural uses decline. Discouraging general plan amendments represents one of the best ways to prevent these intrusions.

Therefore, agricultural thresholds should consider a site's general plan designation. As a result, developers who comply with the plan will be rewarded. Most important, communities will be encouraged to resolve agricultural conservation issues at the planning level.

C. Biological Resources

Biological resources frequently present one of the most contentious CEQA issues. These impacts are controversial in part because extensive site-specific analysis is often required to determine the significance of a project's impacts, and even then the results can be un-

579. One proposed mitigation is requiring developers to pay impact fees for the conversion of agricultural land. These fees could be used to protect permanently an equal amount of agricultural land elsewhere. See Anne E. Mudge, Impact Fees for Conversion of Agricultural Land: A Resource-Based Development Plan for California's Cities and Counties, 19 ECOLOGY L.Q. 63, 67-68 (1992). However, given the legislature's inability to require even mandatory thresholds for analysis of agricultural conversion under CEQA, mandatory fees may be a remote possibility.


certain. For this reason, impacts to biological resources are particularly difficult to evaluate in a standardized manner.

This section analyzes Santa Barbara County’s and Ventura County’s biological resources thresholds. Although these localities have developed some of the most complex thresholds in the state, neither uses quantitative thresholds for biological resources.

This comment recommends that communities should use detailed qualitative thresholds for biological resources. In place of quantitative thresholds, standard mitigation measures can be used to increase the predictability of the review process. To date most California jurisdictions have not adopted standardized thresholds for biological resources. Appendices G and I of the CEQA Guidelines are little help because they provide only general standards for evaluation of this type of impact.

The need for general plan guidance on biological resources impacts is illustrated by the city of Chico’s recurrent conflicts over developments affecting vernal pools, which provide habitat for the Butte County meadowfoam. Chico’s planning staff was forced to evaluate how much loss of meadowfoam habitat could be tolerated. This involved questions of what impacts were significant and how much mitigation would be required. The staff wanted to develop thresholds of significance for the meadowfoam, but without adequate background study and direction from the general plan, any threshold would have been arbitrary. Project-level CEQA review foundered in its attempt to deal with this inherently cumulative problem.

1. Case Study: Santa Barbara County

Santa Barbara County’s experiences illustrate the difficulties as well as some of the possibilities of a complex biological resources threshold. In late 1992, the county released an ambitious draft docu-

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583. See FIXING CEQA, supra note 5, at ch. 5.
584. Appendix G provides that impacts are normally significant if they “[s]ubstantially affect a rare or endangered species of animal or plant or the habitat of the species,” or “[i]nterfere substantially with the movement of any resident or migratory fish or wildlife species.” CAL. CODE REGS. tit. 14, div. 6, ch. 3, app. G (1994). Appendix I provides several evaluative criteria for animal life, as well as plant life. A project will carry a mandatory finding of significance if it will “reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, [or] reduce the number or restrict the range of a rare or endangered plant or animal.” Id. at div. 6, ch. 3, app. I (1994).
585. Telephone Interview with Brian Crawford, supra note 294.
586. Id.
587. Id. The Chico staff considered relying on the Army Corps of Engineers’ one-acre threshold for de minimis impacts under § 404 of the Clean Water Act. However, the staff found that the Army Corps had not based this threshold on any informed assessment of what impacts were tolerable. Id.
ment that included both quantitative and detailed qualitative thresholds of significance and standard mitigation ratios for habitat replacement. This hefty regulatory effort was heavily criticized by development interests alleging insufficient scientific support. In September 1994, the county adopted a much slimmer threshold that lacked quantitative criteria or standard mitigation measures.

Perhaps the most interesting features of the draft threshold were its standard mitigation measures. Habitats were prioritized according to the Department of Fish and Game's Natural Diversity Database rankings for habitat types. For the most threatened natural community types, the threshold set standard habitat mitigation ratios of 4:1 for onsite restoration, 5:1 for offsite restoration, and 4:1 for preservation of other habitat.

The draft threshold also described detailed criteria for determining significant impacts to a number of habitats, including wetlands, chaparral, coastal sage scrub, native grassland and savannah, woodlands, and forests. For example, "[i]mpacts to woodland, savannah and forest habitat [were] considered potentially significant where a project would remove 10% or more of the existing trees on site [or otherwise eliminate 10% of the habitat]."

The draft threshold was controversial in part because developers felt they would be required to implement impossibly expensive habitat mitigation measures, no matter where they tried to develop. In or-

589. See Letter from John L. O'Shaughnessy, Legislative Representative of the Tri Counties District of the Associated General Contractors of California, to Jeff Harris, Department of Environmental Review and Compliance, County of Santa Barbara (Nov. 27, 1992) (on file with the Ecology Law Quarterly).
591. The draft threshold used criteria from the California Department of Fish and Game Natural Diversity database and ranked habitats from S1.1, which involved the most serious jeopardy to the smallest islands of remaining habitat, to S4 and S5, which designated communities that were apparently and demonstrably secure within California. Santa Barbara County, Draft Biological Resources Thresholds, supra note 588, at 61-62. This threshold preserved some staff discretion in assessing the "biological value" of impacts and identifying habitats and sensitive species, but the significance of major encroachments on habitats was defined through fixed criteria. Id. at 57-58.
592. Id. at 65.
593. Id. at 75. Impacts of less than 10% could also be considered significant based on another section. Id. The threshold also contained detailed descriptions of permissible mitigation measures and required buffer zones. Id. at 68-72.
594. The draft threshold drew some very strong responses from the business community. For example, a contractors' representative wrote in exasperation: When you were asked where a developer could find land to replace non-native grasslands at 2 or 3 to 1 without creating more habitat or plant community loss, your answer was that you were not a developer so you could not answer that. We
der to rectify this perception, the 1994 final threshold included a number of biological impacts that were presumed to be insignificant. As required by CEQA, this presumption would be rebutted if there was substantial evidence in light of the whole record of a significant impact. The presumptions of insignificance nevertheless made the threshold more politically balanced by suggesting that development would be permitted in certain areas. The final threshold also was made much less daunting for applicants because substantial material was placed in technical appendices.

2. **Case Study: Ventura County**

Ventura County provides a more common example of evaluative criteria for biological resources: detailed procedures for study of a project’s potential impacts. A complex threshold such as biological resources begins with an extensive set of definitions, including definitions of endangered, threatened, rare, and candidate species; wetland and coastal habitat; migration corridors; and locally important species and locally important communities. The threshold then sets quite general qualitative criteria for evaluating impacts to each of these subjects. The greatest detail is provided in the methodology, which specifies the criteria in a preliminary assessment, what is required in a consultant’s study, and which procedures are required when there is further review and consultation with other agencies. The biological

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Letter from John L. O'Shaughnessy to Jeff Harris, *supra* note 589.

595. SANTA BARBARA COUNTY, BIOLOGICAL RESOURCES GUIDELINES, *supra* note 590, at 5. These areas included: “[s]mall acreages of non-native grassland if wildlife values are low,” “[a]reas of historical disturbance such as intensive agriculture,” and “[s]mall pockets of habitats already significantly fragmented or isolated, and degraded or disturbed.” *Id.*

596. *Id.* at 5 n.1; see CAL. PUB. RES. CODE § 21082.2(d) (West Supp. 1995).

597. See SANTA BARBARA COUNTY, BIOLOGICAL RESOURCES GUIDELINES, *supra* note 590, at app. The appendices included procedures for conducting biological resources surveys, habitat descriptions and project design suggestions, and standard biological mitigation measures (although not habitat replacement ratios). *Id.*

598. VENTURA COUNTY, INITIAL STUDY GUIDELINES, *supra* note 269, at 6-1 to 6-2.

599. Two examples of the threshold criteria are provided:

*Wetland Habitat:* A significant impact would result from the direct reduction of, or a substantial indirect impact to, a significant Wetland Habitat. All wetlands are potentially significant; therefore, a qualified biologist must make a determination of significance in consultation with the California Department of Fish and Game during Initial Consultation.

*Locally Important Species/Communities:* Since this group of species/communities is so diverse, significance must be made by a qualified biologist on a case-by-case basis.

*Id.* at 6-4.

600. *Id.* at 6-4 to 6-8.
resources threshold also includes a list of approved consultants, a model contract, and the scope of consultants’ studies.601

3. Evaluation and Recommendations

Threatened biological resources present a regional and state problem, and the most effective solutions for conserving sufficient habitat will need to be adopted at the regional and state levels.602 In the absence of larger scale plans, however, localities need to address the issue through existing tools: CEQA review and general and specific plans.

Because there is no substitute for detailed advance planning to stem the loss of habitat, localities should focus on evaluating impacts to the one or two habitats most threatened by development over the next ten to twenty years. This targeted approach will not only be less expensive than Santa Barbara County’s comprehensive effort, but should also be less controversial. If a locality places a priority on protecting some of its developable land and includes this in its general plan update, but indicates that other areas are slated for development, the development community should have fewer objections.

For their most critical biological impacts, communities should develop thresholds based on detailed qualitative criteria. The threshold should be politically balanced by presumptions of insignificance and should include standard mitigation ratios for habitat replacement to increase the predictability of the review process. This model would draw from both the draft and final Santa Barbara documents, as well as the Ventura County model. The basic threshold itself should be less than ten pages, identifying habitats of greater and lesser concern, and standard mitigation ratios for the more important habitats. All other supporting and explanatory information could be placed in technical appendices.

Standard mitigation ratios for habitat replacement should make the process much more predictable. The amount of mitigation required will inform developers of the costs of selecting a certain site

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601. Id. at 6-9 to 6-18.
602. See Fixing CEQA, supra note 5, at ch. 6.

One state program of particular interest is the development of “natural community conservation plans.” See Cal. Fish & Game Code §§ 2800-2840 (West Supp. 1995). This program involves the arduous negotiation of a detailed agreement among stakeholders to conserve habitat for endangered species. Id. § 2810 (West Supp. 1995). In the shadow of the federal and state Endangered Species Acts, 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993), Cal. Fish & Game Code §§ 2050-2589 (West 1984 & Supp. 1995), developers, municipalities, and environmentalists may have incentive to map out protected habitat in advance of legal compulsion. This process is far from easy, however, and requires considerable funding for extensive scientific studies and extensive staff involvement in negotiations.
plan in advance of the review process. The standard mitigation measures also can be a plan implementation tool for ensuring that a sufficient quantity of valued habitat is conserved within a jurisdiction. The measures should not be inflexible, but instead should be presumptions. The standards should indicate that where habitat is degraded or disturbed, significantly less mitigation may be required.\textsuperscript{603}

**CONCLUSION**

A major 1995 assessment of CEQA has concluded that certain reform measures can simultaneously reduce the statute's procedural uncertainties while increasing its effectiveness in dealing with larger scale environmental problems.\textsuperscript{604} Thresholds of significance and standard mitigation measures represent part of a package of these measures.\textsuperscript{605}

Localities can obtain the most benefit by adopting quantitative thresholds and/or standard mitigation measures for two or three of their most pressing environmental issues. These thresholds are most effectively developed as part of a specific plan or a selected general plan update. The plans can develop strategies for addressing these major environmental concerns, and thresholds and standard mitigation measures offer implementation tools. As an example, thresholds for the conversion of agricultural land can incorporate scaled thresholds, calibrated to discourage general plan amendments within intended agricultural preserves, while simultaneously encouraging development on other agricultural soils. Under this approach, developers will be able to calculate their costs and know a project’s risks in advance. Finally, quantitative thresholds are most effective when adopted in conjunction with standard mitigation measures. The combination of these tools further increases the predictability of the process, and the standard mitigation measures give planners a tool for developing a comprehensive mitigation strategy.

Although they are less useful, qualitative thresholds should not be entirely dismissed. The great advantage of qualitative thresholds is they can focus community debate at very little cost. As the keystone of a more accessible and consistent review process, municipalities should develop locally customized variants of the Appendix I checklist of environmental impacts for the initial study. The new checklist should be coordinated with qualitative thresholds that define the relevant issues and prescribe procedures for determining impacts’ significance. A useful companion to this customized checklist is

\textsuperscript{603} Telephone Interview with Elihu Gevirtz, \textit{supra} note 439.
\textsuperscript{604} \textit{See} \textit{Fixing CEQA}, \textit{supra} note 5, at ch. 6.
\textsuperscript{605} For a discussion of other reform measures, see \textit{supra} notes 11-15 and accompanying text.
communities' own standard conditions of approval manual. This manual can also improve the accessibility and consistency of the review process.

If communities primarily focus on quantitative thresholds, they need to address two possibly significant difficulties. First, attempts to increase the predictability of the review process necessarily are in tension with the need for flexibility to consider site-specific impacts and other factors. One way to resolve this tension is to adopt quantitative thresholds in conjunction with scaled thresholds. Where projects fall within a certain range of the threshold, perhaps 30%, the decision of whether or not to prepare an EIR would be left to planners' bounded discretion. Within the bounded range, planners would be explicitly directed to consider a limited range of factors, such as the sufficiency of the developer's mitigation efforts and the combined importance of the project's other environmental impacts. Outside the bounded range, there would be no flexibility, offering predictability to developers. Both developers and the environment could benefit from this approach, because developers would be encouraged to trade improved mitigation measures in order to avoid the necessity of preparing an EIR. This approach would also address the concern of some that developers might design their projects to fall just below simple, fixed threshold levels.

The second potential difficulty with quantitative thresholds is the cost of accurately calibrating the threshold levels. Communities can greatly reduce the costs, however, through two strategies. First, they can adopt quantitative thresholds only for selected environmental issues. Second, they can greatly reduce data collection costs by adopting thresholds as part of a selected general plan update or specific plan process.

Other frequently expressed concerns about quantitative thresholds are less significant. For example, some planners have expressed concern that threshold levels can be politically manipulated. Even without thresholds, however, significance determinations are already subject to the whims of the local legislative bodies. It would be much easier for a locality to make environmentally arbitrary decisions quietly, without the exposure of insupportably high or low thresholds.606

606. Another concern is that neighboring localities or state and local agencies might conflict over threshold levels, causing confusion and controversy. This concern is particularly real in the case of selected state agencies with which localities typically have a poor relationship, such as the Department of Fish and Game. In these selected cases, localities will need to work with the relevant state agencies during the process of developing thresholds. However, this problem is much less significant for most impacts, including air quality and agricultural lands. In these cases, municipalities will likely adopt thresholds that have been designed or approved by state or regional agencies. See discussion supra part V.B.3.
In designing quantitative thresholds, communities should consider three general principles besides the advantages of scaling. First, thresholds should be politically balanced. In addition to listing which types of impacts are presumed to be significant, thresholds should indicate impacts that are presumed to be insignificant. Second, quantitative thresholds should be designed to be as simple and as comprehensible as possible for the public and applicants. For example, communities should not adopt separate thresholds for cumulative impacts, in large part because of the administrative complexities that these would cause. The best solution for addressing cumulative problems is appropriately designed project-level thresholds as part of carefully developed plans. Finally, threshold criteria should include consideration of a project's general plan consistency where feasible. This approach will help CEQA become a force for implementing larger planning goals, rather than primarily a tool for more parochial neighborhood concerns.

California's most pressing environmental problems are regional in scope, such as regional air quality, traffic, and preservation of agricultural lands and species habitat. There have long been calls for state or regional efforts to confront these large-scale problems. However, with a few exceptions, the prospects for state funding of new regional agencies or regionally negotiated solutions appear bleak. Quantitative thresholds as a tool for implementing local plans represent more of a small-scale, bottom-up approach to these problems. In the current fiscal and political climate, bottom-up local solutions may be the most realistic. Quantitative thresholds also can benefit developers by increasing the predictability of CEQA review. Thus, significance thresholds are an appropriate reform measure for the current political environment: low cost, locally focused, and fairly balanced.